

### PROPOSED AMENDMENT TO ARTICLE 8(2)(e) OF THE ROME STATUTE TO INCLUDE THE INTENTIONAL STARVATION OF CIVILIANS AS A WAR CRIME IN NON-INTERNATIONAL ARMED CONFLICTS

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#### States Parties should adopt the proposed amendment to Article 8(2)(e) of the Rome Statute

On 20 April 2018, Switzerland proposed an amendment to Article 8 of the Rome Statute to include the intentional starvation of civilians as a war crime in non-international armed conflicts (NIACs). Switzerland officially submitted its amendment proposal to the Secretary-General of the United Nations on 28 August 2019. The proposal will be considered at the eighteenth session of the Assembly of States Parties, to be held in December 2019.

The proposed amendment inserts as a new subparagraph to Article 8(2)(e):

*Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.<sup>1</sup>*

Amnesty International has carefully considered the proposed amendment and its implications, and recommends that states parties adopt the proposed amendment. Amnesty International supports the adoption of this amendment, for the following reasons. However, **Amnesty International urges all states parties not replicate the 'understanding' which sought to limit the Court's jurisdiction in Resolution ICC-ASP/16/Res.4 adopting amendments to article 8. Article 121(5) does not limit the Court's jurisdiction in respect to states that are not parties to the Statute.**

#### The proposed amendment has a strong basis in treaty law and customary international humanitarian law (CIHL)

The prohibition on intentionally using starvation as a method of warfare in NIACs enjoys broad recognition under international law. In this sense, the amendment codifies existing international humanitarian law (IHL) applicable to NIACs, considering the prohibition of starvation of civilians is already a binding obligation under international law.

Additional Protocol II to the 1949 Geneva Conventions provides that the starvation of civilians as a method of warfare is prohibited, and also prohibits attacking, destroying or rendering useless objects indispensable to the survival of the civilian population.<sup>2</sup> Furthermore, it states that if the civilian population is suffering due to lack of access to survival essentials, relief actions shall be undertaken subject to the consent of the High Contracting Party.<sup>3</sup>

The International Committee of the Red Cross' (ICRC) CIHL database contains four rules – Rules 53, 54, 55 and 56 – which, *inter alia*, prohibit the use of starvation as a method of warfare and impose an obligation to allow humanitarian aid.<sup>4</sup> These rules apply equally in international and non-international

<sup>1</sup> Switzerland: Proposal of Amendment, *Depository Notification*, available at <https://treaties.un.org/doc/Publication/CN/2019/CN.399.2019-Eng.pdf>. Switzerland sets out the reasons behind its proposal in a Non-Paper, *Inclusion of starvation as a war crime in non-international armed conflicts into the Rome Statute*, 20 September 2018. Switzerland observes that the distinction between international and non-international armed conflicts is not justifiable with respect to starvation, and that this gap in the Rome Statute ought to be rectified.

<sup>2</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II), 8 June 1977, Article 14.

<sup>3</sup> Additional Protocol II, Article 18(2).

<sup>4</sup> ICRC, *Customary International Humanitarian Law Database*, Rules 53, 54, 55, 56. For an understanding of how the study was conducted, and the practice that was relied on to determine the customary status of a norm see Jean-Marie Henckaerts and Louise Doswald-Beck, 'Customary International Humanitarian Law. While the relevant treaties (Additional Protocols I and II) require the consent

armed conflicts. The ICRC also lists “using starvation of civilians as a method of warfare by depriving them of objects indispensable for their survival, including by impeding relief supplies” as a war crime<sup>5</sup>. As a part of customary international law, these rules are applicable irrespective of whether the state in question has ratified Additional Protocol II.

### **The proposed amendment harmonises the Rome Statute’s provisions and material jurisdiction on starvation as a war crime and improves the coherence of the Statute<sup>6</sup>**

At the outset, it is crucial to note that “the fact a certain rule is not included under the jurisdiction of the Court can in no way mean that it does not reflect serious violations under international customary law”<sup>7</sup>.

At present, the Rome Statute criminalises the intentional starvation of civilians only in international armed conflicts (IACs), and not in NIACs. The drafting history does not provide any indication as to the reason behind this exclusion<sup>8</sup>, and it has been observed that this omission is likely to have been unintentional.<sup>9</sup>

The proposed amendment therefore fills a gap in the Rome Statute’s provisions. It also harmonises the court’s jurisdiction over the crime of starvation, enabling it to exercise jurisdiction over this crime in all types of conflict.

### **The proposed amendment more accurately addresses contemporary conflicts**

The vast majority of conflicts occurring today are non-international in nature.<sup>10</sup> Given the rising prominence of non-international armed conflicts and the humanitarian crises linked to them, this amendment would address the disconnect between law and reality.<sup>11</sup> It bolsters the fight against impunity by allowing the ICC to adjudicate the intentional starvation of civilians, regardless of the legal classification of the conflict.<sup>12</sup>

### **The proposed amendment would strengthen the possibility for victims of the war crime of intentional starvation in NIAC to access justice at the ICC**

The Rome Statute currently does not contain a provision that expressly criminalises the intentional starvation of civilians in NIACs. Nevertheless, the prosecution of such conduct could be pursued under other Rome Statute crimes, such as the war crimes of murder, cruel treatment, attacks on humanitarian

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of the parties to the conflict for humanitarian relief, the ICRC study found that customary IHL prohibits parties from refusing consent (to impartial humanitarian relief) on arbitrary grounds. 2 volumes, Volume I. Rules, Volume II. Practice’ (Cambridge University Press 2005).

<sup>5</sup> See ICRC, *Practice Relating to Rule 156* available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156).

<sup>6</sup> A concern can be expressed that this amendment could result in further fragmentation of the Rome Statute regime. Due to the operation of article 121(5), the amendment would only apply to those states that accept it, creating a chasm between the states accepting it and those not doing so. However, the possibility of fragmentation must have been contemplated by the drafters, who accepted it while drafting article 121(5). This does not affect the sound legal basis for the proposed amendment. Moreover, if states wish to limit the fragmentation of the regime, it is their responsibility to accept the amendment and ensure cohesion. See, Non-Paper by Switzerland, p. 3.

<sup>7</sup> See [United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June - 17 July 1998 \(Vol. III\)](#), p. 225-226.

<sup>8</sup> See [United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June - 17 July 1998](#).

<sup>9</sup> See Rogier Bartel, ‘Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and some Proposal for the Future’ [2015] 48 Israel L. Rev. 281-307, fn 128.

<sup>10</sup> See Geneva Academy, [The War Report 2018](#), p.31-34. This report notes that out of at least 69 armed conflicts occurring around the world, at least 51 are non-international armed conflicts.

<sup>11</sup> It has been estimated that non-international armed conflicts have increased by 125% since 2010. The link between conflict and hunger has also been articulated. Out of 815 million undernourished people in the world, 439 million live in conflict zones. Taken together, this means that most of the instances of starvation in armed conflict are outside the reach of the ICC. See FAO, IFAD, UNICEF, WFP and WHO, [The State of Food Insecurity and Nutrition in the World \(2017\)](#), p. 33.

<sup>12</sup> Non-Paper by Switzerland, p. 3.

objects or destruction of the adversary's property.<sup>13</sup> However, these crimes have their own unique elements that need to be satisfied. For instance, murder requires the result of death<sup>14</sup> and cruel treatment requires the infliction of severe physical/mental pain<sup>15</sup>, elements which are often but not always a part of intentional starvation. Such charges may also not correspond to the particular harm that the crime of "intentional starvation" is meant to address.

Intentional starvation could also be prosecuted as crimes against humanity, namely murder, extermination and other inhumane acts. In this case, the conduct must be committed as part of a widespread or systematic attack directed against a civilian population, which has been clarified to mean conduct involving the multiple commission of any of the prohibited acts.<sup>16</sup> Crucially, there is also a 'policy' element of crimes against humanity, which requires that the attacks be in furtherance of a state or organisational policy. Therefore, even though a single instance of intentional starvation is a serious violation of IHL, the conduct would have to be a part of a widespread or systematic attack for it to be prosecuted as a crime against humanity. Starvation could also be prosecuted as genocide<sup>17</sup>, but 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group' would have to be established.<sup>18</sup>

Therefore, although it should be possible to prosecute the constituent acts of intentional starvation as other crimes under the Rome Statute there are several legal and evidentiary hurdles that would need to be overcome. Including the intentional starvation of civilians in NIACs as a separate offence would eliminate these obstacles, and allow the prosecution of intentional starvation where the specific elements of other crimes are not met.

#### **The adoption of the proposed amendment may strengthen states parties' legislation at the national level and catalyse effective accountability for starvation outside of the ICC framework**

Under the principle of complementarity, states parties to the Rome Statute are obliged to domesticate Rome Statute crimes in their national legal systems and to investigate and prosecute Rome Statute crimes.

Notwithstanding the existing customary nature of the prohibition, the adoption of the proposed amendment should encourage states (where they have not yet done so) to adopt specific national-level legislation criminalising the use of starvation of civilians as a method of warfare in NIACs.<sup>19</sup>

#### **The proposed amendment would enable the court to exercise jurisdiction over the crime of intentional starvation in a NIAC when a situation is referred to it by the United Nations Security Council**

This amendment can also prove useful in the context of referrals to the ICC Prosecutor by the United Nations Security Council (UNSC).<sup>20</sup> The UNSC has the power to refer situations to the ICC Prosecutor in which crimes under the jurisdiction of the Court may have been committed. Adopting the amendment would enable the Court to exercise jurisdiction over the crime of starvation in this context as well.

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<sup>13</sup> Samira Mathias, 'The Silent Killer: The Inadequacy of the Present ICC Framework in Criminalizing Starvation as NIAC Warfare' (CILJ, August 9 2018) available at: <http://cilj.co.uk/2018/08/09/the-silent-killer-the-inadequacy-of-the-present-icc-framework-in-criminalizing-starvation-as-niac-warfare/>

<sup>14</sup> Elements of Crimes, article 8(2)(c)(i)-1, para 1.

<sup>15</sup> Elements of Crimes, article 8(2)(c)(i)-3, para 1.

<sup>16</sup> See Rome Statute, article 7(2)(a).

<sup>17</sup> See Rome Statute, article 6(c): "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".

<sup>18</sup> Elements of Crimes, article 6. See also Phedra Neel, 'Side Event- Towards Accountability for the War Crime of Starvation in Internal Armed Conflict' (co-hosted by Switzerland and the Oxford Institute for Ethics, Law and Armed Conflict) (PILPG, December 12 2018) available at: <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2018/12/17/side-event-towards-accountability-for-the-war-crime-of-starvation-in-internal-armed-conflict-co-hosted-by-switzerland-and-the-oxford-institute-for-ethics-law-amp-armed-conflict>

<sup>19</sup> For instance, after UNSC Res 2417 was unanimously adopted, the Netherlands amended its International Crimes Act to reflect the equivalence of starvation in all types of armed conflict.

<sup>20</sup> Rome Statute, Article 13(b).