

# The War Crime of Starvation in Non-International Armed Conflict

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## *Introduction*

From Yemen to Syria to South Sudan, starving civilians in war has resurfaced as a major method of combat.<sup>1</sup> Civilian starvation in conflict is both morally repugnant and unlawful. It amounts to a war crime under customary international law,<sup>2</sup> and is recognised as a crime during IAC under article 8(2)(b)(xxv) of the Rome Statute of the ICC. However, there is no equivalent crime in the Rome Statute applicable during NIACs. The absence of a provision for NIAC is conspicuous, as evidence abounds of the existence of a customary rule against the starvation of civilians, as well as a number of corollary applicable rules designed to prevent the use of starvation as a method of war irrespective of the legal characterization of the conflict. To redress the situation, the Government of Switzerland has proposed the inclusion of civilian starvation as a war crime in NIAC into the Rome Statute.<sup>3</sup> The proposal is very timely, as starvation features frequently in modern NIACs.<sup>4</sup> This article, which has been written in anticipation of some of the debates that will arise during the negotiations on the proposed amendment, will offer an in-depth discussion of both starvation as a war crime in NIAC, and the elements of the proposed Swiss amendment itself. Even though existence in customary law is not a requirement for a crime to be included in the Rome Statute, this paper will also demonstrate that the war crime of starvation in NIAC already exists as a matter of custom and is well-founded in IHL. The analysis will present concrete and relevant examples of real-life combat operations that could be impacted by the adoption of the proposal. The paper will also briefly discuss the implications of the absence of a relevant provision under the Rome Statute and, finally, it will make recommendations on the adoption of the amendment.

## **1. Applicable Treaty and Customary International Law Relevant to the Prohibition Against Civilian Starvation in NIAC**

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<sup>1</sup> See i.e. Independent International Commission of Inquiry on the Syrian Arab Republic 'Sieges as Weapons of War: Encircle, Starve, Surrender, Evacuate', 29 May 2018, available at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PolicyPaperSieges\\_29May2018.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PolicyPaperSieges_29May2018.pdf) (visited 7 March 2018); OHCHR, 'Situation of human rights in Yemen, including violations and abuses since September 2014', Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts, 17 August 2018, UN Doc A/HRC/39/43, §§ 46-64; OHCHR, 'Report of the Commission on South Sudan', 13 March 2018, UN Doc A/HRC/37/71, § 25.

<sup>2</sup> See i.e. SC Res. 2417 (2018).

<sup>3</sup> ICC Assembly of State Parties, 'Report of the Working Group on Amendments' ICC-ASP/17/35, 29 November 2018, at 12-13.

<sup>4</sup> FAO and WFP, 'Monitoring Food Security in Countries with Conflict Situations', Joint FAO/WFP Update for the United Nations Security Council, August 2018, available at <http://www.fao.org/3/CA1315EN/ca1315en.pdf> (visited 7 March 2018).

“To starve” someone is generally understood as the act of subjecting them to famine, extreme, and general scarcity of food,<sup>5</sup> and generally subjecting them to the ‘[s]uffering or death caused by lack of food’.<sup>6</sup> In armed conflict, starvation can be the result of both material ‘acts’, such as the targeting of civilian foodstuffs, agricultural sites, and water infrastructures,<sup>7</sup> and “omissions” – ie. preventing humanitarian and emergency aid to be promptly delivered to civilians in need by withholding consent to their operations or otherwise wilfully impeding the consignments.<sup>8</sup> The following section will provide an overview of the international treaty law and customary IHL rules applicable to the prohibition against starvation in NIAC.<sup>9</sup>

### **A. Article 14 Additional Protocol II**

Whereas starvation has been used throughout history against combatants and civilians alike,<sup>10</sup> an absolute prohibition against the intentional starvation of civilians in war exists today both in treaty and in customary international law, irrespective of the nature of the conflict. Article 54 AP I, applicable in IAC, and Article 14 of AP II, applicable in NIAC, both set it out. Article 14 AP II in particular, on the ‘protection of objects indispensable to the survival of the civilian population’, directly prohibits the ‘starvation of civilians as a method of combat’,<sup>11</sup> by means of ‘attack[ing], destroy[ing], remov[ing], or render[ing] useless, for that purpose, objects indispensable to the survival of the civilian population’, specifying that ‘foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installation, and supplies, and irrigation works’ all qualify as protected civilian objects under the provision.<sup>12</sup> When the provision was negotiated in 1977, some sense of discomfort reportedly existed with its applicability in NIAC.<sup>13</sup> Prior to that date, in fact, only scant provisions could be found in treaty law that, combined with general principles of IHL such as the principle of distinction in attack, and the principle of humanity, would have mitigated civilians starvation during warfare;<sup>14</sup> prior to 1949, even scarcer evidence existed of specific rules that would have

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<sup>5</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 1949* (Martinus Nijhoff, 1987), at 1456, § 4791.

<sup>6</sup> ‘Starvation’ (*OED Online*, OUP December 2018) available at [www.oed.com/view/Entry/189208](http://www.oed.com/view/Entry/189208) (visited 7 March 2019).

<sup>7</sup> As it was the case, for example, in the Darfuri region of Sudan, see: Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, at 83, § 315.

<sup>8</sup> Recent examples have been Syria and Yemen, see i.e. UN Press Release, ‘Essential Aid Deliveries Blocked for Millions of Syrians in Besieged Areas’, 30 January 2018, SC/13190, available at <https://www.un.org/press/en/2018/sc13190.doc.htm> (visited 28 February, 2018); Report of the Independent and Eminent International and Regional Experts on Yemen, *supra* note 1, at 46-64.

<sup>9</sup> Whereas other bodies of international law, such as International Human Rights Law, are relevant to the prohibition against starvation as well, in order to limit the scope of this article, only International Humanitarian Law (in this section), and International Criminal Law (in the next section) will hereby be discussed.

<sup>10</sup> Esbjörn Rosenblad, ‘Starvation as a Method: Conditions for Regulation by Convention’, 7 *The International Lawyer* (1973) 252, at 266.

<sup>11</sup> Art. 54 (1) AP I first sentence reads similarly: ‘Starvation of civilians as a method of *warfare* is prohibited’ [emphasis added]. The ICRC Commentary explains that using different terminology (‘combat’ instead of ‘warfare’) has no legal consequences, and was at the time of the adoption considered the appropriate term for NIAC. For details, see Sandoz, Swinarski and Zimmermann, *supra* note 5, at 653, § 2089 and 1457, § 4799.

<sup>12</sup> Art. 54 AP I also prohibits the direct and intentional starvation of civilians as a method of warfare, but unlike Art. 14 AP II, it adds specifications on the targeting of military and dual use objects to which we shall return later in the article.

<sup>13</sup> Simone Hutter, *Starvation as a Weapon: Domestic Policies of Deliberate Starvation as a Means to an End Under International Law* (Brill/Nijhoff, 2015), at 184.

<sup>14</sup> For example, art. 23 GC IV introduced the free passage of food to civilians, but only in unoccupied territory, and art. 17 GC IV improved agreements to evacuate the wounded, the sick, infirm and aged persons, children and maternity cases during sieges.

mitigated civilians starvation during war.<sup>15</sup> For this reason, some debate occurred around the negotiation of the APs as to the origins of the prohibition.<sup>16</sup> Whereas some claimed that the prohibition against starvation found its roots in Common Article 3 GCs,<sup>17</sup> others felt that such a wide interpretation of this ‘convention in miniature’ could not cover the ‘concrete protection of objects indispensable to civilian survival’.<sup>18</sup> The provision, in the form of Draft Article 27, was at risk of being deleted by the Diplomatic Conference, but the Article was ultimately adopted by consensus because of its ‘humanitarian substance’.<sup>19</sup>

### ***B. Customary International Humanitarian Law***

Over 40 years after the negotiation of the provision, the prohibition has hardened into customary international law. The fact that the protocol itself has been adopted by 168 countries is indication enough of the widespread acceptance of the prohibition in NIAC. Unlike in 1977, however, the prohibition is today also supported by incorporation into a number of military manuals that are either applicable or have been applied in NIAC, or other expressions of state practice. The ICRC’s assessment of customary humanitarian law rules, which reviewed ‘virtually uniform, extensive and representative’ state practice amounting to customary rules applicable both in IAC and in NIAC,<sup>20</sup> found enough of such expressions to conclude that customary rules 53 and 54 respectively indeed prohibit the ‘use of starvation of the civilian population as a method of warfare’, and ‘attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population’.<sup>21</sup> Even countries that are not party to the Protocol have in fact included the prohibition in their domestic War Manuals,<sup>22</sup> and for those countries not party to the Protocol that have not included a provision in their domestic War Manuals, the ICRC tracked other expressions of state practice accompanied by *opinio juris* that helped them determine the unequivocal existence of the customary rule in NIAC.<sup>23</sup> Most importantly, the ICRC study did not seem to find any ‘persistent objectors’ to

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<sup>15</sup> Hutter, *supra* note 13. More generally, it should be understood the context in which the Protocols were being negotiated: with wars of liberation and decolonization under way, many countries hesitated to agree to the application of IHL rules in NIAC, see: Jonathan Cuénoud, ‘40th Anniversary of the Additional Protocols of 1977 of the Geneva Conventions of 1949’, EJIL:Talk!, 8 June 2017, available at <https://www.ejiltalk.org/40th-anniversary-of-the-additional-protocols-of-1977-of-the-geneva-conventions-of-1949/> (visited 07 March 2019).

<sup>16</sup> Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, 1982), at 279.

<sup>17</sup> Interpreted *-inter alia-* to protect civilians (and thus civilian objects) from becoming military targets and from becoming the object of deliberate attacks. G. A. Mudge, ‘Starvation as a Means of Warfare’, 4 *The International Lawyer* (1970) 228, at 254; Christine Breining-Kaufmann, *Hunger als Rechtsproblem: Völkerrechtliche Aspekte eines Rechtes auf Nahrung* (Schulthess, 1991), at 192; Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1456, § 4794.

<sup>18</sup> This interpretation at the time directly contradicted the position of some states. See Jean S. Pictet (ed), *The Geneva Conventions of 1949: Commentary* (Geneva: ICRC, 1958), at 34 and 38-40.

<sup>19</sup> Bothe, Partsch and Solf, *supra* note 16, at 681. Subsequent authoritative scholarship has in fact credibly traced the prohibition to the principle of humanity and its demand for the humane treatment of civilians, which were clearly established far prior to 1977. See Jelena Pejic, ‘The Right to Food in Situations of Armed Conflict: The Legal Framework’, 83 *International Review of the Red Cross* (2011) 1097, at 1106.

<sup>20</sup> For a review of all state practice considered in the ICRC Study, see the Study’s Volume II. Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 2: Practice* (Cambridge University Press, 2005).

<sup>21</sup> *ibid*, Rule 53 and 54, at 1123-73, §§ 1-360.

<sup>22</sup> Most notably, the US, see: US Department of Defense, Office of the General Counsel, LOAC Manual, 31 May 2016, § 5.20.

<sup>23</sup> For example, Azerbaijan, who is not party to AP II, has included the war crime of civilian starvation in its domestic criminal code irrespective of the nature of the conflict; Iraq, who is also not a party to AP II, has made official statements condemning starvation in NIAC, and Malaysia, also not a party, reportedly has shown

the prohibition against intentional starvation of civilians in NIAC, but, to the contrary, found that practice contravening the prohibition has generally and consistently been condemned.

### ***C. Corollary International Humanitarian Law Rules and Principles***

Additional evidence of the unequivocal existence of the prohibition against the starvation of civilians today can also be found in a number of contemporary applicable rules and principles related to the protection of civilians in IHL. First of all, if in 1977 doubts might have existed as to whether Common Article 3 or any other rule on the conduct of hostilities might have reached as far as including civilians and objects necessary to their survival as protected, there can be no doubt today that the principle of distinction between civilian and combatants, and the prohibition against directing attacks on the civilian populations or civilian objects, including against objects necessary for their survival, are customarily binding on all countries.<sup>24</sup> Other customary, and thus binding, relevant corollary rules that would make it impossible to argue against the existence of a prohibition against intentionally starving civilians are the prohibition against terrorizing civilians (Article 33, GC IV, and Customary rule 2), the prohibition against collective punishment (Customary rule 103), the prohibition against forced displacement for reasons other than the civilians' own security or imperative military necessity (Customary rule 129), the prohibition against indiscriminate methods of warfare,<sup>25</sup> obligation to allow the rapid and unimpeded passage of humanitarian relief (Customary rules 55, 56, which has an even lower triggering threshold than starvation),<sup>26</sup> and the general obligation to protect civilians from the adverse effects of conflict, which lies at the very core of today's LoAC. Regardless of what the status of these obligations might have been in 1977 in fact, and how novel these ideas might have been at the time,<sup>27</sup> in light of today's IHL developments any argument against the prohibition of intentionally starving civilians as a method of warfare truly appears to be unsustainable.

## **2. The Customary Humanitarian Law Obligation to Allow and Facilitate the Unimpeded Passage of Humanitarian Aid**

Under customary Rules 55 (access for humanitarian relief for civilians in need) and 56 (freedom of Movement of Humanitarian Relief Personnel), all parties to a conflict are also under a legal obligation to allow and facilitate the unimpeded passage of humanitarian aid.<sup>28</sup> This is a non-derogable obligation, which is amply also found in treaty law.<sup>29</sup> Article 18(2) of Additional Protocol II, for example, provides that “[i]f the civilian population is suffering

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consistent practice, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 1: Rules* (CUP 2005, revised 2009), Rule 53, at 188, fn 18.

<sup>24</sup> The Eritrea-Ethiopia Claims Commission deliberated on this question in depth and held that, even though the prohibition on attacks against objects indispensable to the survival of the civilian population represented a significant advance in the prior law when it was included in API in 1977, it had become a part of customary IHL within two decades. Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25-26, between the State of Eritrea and the Federal Democratic Republic of Ethiopia, The Hague, 19 December 2005, §§ 104-105.

<sup>25</sup> *Legality of the Threat or Use of Nuclear Weapons* (1970) ICJ Reports (1996) 226.

<sup>26</sup> The threshold triggering the obligation to allow unimpeded passage of goods that are genuinely humanitarian in nature ‘is that civilians are inadequately supplied’, which is clearly a much lower threshold of deprivation than ‘starvation’. See i.e. Dapo Akande and Emanuela-Chiara Gillard, ‘Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict’, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), October 2016, §§ 43 and 51.

<sup>27</sup> Hutter, *supra* note 13, at 184.

<sup>28</sup> Henckaerts and Doswald-Beck, *supra* note 23, Rule 55 and 56, at 193 and 200.

<sup>29</sup> Art. 23 GC/IV, Art. 70(2) AP/I. See also Art. 18 AP II.

undue hardship owing to a lack of supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the *consent* of the High Contracting Party concerned.”<sup>30</sup> In relation to this consent clause, it is argued that “the fact that consent is required should not be taken to mean that the decision is left to the discretion of the parties and the rule should be read as equivalent to the one applicable in international armed conflicts.”<sup>31</sup> Consequently, “if the survival of the civilian population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place (...) The authorities responsible for safeguarding the population in the whole of the territory of the state cannot refuse such relief without good grounds. Such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat as the population would be left deliberately to die of hunger without any measures being taken.”<sup>32</sup> Furthermore, whereas both parties might negotiate conditions to the delivery of such consignments,<sup>33</sup> and the party ‘in control’ may retain the right to supervise (but *also the obligation to facilitate*) the distribution of humanitarian and emergency relief,<sup>34</sup> humanitarian relief operations have to be carried out impartially and without any adverse distinction.<sup>35</sup> Again, the interpretation of IAC treaty law offers some insight on how the obligation should be understood. Article 70 AP/I forms part of customary law, thus it might be fair to assume that the customary law rules regarding the diversion of humanitarian relief equally apply in NIAC.<sup>36</sup> Article 70(3)(c) AP/I prescribe that parties to the conflict:

(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned’.

The strict exception in this paragraph may only be met in extreme circumstances, for example if it is impossible to enter the respective territory for security reasons or if perishable foodstuff might not reach the population in time; but under no other circumstances shall humanitarian aid destined to civilians be diverted to combatants, re-routed with adverse effect on some segments of the civilian population, or impeded. Wilfully impeding the passage of humanitarian aid or diverting such aid with discriminatory intent might in fact amount to crimes under international law.<sup>37</sup>

### **3. The Unintentional Starvation of Civilians as a Consequence of other Lawful Methods of Warfare**

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<sup>30</sup> Art. 18(2) AP II; Pejic, *supra* note 19, at 1108 [emphasis added].

<sup>31</sup> *Ibid.*

<sup>32</sup> *ibid.*; Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1479, § 4885.

<sup>33</sup> See Art. 70(3)(a) and (b) AP/I.

<sup>34</sup> *ibid.* See also Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1479, § 4887.

<sup>35</sup> Article 70(1) AP I and Article 18(2) AP II.

<sup>36</sup> The ICTY did rule, in fact, that ‘[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’. See Decision on Interlocutory Appeal Challenging Jurisdiction, *Tadić* (IT-94-1-A) Appeals Chamber, 2 October 1995, § 119.

<sup>37</sup> See Rogier Bartels, ‘Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future’, 48 *Israel Law Review* (2015) 281-307.

Under Art. 30 of the Rome Statute, ‘intent’ can also be established if, *inter alia*, a foreseeable consequence of the conduct will incur in the ordinary course of events.<sup>38</sup> This raises the question of whether the incidental starvation flowing from other lawful acts would be covered by the proposed amendment, and whether this would constitute a departure from current law on starvation. This is a particularly important question to answer as many take the view that the incidental starvation of civilians is in fact allowed if the means of subsistence served *both* civilians and combatants. This position, for example, was taken by Antonio Cassese,<sup>39</sup> and is still taken today in the DoD and San Remo Manual on NIAC.<sup>40</sup> Even there where this position is acknowledged, however, it is clear it *has* to be counterbalanced with the obligation to ‘allow and facilitate humanitarian assistance’.<sup>41</sup> This section of the paper will discuss three potential scenarios in which the unintentional starvation of civilians could materialize, in the hope to clarify how the prohibition against starvation would play out. The three case scenarios under consideration will be: the cumulative effects of the use of kinetic force on ‘dual-use’ objects; scorched earth techniques; and methods of warfare -such as sieges, blockades, etc.- that, even though *per se* lawful are, by design, aimed to impose hardship and isolation.

### A. Kinetic ‘attack’s on ‘dual use objects’

Article 14 AP II and customary rules 53 and 54 are silent on the issue of attacks on dual-use objects.<sup>42</sup> Some guidance on the customary rule, however might found by looking at Article 54 AP I.<sup>43</sup> This is confirmed by the ICRC itself, who in its commentary to Art. 14 AP II, clarifies:

It is prohibited to attack or destroy objects with the aim of starving out civilians. However, if the objects are used for military purposes by the adversary, they may become a military objective and it cannot be ruled out that they may have to be destroyed in exceptional cases, though always provided that such action does not risk reducing the civilian population to a state of starvation.<sup>44</sup>

The language used by the ICRC suggests that military necessity cannot be derived by the “purpose of depriving the civilian population of such objects ‘because of their sustenance

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<sup>38</sup> Art. 30 Rome Statute.

<sup>39</sup> Antonio Cassese, ‘The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law, 3 Pacific Basin Law Journal (1984) 57, at 92.

<sup>40</sup> San Remo Manual on the Law of Non-International Armed Conflicts, International Institute of Humanitarian Law, 2006 at 45, § 2.3.10; US LOAC Manual, *supra* note 22, § 5.20.2.

<sup>41</sup> San Remo Manual on the Law of Non-International Armed Conflicts, *supra* note 40, § 2.3.10.3 in combination with § 5.1. This latter obligation in and of itself, it might be argued, carries its own challenges related to ‘consenting’ to such humanitarian operations, which are in turn -at least in part- justified by the difficulties of controlling distribution to civilians only (as opposed to diversion to combatants). These issues, and how they do not infringe upon the prohibition against starving civilians, will be discussed more in detail later in this paper.

<sup>42</sup> Some have taken this silence to conclude that no exceptions are contained in the prohibition against starvation in NIAC. Kaufmann, *supra* note 17, at 215; Bothe, Partsch and Solf, *supra* note 16, at 681; Hutter, *supra* note 13, at 212. This blanket position seems however untenable, if not by interpretation of the customary rule, by application to the reality of military operations.

<sup>43</sup> In its Customary Law Study, the ICRC concluded in fact that ‘149 out of the 161 rules apply equally in international and non-international armed conflicts’, with rules 53 and 54 being two of them. Furthermore, when reviewing practice in connection with rule 54 (Attacks against objects indispensable to the survival of the civilian population), and rule 8 (military objectives) the study did not find contrary practice with respect to either IAC or NIAC. See Henckaerts and Doswald-Beck, *supra* note 23, at 186 and 189.

<sup>44</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1459, § 4807.



value”.<sup>45</sup> It is in fact legitimate to damage the protected objects and installations by military operations only “if the impairment is an incidental effect of the attack”:<sup>46</sup>

An irrigation channel, for example, shall not be destroyed deliberately in order to interrupt agricultural production; the same is true for the destruction of crops or gardens because of their importance to the sustenance of the civilian population. Nevertheless, the destruction of an irrigation channel may be permissible if the channel is used as a defensive position by the military forces in occupation and a field of crops may be burnt down in order to clear the field for artillery.<sup>47</sup>

If this is correct, (and if it is not, then an even more restrictive interpretation ought to apply) other IHL rules on the conduct of hostilities would have to apply, ie. any lawful attack would have to be dictated by imperative military necessity, be carried out against a lawful military objective identified with the requisite degree of certainty,<sup>48</sup> and proportionality would demand that any foreseeable incidental harm resulting from the attack would not be *excessive* in relation to the anticipated concrete and direct military advantage.<sup>49</sup> The applicability of this approach to attacks on dual-use object is the context of the prohibition against starvation is illustrated in many LoAC Manuals, including those of the UK and Australia.<sup>50</sup> A far more difficult question to answer might seem that of what then would be considered excessive damage, or how proportionality and the prohibition against starvation could be reconciled. When considering the proportionality of a single attack on a dual-use object or facility, however, one has to consider the context of the ‘attack as a whole’.<sup>51</sup> This is true also for ‘knock-on’ or ‘reverberating’ harm, ie. ‘incidental harm that does not arise immediately or in one causal step’.<sup>52</sup> In the context of foodstuffs and agricultural areas producing them, crops, livestock and supplies of drinking water, it is possible to imagine how the single attack might be justified by imperative military necessity, and the destruction of a ‘wheat field to deny concealment to enemy forces’,<sup>53</sup> for example, might be considered proportional to the anticipated military advantage; but once the destruction of the same field is considered against the background of the ‘attack as a whole’, the litmus test is whether the civilian population might or not be

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<sup>45</sup> Dieter Fleck, *Handbook of International Humanitarian Law* (Oxford University Press, 2013), at 209.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.* 209-10. The same position has been taken recently by Gaggioli, see Gloria Gaggioli, ‘Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?’, *EJIL:Talk!*, 30 January 2019, available at <https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/#more-16877> (visited 7 March 2019).

<sup>48</sup> Henckaerts and Doswald-Beck, *supra* note 23, Rule 8, at 29-32; ‘As far as dual-use facilities are concerned, such as civilian means of transportation and communication which can be used for military purposes, practice considers that the classification of these objects depends, in the final analysis, on the application of the definition of a military objective’.

<sup>49</sup> *ibid.*, Rule 14, at 46.

<sup>50</sup> Australia, Department of Defence, *Law of Armed Conflict Manual* (2006) ADDP 06.4, §§ 7.11-7.13; United Kingdom, Department of Defence, *Joint Service Manual on the Law of Armed Conflict*, 2004, § 15.19.1.

<sup>51</sup> See Emanuela-Chiara Gillard, ‘Chatham House Report on Proportionality in the Conduct of Hostilities — Some Key Elements’, *EJIL:Talk!*, 28 January 2019, available at <https://www.justsecurity.org/62311/manus-mini-forum-opener/> (visited 7 March 2019). ‘In determining what amounts to an ‘attack as a whole’ and, therefore, constitutes the frame of reference for conducting a proportionality assessment, consideration must be given to the *context* in which the act is conducted. If the military advantage anticipated from a single attack is not dependent on or affected by other acts, then the act should be considered an ‘attack as a whole’ for the purpose of proportionality assessments. If, on the other hand, a single attack is an element in a larger operation where other acts contribute to the military advantage, then the operation in its entirety should be considered the ‘attack as a whole’.

<sup>52</sup> *ibid.*

<sup>53</sup> Australian LOAC Manual, *supra* note 50, § 7.13.

*foreseeably* left “with such inadequate food or water as to cause its starvation or force its movement”.<sup>54</sup> Whereas proportionality may in fact be relevant insofar as virtually any other adverse effects of the kinetic attack, with regards to the prohibition against starvation it is redundant.

### ***B. Scorched earth techniques***

The legality of “scorched earth” tactics, whereby a force retreating across its own territory (territory under its own control) destroys foodstuffs, water supplies, or other resources in order to slow down a pursuing force, arises in relation to the crime of starvation. Whereas some military manuals entirely prohibit scorched earth policies, they are customarily found to be lawful in IAC in self-defence of territory, or to arrest the enemy’s military advance, and only on the state’s own land.<sup>55</sup> One might ask what their status is in NIAC. Scorched earth techniques were in fact discussed during the negotiations of AP II. Already then, the ICRC was of the opinion that the obligation not to attack objects indispensable to the civilian population equally applies to the HCP’s own territory in NIACs.<sup>56</sup> The 1987 Commentary mentions however that:

During the discussions, this interpretation, which was the object of lengthy discussion in connection with the corresponding article of Protocol I, was neither confirmed nor dismissed with regard to Protocol II. It was argued that in an international armed conflict a State retained freedom of action in the territory under its own control, and that consequently it could not entirely be ruled out that the State would destroy everything on its own side under a "scorched earth" policy in case of imperative military necessity, for example, to halt the advance of enemy troops.<sup>57</sup>

The ICRC Customary Law study nevertheless concluded that ‘[i]t is doubtful, [...] whether the exception of scorched earth policy applies to non-international armed conflicts because Article 14 of Additional Protocol II does not contain it’.<sup>58</sup> In this respect, the ICRC commentary finds it is clear in NIACs that “it is not admissible that one of the parties could destroy or render useless objects indispensable to the survival of part of the population living in the part of the territory under its control because it suspected that the latter supported or sympathized with the adversary.”<sup>59</sup> The study cites the Military Manual of Colombia as an example of practice prohibiting the order a scorched earth policy ‘in all armed conflicts’.<sup>60</sup> A reference to an absolute prohibition of scorched earth tactics however can also be found in the UK LOAC Manual, which states in its section on internal armed conflicts that Article 14 AP/II would ‘prevent government forces from adopting a ‘scorched earth’ policy as a method of pressure against civilians supporting insurgents’.<sup>61</sup> A similar attitude can be found among scholars.<sup>62</sup> Some, in fact, while accepting them as a defensive measure in IACs, conclude that they are

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<sup>54</sup> Once again, an example of state practice on this is Australia above; also see: Art 54 (3)(b) AP I, and ICRC commentary to Art 14 AP II.

<sup>55</sup> Henckaerts and Doswald-Beck, *supra* note 23, Rule 54, at 192-93.

<sup>56</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1459, §§ 4808-9.

<sup>57</sup> *ibid.*

<sup>58</sup> Henckaerts and Doswald-Beck, *supra* note 23, Rule 54, at 192-93.

<sup>59</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1459, § 4811.

<sup>60</sup> *ibid.*

<sup>61</sup> UK LOAC Manual, *supra* note 50, at 408, fn 123.

<sup>62</sup> For a very detailed discussion of why scorched earth tactics cannot be an exception to Art 14 AP II, see: Hutter, *supra* note 13, at 218-222.



completely prohibited in NIACs.<sup>63</sup> This is in fact a rare instance in which the protection in NIAC is actually greater than in IAC.<sup>64</sup> Moreover, even if the jury was still out on the issue, *at a minimum* the same limitations that apply to IAC would have to also apply to NIAC. This means that ‘as soon as there is a lack of indispensable objects, the international relief actions provided for in Article 18 “(Relief societies and relief actions)” should be authorized to enable the obligation following from Article 14 to be respected’.<sup>65</sup>

### C. Starvation and isolation-related practices

Any isolation-related practice intended, by design, to impose hardship (such as sieges, blockades, and embargoes) is already considered unlawful *per se* if ‘it has the sole purpose of starving the civilian population or denying it other objects essential for its survival’.<sup>66</sup> The commentary to the San Remo Manual, recounting the debate over the provision concerning blockades in particular, mentions however that:

[..] the word ‘sole’ was retained because if a blockade has both the unlawful purpose of starvation together with a lawful military purpose, the provision in (b) is applicable, therefore rendering the blockade unlawful if the effect on the civilian population is excessive in relation to the lawful military purpose.<sup>67</sup>

Having a legitimate military objective is in fact not sufficient, and other precautions are necessary to make sure that the affected population does not starve. During siege, for example, it is an obligation of both parties to allow civilians safe passage out if the siege is subjected to any form of violence.<sup>68</sup> There is some debate as to whether a siege *per se* can be considered an attack,<sup>69</sup> but whether one considers it an ‘attack’ on its own, or views the mounting and maintaining of the siege as a series of attacks (ie. on ‘dual-use objects’, and by combining several methods of warfare such as land, air or other), given the adverse effect that sieges inevitably have on civilians, the ongoing lawfulness of such a method of combat would have to be monitored at all times,<sup>70</sup> and ultimately, the same litmus proportionality test as described above (ie. whether ultimately civilians are starving) would apply. The same remains true for

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<sup>63</sup> Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press, 2015), at 138-39.

<sup>64</sup> Sivakumaran reaches the same conclusion with regards to NIAC. Both him and Dinstein cite the ICRC Customary Law study and the fact that Article 14 does not include the derogation clause of Art 54(5) API. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Cambridge University Press, 2012), at 425.

<sup>65</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1457, § 4798.

<sup>66</sup> Henckaerts and Doswald-Beck, *supra* note 5, Rule 53, at 188-89.

<sup>67</sup> Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995), art 102(a). Similar to blockades, siege warfare is not *per se* prohibited under international law, neither in IACs nor in NIACs, as long as its purpose is to achieve a legitimate military objective, and not ‘solely’ to starve the civilian population. Henckaerts and Doswald-Beck, *supra* note 5, Rule 53, at 188-89.

<sup>68</sup> Henckaerts and Doswald-Beck, Rule 24, *supra* note 20.

<sup>69</sup> Gaggioli, *supra* note 47; Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1456, § 4794; Michael Cottier and Emilia Richard, ‘Article 8(2)(b)(xxv)’ in Kai Ambos and Otto Triffterer (eds), *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck/Hart/Nomos 2016), at 509; Sean Watts, ‘Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations’, Research and Policy Paper (Harvard Law School, Counterterrorism and Humanitarian Engagement Project) available online at <http://blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-IHL-and-SC-Practice-concerning-Urban-Siege-Operations.pdf> (visited 7 March 2019) at 10.

<sup>70</sup> Gaggioli, *supra* note 47.

blockades and similar (ie. embargoes, for example).<sup>71</sup> Whereas they may be mounted lawfully for a legitimate military (or even economic) purpose, they must be accompanied by the timely and unimpeded passage of humanitarian and emergency relief in accordance with customary rule 55.<sup>72</sup> Additionally, consistent with Article 17 of Additional Protocol II, using starvation to forcibly move the population, or moving the population in circumstances where sufficient shelter, hygiene, health, safety and nutrition would not be received, would constitute a violation of IHL.<sup>73</sup> Similarly, “if it turned out to be impossible to send sufficient aid for that part of the population of a besieged or encircled area that is particularly weak, the principle of the prohibition of starvation should henceforth dictate the evacuation of such persons.”<sup>74</sup> At the same time, the evacuation would have to be conducted so as to ensure that “removals are effected in satisfactory conditions of (...) nutrition”. Failure to do so could result in a violation of the prohibitions on forcible displacement of the population as well as the prohibition on starvation.<sup>75</sup> In this way the provisions of international humanitarian law are consistent in their protection of civilians and mutually reinforcing.

#### **4. The Conspicuous Absence of a Provision Prohibiting Starvation in NIAC in the Rome Statute**

In light of the clear status of the prohibition against starvation in NIAC under customary law, it is remarkable that a provision criminalizing it as a war crime in NIAC was not included in the Rome Statute. In fact, many delegations at the Rome Conference were in favour of including starvation as a war crime in NIACs.<sup>76</sup> Already in 1997, the Preparatory Committee had produced a draft that included ‘starvation of civilians’ as a crime in both types of conflict.<sup>77</sup> The crime was equally included for NIACs in a joint Switzerland–New Zealand proposal based on an earlier ICRC working paper.<sup>78</sup> As pointed out by Bartels, the option to include starvation of the civilian population was also part of the 1998 Zutphen draft.<sup>79</sup> From this point, however, and despite the authors’ best efforts, the disappearance of the provision becomes difficult to trace, which has led some commentators to conclude that the non-inclusion was simply an oversight.<sup>80</sup> Yet, Hermann von Hebel (who was Chair of the Working Group on the Definition of War Crimes during the Rome Conference) and Darryl Robinson mention that ‘[t]he inclusion of this crime in the context of international armed conflicts had already caused considerable controversy, and its inclusion in the context of internal armed conflicts appeared impossible, even though the prohibition of starvation is explicitly included in Article 14 of Additional Protocol II’.<sup>81</sup> Delegates involved in the Rome Conference, who have been

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<sup>71</sup> See i.e. Report of the Independent and Eminent International and Regional Experts on Yemen (*supra* note 1), Annex II: Access Restrictions by the Government of Yemen/Coalition, §§ 1-31.

<sup>72</sup> Henckaerts and Doswald-Beck, *supra* note 23, Rule 55, at 193.

<sup>73</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1460, § 4813.

<sup>74</sup> *ibid* at 654, § 2096.

<sup>75</sup> Pejic, *supra* note 19, at 1110-1101, citing inter alia Art. 17 AP II.

<sup>76</sup> Cottier and Richard, *supra* note 69, at 510, fn 1226.

<sup>77</sup> ICC PrepCom, ‘Decisions Taken by the Preparatory Committee at its Session Held From 11 to 21 February 1997’, 12 March 1997, A/AC.249/1997/L.5.

<sup>78</sup> ‘Working Paper Submitted by the Delegations of New Zealand and Switzerland’, 14 February 2017, A/AC.249/1997/WG.1/DP.2. See also Bartels, *supra* note 37, at 297.

<sup>79</sup> ICC PrepCom, ‘Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands’, 4 February 1998, A/AC.249/1998/L.13, at 30. See also Bartels, *supra* note 37, at 297.

<sup>80</sup> Bartels, *supra* note 37, at 298.

<sup>81</sup> Hermann von Hebel and Darryl Robinson, ‘Crimes Within the Jurisdiction of the Court’ in Roy S. K. Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999), at 125, fn 122; see also Darryl Robinson and Hermann von Hebel, ‘War Crimes In Internal Conflicts: Article 8 of the ICC

contacted by the authors of this article, have also confirmed this interpretation. Indeed, throughout the negotiations, there had been much disagreement on the scope of the ICC's jurisdiction over war crimes in NIAC, ranging from no crimes at all to complete symmetry between IAC and NIAC. It is therefore not unlikely, that the inclusion of starvation as a war crime in NIAC became a 'sacrificial lamb' in order to maintain a delicate compromise in the final draft.<sup>82</sup> One might then wonder why no one proposed to 'fill the gap' at other times, especially since Article 8 has already been amended once.<sup>83</sup> It appears however that no systematic analysis of what amendments could be done to Article 8 ever occurred. The government of Belgium proposed several specific amendments to Article 8 but none of them concerned starvation.<sup>84</sup> The Review Conference adopted some of them in 2010, the rest later became the amendments of 2017.<sup>85</sup> It should also be noted that in the same timeframe, negotiations first and ratification campaign subsequently were taking place on the crime of aggression. Given how difficult those negotiations turned out to be,<sup>86</sup> it appears that insufficient time and energy was left to address the inclusion of starvation as a crime in NIACs.

## 5. The Swiss Proposed Amendment

To codify into the Rome Statute the customary international law thus far highlighted, the Swiss proposed amendment submits that the following text be inserted as new sub-paragraph 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.

The proposed text largely follows that of the existing crime of starvation in IAC under article 8(2)(b)(xxv):

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.

For this reason, the terms of the proposed text which match those in article 8(2)(b)(xxv), should be interpreted consistently with the existing crime to the extent possible. The following analysis will address all the terms of the proposed text.

### A. *Elements of the Proposed Crime*

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Statute', 2 *Yearbook of International Humanitarian Law* (1999) 193, at 208, fn 76. Yet, Cottier and Richard argue that the inclusion for IACs was not controversial, see Cottier and Richard, *supra* note 69, at 510.

<sup>82</sup> That a delegates' name appears in the acknowledgements of this article does not necessarily mean that the person was consulted or agreed to be consulted for the purposes of this paragraph. The views expressed in this paragraph however are in fact representative of the views expressed by all who were consulted during the authors' research.

<sup>83</sup> Amendment to article 8 of the Rome Statute of the International Criminal Court (adopted 10 June 2010, entered into force 26 September 2012) 2868 UNTS 195.

<sup>84</sup> ICC ASP, Resolution ICC-ASP/8/Res.6, Annex III, 26 November 2009.

<sup>85</sup> See Amendment to Article 8, *supra* note 83, and Amendment to article 8 of the Rome Statute of the International Criminal Court (Weapons which use microbial or other biological agents, or toxins) (adopted 14 December 2017) Resolution ICC-ASP/16/Res.4 (not yet in force).

<sup>86</sup> See i.e. Claus Kreß, 'Introduction: The Crime of Aggression and the International Legal Order' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), at 1-18.

## 1. *Chapeau Elements*

As with the other crimes set out in articles 8(c) and (e), the proposed amendment would require that the conduct took place in the context of and was associated with a NIAC, and perpetrator was aware of the factual circumstances that established the existence of a NIAC.<sup>87</sup> A key point in this respect is that the perpetrator need not appreciate the legal qualification of the conflict in question. Indeed, the question of whether a particular conflict *legally* qualifies as international or non-international can divide even judicial opinion in the same case.<sup>88</sup> On the additional requirement of showing the nexus between the starvation and a NIAC, the analysis will largely overlap with the requirement of showing that the starvation was used as a method of warfare. As long as a NIAC has been established and it is shown that starvation was used as a method of warfare, the nexus will usually be clear unless the starvation somehow concerned a completely separate armed conflict.

## 2. *Mens Rea and Actus Reus*

In line with the existing text of article 8(2)(b)(xxv), the proposed crime requires that the conduct be undertaken “intentionally”. The definition of intent is set out in article 30 of the Rome Statute which provides, in relation to conduct, that intent is established if the person means to engage in the conduct, and that for consequences, intent is established if the person means to cause that consequence or is aware that it will occur in the ordinary course of events.<sup>89</sup> In interpreting and applying the reference to a person “intentionally” using starvation as a method of war, the terms of article 54 of Additional Protocol I may prove instructive. They state that “in no event shall actions against these objects [used in direct support of military action] be taken which may be *expected* to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement”.<sup>90</sup> In light of this, the mental element of the crime of starvation may include undertaking actions that can be expected to deprive the civilian population of adequate food or water. On a related note, the ICRC Commentary to article 54 of Additional Protocol I recalls that “[u]nfortunately it is a *well-known* fact that all too often civilians, and above all children, suffer most as a result [of blockades]”.<sup>91</sup> Again, if the deprivation of objects indispensable to the survival of the civilian population is the expected result of a military action, then that may be sufficient to establish the necessary intent. Consistently with the existing crime, the proposed text also includes reference to a different mental element, by prohibiting “*wilfully* impeding relief supplies”. Although “the standard of ‘wilfully’ includes recklessness and insofar would differ from the general standard under article 30 Rome Statute”, it is not clear that the drafters intended to deviate from the general rules regarding the mental element in this respect.<sup>92</sup> One understanding of the term *wilfully* is as a way of excluding circumstances in which a party to a conflict impeded the relief supplies inadvertently because of their military activities in the path of the relief vehicles delivery route.

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<sup>87</sup> See Article 8(2)(c) and (e), Elements of Crimes.

<sup>88</sup> Compare Decision on the Confirmation of the Charges, *Thomas Dyilo Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber, 29 January 2007, § 220 with Judgment pursuant to Article 74 of the Statute, Trial Chamber, 14 March 2012, § 567.

<sup>89</sup> Art. 30 Rome Statute.

<sup>90</sup> Art. 54(3)(b) API.

<sup>91</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 653-54, §§ 2089-2095.

<sup>92</sup> Cottier and Richard, *supra* note 69, at 518.

In terms of *actus reus*, the proposed text would require that the perpetrator used starvation as a method of warfare, including if the perpetrator deprived civilians of objects necessary to their survival by an act or omission.

## ***B. Interpreting Some Key Terms According with ICC Practice***

### *1. Starvation*

Neither the proposed text, nor the existing crime under article 8(2)(b)(xxv), nor article 54 of Additional Protocol I,<sup>93</sup> requires that civilians actually were starved to death or to any other point of suffering.<sup>94</sup> Similarly, the elements of crimes of the Rome Statute indicate that the crime of starvation does not require proof that civilians actually died or suffered. Under the elements, it is simply required to show that “the perpetrator deprived civilians of objects indispensable to their survival” and that “the perpetrator intended to starve civilians as a method of warfare”, along with the usual linkage to an armed conflict,<sup>95</sup> and it is not required to show that civilians were actually starved. A result element for the crime of starvation was suggested by the USA (“That, as a result of the accused’s acts, one or more persons died from starvation”), but was not included in the Elements of Crimes adopted by the Preparatory Commission.<sup>96</sup> It is also unclear whether there is any minimum duration of deprivation required to establish this element. The question of duration is particularly relevant to instances of temporary cut-offs of electricity or water, which often occur in connection with armed conflict.

### *2. Depriving*

The wording of the proposed prohibition mirrors the existing crime in IACs insofar as it provides that starvation consists of *depriving* civilians of objects indispensable to their survival. Article 14 of AP II, as we saw, provides guiding language as to the meaning of depriving civilians in this manner. The formulation is however “non-exhaustive”,<sup>97</sup> and would include “destroying crops by defoliants or poisoning wells or springs, a particularly egregious form of starving civilians”,<sup>98</sup> along with rendering irrigation works or installations useless.<sup>99</sup> It is questionable whether a “failure to fulfil a duty under international humanitarian law may also amount to depriving civilians of objects indispensable to their survival”.<sup>100</sup> For example, “an Occupying Power may fail to ensure food and medical supplies to the civilian population within the occupied territories”.<sup>101</sup> If this omission form of inflicting starvation were considered sufficient for the responsibility of a State to be held responsible therefor, then, it could equally be argued that a non-State actor in control of a part of the territory may be responsible on the

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<sup>93</sup> Although the ICRC commentary on Art. 14 of Additional Protocol II does not explicitly address whether a result is required, it does note that Art. 14 is a ‘simplified version’ of article 54 of Additional Protocol I; Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1456, § 4792. Consistent with the commentary on Article 54, no result requirement should be read into article 14 of Additional Protocol II.

<sup>94</sup> Knut Dörmann, *Elements of War Crimes of the Rome Statute of the International Criminal Court* (Cambridge University Press, 2003), at 363-64; Pejic, *supra* note 19, at 1098.

<sup>95</sup> Article 8(2)(b)(xxv), Elements of Crimes.

<sup>96</sup> Proposal by the United States of America, UN Doc. PCNICC/1999/DP.4/ Add.2 (4 Feb. 1999) 18) cited in Cottier and Richard, *supra* note 69, at 517.

<sup>97</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1458, § 4800.

<sup>98</sup> Cottier and Richard, *supra* note 69, at 514, citing Sandoz, Swinarski and Zimmermann, *supra* note 5, at 655, § 2101 and 1458, § 4801.

<sup>99</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 655, § 2100.

<sup>100</sup> Cottier and Richard, *supra* note 69, at 516.

<sup>101</sup> *ibid.*

same basis. As set out above,<sup>102</sup> a non-state actor may thereby acquire the obligation to ensure food and medical supplies can reach the population under its control. It is important in this respect that the rules of IHL place obligations on armed non-state actors, as well as states.<sup>103</sup> In this respect, if the non-state actor were considered to have the same duty as a state due to its effective control over territory and the population thereof, it could be considered to deprive the population of indispensable objects if it wilfully omitted to ensure that supplies were able to reach the population, despite its ability to do so.

### 3. *Objects indispensable to their survival*

The ICRC Commentary on Article 14 of AP II provides that “[o]bjects indispensable to the survival of the civilian population’ means objects which are of basic importance for the population from the point of view of providing the means of existence”.<sup>104</sup> It includes “[items] such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.<sup>105</sup> It then clarifies that “foodstuffs” and “agricultural areas for the production of foodstuffs” should be “understood in the broadest sense to cover the infinite variety of needs of the populations of different geographical areas throughout the world”.<sup>106</sup> In addition to food and water and related resources, indispensable objects include “clothing, medical supplies”<sup>107</sup> and “under certain circumstances, electricity sources”.<sup>108</sup> A key question is whether the objects in question need to be directly indispensable to the survival of the civilian population, such as water and food sources, or whether other commodities, the sale of which generates income for the purchase of basic sustenance, would also be covered. An additional question arises if the supplies are indispensable to the survival of civilians, but the party preventing those supplies from reaching the civilians offers alternative sources. In the context of IACs, one view is that “[i]f the civilian population of the blockaded territory is however adequately provided with essential commodities, the blockaded objects are not ‘indispensable to their survival’ and thus could not fall under the prohibition of starvation”.<sup>109</sup> However, another view is that the objects were indispensable at the time they were blocked from reaching the civilians and the alternative sources were only subsequently provided, then the prohibition would be violated.

### 4. *Including by wilfully impeding relief supplies*

In line with the existing crime, the proposed text provides that one form of depriving civilians of objects indispensable for their survival is wilfully impeding relief supplies. Accordingly, the rules governing the access of relief supplies to civilians are critical for the application of the prohibition of starvation whether in NIACs or IACs. Indeed, the Commentary to Article 54 of AP I highlights that the provision can only be operationalized by taking into account its accompanying rules of application,<sup>110</sup> and the Commentary to AP II explicitly links Article 14

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<sup>102</sup> See above, referring to the right to supervise (but *also the obligation to facilitate*) the distribution of humanitarian and emergency relief.

<sup>103</sup> Pejic, *supra* note 19, at 1097.

<sup>104</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 1458, § 4803.

<sup>105</sup> *ibid.*, § 4805.

<sup>106</sup> *ibid.*, § 4805.

<sup>107</sup> Cottier and Richard, *supra* note 69, at 512-513; Sandoz, Swinarski and Zimmermann, *supra* note 5, at 655, § 2101. See also Dörmann, *supra* note 92, at 363.

<sup>108</sup> Cottier and Richard, *supra* note 69, at 513.

<sup>109</sup> *ibid.*, at 515.

<sup>110</sup> Sandoz, Swinarski and Zimmermann (*supra* note 5) at 653, § 2091.



to a later article on relief societies and relief actions.<sup>111</sup> The wording of article 8(2)(b)(xxv) includes the clause “as provided for under the Geneva Conventions”. The reference to relief supplies imports the rules set out in the IV GC and AP I.<sup>112</sup> The broader framework of international humanitarian law would also apply, *mutatis mutandis*, to the prohibition of starvation in the context of NIACs, as article 8(2)(e) of the Rome Statute states that it concerns “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law”. As we discussed, as a matter of customary international law applicable to IACs and NIACs, “parties to the conflict must allow and facilitate unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control”.<sup>113</sup> This is consistent with common article 3, which applies to IACs and NIACs, and provides that “an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict”.<sup>114</sup>

## 5. Civilians

The term “civilian” is generally defined in Article 50 of AP I to the Geneva Conventions.<sup>115</sup> According to this provision “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Of course “the protection civilians enjoy is lifted as soon as they are directly participating in hostilities and for the whole duration of their participation”.<sup>116</sup> To date, the ICC has adhered to the traditional definitional approach whereby the term civilian is defined negatively in contradistinction to the term military.<sup>117</sup> Civilian objects are defined negatively based on the definition of military objects, which are those “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances

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<sup>111</sup> *ibid.*, at 1456, § 4791.

<sup>112</sup> Michael Bothe, ‘War Crimes’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002), at 402; Sandoz, Swinarski and Zimmermann, *supra* note 5, at 653, § 2091.

<sup>113</sup> Henckaerts and Doswald-Beck, *supra* note 23, Rule 55, at 193.

<sup>114</sup> Pejic, *supra* note 19, at 1105.

<sup>115</sup> Dörmann, *supra* note 92, at 364. The category of civilians does not include (Article 4 A (1), (2), (3) and (6) of GCIII) POWs (who have fallen into the power of the enemy):(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war; and (Art.43 Additional Protocol I) organised armed forces. See Judgment, *Milan Martić* (IT-95-11), Appeals Chamber, 8 October 2008, §§ 291-302.

<sup>116</sup> Cottier and Richard, *supra* note 69, at 513.

<sup>117</sup> See, e.g., Judgment pursuant to Article 74, *Jean Pierre Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March 2016, § 152.

ruling at the time, offers a definite military advantage”.<sup>118</sup> However, the prohibition on using starvation against civilians is not limited to civilians of the opposing side; “Article 8(2)(b)(xxv) “not only protects civilians belonging to an adverse party to the conflict finding themselves on that adverse party’s territory or in occupied territory, but also any other civilian population such as civilians belonging to the own party to the conflict or finding themselves on the territory of the own party to the conflict”.<sup>119</sup> Consistent with this broad approach, “objects indispensable to the survival of the civilian population are protected by this article when they are located in the territory held by the Party to the conflict concerned or that of a co-belligerent as well as in enemy territory”.<sup>120</sup>

#### 6. *As a method of warfare*

Because of the “method of warfare” requirement, the starvation or deprivation “must be conducted to achieve a military advantage or other objective vis-a`-vis an adversary party ...[t]o deliberately decide not to take measures to supply the population with objects indispensable for its survival can become a method of combat by default, and would also be prohibited”.<sup>121</sup> In this respect, the crime would cover “using starvation to achieve a speedier subjection of a besieged town or village, as was medieval warfare practice, or to pressure on the adversary to accept some other aim of the attacker...[or] to deprive civilians of indispensable goods in order to force them to move out of a certain area in order to facilitate the control over that area”.<sup>122</sup> The terms of article 54 of AP I draw a distinction between purpose and motive. Article 54(2) provides that it is prohibited to interfere with objects indispensable to the survival of the population: “for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive”.<sup>123</sup> Although this same wording was not reproduced in article 14 of AP II, applicable to NIACs, or to the criminal prohibitions set out in the Rome Statute, it highlights that the prohibition concerns the use of starvation as a method of war, irrespective of the ultimate motive behind the conduct. *A fortiori*, the use of starvation as a tactic during armed conflict for unlawful purposes would violate the prohibition: “depriving civilians of indispensable objects with the intention, for instance, to ‘ethnically cleanse’ a region or town from a certain group of civilians, or to force targeted civilians to move away or take some other action intended or ordered by the perpetrator, would seem to meet the *mens rea* required under article 8(2)(b)(xxv)”.<sup>124</sup> The use of starvation as a tactic of war, whether in IAC or in NIAC, is unfortunately not obsolete. The Commission of Inquiry into events in Darfur recognized how, as one method of warfare “water pumps and wells were destroyed and poisoned by dropping the carcasses of cattle into them”.<sup>125</sup> Similarly, the Office of the Prosecutor of the ICC noted

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<sup>118</sup> Art. 52(1) AP I; Judgment pursuant to Article 74, *Germain Katanga* (ICC-01/04-01/07), Trial Chamber, 7 March 2014, § 893; Judgment, *Dario Kordić & Mario Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 52.

<sup>119</sup> Cottier and Richard, *supra* note 69, at 513.

<sup>120</sup> Sandoz, Swinarski and Zimmermann, *supra* note 5, at 657, § 2113.

<sup>121</sup> Cottier and Richard, *supra* note 69, at 518.

<sup>122</sup> *ibid.*

<sup>123</sup> Art. 54(2) AP I. See also Sandoz, Swinarski and Zimmermann, *supra* note 5, at 656, § 2107 (‘the provision under consideration here means that it is prohibited to attack etc. objects indispensable to the survival of the civilian population wherever it is, or to deprive the enemy State of such objects indispensable to the civilian population.’).

<sup>124</sup> Cottier and Richard, *supra* note 69, at 518.

<sup>125</sup> Cottier and Richard, *supra* note 69, at 512, citing the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, §§ 235 and 305.

that across Darfur the forces of Al-Bashir “destroy all the target groups’ means of survival, poison sources of water including communal wells, destroy water pumps, steal livestock and strip the towns and villages of household and community assets.”<sup>126</sup>

### 7. *Amendment: Article 121(5)*

In accordance with Article 121(5) of the ICC Statute, the amendments will enter into force for the State Parties which accept them one year after the deposit of their instruments of ratification or acceptance. This would match the approach followed for the amendments to Article 8 proposed by Belgium and adopted at the Kampala Conference to include three war crimes relating to the use of prohibited weapons in NIACs, which mirrored those already included in the Statute with respect to IACs.<sup>127</sup>

### ***C. Recommendations on the Adoption of the Swiss Amendment***

#### *1. Possible objections to the Amendment*

Even though existence in customary law is not a requirement for a crime to be included in the Rome Statute, this paper has shown that there is substantial state practice showing that depriving civilians of humanitarian aid, including by wilfully impeding the delivery of humanitarian aid and relief supplies, would constitute a violation of IHL in NIAC, and this practice thus supports the application of the crime of starvation in the context of NIACs. One might thus assume that the Swiss proposed amendment would be fairly uncontroversial when negotiated within the Assembly of States Parties. Introducing amendments to the ASP is however not simply a question of substance. One objection that may be raised is that the piecemeal introduction of new war crimes through amendment under Article 121(5) will lead to a fragmented regime, whereby certain crimes are only applicable to States that have ratified the particular amendment in question. A risk arises that persistent non-ratification by a substantial number of States could raise doubts as to the existence of a customary basis for the crime. However, the potential for this future outcome is implicit in the amendment procedure, and should not prevent States having the opportunity to ratify and accept the application of the prohibition of starvation in the context of NIACs alongside IACs. It is in fact the responsibility of each state party to the court to be sure this outcome is avoided by living up to their commitments and promptly and speedily ratifying and implementing any amendments to the Statute. Another objection may be that the crime’s application in NIAC was already rejected during the Rome negotiations. Unlike the negotiations of the AP in 1977, we found no evidence that in 1998 doubts persisted as to the customary existence of the crime. To the contrary, it appears that the crime was sacrificed on political grounds. Thus, in the absence of compelling substantive reasons for the non-inclusion of this crime during NIACs, little weight can be placed on this objection. Finally, some might call into question the timing of the amendment, and appeal to what some consider a form of “amendment fatigue” caused by the negotiations surrounding the crime of aggression and the Belgian amendments on war crimes. The trends we have seen in NIACs around the world, however, and the suffering of so many civilians who have wilfully and appallingly been starved to achieve a military advantage should make the timeliness of this amendment a self-evident reality.

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<sup>126</sup> Public Redacted Version of the Prosecutor’s Application under Article 58, *Situation in Darfur, The Sudan* (ICC-02/05), 14 July 2008, § 14.

<sup>127</sup> Robin Geiß, ‘Preliminary remarks on subparagraphs (xiii)–(xv): Prohibited weapons in non-international armed conflicts’ in Ambos and Triffterer, *supra* note 69, at 569-571.

## 2. A gap in Accountability in the Rome Statute

The Swiss proposed amendment is not simply timely, it is also necessary. It is crucial to appreciate that the Rome Statute currently has a real gap. The starvation of civilians and related acts might arguably already be prosecuted in NIAC under the Rome Statute under Article 8(2)(e)(i) (the war crime of directing an attack against a civilian population), under Article 7(1)(a), (b), (h), or (k) (the crimes against humanity of murder, extermination, persecution, and other inhumane acts), or perhaps even under Article 6 (as an act of genocide); however, each one of these potential alternatives has serious limitations. Insofar as prosecutions under Article 8(2)(e)(i) are concerned, for example, while the provision could arguably cover the wilful starvation of civilians through acts of violence, it would not cover the wilful impeding of passage of humanitarian and relief goods; Article 6 would only cover groups protected under the genocide definition, and the ‘intent’ required for genocide is a much different threshold than the *mens rea* required for a war crime.<sup>128</sup> Prosecutions for the crime against humanity of murder under Article 7(1)(a) would fall short of including cases of starvation in which civilians do not actually die, thus setting a different, much higher bar in NIAC than in IAC. Prosecutions under Article 7(1)(b) also present quite a high threshold for extermination under which not all cases of starvation will fall;<sup>129</sup> Article 7(1)(h), which could arguably cover the diversion of humanitarian and relief supplies with adverse discriminatory intent, would however also incur in the special intent problem, as the intent to discriminate is a lower bar than the intent to persecute.<sup>130</sup> Furthermore, while a single act can amount to a war crime, any prosecutions under Article 7 would have to be part of a ‘widespread and systematic attack’. It thus appears clear that existing provisions in the Rome Statute are unable to capture the full scope of the ways in which, today, the war crime of starvation is most likely to be inflicted. For this reason, the Swiss amendment is imperative to close the accountability gap.

### Conclusions

To conclude, the proposed Amendment to include a provision on the war crime of starvation in the context of NIACs into the Rome Statute is both timely and necessary. Denying humanitarian access and condemning civilians to a dreadful death by exhaustion, disease, and hunger has become a major scourge in modern armed conflicts, the vast majority of which are non-international in character. We submit that there is a clear customary basis for this war crime both in IACs and in NIACs. Furthermore, because not the full scope of acts or omissions that lead to intentional civilian starvation in NIACs are currently captured by the Rome Statute, we submit that there is an imperative need to close the accountability gap. For this reason, we encourage the Assembly of States Parties to the Rome Statute of the International Criminal

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<sup>128</sup> Which means the victims have to belong to a certain national, ethnical, racial or religious group and the act of starvation must be accompanied by the intent to destroy such group in whole or in part. See Art. 6 Rome Statute; see also: Second Decision on the Prosecution’s Application for a Warrant of Arrest, *Al Bashir* (ICC-02/05-01/09) Pre-Trial Chamber, 12 July 2010, § 34.

<sup>129</sup> Although the population of a besieged town may qualify as ‘part of a population’, the conduct would still need to be part of a widespread or systematic attack directed against a civilian population which might exclude single instances of starvation as a method of warfare. See i.e. Susan Power, ‘Siege Warfare in Syria: Prosecuting the Starvation of Civilians’, 8 *Amsterdam Law Forum* (2016) 1, at 18-19; Christopher K. Hall and Carsten Stahn ‘Article 7(b)’ in Ambos and Triffeter, *supra* note 69, at 257.

<sup>130</sup> To commit the crime against humanity of persecution, the victim group would have to be targeted due to their political, racial, national, ethnic, cultural or religious status or gender. See Element 3, Article 7(1)(h), Elements of Crime.

Court to embrace the Swiss proposal, and amend the Statute to deter and punish those who insist on using starvation as a method of warfare in NIACs.