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Report of the Working Group on Amendments

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I. Introduction

1. The present report is submitted pursuant to the mandate given by the Assembly of State Parties (“the Assembly”) to the Working Group on Amendments (“the Working Group”). The Working Group was established by Assembly resolution ICC-ASP/8/Res.6 for the purpose of considering amendments to the Rome Statute proposed in accordance with article 121, paragraph 1, of the Statute as well as any other possible amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be adopted in accordance with the Rome Statute and the Rules of Procedure of the Assembly.
2. The Working Group’s consideration of amendment proposals to the Rome Statute and to the Rules of Procedure and Evidence is governed by the Terms of Reference set out in Assembly resolution ICC-ASP/11/Res.8, annex II. The amendment procedure for the Rules of Procedure and Evidence is also governed by the “Roadmap on reviewing the criminal procedures of the International Criminal Court”, the main purpose of which is to facilitate a structured dialogue between key stakeholders on proposed amendments to the Rules of Procedure and Evidence.¹ In endorsing the Roadmap by resolutions ICC-ASP/11/Res.8 and ICC-ASP/12/Res.8, the Assembly has reaffirmed the role of the Working Group in receiving and considering recommendations to the Assembly on proposals of amendments to the Rules of Procedure and Evidence.
3. At its sixteenth session, the Assembly invited the Working Group to continue its consideration of all amendment proposals in accordance with the Terms of Reference of the Working Group, and requested the Working Group to submit a report for the consideration of the Assembly at its seventeenth session.²
4. On 4 March 2018, the Bureau appointed via a silence procedure Ambassador Juan Sandoval Mendiolea (Mexico) as Chairperson of the Working Group.³
5. The Working Group met on 20 April 2018 to commence its work. Cognizant of the importance of holding regular meetings, the Working Group agreed to meet approximately every six weeks. It held four intersessional meetings, on 20 April, 14 June, 2 October, and 15 November 2018.

II. Consideration of proposals to amend the Rome Statute

6. The Working Group had before it those amendment proposals previously referred to it by the Assembly at its eighth session, as well as those transmitted by the Depositary of the Rome Statute on 14 March 2014 and 15 August 2017.⁴ It also had before it the non-paper submitted by Switzerland on 19 April 2018, revised on 20 September, containing proposed amendments relating to article 8 of the Rome Statute.⁵
7. As in the past, proponents were given the opportunity, at each meeting of the Working Group, to provide updates on their proposals. All delegations were invited to comment on the different proposals before the Working Group.

¹ The Roadmap is contained in the Report of the Bureau on the Study Group on Governance to the eleventh session of the Assembly (ICC-ASP/11/31, annex I). The Revised Roadmap is contained in the Report of the Bureau on the Study Group on Governance to the twelfth session of the Assembly (ICC-ASP/12/37, annex I). The Roadmaps are respectively available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-ENG.pdf and at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-ENG.pdf.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixteenth session, The Hague, -4 – 14 December 2017* (ICC-ASP/16/20), vol. I, part III, ICC-ASP/16/Res.6, annex I, paras. 18(a) and (b), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-20-ENG-OR-vol-II.pdf or at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res6-ENG.pdf.

³ Decision of the Bureau of the Assembly of States Parties, 4 March 2018 (adopted via a silence procedure), available at https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/Bureau%20appointments.NY-DH.05Mar18.1600.pdf.

⁴ These amendment proposals are contained: in the Report of the Working Group on Amendments to the thirteenth session of the Assembly (ICC-ASP/13/31); on the website of the Assembly at https://asp.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx; and, having been notified to the Depositary, at the United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XVIII-10&chapter=18&clang=en.

⁵ The non-paper also included a proposal on elements of crimes relating to the proposed amendments to article 8 of the Rome Statute. Both the text of the proposed amendments and the non-paper are included respectively in annexes III and IV of the present report.

8. As a general comment, some delegations expressed concern about possible fragmentation of the Rome Statute through the addition of amendments, including on the impact this would have on the efforts toward universality, taking into consideration that past amendments have not yet been ratified widely, and also expressed that this could merit further discussion. Other delegations pointed out that the Court would be in a position to determine which amendments had been ratified by which State Party and, accordingly, to determine the applicable law. Furthermore, some delegations emphasized that each State Party has the right to propose amendments and to initiate discussions in the Working Group and that each proposal put forward should be considered on its own merits, while others expressed doubts regarding the desirability of amending the Rome Statute. Some delegations indicated that they would refrain from taking a position on the substance of the proposals presented to the Working Group pending such general discussion as well as that referenced in part IV of this report.

A. Switzerland

9. At the first meeting, on 20 April 2018, Switzerland presented a new proposal of amendments to article 8 of the Rome Statute on the “Inclusion of starvation as a war crime in non-international armed conflicts (NIAC) into the Rome Statute”.⁶ The delegation explained that intentionally using starvation of civilians as a method of warfare was the prime example of a serious violation of international humanitarian law in both types of armed conflict, which the Rome Statute, however, only criminalized in international armed conflict (IAC). The Working Group decided to continue its consideration of this proposal at the next meeting.

10. At the second meeting, on 14 June 2018, many delegations noted that the Swiss proposal would contribute to the harmonization of the Rome Statute by further closing the gap between the rules for IAC and those for NIAC. Delegations generally agreed that the protection of civilians was a central principle of international humanitarian law and the Rome Statute. Many stated that the Swiss proposal had firm grounds in treaty law. The point was made that starving civilians in NIAC had become a war crime under customary international law. Others doubted if it had already acquired such a status given different examples of state practice. A view was further expressed that the second phrase of the proposal, “including wilfully impeding relief supplies”, should be dropped, as it was argued that it is unforeseen in treaty law applicable to NIAC and premature to be regarded as part of customary international law. The Working Group decided to continue its consideration of this proposal at the next meeting.

11. At the third meeting, on 2 October 2018, Switzerland proposed to defer a decision on its proposal by the Assembly to its eighteenth session in order to allow for a thorough discussion in the Working Group. Delegations appreciated the flexibility of Switzerland. Some expressed their strong support for the proposal and wish to consider it already at the seventeenth session of the Assembly. Switzerland presented its revised non-paper referring *inter alia* to Security Council Resolution 2417 (2018) which states that using starvation as a method of warfare may constitute a war crime and makes no distinction based on the nature of the armed conflict. The revised non-paper further addresses the question of fragmentation and the legal basis of the proposal in treaty and customary international law. Switzerland indicated that the harmonization of the Rome Statute regarding war crimes in IAC and NIAC would promote its coherence and therefore provide incentives to non-States Parties to ratify, a view that was also supported by other delegations. It also recalled that the perspective of victims, which would benefit from enhanced protection, should be taken into account. During the discussion, some delegations pointed out that harmonizing the rules regarding criminalization of starvation was welcomed for both IAC and NIAC, while one State was of the view that the amendment was not legally necessary as the Rome Statute already covered deliberate starvation of civilians in non-international conflicts. In this regard, Switzerland recalled the principle *nullum crimen sine lege*. There was general support among delegations regarding the substance of the amendment proposal. The Working Group decided to continue its consideration of the Swiss proposal.

⁶ Ibid.

B. Belgium

12. At the first meeting, on 20 April 2018, Belgium informed the Working Group that the consideration of its proposal of amendment to article 8 of the Rome Statute based on the Ottawa Convention of 1999 was postponed in the spirit of compromise while the proposal would remain on the table. Some delegations expressed their wish to see the adoption of this proposal earlier, including in the seventeenth session of the Assembly.

C. Mexico

13. At the first meeting, on 20 April 2018, Mexico indicated that the delegation would intend to discuss its amendment proposal at a later stage, taking into consideration the progress related to the adoption on 7 July 2017, of the Treaty on the Prohibition of Nuclear Weapons.

D. Trinidad and Tobago

14. No further updates were provided by Trinidad and Tobago concerning its proposal during the intersessional period.

E. South Africa

15. No further updates were provided by South Africa concerning its proposal during the intersessional period.

F. Kenya

16. No further updates were provided by Kenya concerning its proposal during the intersessional period.

III. Consideration of proposals to amend the Rules of Procedure and Evidence**A. Proposed amendments to rule 26**

17. The Working Group had before it the draft report of the Study Group on Governance Cluster I: Increasing the efficiency of the criminal process, in relation to the proposed amendments to rule 26 of the Rules of Procedure and Evidence, which was approved by The Hague Working Group under a silence procedure ending 2 July 2018, and was conveyed to the Working Group for its consideration.

18. The proposed amendments were to seek a more permanent solution by aligning the Rules of Procedure and Evidence of the Court with the mandate of the Independent Oversight Mechanism with regard to the receipt and investigation of claims of misconduct against elected officials such as judges, the Prosecutor, a Deputy Prosecutor, the Registrar and a Deputy Registrar.

19. The Working Group considered the proposed amendments to rule 26 of the Rules of Procedure and Evidence in the third meeting held on 2 October 2018, following a briefing by the co-Chair (Chile) of the Study Group on Governance and co-focal points for its Cluster I (Argentina and the United Kingdom), via video-conference in the same meeting. Delegations supported in general the proposed amendments and decided to continue their consideration in the next meeting with a view to taking a decision on how to proceed on this matter.

20. At the fourth meeting, on 15 November 2018, the Working Group continued its consideration of the proposed amendments to rule 26 and decided to submit to the Assembly the draft resolution through which the Assembly would adopt the amendments to rule 26. The Working Group agreed that such amendments would be based on rule 3 of the Rules of Procedure and Evidence.

B. Provisional amendment to rule 165

21. At the first meeting, on 20 April 2018, France, supported by Germany, informed the Working Group that the provisional amendments to rule 165 adopted by the judges of the Court on 10 February 2016 were not followed by the Appeals Chamber in delivering its judgment on the Reparations Order in the case of Ahmad Al Faqi Al Mahdi on 8 March 2018. Said delegations noted that it could consider withdrawing its proposal of amendments to rule 165 if the Court took it that the provisionally amended rule 165 would not apply. In response, some delegations stated that they would be supportive of the Court's approach and not of the proposal made by France and Germany. The Working Group was not in a position to make a concrete recommendation to the Assembly regarding the provisional amendments, and consideration of this issue was postponed to a future date taking into consideration any future action on this matter by the Court.

C. Proposed amendment to rule 76 (3)

22. No delegation provided any further update on the issue.

IV. Consideration on the participation of Observers in the meetings of the Working Group

23. At the first meeting, on 20 April 2018, some delegations addressed the importance of transparency and openness in the working methods of the Working Group in order to promote the universality of the Rome Statute and requested that its meetings be opened to Observers. Others highlighted that, while there is strong recognition of the need to promote universality, a balance had to be struck against the need to preserve a space for delicate negotiations of proposals submitted by States Parties, bearing in mind that only Parties to the Rome Statute are interested parties to any amendment and that allowing non-parties to be present in the deliberations, could trivialize their incentives to become a party. The suggestion was made to have open briefings including with civil society considering its valuable contribution to the work of the Working Group. A view was expressed to leave various modalities of participation open considering the contribution of civil society. Another point was addressed that consistency was needed on this matter throughout the year. Some other delegations recalled that in order to accommodate values and needs of both open and closed meetings, the Working Group reports regularly before the New York Working Group, which serves as an open forum for discussion.

24. At the second meeting, on 14 June 2018, some delegations emphasized again transparency and openness and requested that Observer States and civil society should be able to take part in the meetings. Reference was made to rule 42 of the Rules of Procedure of the Assembly of States Parties and to the decision of 18 October 2017 adopting the "Understanding on the participation of Observer States in meetings of the Assembly of States Parties"⁷, by which the meetings of the Assembly should be open by default, and that the Working Group would thus need a further decision to make its meetings closed. Other delegations recalled that a decision had been taken to close the meetings of the Working Group, and that the understanding reached last year did not replace existing practice. Some delegations recalled that the Working Group has the option of holding open briefings to take into account the call for transparency and openness, and that these elements were observed by providing regular briefings to the New York Working Group, which is normally open to non-parties. A decision was made to include this issue as an agenda item for the third meeting of the Working Group.

⁷ https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2017-Bureau-06.pdf.

25. At the third meeting, on 2 October 2018, delegations further discussed the procedural aspects of this issue. Some delegations expressed their view that while the Working Group might be able to decide otherwise, the meetings would be open in principle, not the other way around. These delegations advocated for transparency and openness in order to promote universality, as deliberations in the Working Group might impact a decision whether or not to ratify the Rome Statute. The view was expressed that a decision which may have been taken to close the meetings would not have been on a permanent basis. Other delegations expressed their understanding that the meetings had been closed before a Bureau decision on 18 October 2017 adopting the “Understanding on the participation of Observer States in meetings of the Assembly of States Parties” and therefore a separate decision was needed if they should be reopened. These delegations considered that States Parties were the ones deciding and ultimately being affected by possible amendments to the Rome Statute and that in view of the nature of deliberations in the Working Group its meetings should not be open to Observers. In this connection, the added value of participation of non-States Parties was questioned, and their option to participate after ratification – as an incentive to do so – was pointed out. Some expressed the view that some States Parties may not wish to discuss their own proposals in open meetings, but that open meetings could be held on a case by case basis. The Chair reminded delegations that the recent practice of the Working Group since 2017 has been to hold closed meetings and that it was on this basis that the meetings were convened during 2018. In the past, before discussions on participation of Observer States, the meetings of the Working Group had been open to States Parties and civil society. On the other hand, the latter delegations indicated the merit of the closed sessions given the privileges and duties of States Parties that the decisions of the Working Group affecting States Parties should be made by themselves. The Secretariat was requested to provide information on practice in respect of formats of working groups and subsidiary bodies of the Assembly and a list of closed meetings kept by the Bureau in accordance with the aforesaid Understanding. The Working Group decided to continue the consideration of this issue pending further information in order to take a decision.

V. Information on the status of ratifications of the Kampala amendments to the Rome Statute as well as on the amendments adopted at the fourteenth and sixteenth sessions of the Assembly

26. The Working Group was kept regularly informed of any ratifications of the amendments to the Rome Statute adopted at the 2010 Review Conference or at the fourteenth session of the Assembly. Since the submission of its last report, Guyana, Panama, and the State of Palestine had ratified the Kampala amendment relating to article 8 of the Rome Statute; Guyana, Ireland, and Panama had ratified the Kampala amendments on the crime of aggression; and Croatia, France, Italy, and Romania had ratified the amendment to article 124 of the Rome Statute.⁸ No State had ratified the three amendments to article 8, paragraph 2 (b) and to article 8, paragraph 2 (e), of the Rome Statute regarding “employing microbial, biological or toxin weapons”, “employing weapons that injure by fragments undetectable by X-rays”, and “employing laser blinding weapons”.⁹

27. As of 7 November 2018, the Kampala amendment to article 8 had been ratified by 37 States Parties, the Kampala amendments on the crime of aggression had been ratified by 37 States Parties and the amendment to article 124 had been ratified by ten States Parties.

⁸ The list of the States that ratified relevant amendments is available at the United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

⁹ The brief descriptions of the three amendments to article 8, paragraph 2 (b) and to article 8, paragraph 2 (e), of the Rome Statute are based on the terminologies used in Assembly resolution ICC-ASP/16/Res.4, preambular paragraph 7, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf.

VI. Decisions and recommendations

28. The Working Group recommends to the Assembly the adoption of a draft resolution on amending rule 26 of the Rules of Procedure and Evidence (annex I).
29. The Working Group recommends that regular meetings be held throughout 2019, including, if necessary, in expert meetings format.
30. The Working Group concludes its intersessional work by recommending to the Assembly the inclusion in the omnibus resolution of two paragraphs (annex II).

Annex I

Draft resolution on amendments to rule 26 of the Rules of Procedure and Evidence

The Assembly of States Parties,

Recalling the need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence, and *inviting* the organs of the Court to continue to engaging in such a dialogue with States Parties,

Recognizing that enhancing the efficiency and effectiveness of the Court is of common interest both for the Assembly of States Parties and the Court,

Recalling operative paragraphs 1 and 2 of resolution ICC-ASP/9/Res.2 and article 51 of the Rome Statute,

Further recalling paragraph 9(c) of the annex to resolution ICC-ASP/16/Res.6,

Noting the report of the Working Group on Amendments¹ and the report of the Bureau on the Study Group on Governance,²

Taking note with appreciation of the consultations undertaken within the Study Group on Governance and the Working Group on Amendments,

Recalling resolution ICC-ASP/12/Res.6 and the operational mandate of the Independent Oversight Mechanism contained in the annex to that resolution,

1. *Decides* that the following shall replace rule 26 of the Rules of Procedure and Evidence:

**“Rule 26
Receipt and admissibility of complaints**

1. For the purposes of article 46, paragraph 1, and article 47 of the Statute, any complaint concerning any conduct defined under rules 24 and 25 shall include the grounds on which it is based and, if available, any relevant evidence, and may also include the identity of the complainant. The complaint shall remain confidential.

2. All complaints shall be transmitted to the Independent Oversight Mechanism which may also initiate investigations on its own motion. Any person submitting such complaints may also elect to submit a copy to the Presidency of the Court for information purposes only.

3. The Independent Oversight Mechanism shall assess complaints and set aside those complaints which are manifestly unfounded. Where a complaint is set aside as manifestly unfounded, the Independent Oversight Mechanism shall provide its reasons in a report which shall be transmitted to the Assembly of States Parties and the Presidency.

4. All other complaints shall be investigated by the Independent Oversight Mechanism. The Independent Oversight Mechanism shall transmit the results of any investigation, together with its recommendations, to the Assembly of States Parties and any other competent organ(s) as set out in articles 46 and 47 of the Statute, and rules 29 and 30.”

¹ ICC-ASP/17/35.

² ICC-ASP/17/30.

Annex II

Draft text for the omnibus resolution

1. Paragraph 134 of the 2017 omnibus resolution (ICC-ASP/16/Res.6) remains unchanged, reading:

“*Welcomes* the report of the Working Group on Amendments.”

2. Paragraph 18 of annex I (mandates) of the 2017 omnibus resolution (ICC-ASP/16/Res.6) is replaced by the following:

“(a) *invites* the Working Group to continue its consideration of all amendment proposals, in accordance with the Terms of Reference of the Working Group; and

(b) *requests* the Working Group to submit a report for the consideration of the Assembly at its eighteenth session;”

Annex III

Amendments to article 8 of the Rome Statute proposed by Switzerland

A. Amendment to article 8 of the Rome Statute

To be inserted as 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 willfully impeding relief supplies.

B. Elements of crimes

New subparagraph to article 8(2)(e)

War crime of starvation as a method of warfare

Elements

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Annex IV

Non-paper submitted by Switzerland: proposed amendments to article 8 of the Rome Statute on the inclusion of starvation as a war crime in non-international armed conflicts

20 September 2018

A. Introduction

1. Under article 8 of the Rome Statute, the International Criminal Court (ICC) has jurisdiction to investigate and prosecute individuals charged with war crimes. For this purpose, article 8 distinguishes between international armed conflicts (IAC) and non-international armed conflicts (NIAC). Acts punishable under the Rome Statute as war crimes are mainly but not always identical in IAC and NIAC.

2. While a distinction between IAC and NIAC is legally justified for certain war crimes, this is not always the case. In fact, some of the “serious violations of the laws and customs” are considered to constitute war crimes under international law in both IAC and NIAC, but the Rome Statute nonetheless only penalizes them in IAC. A prime example is the crime of intentionally using starvation of civilians as a method of warfare.

B. Broad recognition in international law

3. In NIAC, using starvation of civilians as a method of warfare is prohibited by article 14 of Additional Protocol II of the Geneva Conventions (AP II),¹ ratified by 168 States. The prohibition also amounts to a rule of customary international humanitarian law (CIHL) as evidence of a general practice accepted as law. For example, it has been included in national laws and military manuals applicable in NIAC as well as affirmed by relevant judgments. The customary nature of the rule is supported by public declarations and the reported practice of States.²

4. The prohibition of starvation in NIAC is reinforced by several corollary rules of IHL. These include the prohibition of attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population³ and the rules relating to humanitarian relief actions and access.⁴ This means that attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population or denying access of humanitarian relief intended for civilians in need, including deliberately impeding humanitarian aid or restricting the freedom of movement of humanitarian relief personnel, may constitute violations of the prohibition of starvation.⁵

¹ Article 14 of AP II: “Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.”

² See for example Rule 53 of the ICRC Study on CIHL, available online at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule53.

³ See article 14 of AP II; see also for example Rule 54 of the ICRC Study on CIHL (fn 2).

⁴ According to article 18(2) of AP II, “if the civilian population is suffering undue hardship owing to a lack of the 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.” Moreover, under CIHL as identified in Rule 55 of the ICRC study on CIHL, “parties to the conflict must allow and facilitate rapid and 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” (see Rule 55 of the ICRC study on CIHL (fn 2)). Concerning humanitarian relief personnel, under CIHL as identified in Rule 56 of the ICRC study on CIHL, “parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions”, unless imperative military necessity requires that their movements be temporarily restricted (see Rule 56 of the ICRC Study on CIHL (fn 2)).

⁵ Article 14 in combination with article 18 § 2 of APII and Rule 55 of the ICRC Study on CIHL (fn 2).

5. If the prohibition of starvation in NIAC is violated, it is considered a serious violation of IHL that gives rise to individual criminal responsibility.⁶ This is the position expressed by relevant international bodies.⁷ Thus, the crime of intentionally using starvation of civilians as a method of warfare in NIAC enjoys broad recognition in international law.

C. Gap in the Rome Statute

6. Despite this broad recognition, starvation of civilians as a method of warfare is not listed as a war crime in NIAC under the Rome Statute. It only exists in IAC under article 8(2)(b)(xxv), which defines the crime as “*intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions*”.

7. In 1998, a provision penalizing starvation in NIAC had been part of the draft Rome Statute. However, the “final package” of the Rome Statute did not include starvation in the list of war crimes in NIAC. The drafting history⁸ does not provide any specific reasons why it was not included in the final draft. In fact, there appears to have been no substantive disagreement during the Rome conference concerning the war crime of starvation in NIAC. Some drafters of the Statute instead remember that the inclusion of starvation in the list of war crimes in NIAC was supported by many delegations⁹ and that omission from the ‘final package’ is likely to have been unintentional.¹⁰ The gap remains in the Statute to this day.

D. Proposal for harmonization

8. Although prohibited under conventional and CIHL, starvation as a method of warfare has allegedly been used in a number of conflicts in recent years. This has prompted the UN Security Council to underline that this conduct may constitute a war crime – making no distinction between IAC and NIAC – and to urge States to conduct investigations and, where appropriate, to take actions against those responsible.¹¹ The Special Rapporteur on the right to food has called for an amendment of the Rome Statute to include within the ICC’s jurisdiction the war crime of using starvation of civilians as a method of warfare in NIAC.¹²

9. To harmonize the jurisdiction of the ICC with regards to war crimes in IAC and NIAC, Switzerland proposes an amendment to the Rome Statute to include the war crime of using starvation of civilians as a method of warfare in NIAC. The large majority of today’s armed conflicts being non-international in nature, this amendment would strengthen the fight against impunity by allowing the ICC to prosecute those alleged to have committed this war crime irrespective of the nature of the conflict. This would also contribute to improving the coherence of the Statute as a whole. This amendment would clearly signal the willingness of the Assembly of States Parties to further pursue criminal accountability with regard to war crimes in NIAC.

⁶ Rule 156 of the ICRC Study on CIHL (fn 2).

⁷ See the Security Council Resolution 2417 (2018) preamble and para. 10, the Report of the International Commission on Inquiry on Darfur to the Secretary-General, S/2005/60, 1st February 2005, para. 166-167, the Security Council Resolution 794 (1992), para. 5, and the statements of the Secretary-General of the United Nations, available online at: <http://www.un.org/apps/news/story.asp?NewsID=53003>, Interim report of the Special Rapporteur on the right to food, UNGA, 21 July 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/24/73/PDF/N1722473.pdf?OpenElement>, para. 84 and 97. See also ICRC in its interpretation to Rule 156 of the ICRC Study on CIHL (“Serious violations of international humanitarian law constitute war crimes”), which refers to starvation as a serious violation of IHL in NIAC.

⁸ For more information, see the official records of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC, available online at <http://legal.un.org/icc/rome/proceedings/contents.htm>.

⁹ Michael Cottier, ‘Article 8’ in Otto Triffterer, *The Rome Statute of the International Criminal Court* (2nd edition, Back/Hart/Nomos 2008) 208.

¹⁰ This are the views of the chair of the Committee of the Whole and the chair of the Working Group on the definition of war crimes, 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’ (2015) 48 *Israel Law Review* 282, fn 128.

¹¹ Security Council Res. 2417 (2018), preamble and para. 10.

¹² UN Human Rights Council, Interim report of the Special Rapporteur on the right to food, 21 July 2017, A/72/188, para. 97(b).

10. If adopted, the new subparagraph to article 8(2)(e) of the Rome Statute would, in accordance with article 121(5) of the Statute, only enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. While it might raise questions with regard to a possible fragmentation of the Statute, this eventuality was contemplated by the drafters of the Rome Statute, who accepted it when drafting article 121(5) of the Statute. It is up to each State Party to ratify amendments if it wishes to limit the fragmentation of the Statute. In addition, any given situation where the ICC would have jurisdiction over the crime of starvation would contribute to rendering justice for the concerned victims. To them, the new crime would be highly relevant despite the fact that the ICC would not have jurisdiction over the same crime in other situations.

E. Draft amendment text

1. Amendment to article 8 of the Rome Statute

To be inserted as 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 willfully impeding relief supplies.

2. Elements of crimes

New subparagraph to article 8(2)(e)

War crime of starvation as a method of warfare

Elements

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

F. Explanation of the draft amendment text

11. The draft text is based on article 8(2)(b)(xxv) of the Rome Statute, applicable in IAC, which declares as a war crime “*intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions*”.

12. Treaty IHL governing NIACs¹³ does not explicitly refer to “willfully impeding relief supplies”. However, article 18(2) of AP II makes clear that “[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival ... 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”. In these circumstances, a refusal to grant consent “without good grounds” is equivalent to a violation of article 14 AP II prohibiting the use of starvation as a method of warfare.¹⁴

¹³ Common article 3 and, as applicable, AP II.

¹⁴ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 1479.

13. As identified in Rule 55 of the ICRC study on CIHL,¹⁵ “parties to the conflict must allow and facilitate rapid and 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”. This conclusion is based on a meticulous study of military manuals, national legislation and other State practice, essentially making no distinction between IACs and NIACs in relation to the obligation to allow the passage of humanitarian relief.¹⁶ This is also supported by Resolution S/RES/2417 (2018), which emphasizes that “*willfully impeding relief supply and access for responses to conflict-induced food insecurity in situations of armed conflict, (...) may constitute a violation of international humanitarian law.*”¹⁷ It may be noted that S/RES/2417 (2018) makes at no juncture a difference between IACs and NIACs.

14. The reference “as provided for under the Geneva Conventions” was omitted because, with the exception of Common article 3, their scope of application only covers IAC. As mentioned above, the legal basis for this part of the amendment is based on CIHL.¹⁸ It is worth recalling that the amendment proposal is to be inserted as a new subparagraph to article 8(2)(e) of the Rome Statute devoted to “other serious violations of the laws and customs applicable in armed conflicts not of an international character, *within the established framework of international law*” (emphasis added). It is therefore clear that the amendment proposal falls within the existing rules of IHL applicable in non-international armed conflicts (NIAC).

15. The elements of crime are identical to those for article 8(2)(b)(xxv) of the Rome Statute relating to IAC, with the exception of paragraph 3, where the term “international armed conflict” is to be replaced with “armed conflict not of an international character”.

¹⁵ The explanation to Rule 55 makes clear that this rule does not go beyond the text of article 18(2) of Additional Protocol II, Rule 55 of the ICRC study on CIHL (fn 2).

¹⁶ See the practice relating to Rule 55 of the ICRC Study on CIHL (fn 2).

¹⁷ UNSC Res. 2417 (24 May 2018), preamble and para. 6 & 10.

¹⁸ Rules 55 and 156 of the ICRC Study on CIHL (fn 2).

Annex V

Non-paper submitted by France and Germany: Proposed amendments to provisional rule 165 of the Rules of Procedure and Evidence

<i>Original Rule 165</i>	<i>Provisional Rule 165</i>	<i>Amendment to Provisional Rule 165</i>
Rule 165 Investigation, prosecution and trial	Rule 165 Investigation, prosecution, trial <u>and</u> <u>appeal</u>	Rule 165 Investigation, prosecution, and trial <u>and</u> <u>appeal</u>
1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.	1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.	1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.
2. Articles 53 and 59, and any rules thereunder, shall not apply.	2. Articles 39(2)(b) , 53, 57(2) , 59, 76(2) <u>and</u> 82(1)(d), and any rules thereunder, shall not apply. <u>A Chamber composed of one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations.</u>	2. Articles 39(2)(b) , 53, 57(2) , and 59, 76(2) and <u>82(1)(d)</u> , and any rules thereunder, shall not apply. <u>A Chamber composed of at least one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58. When the Pre-Trial Chamber is seized of offences against the administration of justice under article 70, orders or rulings issued under article 61 paragraph 7 must be concurred in by a majority of judges. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations.</u>
3. For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.	3. For purposes of article 61, the Pre-Trial Chamber, as constituted under sub-rule 2 , may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.	3. For purposes of article 61, the Pre-Trial Chamber, as constituted under sub-rule 2, may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.
4. A Trial Chamber may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8.	4. <u>The Trial Chamber seized of the case from which the article 70 proceedings originate may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges in the originating case. Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.</u>	4. <u>The Trial Chamber seized of the case from which the article 70 proceedings originate may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges in the originating case. Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.</u>