

## RESEARCH BRIEF

### HARMONIZING WAR CRIMES UNDER THE ROME STATUTE

#### KEY MESSAGES

- The Rome Statute solidified the key contributions of the ad hoc tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR) in the 1990s to the criminalization of serious violations of international humanitarian law (IHL) in non-international armed conflicts (NIACs). However, the Rome Statute divides the International Criminal Court's (ICC) subject matter jurisdiction over war crimes into two separate yet different lists covering war crimes in international armed conflicts (IACs) and those applicable in NIACs. Specifically, in addition to other war crimes that appear in both lists, it grants the ICC with jurisdiction over 10 war crimes *only* in IACs but not in NIACs, thereby creating, in many but not all cases, serious legal gaps in the Statute that are no longer justified given key developments in the law since 1998.
- Customary and/or conventional IHL provide a sound legal basis to harmonize the following four IAC-only war crimes without any textual modifications (except, of course, replacing the term 'international armed conflict' in the contextual element of each crime with 'armed conflict not of an international character'): (1) Article 8(2)(b)(ii): direct attacks against civilian objects; (2) Article 8(2)(b)(iv): disproportionate attacks; (3) Article 8(2)(b)(v): attacking undefended places; and (4) Article 8(2)(b)(xxiii): human shields.
- For the same reason, an appropriate legal basis also exists to harmonize the following war crimes with some minor modifications to account for the specificities of NIACs: (1) Article 8(2)(b)(vii): improper use of flags of truce, United Nations (UN) or enemy military flags, insignia, or uniforms, or the distinctive emblems; (2) Article 8(2)(b)(xx): employing weapons or methods of warfare that cause unnecessary suffering or superfluous injury or which are inherently indiscriminate as listed in the annex of the Statute; and (3) Article 8(2)(b)(xxv): starvation as a method of warfare.
- Although the necessary legal basis exists to harmonize the war crime of killing or wounding persons who are *hors de combat* as contained in Article 8(2)(b)(vi), this is not necessary because Article 8(2)(c)(i), which already criminalizes such conduct in NIACs, has a broader material scope of application.
- There is no legal basis to harmonize two war crimes – namely, Articles 8(2)(b)(xiv) (depriving nationals of a hostile power of legal rights and actions) and 8(2)(b)(xv) (compelling them to participate in military operations) – as they only apply in IACs under customary IHL.

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## INTRODUCTION

Beginning in the 1990s, the establishment of the ICTY and ICTR and their resulting jurisprudence recognized that serious violations of customary or conventional IHL also constitute war crimes in NIACs.<sup>1</sup> In addition to paving the way for the adoption of the Rome Statute in 1998 and the eventual creation of the ICC, both ad hoc tribunals made significant contributions to the enforcement of IHL by merging, in most cases, the primary norms of IHL to apply equally to both IACs and NIACs as well as the secondary norms of international criminal law (ICL) criminalizing violations thereof. As explained by the ICTY Appeals Chamber, both ‘elementary considerations of humanity’ and ‘common sense’ demonstrate that ‘[w]hat is inhumane, and consequently, proscribed in international wars, cannot but be inhumane and inadmissible in civil strife.’<sup>2</sup>

The Rome Statute, currently ratified by 123 States, solidified these important developments pertaining to war crimes and, in some respects, even progressively developed the notion of war crimes in both types of conflicts. Regrettably, however, it does not follow the ICTY’s broad approach considering that Article 8 still adopts the increasingly outmoded distinction between IACs and NIACs by granting the ICC subject matter jurisdiction over 10 war crimes *only* in IACs but not in NIACs. While the crimes relating to nationals of a hostile power are by their specific nature inapplicable to NIACs, developments since 1998, including the International Committee of the Red Cross’ (ICRC) customary IHL study, more recent ICTY and ICTR jurisprudence, and State practice, demonstrate that excluding a number of the other war crimes from the ICC’s jurisdiction in NIACs is no longer justified.

In light of these developments, the present research brief examines whether and to what extent customary and conventional IHL provide a legal basis to harmonize the Rome Statute’s IAC-only war crimes by amending Article 8(2)(e), which grants the ICC subject matter jurisdiction over an *exhaustive* list of serious violations of the laws and customs of war in NIACs. It thus seeks to provide a succinct yet thorough analysis of the (in some cases serious) legal gaps in the Rome Statute.

<sup>1</sup> ICTY Statute, Art. 3; ICTR Statute, Art. 4. See also, e.g., ICTY, *Prosecutor v. Tadić* (Decision on Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) paras. 77, 91, 94, 97-8, 100, 102, 105-6, 112, 114, 115, 117-9, 126-7, 129-30, 143; ICTR, *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) paras. 604-5, 609, 611, 613, 616-7.

<sup>2</sup> *Tadić*, *ibid.*, para. 119.

## WAR CRIMES SUBJECT TO HARMONIZATION WITHOUT MODIFICATION<sup>3</sup>

### ARTICLE 8(2)(B)(III): DIRECT ATTACKS AGAINST CIVILIAN OBJECTS

Intentionally directing attacks against civilian objects constitutes a serious violation of customary and conventional IHL entailing individual criminal responsibility (that is, a war crime) in NIACs, as confirmed by ICTY jurisprudence,<sup>4</sup> certain treaties applicable in both IACs and NIACs, numerous military manuals, national criminal legislation, and official statements.<sup>5</sup> Although Additional Protocol II of the 1949 Geneva Conventions (AP II) does not explicitly prohibit attacking civilian objects, the general protection afforded to civilians and the civilian population under Article 13(1) arguably encompasses this violation.

While some contend that war crime of destroying property unless justified by imperative military necessity, which Article 8(2)(e)(xii) criminalizes in NIACs, sufficiently covers the present war crime, several reasons militate against such a construction. First, Article 8(2)(b)(ii) does not require establishing a particular result (i.e., damage), whereas Article 8(2)(e)(xii) requires the Prosecutor to prove, beyond an object’s civilian status, *actual* destruction of property that is additionally not justified by imperative military necessity.<sup>6</sup>

Second, under Article 22(2), each crime in the Rome Statute must be ‘strictly construed’ and cannot be extended by analogy. Finally, and most importantly, such an interpretation would also weaken the ‘cardinal’ principle of distinction by extending the notion of legitimate targets beyond the accepted definition of military objectives under customary IHL. In other words, attacks against civilian objects would not constitute a war crime under Article 8(2)

<sup>3</sup> Of course, the phrase ‘international armed conflict’ in the contextual element of each crime must be replaced with term ‘armed conflict not of an international character’.

<sup>4</sup> *Tadić*, *supra* note 1, paras. 100, 105-6, 119; *Prosecutor v. Hadžihasanović and Kubura* (Decision on Interlocutory Appeal) IT-01-47-AR73.3 (11 March 2005) paras. 17-18, 21, 28, 30; *Prosecutor v. Strugar* (Decision on Interlocutory Appeal) IT-01-42-AR72 (22 November 2002) paras. 9-10; *Prosecutor v. Strugar* (Judgment) IT-01-42-T (31 January 2005) paras. 224-6; *Prosecutor v. Kordić and Cerkez* (Corrigendum to Judgment) IT-95-14/2-A (26 January 2005) p. 2; *Prosecutor v. Kordić and Cerkez* (Appeals Judgment) IT-95-14/2-A (17 December 2004) para. 54; *Prosecutor v. Kupreškić et al.* (Judgment) IT-95-16-T (14 January 2000) paras. 53, 521; *Prosecutor v. Blaškić* (Judgment) IT-95-14-T (3 March 2000) paras. 161, 164, 168, 180; *Prosecutor v. Martić* (Judgment) IT-95-11-T (12 June 2007) paras. 40, 45-6, 67-9.

<sup>5</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge University Press 2005) Rules 7-10 and 156, pp. 25-34, 597-8 [hereinafter ‘CIHL Study’].

<sup>6</sup> See ICC, *Prosecutor v. Katanga* (Article 74 Judgment) ICC-01/04-01/07 (7 March 2014) paras. 893-4, 896.

(e)(xii) if justified by military necessity, while such attacks would amount to a war crime pursuant to the absolute prohibition in Article 8(2)(b)(ii).<sup>7</sup> This war crime should therefore be harmonized so that the ICC can adjudicate intentional attacks against civilian objects committed in NIACs.

#### ARTICLE 8(2)(B)(IV): DISPROPORTIONATE ATTACKS

Disproportionate attacks also constitute a serious violation of customary and conventional IHL entailing individual criminal responsibility in NIACs, as confirmed by ICTY jurisprudence,<sup>8</sup> national criminal legislation, military manuals, and certain treaties.<sup>9</sup>

Although disproportionate attacks are not criminalized under the Rome Statute in NIACs, Articles 8(2)(e)(i) and 8(2)(e)(xii) would likely cover many cases of such attacks. Indeed, in assessing both articles, the ICC noted that disproportionate attacks may ‘qualify as intentional attacks against the civilian population or individual civilians’ and that attacks against legitimate military objectives must nevertheless comply with the customary proportionality rule.<sup>10</sup> Article 8(2)(b)(iv), however, also criminalizes disproportionate ‘wide spread, long-term and severe damage to the natural environment.’ The prohibition against using means or methods of warfare intended or expected to cause such damage to the natural environment also ‘arguably’ applies in NIACs as reflected by military manuals, national legislation criminalizing such damage in all armed conflicts, and official statements and denunciations concerning environmental damage committed in NIACs.<sup>11</sup> Even if this prohibition has not yet crystalized into a customary norm applicable in NIACs, this war crime should be harmonized – based upon the principle of mutual consent – to also apply in NIACs given that environmental damage can have transboundary effects and possibly violates other key customary IHL rules equally applicable in NIACs, such as the prohibition against indiscriminate attacks.<sup>12</sup> Accordingly, the war crime of disproportionate attacks and

7 For a further analysis and references, see ‘War Crimes’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck/Hart/Nomos 2016) pp. 438-40, 443, 568, paras. 491-6, 499, 509, 511, 967-72.

8 *Prosecutor v. Galić* (Judgment) IT-98-29-T (5 December 2003) paras. 57-60, 62; *Prosecutor v. Galić* (Appeals Judgment) IT-98-29-A (30 November 2006) para. 190; *Hadžihasanović and Kubura*, *supra* note 4, para. 17; *Kupreškić et al.*, *supra* note 4, paras. 513, 524-6; *Martić*, *supra* note 4, para. 69.

9 CIHL Study, *supra* note 5, Rules 14, 18, and 156, pp. 46, 48-9, 58-60, 599-601. See also ICC, *Prosecutor v. Mbarushimana* (Decision on Confirmation of Charges) ICC-01/04-01/10 (16 December 2011) para. 142, fn. 290.

10 Katanga, *supra* note 6, paras. 802, 895.

11 CIHL Study, *supra* note 5, Rule 45, pp. 151, 156-7.

12 *Ibid.*, pp. 156-7.

disproportionate environmental damage is also ripe for harmonization in Article 8(2)(e).

#### ARTICLE 8(2)(B)(V): ATTACKING UNDEFENDED PLACES

Article 3(c) of the ICTY Statute, national criminal legislation, and military manuals confirm that directing attacks against undefended places that do not constitute military objectives is equally a war crime under customary international law when committed in NIACs.<sup>13</sup> However, Articles 8(2)(e)(i) and 8(2)(e)(xii), which criminalize attacks against the civilian population and the destruction of an adversary’s property without imperative military necessity, respectively, arguably also criminalize directing attacks against undefended places.

Nevertheless, for the reasons explained above, Article 8(2)(e)(xii) should not be interpreted in this manner because, in particular, it is a crime of result while Article 8(2)(b)(v) is simply a crime of conduct. Although Article 8(2)(e)(i) is also a crime of conduct, it only prohibits attacks against undefended places *actually* occupied by civilians.<sup>14</sup> Even though a clear legal basis exists to also criminalize this crime in NIACs, harmonizing the war crime of intentionally attacking civilian objects should be prioritized instead because it would sufficiently encompass the crime of attacking undefended places, including places behind enemy lines that Article 8(2)(b)(v) does not cover.

#### ARTICLE 8(2)(B)(XXIII): HUMAN SHIELDS

The prohibition against using human shields amounts to a serious IHL violation in NIACs under both customary and treaty law that entails individual criminal responsibility. Article 13(1) of AP II prohibits this practice by granting ‘the civilian population and individual civilians... general protection from the dangers arising from military operations.’ In addition, ICTY jurisprudence (either as cruel treatment, outrages upon personal dignity, or hostage taking)<sup>15</sup> as well as ICTR jurisprudence<sup>16</sup> (as cruel treatment), military manuals, national criminal legislation, and official State denunciations confirm this norm’s customary status and criminalization in NIACs.<sup>17</sup> While the ICC could

13 *Ibid.*, Rules 37 and 156, pp. 122-5, 599-601.

14 See *Katanga*, *supra* note 6, para. 802; *Mbarushimana*, *supra* note 9, para. 148; ICC, *Prosecutor v. Katanga and Chui* (Decision on Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) para. 266, fn. 368.

15 *Blaškić*, *supra* note 4, paras. 186, 716, 750; *Prosecutor v. Kordić and Cerkez* (Judgment) IT-95-14/2-T (26 February 2001) para. 256; *Prosecutor v. Aleksovski* (Judgment) IT-95-14/1-T (25 June 1999) para. 229; *Prosecutor v. Karadžić and Mladić* (Review of the Indictments) IT-95-5-R61 and IT-95-18-R61 (11 July 1996) paras. 6, 13, 20, 82, 89.

16 *Prosecutor v. Bagosora et al.* (Decision on Motions for Judgment of Acquittal) ICTR-98-41-T (2 February 2005) para. 39, fn. 84.

17 CIHL Study, *supra* note 5, Rules 97 and 156, pp. 337-40, 599-600, 602.

technically adopt the ICTY's approach by prosecuting the use of human shields in NIACs as either a subspecies of paragraph 2(c)(i) (as cruel treatment), 2(c)(ii) (as an outrage upon personal dignity),<sup>18</sup> or 2(c)(iii) (as hostage taking), the use of human shields should nonetheless be harmonized in the Rome Statute as an autonomous crime. First, in contrast to Article 8(2)(b)(xxiii), the aforementioned crimes require proving that a particular result or harm occurred.<sup>19</sup> Second, none of these crimes address three situations covered by Article 8(2)(b)(xxiii)'s broader material scope of application: the use of voluntary human shields, the co-location or movement of military operations near civilians by the defending party, or simply taking advantage of the presence of civilians. The use of human shields should therefore be harmonized as an autonomous war crime in NIACs.

## WAR CRIMES SUBJECT TO HARMONIZATION WITH MODIFICATIONS

### ARTICLE 8(2)(B)(VII): IMPROPER USE OF FLAGS OF TRUCE, UN OR ENEMY MILITARY FLAGS, INSIGNIA, OR UNIFORMS, OR THE DISTINCTIVE EMBLEMS

This war crime is broader than perfidy, which is criminalized in NIACs under Article 8(2)(e)(ix), as it covers *any* use other than intended uses, the improper use of enemy flags, insignia, and uniforms (which do not accord protection under IHL and therefore cannot constitute perfidy), and death or injury that indirectly results from the improper use (whereas perfidy additionally requires the perpetrator to have killed or injured the victim).

Although the ICRC's study on customary IHL does not specifically list improper use of these items as a war crime in NIACs,<sup>20</sup> the improper use of flags of truce and the distinctive emblems of the Geneva Conventions as well as any unauthorized use of the UN's emblem or uniform constitute violations of customary IHL in NIACs, as confirmed by military manuals, national criminal legislation, and official statements and denunciations.<sup>21</sup> Furthermore, Article 12 of AP II proscribes the improper use of the distinctive emblems of the Geneva Conventions.<sup>22</sup>

<sup>18</sup> See *Katanga and Chui*, *supra* note 14, para. 371.

<sup>19</sup> Compare ICC, *Elements of Crimes* (ICC 2011) p. 30 with *ibid.*, pp. 32-3.

<sup>20</sup> See generally CIHL Study, *supra* note 5, pp. 590-603 (listing instead perfidy as a war crime in NIACs).

<sup>21</sup> *Ibid.*, Rules 58-60, pp. 205-11.

<sup>22</sup> Article 8(2)(e)(ii) also refers to the 'distinctive emblems of the Geneva Conventions' in the NIAC context, which is simply a generic reference to the emblems of the red cross, red crescent, and, more recently, the red crystal. Therefore, harmonizing this crime would not require amending this language.

The improper use of an adversary's military flags, insignia, or uniforms, however, appears to only constitute a violation of customary IHL in IACs, although this prohibition also 'arguably' applies when parties to a NIAC utilize uniforms given that military manuals, national criminal legislation, official statements, and other State practice applicable to such conflicts equally prohibit this conduct.<sup>23</sup>

Additionally, in contrast to the ICTY and ICTR, which, as *ex post facto* tribunals, had to determine whether a serious violation of customary IHL also entailed the individual criminal responsibility of the perpetrator to ensure compliance with the prohibition against applying *ex post facto* criminal laws,<sup>24</sup> the ICC's jurisdiction is prospective and based upon the longstanding principle of State consent. In other words, irrespective of the fact that these uses are identified only as customary IHL violations,<sup>25</sup> State parties have contractual freedom to agree upon criminalizing this conduct in NIACs given that such improper uses constitute serious violations of customary IHL by undermining the protective effect of flags of truce, the UN's insignia, and the distinctive emblems or by otherwise contravening the understandable desire of States to prohibit adversaries from using their flags, insignia, and uniforms. Should State parties agree to criminalize this conduct in NIACs, however, the term 'enemy' in Article 8(2)(b)(vii) must be changed to 'adversary' because 'enemy' is a term of art applicable in IACs that excludes property belonging to 'nationals of the belligerent itself or to nationals of third States' yet NIACs typically only involve adversaries with the same nationality who 'cannot be considered as 'enemies' in the technical sense.'<sup>26</sup>

### ARTICLE 8(2)(B)(XX): EMPLOYING WEAPONS OR METHODS OF WARFARE THAT CAUSE UNNECESSARY SUFFERING OR SUPERFLUOUS INJURY OR WHICH ARE INHERENTLY INDISCRIMINATE AS LISTED IN THE ANNEX OF THE STATUTE

The use of weapons prohibited by IHL, such as weapons that cause unnecessary suffering or superfluous injury or which are inherently indiscriminate, constitutes a serious

<sup>23</sup> CIHL Study, *supra* note 5, Rule 62, pp. 214, 217-8.

<sup>24</sup> See, e.g., *Tadić*, *supra* note 1, paras. 94, 143; ICTR, *Prosecutor v. Rutangada* (Judgment and Sentence) ICTR-96-3-T (6 December 1999) paras. 86, 90, 106. But cf. CIHL Study, *supra* note 5, Rule 156, pp. 568-73, which does not require a serious violation of IHL to entail grave consequences for the victim as long as it 'breaches important values' or individual criminal responsibility of the perpetrator to constitute a war crime.

<sup>25</sup> See, however, ICTY, *Prosecutor v. Delalić et al.* (Appeals Judgment) IT-96-21-A (20 February 2001) para. 131 (finding that Article 3 of the ICTY Statute was intended to 'cover [serious] violations of all of the laws or customs of war, understood broadly...') (emphasis in original).

<sup>26</sup> Triffterer and Ambos (eds), *supra* note 7, p. 441, para. 503, fn. 790 and p. 568, para. 969.

violation of customary and conventional IHL in NIACs, as confirmed by certain weapons treaties applicable to NIACs, the jurisprudence of the ICTY and ICJ, national legislation as well as case-law, military manuals, and other State practice.<sup>27</sup> Accordingly, a sufficient legal basis exists to amend Article 8(2)(e) to include a similar provision. Nevertheless, States parties have yet to adopt the necessary annex listing weapons of such a nature as required by Article 8(2)(b) (xx), and the ICC therefore does not yet have jurisdiction over this war crime even in IACs. This provision should therefore only be harmonized after (or in conjunction with) an agreement on the requisite annex.

### ARTICLE 8(2)(B)(XXV): STARVATION AS A METHOD OF WARFARE

Starvation as a method of warfare constitutes a war crime in NIACs under both customary and conventional IHL, as confirmed by Article 14 of AP II, official statements condemning this practice and its ‘serious’ nature, national criminal legislation, and military manuals<sup>28</sup> as well as by several international organizations.<sup>29</sup> In addition, numerous commentators have decried the fact that, for mysterious reasons, this crime in the NIAC context was excluded from final version of the Rome Statute in 1998,<sup>30</sup> despite being proposed by many State delegations.<sup>31</sup> In fact, several drafts of the Rome Statute included the option of criminalizing starvation as a method of warfare in NIACs,<sup>32</sup> and its

27 CIHL Study, *supra* note 5, Rules 70 and 156, pp. 237, 239-43, 599-600.

28 *Ibid.*, Rules 53-55 and 156, pp. 186-9, 191-6, 599-600, 603.

29 See, e.g., UN Security Council Res. 2417 (2018) preamble (para. 14) and para. 10; UN Security Council Res. 787 (1992) para. 7; UN Security Council Res. 794 (1992) preamble (para. 8) and para. 5; UN Human Rights Commission Res. 1996/73 (1996) preamble, para. 9 (stating that impeding humanitarian relief constitutes a violation of IHL and an ‘offence to human dignity’); ‘Report of the International Commission of Inquiry on Darfur to the Secretary-General’ (2005) UN Doc. S/2005/60, paras. 166-7, fn. 84; ‘Interim Report of the Special Rapporteur on the Right to Food’ (2017) UN Doc. A/72/188, paras. 84, 97.

30 Michael Bothe, ‘War Crimes’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford University Press 2002) 417, 420; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2nd edn, Oxford University Press 2014) 423; Djamchid Momatz, ‘War Crimes in Non-International Armed Conflicts Under the Statute of the International Criminal Court’ (1999) 2 YIHL 177, 186, 188; Darryl Robinson and Herman von Hebel, ‘War Crimes in Internal Armed Conflicts: Article 8 of the ICC Statute’ (1999) 2 YIHL 193, 208; Roger 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* 282, 284, 297-8; Interim Report on the Right to Food, *supra* note 29, paras. 84, 97.

31 Triffterer and Ambos (eds), *supra* note 7, p. 510, para. 762, fn. 1226; Bartels, *supra* note 30, 297-8.

32 See several prior drafts of the Rome Statute as reproduced in M. Cherif Bassiouni and William A. Schabas (eds), *The Legislative History of the International Criminal Court* (2nd edn, Brill Nijhoff 2016) pp. 86 (1998 Preparatory Committee Draft), 95 (Zutphen Draft), 104 (Decisions Taken by the Preparatory Committee at its Session Held 1 to 2 December 1997), 111 (Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997), 113 (1996 Preparatory Committee Draft); see also Bartels, *supra* note 30, 297-8.

exclusion from the final draft was likely unintentional as it seems at the time that there was no ‘actual opposition’ to its inclusion as a war crime in NIACs.<sup>33</sup>

Given this crime’s clear customary status in NIACs, the aforementioned legislative history, and the grave consequences that starvation poses for civilians, harmonizing this war crime should be prioritized by using the text of Article 8(2)(b)(xxv) to add it to the list of war crimes applicable in NIACs, except that the phrase ‘as provided for under the Geneva Conventions’ should be deleted. Although the chapeau of Article 8(2)(e) refers to ‘within the established framework of international law’, it is preferable that the deleted phrase be replaced with ‘as provided for under applicable rules of international law’ to clarify that the humanitarian relief at issue must be provided in conformity with IHL applicable in NIACs.

Indeed, the provision applicable in IACs also appears under a chapeau referring to the established framework of international law, and yet it contains this clarification. Such a clarification is also mentioned, despite the chapeau, in other provisions of the Rome Statute applicable to NIACs.<sup>34</sup>

### WAR CRIMES THAT SHOULD NOT BE HARMONIZED

#### ARTICLE 8(2)(B)(VI): KILLING OR WOUNDING PERSONS *HORS DE COMBAT*

As confirmed by the Statutes of the ICTY, ICTR, and the Special Court for Sierra Leone, ICTY and ICTR jurisprudence, Common Article 3 of the 1949 Geneva Conventions, AP II, military manuals, and national criminal legislation, killing or wounding persons who are *hors de combat* also constitutes a war crime in NIACs under both customary and conventional IHL.<sup>35</sup> Although State parties could theoretically harmonize this crime, Article 8(2)(c)(i) already sufficiently criminalizes this conduct in NIACs. In fact, Article 8(2)(c)(i) goes well beyond the plain text of Article 8(2)(b)(vi)<sup>36</sup> as it also covers civilians who are not directly participating in hostilities as well as other situations placing a person *hors de combat*. For these reasons, it is not necessary to harmonize this specific crime in the Rome Statute.

33 Bartels, *supra* note 30, 298, fn. 128.

34 See, e.g., Articles 8(2)(e)(ii) and 8(2)(e)(iii).

35 CIHL Study, *supra* note 5, Rules 47, 89, and 156, pp. 164-9, 311-4, 590-91.

36 Although, the Elements of Crimes, *supra* note 19, p. 20, confirm that Article 8(2)(b)(vi) covers all instances of murder or injury committed against persons who are *hors de combat* and not just combatants who have surrendered.

## ARTICLES 8(2)(B)(XIV) AND 8(2)(B)(XV): DEPRIVING NATIONALS OF THE HOSTILE POWER OF LEGAL RIGHTS AND ACTIONS AND COMPELLING THEM TO PARTICIPATE IN MILITARY OPERATIONS

These war crimes are not subject to harmonization. First, they require the victims to be ‘nationals of the hostile party’, and their application in NIACs would therefore be unfounded as most, but not all, NIACs involve adversaries with the same nationality. Second, a war crime must constitute a serious IHL violation, but neither crime violates customary or conventional IHL applicable in NIACs as required.<sup>37</sup>

## CONCLUDING REMARKS AND RECOMMENDATIONS

The above analysis reveals that in most, but not all cases, the remaining legal gaps in the ICC’s jurisdiction over war crimes in NIACs are no longer justified in light of further developments in IHL and ICL since the Rome Statute’s adoption. These gaps should be bridged by adding certain crimes to Article 8(2)(e) that are, at present, contained only in Article 8(2)(b).

Specifically, to bolster the fight against impunity and the respect of IHL in all conflicts, Article 8(2)(e) should be harmonized to include the following war crimes (listed in order of priority), subject to the modifications, if any, identified above: (1) Article 8(2)(b)(ii): direct attacks against civilian objects; (2) Article 8(2)(b)(xxv): starvation as a method of warfare; (3) Article 8(2)(b)(xxiii): human shields; (4) Article 8(2)(b)(vii): improper use of flags of truce, UN or enemy military flags, insignia, or uniforms, or the distinctive emblems; (5) Article 8(2)(b)(iv): disproportionate attacks; (6) Article 8(2)(b)(v): attacking undefended places; and (7) Article 8(2)(b)(xx): employing weapons or methods of warfare that cause unnecessary suffering or superfluous injury or which are inherently indiscriminate as listed in the annex of the Statute.

Although a legal basis exists to harmonize the war crime of killing or wounding persons *hors de combat* contained in Article 8(2)(b)(vi), Article 8(2)(c)(i) already sufficiently criminalizes this crime in the NIAC context. Harmonization is therefore not necessary.

Finally, the last two crimes under examination – namely, depriving nationals of the hostile power of legal rights and actions (Article 8(2)(b)(xiv)) and compelling them to take part in military operations (Article 8(2)(b)(xv)) – only constitute war crimes in IACs and are consequently not subject to harmonization.

<sup>37</sup> CIHL Study, *supra* note 5, Rules 95 and 156, pp. 333-4, 574-5, 583 (listing both prohibitions only in IACs).

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