

The Crime of Starvation and Methods of Prosecution and Accountability

Accountability for Mass Starvation: Testing the Limits of the Law

Policy Paper #1



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I. INTRODUCTION

1. Every instance of famine or acute food insecurity today is, at its core, man-made. This paper explores the paths to prohibition and accountability for the widespread and systematic death and suffering that it causes worldwide, with a focus on criminal prosecutions.¹ The current scale of suffering and death caused by, or associated with, this crime is unprecedented in recent history. The famine in Yemen alone threatens to be the most severe in living memory. Starvation has a compound effect on international peace and security surpassing the (atrocious) death tolls: mass displacement and social disruption,² intergenerational physical and cognitive harm,³ and severe economic deprivation⁴ are only a fraction of the terrible consequences visited upon the unfortunate victims.
2. The United Nations (UN) Security Council (SC) Resolution S/RES/2417 (UNSC 2417) championed by The Kingdom of the Netherlands, and passed unanimously in May 2018, is the UNSC's response to the re-emergence of famine and the burgeoning humanitarian crisis. It highlights the war crime of starvation and implores member states to prevent, prohibit and hold to account those who commit the crime. Notwithstanding this and other examples of international recognition of the deliberate nature of starvation, attribution of fault and accountability remain elusive. Global Rights Compliance jointly with the World Peace Foundation lead the project 'Mass Starvation: Testing the Limits of the Law';⁵ the project is aimed at support of UNSC 2417, how to increase accountability and render starvation morally toxic. The present paper's themes are based upon the project's predicate objectives, including clarifying the contours of the crime and advocating for appropriate prosecutions.
3. We are at the start of a long road to the effective criminalisation of starvation. The use of starvation of civilians as a method of warfare was prohibited under international humanitarian law (IHL) in the Additional Protocols of 1977,⁶ a conduct that has been prohibited and criminalised also under customary international law (CIL).⁷ Prohibiting conduct as a matter of IHL is one thing, but an effective route to criminal accountability for violation of those prohibitions presents altogether different challenges. Man-made starvation continues to be inflicted upon civilians, notably in the ongoing conflicts in Yemen, Syria and South Sudan.⁸ An examination of these conflicts suggests that starvation has re-emerged as a significant feature of modern warfare. As our examination in three separate country case studies shows,⁹ starvation in these conflicts is entirely man-made and has catastrophic humanitarian consequences for those civilians already suffering the blight of war. Despite these causes and consequences, there have been little or no meaningful attempt to prosecute the offence at the international or national level.
4. There are of course many factors that might explain (albeit not justify) the ongoing neglect and the lack of effective criminal accountability for man-made starvation. As discussed in this paper, three stand out as particularly pertinent to this modern-day judicial malaise. These are:
 - (i) A gap in the available International Criminal Court (ICC) law, namely the lack of a specific provision criminalising starvation in non-international armed conflicts (NIACs) under the Statute of the ICC (the Rome Statute). This gap threatens the protection of civilians and prevents international criminal prosecutions in almost all of the current conflicts where starvation is being used;
 - (ii) A lack of understanding of the terms of the crime of starvation pursuant to Article 8(2)(b) (xxv) of the Rome Statute, and how it will operate in practice. This includes a lack of clarity concerning the meaning of its basic elements, including the requirement that the alleged perpetrator be shown to have 'intentionally used starvation as a method of warfare'. This appears to have contributed to the misconception that prosecutions for starvation are too difficult and accountability unattainable;

- (iii) Uncertainty concerning which conduct might amount to the crime of starvation, particularly which acts provide evidence of criminal intent. Law requires usage in courtrooms before it may become a focus of judicial consideration, expert debate and evolution and thereafter a useful tool for accountability. In the absence of prosecutions at the international level, much remains to be done to delineate offending conduct, especially when it arises in the midst of apparently lawful conduct that appears to permit interference with humanitarian supplies.
5. In order to explore these issues, which appear to have significantly inhibited judicial action to prevent, prohibit and punish the crime of starvation, this paper is divided into three sections: policy; law; and, practice.
 6. The Policy Section (paragraphs 10 - 14) is aimed principally at the significance of the amendment to the Rome Statute to allow the Article 8(2)(b)(xxv) crime to be prosecuted in NIACs as proposed by the Government of Switzerland to the Working Group of the Assembly of State Parties to the ICC in 2018. It outlines how support for the proposal will narrow the apparent impunity for those perpetrating starvation, enable redress for victims, and strengthen the fundamental protection of civilians and civilian objects.
 7. The Law Section (paragraphs 15 - 84) is primarily for those seeking to understand the substantive law, including legal practitioners and humanitarians. This paper drafted by leading legal practitioners¹⁰ and academic experts¹¹ purports to distil the elements of the Article 8(2)(b)(xxv) crime. The authors analyse the elements of the crime of starvation through the relevant international legal frameworks, including IHL and International Criminal Law (ICL). This section seeks to bring legal clarity to a much-neglected offence.
 8. The Practice Section (paragraphs 85 - 127) is aimed at a range of practitioners including: humanitarians delivering aid into conflict-affected areas; investigators collecting and documenting information for accountability efforts;¹² policy makers seeking to maintain political pressure on belligerent states and warring parties; and legal practitioners seeking to apply the law. This section seeks to bring clarity to the applicable legal framework, detailing how the conduct of warring parties and individuals may constitute a starvation violation. It addresses four key topics: (i) the use of specific modes of responsibility in leadership cases (likely to be prosecuted at the ICC); (ii) challenges arising from the need to map causation (i.e. the connections between the alleged perpetrator's acts and omissions and deprivation of objects indispensable to the survival of the civilian population (OIS) and any consequential adverse impacts upon civilian populations); (iii) the role of direct and indirect (circumstantial) evidence in establishing the elements of the offence, particularly the intent requirement; and (iv) the likely approach to evidence and proof of the offence in relation to two distinct scenarios: where the deprivation of OIS occurs in pursuit of an unlawful purpose and where it occurs during the pursuit of a lawful purpose (including sieges and blockades).
 9. The paper concludes with the next steps for moving the crime of starvation into the realm of the impermissible. As the discussion in the various sections of this paper shows, much needs to be done to ensure a common understanding of the crime in order to advance the prospect of prosecutions. However, as finally discussed, prosecutions are not a panacea; they must be viewed as part of a process and be situated in a range of alternative remedies as envisaged in UNSC 2417, which together must be deployed to ensure that starvation is viewed as an intentional act and a morally toxic one.

II. THE POLICY SECTION

A. The Gap in the ICC Law and the Proposed Rome Statute Amendment

10. Under the Rome Statute, starvation as a war crime is only available in an IAC and not in a NIAC. As a matter of legal analysis, this is a distinction apparently without any rational legal basis. In practice, this lacuna acts to seriously limit the Rome Statute's ability to allow relevant and effective prosecutions and achieve much needed accountability for contemporary starvation. Indeed, several national jurisdictions appear to have recognised the undesirability of this lacuna and have departed from the ICC's restriction, criminalising starvation in both IACs and NIACs.¹³ Unfortunately, as most (if not all) instances of starvation occurring today are in the context of NIACs, the victims of starvation in Yemen, Syria, South-Sudan, north-eastern Nigeria, and Somalia, to name but a few, will, on that basis alone, be denied access to international justice under the current Rome Statute, Article 8 framework.
11. The prohibitions of starvation in the Additional Protocols to the four Geneva Conventions, adopted in 1977, applies to both IACs and NIACs.¹⁴ The same prohibition exists under IHL for both types of conflicts,¹⁵ and is criminalised under CIL.¹⁶ This reflects the identical human cost of the crime, regardless of the characterisation of the conflict. Nonetheless, the drafting history of Article 8(2)(b)(xxv) of the Rome Statute provides no indication as to why starvation was criminalised only in an IAC including, importantly, why it departed from the aforementioned position under IHL.¹⁷ Notably, in 1998 there was a provision in the draft of the Rome Statute that included criminalisation in NIAC. However, for reasons that are difficult to discern, the final draft of the Rome Statute did not include it.¹⁸
12. As observed, this anomaly has created an obvious accountability gap. In 2018, Switzerland proposed an amendment to the Rome Statute to include starvation within the list of war crimes capable of being committed in a NIAC.¹⁹ The language proposed mirrors almost identically the crime as it is drafted in Article 8(2)(b)(xxv) save for a minor technical correction.²⁰ There is in general strong support for the substance of the proposal from the majority of State delegates. Although some reservations have been raised, these appear to be based upon 'amendment fatigue' as well more general opposition to the ICC's jurisdiction, rather than any principled objection to the substantive amendment.
13. There are good reasons to support the amendment, including:²¹
 - (i) The protection of civilians: the proposed amendment underscores a commitment to the protection of civilians, a longstanding UNSC objective implemented in UNSC S/RES 1265 and which commemorates its twenty-year anniversary in May 2019.²² There can be no doubt that the amendment is squarely aligned with the fundamental principles of IHL that demands the protection of civilians and civilian objects regardless of the technical characterisation of the conflict in which they find themselves embroiled.²³ As the seminal case of Tadić at the International Criminal Tribunal for the Former Yugoslavia (ICTY) highlighted, '[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.'²⁴
 - (ii) Legal consistency: As noted, the proposed amendment does no more than reflect the position in IHL and ICL, namely that starvation is prohibited and criminalised in both types of conflict designation. Of the 168 State Parties who have signed Additional Protocol II (AP II), which clearly prohibits the use of starvation in a NIAC, 122 of those State Parties have also

ratified the ICC Rome Statute.

(iii) Pushing the accountability envelope: If adopted, the proposed amendment will encourage states to mirror these legal provisions in their domestic law. States that become involved in the 'starvation debate' are more likely to ensure legal consistency in their own judicial frameworks. For example, the Netherlands amended their domestic legislation ahead of UNSC 2417's vote in May 2018, ensuring that the crime of starvation may be prosecuted in both a NIAC and an IAC.²⁵

14. The proposal is currently before the Working Group on Amendments in New York and, if supported, will be considered at the 18th Session of the Assembly of State Parties to the Rome Statute (December 2019).²⁶ In our view, it provides a significant opportunity to ensure that this accountability gap is closed. The importance of this amendment to countering impunity and as a springboard towards effective accountability for starvation crimes worldwide cannot be overstated.

III. THE LAW SECTION

A. Lack of clarity in the Legal Elements of the Crime of Starvation

15. Despite the criminalisation of starvation and its terrible human cost, there has yet to be a prosecution of starvation on the international level.²⁷ Consequently, the crime and its intersection with a wide range of other violations remain unexplored. ICL's traditional focus on more direct atrocity crimes and the perceived complexity of identifying when lawful military conduct (that contributes to starvation) crosses the line into the crime of starvation appears to have deterred judicial responses.
16. Modern ICL has focused on specific types of crimes and prosecutions that examine violent deaths occurring in the midst of the immediate infliction of violence. The crimes that have occupied the international courts are those most frequently associated with an ongoing armed conflict. Whether the 'the hellish environment' of persecutory rapes in Omarska in Bosnia,²⁸ the slaughter of those across Rwanda in 1994²⁹ or the amputations of civilians in Freetown in Sierra Leone in 1999,³⁰ it is this conduct that appears to have shaped the perception of the type of deaths and injury that are most appropriate for prosecution in modern international criminal courts.
17. Moreover, in complex militarised environments, even these types of prosecutions continue to present significant challenges to effective and expeditious trials. Identifying remote forms of criminal liability in the midst of armed conflict is always a challenge. In particular, international prosecutors face considerable challenges in identifying causal relationships between the actions of warring parties, adverse impacts upon civilian populations and criminal intent. As illustrated by an examination of the horrors of Yemen, Syria and South Sudan,³¹ starvation is often inflicted in countries with food insecurity, malnutrition and disease that were either pre-existing or partly caused by economic crisis occurring in parallel, and these create a layer of complexity that provides challenges to beleaguered prosecutors.³² These concerns may explain, at least in part, why starvation has languished on the margins of prosecutorial imagination and practice.
18. However, an examination of the material elements of the crime of starvation and how they are to be fulfilled in a trial does not suggest that these challenges are insuperable or even more significant than in the average ICL trial. These practical issues will be discussed below at paragraphs 85 – 127.

B. The Elements of the Crime

19. The Rome Statute, which entered into force in 2002, featured for the first time on the international level the war crime of starvation, enabling the ICC to actively investigate and prosecute such crimes.
20. Article 8(2)(b)(xxv) criminalises:
‘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.’
21. There are four elements required to establish the offence:³³
 - The contextual ‘chapeau’ elements
 - (i) the conduct took place in the context of and was associated with an international armed conflict;
 - (ii) the perpetrator was aware of factual circumstances that established the existence of an armed conflict;
 - The *actus reus* (physical) element
 - (iii) the perpetrator deprived civilians of objects indispensable to their survival, including by wilfully impeding relief supplies;³⁴ and
 - The *mens rea* (mental) element
 - (iv) the perpetrator intended to starve civilians as a method of warfare.
22. The following analysis will examine in turn the physical elements and the central question of intent. As for the latter, in practice, as with many international crimes, the prosecution of the crime of starvation is likely to be focused upon its intent requirement, namely, the intention to starve civilians as a method of warfare by depriving them of OIS, including wilfully impeding relief supplies as provided for under the Geneva Conventions.
23. As with all ICC crimes, assistance in interpretation will be derived from an array of sources of law, that include in the first place, the Rome Statute, Elements of Crimes and Rules of Procedure, and thereafter ‘applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’;³⁵ applied according to relevant ICL trial procedure that has evolved with a view to ensure effective trial processes that respect fundamental rights. It should also be noted that the Rome Statute expressly requires that starvation (along with the other war crimes contained in Article 8(2)(b)) be viewed ‘within the established framework of international law’.³⁶ As such, IHL will provide particularly cogent guidance in relation to the parameters of the crime.³⁷
24. Accordingly, this section of the paper will discuss the following:
 - a. the meaning of and relationship between the terms ‘starvation’ and ‘OIS’;
 - b. the meaning of the act of ‘depriving of OIS’; and
 - c. whether the term ‘wilfully impeding’ introduces recklessness into the crime and impacts upon the intent requirements.
25. Following this we will turn to the mental elements and in particular the central and defining element of intention to starve. We commence by examining the concepts and definitions of specific intent and the related or overlapping concepts of ulterior and purpose-based intent. In order to properly understand how this element will be applied, we then address the following:
 - d. Whether the element requires proof of a result (i.e. that biological condition of starvation resulted) when prosecuting the crime.
 - e. The applicability of the Rome Statute’s Article 30’s (intent and knowledge) mental standards to Article 8(2)(b)(xxv), particularly the nature of the relevant intent and whether it must be

shown that the alleged perpetrator desired starvation (and not only was aware that it was virtually certain). In this context we assess whether genocide provides a helpful comparison in understanding the contours of intention to starve.

- f. What 'method of warfare' in the context of intention to starve means and in particular whether it adds a purposive component to intention to starve.

1. 'Starvation' and 'Objects Indispensable to Survival'

26. Establishing the meaning of and relationship between these two terms will be an important step towards clarifying the material elements of the crime. As will be discussed, starvation tends to imply the deprivation of food and water (at least in English, though not universally in all translated equivalents), whereas OIS includes, more broadly, anything that is indispensable to survival, including for example medicine, clothes and shelter.
27. Whilst the wording of Article 8(2)(b)(xxv) links 'starvation' to the mental element (intent) and 'OIS' to a physical act (the deprivation), it does *not* assist to view them in isolation.³⁸ Indeed, the meaning of the two concepts must align for the crime to be coherent and certain. For example, it would be incoherent to prosecute a perpetrator for depriving a civilian of vital medicine (by destroying a hospital, for instance) but thereafter require his/her intent to correspond only to the deprivation of food or water.
28. The approach taken in IHL and ICC law differs somewhat. As concerns the Commentary to the Additional Protocols, starvation is defined restrictively as causing someone to perish due to hunger or lack of food, or keeping them from accessing food or water supplies.³⁹ Regarding ICC law, the drafters of Article 8(2)(b)(xxv) concluded that the ordinary meaning of the word 'starvation' differs across countries, but that in accordance with the definition in most languages, it encompasses, not only the more restrictive meaning of starvation (death by hunger or depriving of nourishment), but also a more general meaning encompassing deprivation or insufficient supply of some essential commodity or something necessary to live.⁴⁰ As may be concluded, despite starvation in the English language evoking, at least, connotations of death from malnourishment, the ICC's preference was for a broader definition that includes a range of illness and disease resulting from a lack of food, medicines and other essential commodities.⁴¹
29. In any event, the drafters considered that, in light of the inclusion of the term 'OIS', Article 8(2)(b)(xxv) did not require starvation to be more specifically defined to reflect this broader definition. The drafters of Article 8(2)(b)(xxv) appear to have considered 'OIS' to be the dominant term and therefore the most important 'verifier' of the nature of the intention required of any alleged perpetrator. In sum, they considered that 'deprivation of OIS' was the component of the offence that would determine the concrete meaning of the intent to starve the civilian population. Crucially, they considered that the definition of OIS encompassed, not only food and drink, but also such things as medicine or blankets, if in the prevailing circumstances, they could be considered as indispensable for survival.⁴²
30. This broad definition accords with the approach taken across IHL. In IHL, OIS is a term that includes: 'foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.'⁴³ The list of objects is not exhaustive, and it is considered to also include other supplies necessary to support the needs of the civilian population such as 'medical supplies and clothing,'⁴⁴ as well as 'beddings [and] means of shelter,'⁴⁵ fuel and electricity.⁴⁶
31. Moreover, this broad definition impliedly accords with associated IHL rules that define obligations placed upon warring parties with regard to the distribution of relief supplies to the civilian population. These rules are engaged from the moment the population is inadequately supplied with a wide range of items, including blankets and medicines, not only when the population is reduced to

a state of hunger or severe malnutrition.⁴⁷

32. In sum, it is highly likely that the ICC will define OIS broadly and contextually. Any Article 8(2)(b) (xxv) prosecution will require, as one of the most important preliminary assessments, an examination of an individual accused's acts and conduct in relation to a range of items that might, in the circumstances existing at the relevant time, be deemed to be indispensable to civilian survival. An assessment of what is indispensable will be context specific: what will be indispensable to a South Sudanese child attempting to survive in the bush in Sub-Saharan Africa will differ vastly from a pregnant Syrian woman besieged during winter.

2. The Act of 'Depriving Civilians of OIS'

33. Apart from the 'deprivation of objects by wilfully impeding relief supplies' (see section 'Wilfully Impeding Relief Supplies' below), Article 8(2)(b)(xxv) does not precisely define which acts might amount to depriving civilians of OIS. Reference to IHL, including the relevant obligations and prohibitions concerning the provision of humanitarian assistance, will assist in ascertaining the nature of the required acts. As defined in the Additional Protocols there is a wide range of actions that are capable of constituting a relevant deprivation: including 'attack', 'destruction', 'removal' or 'render[ing] useless' of such objects.⁴⁸ IHL provides the relevant objects with the broadest of protection, aimed at prohibiting all conduct aimed at restricting the civilian population's use of the objects.⁴⁹
34. It is also worth observing that IHL provides a humanitarian obligation both to allow and provide relief in blockaded areas. envisages that deprivation can also occur through omission. Thus, deliberately refusing to take measures to supply the population with OIS in a way that would constitute a method of warfare is prohibited.⁵⁰ This incorporates the prohibition of the use of methods of warfare, such as sieges and blockades, aimed at preventing the population from being supplied with OIS.⁵¹ Given that Article 8(2)(b)(xxv) should be construed in accordance with international law it appears that likely these instances would fall within the definition of deprivation of OIS for the purposes of Article 8(2)(b)(xxv).

3. Wilfully Impeding Relief Supplies

35. Article 8(2)(b)(xxv) envisages that the deprivation of OIS includes the wilful impediment of 'relief supplies as provided for under the Geneva Conventions'.⁵² As discussed below at pages 8-15, the deprivation of OIS as a material element of the offence must be committed with intent and also with knowledge as to the circumstances (i.e. that the objects being deprived were indispensable to survival). However, the term 'wilful' clearly refers to a mental state and as such the question arises as to whether or not it is capable of supplanting the intent requirement attached to the deprivation of OIS that appears to be required for establishment of individual responsibility.
36. The precise meaning of wilful varies in ICL. In some instances, ICL uses wilful to connote recklessness, rather than intent.⁵³ In other instances, ICC practice has regarded wilful as encompassing both intent and recklessness.⁵⁴ In light of this diverging approach, it is useful to turn to the precise phrasing of this element in Article 8(2)(b)(xxv). A literal interpretation of the phrase 'depriving civilians of objects indispensable for survival, including by wilfully impeding relief supplies' suggests that the wilful impediment of relief supplies acts merely as an illustration of a deprivation of OIS. This interpretation accords with the lack of reference to 'wilful' in the Elements of Crimes, or any discussion in the drafting process suggesting that, where the deprivation of OIS was accomplished through the impediment of relief supplies, a different, potentially lower, mental standard was envisaged.
37. In sum, there is little support for the proposition that the drafters intended to introduce an alternative (and potentially lower) mental threshold for this specific category of acts. Accordingly, the ICC is

highly likely to interpret this aspect of the crime as merely an express illustration of a relevant deprivation of OIS, rather than a material element of the crime that may be fulfilled through recklessness, rather than intent.⁵⁵

C. Intent

38. As outlined above, the challenges that arise in the prosecution of the crime of starvation are likely to be focused upon the precise nature of the intent that must be established before individual responsibility may be found. As the above discussion has shown, until those (*actus reus*) elements are examined and defined within concrete prosecution cases, their interpretation is not likely to give rise to significant challenges or disagreement.
39. Likewise, as concerns the *chapeau* elements (the link to an armed conflict and awareness of that factual circumstance), these are highly unlikely to prove contentious. International prosecutors rarely, if ever, bring any war crimes prosecution without the clearest link to an armed conflict and where an accused's awareness is a matter of straightforward inference. In sum, in the practical world of international criminal prosecutions, defining and applying these material elements is unlikely to present any significant challenge.
40. The most testing challenge will be with regard to the intent at the core of the crime. The intent that must be proven may be divided into two essential elements:
 1. The perpetrator must have intentionally deprived civilians of objects indispensable to their survival; and
 2. The perpetrator must have intended to starve civilians as a method of warfare.
41. The first of these two elements arises because of the operation of Article 30 of the Rome Statute that is applicable to ICC crimes (unless they specifically state otherwise) and provides that all physical acts must be committed intentionally. Establishing that such acts (in this case, deprivations) were carried out intentionally is commonplace in an international criminal trial. However, the second of these mental requirements - the intention to starve as a method of warfare - gives rise to a degree of complexity that will need to be unpicked in any future ICC trial. This element will be discussed below.

1. The Perpetrator Must Have Intended to Starve Civilians as a Method of Warfare

42. In order to understand this element, it is important to define a number of concepts relating to the ICL approach to intent. In particular, understanding the precise construction of the intent to starve as a method of warfare requires an elaboration of the meaning of 'specific intent'.
43. 'Specific intent' describes an intention that involves an intent or purpose that 'goes beyond the mere performance of the act.'⁵⁶ Doctrinally, this is the most common meaning of specific intent. It is also known, perhaps more descriptively, as ulterior intent in the sense that the intent is ulterior to, or exceeds, any of the criminal acts that are within the offence. One such example is that of burglary and its ulterior cousin: burglary is a basic intent crime, whereas burglary with intent to commit a felony is a specific/ulterior intent crime.
44. On the other hand, 'specific intent' has also been used somewhat confusingly in international criminal law in the context of genocidal intent to describe a concrete desire that genocide occur (i.e., that the group is destroyed in whole or in part), rather than a mere awareness that the genocide is a consequence of pursuing certain qualifying acts (e.g. murder or physical harm). This definition was first adopted in the International Criminal Tribunal for Rwanda (ICTR) case of Akayesu which described

genocidal intent as ‘the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged’⁵⁷ and has been adopted in ICTR and ICTY cases since.⁵⁸

45. Whilst the ICTR and the ICTY may have found it convenient to roll-up the two notions of specific intent into one definition, for the purpose of describing the specific intent (*dolus specialis*) of genocide, for the current analysis it is important to distinguish between the two. Undoubtedly, starvation is a specific/ulterior intent crime in that the perpetrator must be shown to have acted with an intent that went beyond the mere act of depriving OIS to encompass the achieving the objective of starvation. The more complicated question concerns whether, as with genocidal intent defined by the ICTY and ICTR, the crime includes the second definition of specific intent: namely whether the specific intent of starvation also includes a requirement that the perpetrator must have *desired* the starvation of civilians as a method of warfare or, alternatively, whether he/she merely pursued a course of action (e.g. attacking essential food stores or besieging an area to force the military to surrender) that would ordinarily have led to that consequence.
46. In determining this question and reaching a considered view of the overall parameters of the specific intent to starve element, ICC prosecutors and judges will have to grapple with the following questions:
 - a. Does starvation require proof of result/consequence, i.e. that people in fact starved (to death)?
 - b. Can intent to starve be established on the basis of knowledge of virtual certainty or does it require, more narrowly, proof of a concrete desire to achieve the outcome of starving someone?
 - c. What is the significance of the phrase ‘method of warfare’ to the legal construction of the crime of starvation and does it alter the nature of the required intent?

(a) Does starvation require proof of result?

47. Starvation does not require proof of result. This is apparent from a plain reading of Article 8(2)(b) (xxv) as well as the Elements of Crimes. The phraseology employed in both is familiar to ICL and to national systems of criminal law, in that it refers to an intention to bring about a consequence but is silent as to whether proof is required that the consequence actualised. Conventionally, in those circumstances, proof of consequence is not required.
48. As discussed above in paragraph 43, in this sense, starvation is a specific intent crime in that it requires an intent linked to the act of deprivation but also an intent that goes beyond that act. To this extent, starvation intent shares some characteristics with the intent required for genocide.⁵⁹ As with genocidal intent, an analysis of the Elements of Crimes relevant to the intent element (‘the perpetrator intended to starve civilians as a method of warfare’)⁶⁰ suggests that the intent to starve appears to exist independently of any requirement to prove the consequence of causing starvation, as a matter of law. Proof is required only of the perpetrator’s intention to starve, not of the fact that people did in fact starve as a result of the perpetrator’s acts or intentions. In other words, there is no requirement to establish deaths or severe acute malnutrition or any other kind of harm such as thirst, dehydration, communicable disease from contaminated water or neglect of the basic needs for survival of young children. The starvation consequences must merely be intended, not actualised.⁶¹
49. A consequence is a constituent element of a crime only when it has been conceived and defined as

such. It is therefore not an indispensable element of all crimes.⁶² Indeed, the drafters of the Rome Statute considered proposals during the drafting of Article 8(2)(b)(xxv) that would have included the phrase ‘as a result of the accused’s acts, one or more persons died of starvation’ within the definition of the crime. However, this modification was not adopted.⁶³ This approach accords with the general nature of the relevant IHL prohibition. It is now generally accepted that IHL prohibits starvation as a method of warfare, and not only when its effects become visible on the population.⁶⁴ In sum, as a matter of strict legal interpretation, proof is required only of the perpetrator’s intention to starve, not of the fact that people did in fact starve as a result of the perpetrator’s acts or intentions. The crime is completed without proof of any starvation consequence.

50. This is not to argue that the consequences of any deprivation will be irrelevant to any assessment of individual responsibility within the confines of a prosecution. On the contrary, acts and consequences are very often the best evidence of intention.⁶⁵ In larger scale cases, involving large numbers of victims subjected to an extensive course of conduct over time, one would expect to find ample evidence that people did die or otherwise suffered from starvation-induced harm. As such, the most compelling evidence of an intention to starve will be proof that people did in fact starve.
51. However, there are foreseeable scenarios that are readily prosecutable where proof of the consequence of starvation may not be required even as a matter of evidence (e.g. a campaign to destroy agricultural means forcing civilians to move to other food producing areas or the bombing of health facilities and water supplies, without any casualties being sustained).
52. In this sense, it is important to not overstate any similarities between starvation and genocide. Even though starvation shares a certain historical lineage with genocide,⁶⁶ and both are crimes of specific intent (in the first sense – that the intent going beyond the mere performance of the essential criminal acts) and the likely impact of the crime on civilians may well be similar, there are some notable differences.
53. In particular, genocide’s express requirement that the underlying act(s) take place in the context of a manifest pattern of similar conduct ensures that a sustained course of criminal conduct underpins a genocide prosecution.⁶⁷ This reflects the notion that genocide essentially involves mass criminality in every case.⁶⁸ In our view, starvation does not operate within such minimum gravity thresholds. There is nothing within Article 8(2)(b)(xxv) or any of its historical antecedents to suggest that starvation is confined to mass criminality cases, or that it needs to be committed as part of a course of conduct. Consequently, viable prosecutions for starvation may arise, not only in the absence of any proof that starvation did in fact occur, but also premised on single or isolated acts of deprivation of objects, as long as they are manifestly indispensable to survival, remote from any consequential harm.

(b) Can intent to starve be established on the basis of knowledge of virtual certainty or does it require, more narrowly, proof of a concrete desire to achieve the outcome of starving someone?

54. The second significant question surrounding the mental requirements is whether intent to starve can be established on the basis of knowledge of virtual certainty or does it require, more narrowly, proof of a concrete desire to achieve the outcome of starving someone (i.e., the second meaning of specific intent discussed above in relation to genocidal intent).
55. The starting point of this analysis is likely to be Article 30.
 - i) Applicability of Article 30
56. Article 30 states:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.
57. Article 30, therefore, sets out the 'default' mental standard with which each material elements should be committed to attract criminal liability under the Statute. It does this in two ways. First, Article 30(1) creates and appends a mental standard of intent and knowledge to each material physical element of the Rome Statute crimes unless the definition of those crimes provides for another approach to the mental elements. Second, Article 30(2) and (3), respectively, provide guidance as to how the intent and knowledge standards created in Article 30(1) should be applied. Article 30(2) (b), dealing with intent, provides that 'in relation to a consequence' a person has intent where he/she 'means to cause that consequence or is aware that it will occur in the ordinary course of events'. It therefore expressly provides for both knowledge and purpose-based approaches to establishing intent (as to a consequence).
58. As already explained, in the context of Article 8(2)(b)(xxv), Article 30 will engage to create and append a mental standard to the required physical act of depriving civilians of OIS, meaning that the act must be perpetrated intentionally. However, the applicability of Article 30 to the intention to starve, in a strict sense, is doubtful.
59. As we have argued in the discussion above ('Does Starvation require proof of result?'), Article 8(2) (b)(xxv), as a matter of strict legal interpretation, does not require proof of a consequence (i.e. the result that people did in fact starve), only proof of the perpetrator's intention to bring about that result. Absent a material consequence element, the ICC is unlikely to find that Article 30(1) applies. Because Article 30(2) appears confined only to intent standards within the purview of Article 30(1) (the sub-paragraph begins by saying 'for the purposes of this article' as a premise for its operation), if the ICC adopts a strict approach to the construction of that provision, it seems unlikely that the ICC would conclude that the definition of intent outlined in Article 30(2) applies to the intention contained in the crime of starvation.
60. However, this does not mean that the ICC will necessarily assess the intent as requiring proof of a desire to starve (rather than the less demanding requirement that the perpetrator pursued a course of conduct knowing that starvation would occur in the ordinary course of events). In our view, discussed below, there are cogent reasons to suggest that the ICC would apply the standards set out in Article 30(2) in any event. Intent that strictly requires proof of desire or purpose has proven controversial even in the special circumstances of the crime of genocide.

ii) Rationale behind Article 30

61. In order to understand why, despite the technical inapplicability of Article 30 to the intention at the heart of the crime of starvation, the ICC is unlikely to interpret the intent as encompassing only desire, it is useful to examine the rationale behind Article 30.
62. The Article 30 mechanism in the Rome Statute is a legal novelty, not included in the Statutes of

any of the predecessor international criminal tribunals, underscoring its perceived importance to the drafters. The relevant report of the Preparatory Committee suggests that Article 30 was drafted to be applicable to basic intent elements only because where a specific intent was applicable, the particular crime would make that explicit. Consequently, there was no need to create a default position for specific intent elements.⁶⁹ Unfortunately, Article 8(2)(b)(xxv) does not address whether that special intent is also special by dint of requiring that the alleged perpetrator also desired the starvation, and not only foresaw it as a virtual certainty.

63. Accordingly, in circumstances where the drafters did not make that explicit, any Chamber will be required to determine what the drafters meant in the context of the particular crime. The ICC is likely to consider various issues. First, it seems unlikely that any lack of clarity was intended to lead to an automatic presumption that all specific intent elements under the Rome Statute must, by virtue of their omission from the scope of Article 30, be committed purposively. Second, there is nothing within the Rome Statute, or in general principles of criminal law that appears to require such a rigid approach to specific intent.
64. Third, it is clear from the reports of the Preparatory Committee that the purpose behind Article 30 was to introduce a (rebuttable) presumption that uniform mental standards would be required in order to enhance consistency in the standards of culpability required for individual responsibility to be established at the ICC.⁷⁰ In other words, Article 30(2) reflects a strongly held view that consistency of specific mental states required across ICC crimes, to the extent possible, is highly desirable. In other words, Article 30 appears to instrumentalise a determination that ICC crimes will, absent cogent reasons, be interpreted consistently as regards mental elements, particularly with regard to knowledge and intent. In the case of starvation there appears to be no compelling reason to depart from the default position, set out in Article 30(2), that intent 'in relation to a consequence' can be established on either the knowledge or the purpose-based approach. Furthermore, as discussed above, by not requiring proof of result of starvation, the definition of the crime is broadened to strengthen the protection. There is no need to wait to prove that people actually are starving. This increase of the protection of civilians would likely be nullified in part if the ulterior intent requirement would be construed in a manner more demanding than Article 30(2)(b).

iii) Comparisons with Genocide

65. Having said this, no doubt the ICC will want to look carefully at the crime of genocide to ascertain whether any useful comparisons that might be drawn or lessons learnt.
66. In particular, the ICTY and the ICTR, following the purpose-based approach, interpreted the intent to destroy as the *dolus specialis* that 'is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.'⁷¹ Therefore, the perpetrator is culpable only when he / she commits genocide 'with the clear intent to destroy, in whole or in part, a particular group'. Absent that concrete desire, the mere knowledge of consequence that the group would be destroyed is insufficient for establishing the crime.⁷²
67. As the debates around the intent of genocide demonstrate, even in relation to the specific intent of genocide, there has been much criticism of the purpose-based interpretation of the special intent.⁷³ Proponents of the knowledge-based approach argue that '[i]n cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.'⁷⁴
68. However, whilst the narrowness of the purpose-based approach has been widely criticised by academia, for a number of reasons, it has also received some academic support.⁷⁵

69. Nonetheless, our research indicates that genocide appears to stand alone in ICL as the crime that may only be established through proof of desire. The preponderance of support for this approach centres around the gravity of the criminality that genocide implies. The argument in short is that in view of that anticipated gravity, nothing less than a concrete desire to (partially) destroy a defined human population should be required to establish individual responsibility.⁷⁶
70. As must be plain, the same teleological concerns do not necessarily apply to the crime of starvation. In our view, for the foregoing reasons, the offence of starvation is not bound by the same gravity considerations as those that underpin the highly distinct crime of genocide. The minimum gravity threshold is plainly lower for starvation than it is for genocide. Whilst the crime of starvation may well regularly be applied to instances of mass death, there is nothing within IHL or ICL to suggest that it should not equally apply on a more limited basis, such as where the fatalities or casualties are relatively low or indeed wholly avoided.⁷⁷
71. In light of these distinctions, the restrictive purpose-based approach to genocidal intent does not appear to provide an appropriate model for the intention to starve element under Article 8(2)(b) (xxv). Instead, for the reasons discussed above, the ICC is highly likely to reject that approach as too restrictive, especially considering the uniqueness of the special intent of genocide and the nature and intended scope of the crime of starvation.

(c) What is the significance of the phrase ‘method of warfare’ to the legal construction of the crime of starvation?

72. We have concluded that a knowledge-based approach is likely to suffice to establish intent to starve. However, Article 8(2)(b)(xxv) appends a qualification to intent to starve by requiring the establishment of an intent to starve civilians *as a method of warfare*. The question therefore arises: what does ‘as a method of warfare’ mean in this context and does it add a directional or even purposive requirement, and in so doing alter our primary conclusion that intent to starve may be established on the knowledge-based standard? These will be discussed below.
- i) What does ‘method of warfare’ mean in this context?
73. There are a variety of views concerning the meaning of warfare and it is useful to consider them to ascertain whether they connote a purpose of some kind that indicates that the intent to starve demands that the alleged perpetrator desired starvation, and not merely was aware that it would occur in the ordinary course of events.
74. As pointed out by Gaggioli and Melzer, the concept of ‘methods of warfare’ was not defined in treaty law prior to the adoption of the Additional Protocols to the Geneva Conventions.⁷⁸ The Commentaries to the Additional Protocols simply state that the term ‘methods of warfare’ refers to the way in which weapons are used.⁷⁹ However, as they correctly argue, this definition appears to be too restrictive ‘given that even methods not necessarily involving the use of a weapon, such as starvation,⁸⁰ improper use of emblems,⁸¹ perfidy⁸² or denial of quarter⁸³ are either expressly described as ‘methods of warfare’ or as a ‘method of combat’ or are systematically included in Part III, Section I of Additional Protocol I on Methods and Means of Warfare’ (Arts 35-42 AP I).⁸⁴ In view of the ways in which technological advancements have changed the face of contemporary conflicts, a definition of methods of warfare confined to traditional weaponry appears overly restrictive.
75. Instead Gaggioli and Melzer propose that a ‘partly’ more convincing interpretation is proposed in the book *How does Law Protect in War* where methods of warfare are defined as: ‘(i) the way and manner in which the weapons are used; (ii) any specific, tactical or strategic, ways of conducting hostilities that are not particularly related to weapons and that are intended to overwhelm and

weaken the adversary’⁸⁵

76. As pointed out, this definition has the merit of highlighting that methods of warfare are more than just the manner in which weapons are used.⁸⁶ This definition would ensure that methods of warfare may be more accurately understood as ‘referring to any particular manner of using weapons or *otherwise* conducting hostilities irrespective of permissibility or appropriateness, and ranging from the use of emblems, flags, uniforms and weapons or other equipment to the choice of targets for attack.’⁸⁷

ii) Does it add a directional or even purposive requirement?

77. Nonetheless, this proposed definition also raises the legitimate question as to whether the incorporation of an objective to ‘overwhelm and weaken the adversary’ introduces a significant directional or even purposive requirement into the crime of starvation.

78. However, there appears to be no basis in IHL or otherwise for introducing this additional threshold that limits the meaning of methods of warfare to only acts of a particular intensity or effectiveness. The better view is that ‘methods of warfare’ ensures that the consequences intended, or foreseen as a virtual certainty, were military in character, or part of a military process. IHL operates under a fundamental presumption that all hostilities are intended to overwhelm and weaken an adversary. This is an IHL term of art that is intended to describe the boundaries of lawful armed conflict. Understood in that way, describing conduct as ‘intended to overwhelm and weaken the adversary’ does no more than describe conduct that is part of hostilities. As referred to above, the proposed definition seeks to broaden the definition of ‘methods of warfare’ to encompass all ways of conducting hostilities. In this way, it encompasses a subcategory of military operations,⁸⁸ which includes aerial and naval blockades, sieges or the establishment of a no-fly zone.⁸⁹ As such, the intended starvation must have been intended to be a ‘specific, tactical or strategic, way of conducting hostilities’⁹⁰ but nothing more demanding than this is required.

iii) Does the requirement that the starvation is intended as a ‘method of warfare’ exclude knowledge based intent?

79. In other words, the central demand of Article 8(2)(b)(xxv), that the individual must have intended to use starvation as a method of warfare by depriving civilians of OIS, would appear to demand merely that deprivation and starvation became part of the conduct of hostilities. But this would suggest no more than that the starvation was intended as an activity that would adversely affect the enemy’s military operations or capacity without reference to its effectiveness or strategic success. In some circumstances, it may well take the form of a directional or purposive component but in its mildest form, it appears to require nothing more than the showing of a contextual link.

80. In this way, as the construction of the crime suggests, the term ‘as a method of warfare’ may be more than a contextual element but it does not appear to demand that the alleged perpetrator desired that impact, or to exclude a knowledge-based intent. Neither the definition of ‘methods of warfare’ nor the manner in which it is linked to starvation within Article 8(2)(b)(xxv) appears to exclude the scenario in which a perpetrator, not desiring the starvation of civilians as a method of warfare, nevertheless became aware that act(s) of deprivation would inevitably lead to the starvation of civilians and that this would become a part of the conduct of hostilities.

81. On this view, rather than excluding awareness-based intent, the phrase ‘method of warfare’ – linked to the object of the intent, namely human starvation, rather than the deprivation of OIS – may act as an important delineator. It appears to suggest that the crime requires more than a mere showing of starvation (or deprivation of OIS) *incidental* to the conduct of hostilities. Instead, it serves to

delineate the nature of the starvation that suffices, namely that which is a tactical or strategic way of conducting hostilities. By requiring that nexus to active hostilities, this construction appears to align the crime of starvation with the fundamental principle of IHL 'that civilians shall be spared and protected from the effects of the hostilities.'⁹¹

2. Conclusion on Intent

82. Concerning the complex question of whether intent to starve is established on the basis of knowledge of virtual certainty, and not only a purpose or desire-based approach, the question remains to be answered when Article 8(2)(b)(xxv) is considered by the ICC. As discussed above, the Court is likely to refer to, amongst other things, minimum standards of criminality that the offence seeks to prohibit, the interests that the offence seeks to protect, the drafting history of Article 8(2)(b)(xxv), and the provisions of IHL from which it derives.
83. As our brief overview of these issues shows, there is little or no basis for concluding that specific intent crimes such as starvation (in which the intent goes beyond the mere performance of the act) are automatically defined by proof of purpose or desire, and not the lesser form of knowledge-based intent.⁹² Whilst the specific character of the intent to starve technically removes it from the scope of Article 30, there are nevertheless substantial grounds to conclude that the same standards will be applied and as such that a knowledge-based approach will suffice to establish to intention to starve.
84. As a final point, it should also be noted that the more restrictive purpose-based approach to intent does not imply that individual responsibility only flows from a showing that the perpetrator acted with only one purpose or desire. As with genocide, there is no basis to conclude that the crime of starvation requires proof that the perpetrator pursued only that purpose.⁹³ Indeed, a desire to starve may form extemporaneously and temporarily amidst a course of otherwise legitimate (or illegitimate) purposes. Purpose-based intent formed in this way may not differ significantly from knowledge-based intent in any event.⁹⁴

IV. THE PRACTICE SECTION

A. Testing the Limits of the Crime: How the Crime of Starvation may be Investigated and Prosecuted

85. As discussed in the introduction of this paper, there has yet to be a prosecution of starvation on the international level.⁹⁵ As outlined above in paragraph 23, and in common with all international crimes, the process of identifying the contours of the material elements of starvation will rest in large part upon judicial interpretation that will in turn rest upon discerning the intention of the drafters of Article 8(2)(b)(xxv). However, judicial interpretation will not only depend upon a technical analysis of the law but also rest on the creativity of the judges who will be called upon to ensure that the law remains an effective tool for delineating individual responsibility for the crime, whilst ensuring respect for fundamental principles of due process, including the principle of legality and culpability.
86. This creative process will require engagement from all relevant judicial actors and will include grappling with a range of practical trial process issues designed to ensure that ICL is fit for the purpose of ensuring the effective reach of the law. These issues include: (i) the use of specific modes of responsibility in leadership cases (likely to be prosecuted at the ICC); (ii) challenges arising from the need to map causation (i.e. the connections between the alleged perpetrator's acts and omissions and

deprivation of OIS and any consequential impacts upon civilian populations); (iii) the role of direct and indirect (circumstantial) evidence in establishing the elements of the offence, particularly the intent requirement; and (iv) the possible approach to evidence in relation to two distinct scenarios: where the deprivation of OIS occurs in pursuit of an unlawful purpose and where it occurs during the pursuit of a lawful purpose (including sieges and blockades).

87. These issues will be briefly discussed below. This section is designed as an introduction to those wishing to sharpen their individual tools to better identify when conduct crosses the line from lawful to criminal.

B. The Use of Specific Modes of Responsibility in Leadership Cases

88. ICL tends to prosecute senior leaders or those adjudged to be most responsible for the criminal conduct at a regional or country level. These are individuals who are often remote from the scene of the crimes and who must be shown in one way or another to have contributed to the crimes of others, to a degree that attracts individual responsibility. Accordingly, modes of responsibility that allow individuals to be linked to crimes through their membership of groups with a shared purpose – including joint enterprise, common purpose or accomplice modes of liability – are often the necessary, if not favourite, choice of an international prosecutor.
89. Likewise, these modes of liability are often reflected in domestic criminal codes.⁹⁶ Whilst not uncontroversial, these provide the tools by which those at the top of the criminal enterprise may be (more easily) shown to be in control of, or contributing to, criminal plans or objectives. Whether the relevant deprivation conduct is restricted to local sieges or countrywide criminal activity, the existence of common plans and the contributions of individuals to those plans, captured within appropriate modes of responsibility, are likely to be pivotal to any successful international prosecution of starvation.
90. Given the likely factual scenarios and the need to capture the relevant group action and commission or complicity linked to military organisations and operations, a Prosecutor at the ICC is highly likely to focus upon three such modes: co-perpetration, indirect co-perpetration and aiding and abetting. For illustrative purposes, we set out the elements of the first of these, co-perpetration.⁹⁷ The remaining two are discussed briefly in the footnotes.
91. Co-perpetration entails establishing that two or more individuals worked together in the commission of the crime, pursuant to an agreement between these perpetrators, which led to the commission of one or more crimes under the jurisdiction of the Court.⁹⁸ Two objective elements must be established: (i) an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime; and (ii) that the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime.⁹⁹ Although not expressly outlined in the Rome Statute, but developed through jurisprudence, a further form of indirect co-perpetration may also be utilised by an ICC prosecutor.¹⁰⁰ Moreover, in the absence of, or as an alternative to, any viable joint enterprise case, a Prosecutor at the ICC will want to consider pursuing aiding and abetting charges.¹⁰¹
92. As the various factual scenarios currently occurring in war affected countries such as Yemen or Syria suggest these modes of responsibility will be pivotal to capturing the control over and use of (military or civilian) organisations by individuals to adversely impact civilian objects. Instead of looking only at the direct causal relationship between the acts or omissions of an accused and the relevant deprivations (and any consequential starvation), these modes of liability will enable prosecutors to assess individual responsibility from the perspective of their interaction with, and use of, others to achieve the relevant deprivations.

93. Accordingly, in the context of establishing the elements of these modes of liability, any prosecution of the crime of starvation will likely focus on the following (non-exhaustive) issues:
- a. The existence of any common plan or agreement (written or otherwise, calculated, planned or arising extemporaneously) to deprive civilians of OIS;
 - b. Any essential, coordinated contributions to the plan by the alleged perpetrators that led to deprivations of OIS (e.g., blockades, targeted and repeated strikes on OIS, including transport and supply infrastructure, agricultural areas, fisheries, medical facilities, and food markets, etc.);
 - c. The precise nature and scope of the relevant military or civilian organisation and hierarchy;
 - d. Any indication of control over the chains of command and military organization(s) or civilian apparatus that contributed to the deprivations;
 - e. The degree of control over the crime, namely whether the alleged perpetrator had the material ability to control the relevant military organisation or individuals therein to ensure automatic compliance with relevant orders;
 - f. Any indication of the alleged perpetrator's (or any of his/her cohorts) intention to starve civilians through the deprivation of OIS;
 - g. Any indication of the alleged physical perpetrator and his/her remote co-perpetrators mutually awareness and acceptance that implementing the common plan would lead to the deprivation of OIS and starvation; and
 - h. Any indication that the alleged perpetrator lent his or her assistance to actions, group or otherwise, with the aim of depriving civilians of OIS.

C. Mapping of the Chain of Causation

94. Clearly mapping the chain of causation, the connections between the alleged perpetrator's acts and omissions and deprivation of OIS and any consequential impacts upon civilians will be an essential step towards establishing intent in a starvation prosecution. Whilst we have already concluded that Article 8(2)(b)(xxv) does not require proof of a result, i.e. that a civilian did in fact starve, most starvation prosecutions will undoubtedly allege that starvation did result from the perpetrators' acts. As discussed above at paragraphs 47-53, this harm, whilst not an element of the offence, will provide the most cogent evidence of a group's purpose or an individual's intention to starve. However, in order for evidence of harm to play this role, a prosecutor will need to establish through evidence a connection between the perpetrators' acts and these adverse impacts.
95. Depending upon the nature of the case (see paragraphs 105 – 127 below for discussion of cases premised on the pursuit of lawful or unlawful purposes), this may well be a challenging aspect of a prosecution. A range of evidence will need to be examined to map the chain of causation that will illuminate how OIS were treated and any alleged perpetrators' awareness of, and proximity to, the deprivations that occurred. Starvation and famines rarely occur in a vacuum; countries often face pre-existing or co-occurring food insecurity, malnutrition and disease, resources may be limited and climate and other natural factors may impact upon the availability of OIS, as well as the ability of communities to absorb fluctuations in the availability of food, shelter or medicine.
96. Despite the well-established principle in ICL and domestic jurisdictions, known as the 'eggshell skull rule',¹⁰² by which pre-existing conditions or circumstances will not automatically break the chain of causation,¹⁰³ teasing out the originating factors that led to the deprivation and ascertaining the foreseeability (that they would lead to the starvation of a civilian population) will be a focus of many a starvation prosecution, especially in regards to the question of intent.
97. However, these difficulties ought not to be considered unique or insurmountable in the context of

ICL prosecutions more generally. Assessing an accused's acts and conduct in the midst of complex, fluctuating circumstances and contributory factors as part of regional or even countrywide enterprises are the bread and butter of ICL. These issues can be disentangled through a common-sense analysis of context, cause, effect and an accused's awareness of risk.¹⁰⁴ ICL requires that questions of causation and intent be predicated upon existing circumstances or an accused's awareness thereof. Generally, it is no defence to claim that circumstances were already dire, that others were engaged in prohibited conduct or that other causes may have contributed to the prohibited harm.¹⁰⁵

D. Direct and Circumstantial (Indirect) Evidence

98. As outlined above in paragraph 40, the principal challenges that will arise in the prosecution of the crime of starvation relate to understanding and establishing the intent that lies at the heart of the crime.
99. By its nature, intent is not usually susceptible to direct proof because '[o]nly the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own ... intent'.¹⁰⁶ Accordingly, prosecutions at the international level invariably rest upon a dogged prosecutor piecing together proof of intent through an examination of the underlying and surrounding circumstances that show beyond reasonable doubt either that a perpetrator must have harboured a concrete desire to commit the prohibited conduct or a continuation of conduct that left it practically impossible for the individual to envisage that the consequence would not occur – the virtual certainty (intent) requirement.¹⁰⁷
100. In other words, most ICL prosecutions rest in large part upon circumstantial evidence. The various factual scenarios that are amenable to prosecution for the crime of starvation are no exception.¹⁰⁸ As we have outlined in our country policy papers, these range from attacks against humanitarian workers in South Sudan, to the imposition of sieges and the cutting off of relief supplies in Syria, or the adoption of a combination of different acts such as the imposition of blockades coupled with impediments of humanitarian relief and the targeting of agricultural areas in Yemen. It is inevitable in the context of an international case involving any of these starvation scenarios, that circumstantial or indirect evidence will play a critical role in establishing the elements of the crime.
101. As a final point, it should be recalled that distinct from direct evidence, circumstantial evidence requires that the various strands of evidence when considered together lead to an irresistible inference that a particular result was intended or would result in the ordinary course of events.¹⁰⁹

E. Identifying Intent in a Multi-Causal Environment

102. Defined instances of deprivation of OIS that are accompanied by a clear causative link to human starvation, such as deprivation in a detention environment, may present relatively straight-forward assessments of a perpetrator's criminal intent. However, intention to starve may develop extemporaneously in the course of otherwise lawful or unlawful conduct, in which case the task of the tribunal will be to disentangle intention to starve from multiple coexisting purposes (whether lawful or unlawful). This may present challenges. Given the dearth of starvation prosecutions at the international level, no jurisprudence exists that directly bears on the question of how an array of circumstantial evidence might be approached to arrive at a fair and irresistible conclusion concerning the existence of criminal intent. In this section we analyse the role that direct and indirect / circumstantial evidence may play in a prosecution, particularly what might provide relevant and probative evidence of an alleged perpetrator's intent to starve as a method of warfare.
103. For the purposes of this discussion it is useful to consider two types of starvation cases:

- (i) First, where the deprivation occurs in pursuit of an unlawful purpose; and
- (ii) Second, where the deprivation occurs in pursuit of a lawful purpose.

104. In both scenarios, the following factors or indices are likely to provide cogent evidence of a perpetrator's intent, criminal or otherwise, these are discussed further below:

1. Awareness of the risk that an interference with OIS would lead to starvation (including whether the deprivation occurs in pursuit of an ostensibly lawful purpose);
2. Respect for the full range of relevant IHL prohibitions (e.g., the prohibition against terrorising the civilian population;¹¹⁰ the prohibition against collective punishment;¹¹¹ the prohibition on the use of human shields¹¹² and the prohibition against displacement);¹¹³
3. The respect for IHL principles that create positive obligations applicable in the context of the conduct of hostilities; and
4. The concrete steps taken (or not taken) by the alleged perpetrator to ameliorate civilian suffering, particularly through the facilitation of OIS to affected civilian populations.

1. The Deprivation is Connected to an Unlawful Purpose

105. In our country policy papers we have identified a range of starvation scenarios from Syria, Yemen and South Sudan that include circumstances where the deprivation occurs in circumstances where no lawful purpose can reasonably be discerned, such as the cases of attacks, murder and rape of humanitarian workers registered in South Sudan, or the 'kneel or starve' tactics adopted against civilians in Syria.¹¹⁴

106. In circumstances where no lawful purpose may be discerned or relied upon, a court will have a wide discretion concerning how to approach the evidence, providing that the burden of proof remains on the Prosecution and any finding of intent is made beyond a reasonable doubt. The trier of fact will need to consider the entirety of the evidence.

107. In assessing the four factors or indices outlined above, relevant considerations will include: the nature, manner, timing and duration of any deprivations or attacks on civilians,¹¹⁵ including whether such attacks were long-term, persistent and/or indiscriminate;¹¹⁶ whether the attacks were widespread or perpetrated by single or many military components;¹¹⁷ and whether they took place as part of a campaign that systematically targeted the victims, including on account of their membership in a particular group.¹¹⁸ The analysis will encompass all relevant issues, including the general context,¹¹⁹ the repetition of destruction and discriminatory acts,¹²⁰ attacks against civilians more generally,¹²¹ involving a range of modes of perpetration,¹²² the scale of those attacks,¹²³ and relevant policies or speeches encouraging the targeting those civilians.¹²⁴

2. The Deprivation is Connected to a Lawful Purpose

108. Notwithstanding that starvation is prohibited under IHL,¹²⁵ there are a range of military actions that warring parties may conduct that allow OIS to be attacked lawfully. Whilst this does not provide an entitlement to starve, it does complicate any interpretation of what is criminalised under Article 8(2) (b)(xxv) (noting in particular that the Rome Statute expressly requires that its provisions be interpreted in accordance with international law).¹²⁶

109. Warring parties are permitted to attack OIS in a range of circumstances or for different purposes, including:

- a. If OIS are used solely by the armed forces of the opposing Party;¹²⁷
- b. If such targeting or other forms of interference with OIS are used 'in direct support of mil-

- itary action¹²⁸ and such attacks will not be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement;¹²⁹
- c. If such attacks are pursuant to an imperative military necessity (employed in order to prevent or slow down the enemy from invading a territory).¹³⁰ The Additional Protocol allows Parties to adopt these necessary actions only in defence of their own national territory that is under their effective control;¹³¹ and
 - d. Pursuant to the use of sieges and blockades, provided they are imposed with a view to gain a military advantage, even if they incidentally cause starvation.¹³²
110. As a preliminary and defining issue, for each of the aforementioned scenarios to remain lawful, such methods of warfare must not be imposed with the aim of causing the starvation of the civilian population (which remains unlawful in all cases).¹³³ There is an unconditional and absolute prohibition on the targeting of civilians in CIJ,¹³⁴ which aligns with the fundamental IHL protection in both IACs and NIACs against starving civilians.¹³⁵ The pursuit of any of these tactics cannot insulate any individual from a finding that they intended to starve civilians as a method of warfare and therefore from individual responsibility for starvation pursuant to Article 8.
111. In particular, ICL recognises that crimes do not occur in a vacuum and that alleged perpetrators may often harbour an intent to pursue a range of objectives simultaneously, some criminal and some lawful. By way of example, the blockade in Yemen was established in response to the launch of a ballistic missile towards Riyadh in November 2017, with the aim of halting the smuggling of weapons,¹³⁶ which constitutes a legitimate military purpose. Notwithstanding that, the total blockade appears to have violated a number of fundamental IHL rules on the obstruction of humanitarian aid to populations deemed in need.¹³⁷ The UNSC Panel of Experts in their 2018 report found that the blockade was ‘essentially using the threat of starvation as a bargaining tool and an instrument of war.’¹³⁸
112. As a matter of general ICL definition and practice, this is true across a range of crimes, including those with equally or more demanding intent requirements, such as pillage,¹³⁹ the crime of terror as developed at the ICTY,¹⁴⁰ persecution,¹⁴¹ torture,¹⁴² and genocide. As found on numerous occasions, the crime of genocide can be established even if the alleged perpetrator simultaneously possessed other criminal intents.¹⁴³ The existence of a personally held objective, unrelated to the crime, does not preclude the perpetrator from having even the specific intent to commit genocide.¹⁴⁴
113. In sum, in the circumstances where an alleged perpetrator pursues a lawful purpose but, in that pursuit, adopts criminal or non-criminal intent, this will not preclude a finding that the intent underlying Article 8(2)(b)(xxv) is established. It will not be a defence for any alleged perpetrator to assert that they intended to achieve another lawful purpose, even if that was the primary intent.
114. The challenge for any ICC Chamber in investigating and prosecuting an Article 8(2)(b)(xxv) case will be to discern whether the alleged perpetrator, whilst pursuing other lawful or unlawful purposes, such as attacking OIS used in supporting military action or in besieging areas primarily to starve out combatants to hasten their surrender, nonetheless also intended to starve the civilian population as a method of warfare. In the event that the evidence establishes this criminal intent, the concurrent existence of other purposes will not insulate an accused from a finding of criminal responsibility.
115. Notwithstanding that the process of disentangling these various purposes in order to ascertain an intent to starve is likely to be complex, these challenges are common across war crimes cases at the international and national level. As discussed above, any finding of intent will have to be the only reasonable conclusion available on the evidence.¹⁴⁵

F. Sieges and Blockades as Lawful Purposes

116. A detailed analysis of the law on sieges and blockades is outside the scope of this paper.¹⁴⁶ However, given the role that they have played in the starvation of civilians in modern day conflicts,¹⁴⁷ they will be briefly discussed below.
117. As a general proposition, and as outlined above in paragraphs 78, 86 and 110, sieges and blockades are considered to be lawful methods of warfare under IHL.¹⁴⁸ It has been debated whether sieges or blockades which do not involve the use of kinetic force will be bound by IHL rules,¹⁴⁹ but it is the authors' view¹⁵⁰ that, sieges and blockades will in most instances be bound by the IHL rules enshrined in the Additional Protocols. These oblige parties to respect:
- the principle of distinction between civilians and civilian objects on the one hand and military targets on the other;¹⁵¹
 - the principle of proportionality;¹⁵² and
 - the principle of precaution, which includes the obligation to give advance warnings to the population, unless circumstances do not permit.¹⁵³
118. In addition, there are other IHL rules applicable in the context of sieges and blockades that must be taken into account in any evaluation of the lawfulness of a siege or blockade and the intent of an alleged perpetrator in relation to starvation. These include: the obligation to evacuate civilians during sieges¹⁵⁴ and to ensure unimpeded humanitarian relief.¹⁵⁵

G. Approach to Inferring Intent in Sieges and Blockades and Other Purportedly Lawful Military Action

119. As a case in point, sieges or blockades that commence lawfully but in the course of which an intention to starve develops, will provide a significantly more challenging assessment to tribunals. As outlined above, there is a range of factors that will prove important indicators of the presence or absence of criminal intent. These include the risk and foreseeability of interference with OIS, respect for the full range of IHL prohibitions and principles and efforts made by alleged perpetrators to ameliorate civilian suffering, particularly through the facilitation of OIS to affected civilian populations.¹⁵⁶ These will prove useful criteria for any ICC Chamber, particularly when attempting to disentangle the unlawful intent that lies at the heart of the Article 8(2)(b)(xxv) offence from a range of other coexistent purposes.
120. In particular, when attempting to ascertain whether a particular individual possessed the relevant criminal intent a tribunal will be duty bound to consider the lawfulness of the overall purpose of the military attack. However, they will also be equally obliged to consider whether any lawful purpose was superseded by a subsequent intention to starve. An examination of these factors will provide useful indications that allow conclusions to be drawn concerning the on-going lawfulness or otherwise of any military attack and whether in the circumstances an intent to starve developed and can be proven.
121. Thus, for example, the principle of distinction, that prohibits making civilians the object of the besiegement,¹⁵⁷ will provide indications of the alleged perpetrator's approach to civilian targeting and welfare more generally. In light of the principle of distinction, military attacks, including sieges and blockades remain lawful only if they are directed at combatants and those directly participating in hostilities.¹⁵⁸

122. Likewise, attacks that begin lawfully but cause excessive damage to the civilian population, when viewed in relation to the military advantage anticipated, will violate the principle of proportionality.¹⁵⁹ When this damage concerns the ‘incidental starvation’ of civilians,¹⁶⁰ it will be highly relevant to any assessment of the warring party’s Article 8((2)(b)(xxv) intent.
123. This is especially true of the principle of precaution that places a duty on warring parties to avoid or, in any event, minimise the infliction of collateral damage occurring from military attacks,¹⁶¹ including the desirability of warnings to enable civilians to evade the worst effects of any military operation.¹⁶² This fundamental IHL precept will be viewed in a concrete way, including alongside a range of other IHL rules that lay out with some specificity what is expected of warring parties in relation to ensuring the passage of humanitarian relief.
124. As is well known, warring parties have a clear obligation to allow humanitarian access.¹⁶³ Warring parties must allow the rapid and unimpeded passage of relief when the population is inadequately supplied.¹⁶⁴ Aside from these obligations, it is logical to presume that those who do not intend starvation would show good faith attempts to abide by these strictures to ensure that civilians obtained OIS and were not starved. In this regard, it must be noted that there are only limited circumstances where it is lawful to impede aid before it becomes arbitrary and unlawful under IHL.
125. In sum, they fit into one of the following three categories:
- (iii) Where the relief supplies are not humanitarian in nature¹⁶⁵ or do not emanate from an organisation being impartial and humanitarian in character;¹⁶⁶
 - (iv) Where supplies are impeded on the basis of reasonable military necessity (i.e. where the relief personnel may hamper military operations or is suspected of engaging in a behaviour in favour of the other Party¹⁶⁷ or if the consignments may be diverted from their destination);¹⁶⁸ and
 - (v) Where imposing technical arrangements for the passage of humanitarian relief,¹⁶⁹ including searches of the relief consignments of convoys transporting them,¹⁷⁰ the imposition of the condition to provide delivery under the local supervision of the Protecting Power,¹⁷¹ or the temporary limitation of movements of relief personnel.¹⁷² The diversion of relief consignments from the purpose for which they are intended or the delay of their forwarding is only allowed in cases of urgent necessity in the interests of the civilian population concerned.¹⁷³
126. Of course, each course of impeding will have to be assessed on its own merits, taking into consideration the various justifications advanced by the warring parties and the entirety of the evidence concerning the range of IHL rules and the overall treatment of civilians. However, any failure to abide by these narrow exceptions may be probative of the required intent.
127. As is obvious from the foregoing, blanket assertions of the lawfulness of sieges,¹⁷⁴ ignoring the adverse impact to besieged civilians, will not shield a commander from criminal responsibility. On the contrary and as mentioned above, whilst a siege may begin as lawful, conduct associated with it may move it along the spectrum and into violations of IHL that including the prohibition of starvation and fulfil the requirements of the crime.

IV. NEXT STEPS

128. An international criminal prosecution for the crime of starvation, whilst long overdue, is not the panacea. We must look at the full suite of tools (legal or advocacy-based) available, including domestic prosecutions, universal jurisdiction claims, claims before relevant UN Treaty Bodies, international human rights law (IHRL) litigation,¹⁷⁵ investigative bodies and transitional justice tools. There are a variety of alternative accountability options that can and should be harnessed now.¹⁷⁶
129. Commissions of inquiry (COI), fact-finding missions and UNSC Panels of Experts play a vital role in the investigation and accountability for starvation crimes. Exemplary COI reports, such as the COI in the Democratic People's Republic of Korea (DPRK),¹⁷⁷ progressively analysed the crime of starvation and there is an increasing trend in which starvation is included in investigations and findings. The African Commission on Human Rights has also considered starvation in the IHRL context.¹⁷⁸
130. More attention is still needed on starvation within the mandates of these accountability bodies and emerging courts and tribunals, ensuring that the harm caused by starvation is taken seriously, not neutered as mere malnutrition, and not neglected in favour of more traditional atrocity crimes.¹⁷⁹
131. In addition, transitional justice provides a number of measures, including truth commissions and reparations mechanisms, that are both more accessible than a prosecution and capable of serving a wider range of purposes.
132. Truth-telling begins with recognising that a crime has been committed, and naming the crime, its victims and its perpetrators.¹⁸⁰ Memorialisation can be an extension of this.¹⁸¹ Restitution and compensation from those who inflicted the harm is another important signal for those who have suffered grievous wrongs. Guarantees of non-recurrence are also a fundamental tool which can take different shapes, some of these can be technical (such as better national response systems), quasi-technical (such as national commissions of inquiry into what happened), or political (voting the culprits out of office or sufficiently shaming them that they never contemplate such crimes again). When starvation is perpetrated by leaders who cannot be held to account, international pressure is an effective and essential mechanism. To this end, and as noted in UNSC 2417, utilising the various sanctions regimes could also be an effective and more easily attainable tool for states.
133. One particularly salient example of how UNSC 2417 could be implemented through the lens of transitional justice is via the Constitutive Act of the African Union,¹⁸² this provides for '[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly [of Heads of State and Government] in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.' Given that UNSC 2417 explicitly reaffirms that starvation can be a war crime, the AU is obliged to consider its responsibilities accordingly. Adopting this approach would be an exemplary case of shaming a perpetrator in an international forum and creating pressure for non-recurrence.
134. Whilst we have analysed the mechanics of the offence of starvation and the practical realities of any criminal prosecution using that offence, we recognise that this is unlikely to be an immediate solution to the accountability, not least because of its current inability to govern conduct in a NIAC. However, there are a range of ways in which the law could be clarified and/or accountability strengthened. We make four key recommendations in this regard:
 - (i) Multilateral support for the proposed Rome Statute amendment to the war crime of starvation;
 - (ii) Coherent labelling and identification of violations, starvation, and associated conduct causing or exacerbating mass starvation;

- (iii) Utilise and engage with the full suite of existing accountability mechanisms and investigative bodies on the issue of starvation ensuring that it remains a prominent feature in their reporting, publicly and privately; and
- (iv) Developing the UNSC's reporting role through UNSC 2417 and associated thematic and country-specific resolutions. By filing collective and consistent reports through all available platforms and mechanisms within the UN apparatus, including mirroring such reporting to the relevant bodies before the European Union, African Union (such as the Peace and Security Council) and other fora, will foster an inclusive and global consensus.

V. CONCLUSION

135. Our collective determination should be to render mass starvation morally toxic.¹⁸³ We must aim to increase the likelihood that global leaders in a position to inflict or fail to prevent mass starvation, act to avoid it. One of the vital steps must be to encourage accountability including prosecutions to label the criminal conduct appropriately and to ensure effective penal sanctions are imposed. It is only when starvation enters the legal zeitgeist in the way that sexual violence and gender-based crimes (mercifully) now have, will prosecutions produce a more singular definition of the crime. Moreover, it will elevate the public and political profile of the crime, making this conduct so morally reprehensible that its usage decreases. There are challenges with any trial, especially those that seek to describe joint action and criminal purposes that span hundreds of kilometres and the actions of hundreds if not thousands of combatants and civilians. However, as discussed above, these challenges are typical of those that have been confronted throughout the modern era of ICL. Starvation based upon a single act or as a series of acts designed to deprive the civilian population of OIS does not appear to be unique in that sense and does not present insuperable challenges.

ENDNOTES

1 Global Rights Compliance jointly with the World Peace Foundation lead a project entitled Mass Starvation: Testing the Limits of the Law, supported by the Netherlands Ministry of Foreign Affairs, see www.starvationaccountability.org for more details. The project is aimed at support of SC Res. 2417 (2018), which stresses that the fight against impunity, including for starvation, can be strengthened through the work on and prosecution of genocide, crimes against humanity, war crimes and other egregious crimes in national and international criminal justice systems, ad hoc and mixed tribunals as well as specialised chambers in national tribunals. Launching in May will be a compendium of expert policy papers entitled 'Accountability for Mass Starvation: Testing the Limits of the Law' (GRC-WPF Starvation Compendium) these will foreshadow the publication of the forthcoming starvation textbook, the first authoritative assessment of starvation for practitioners in international law, policy makers and related humanitarian actors. The Compendium and forthcoming book will focus on exploring the challenges and opportunities for prosecuting starvation.

2 B. Sadliwala, 'Fleeing Mass Starvation: What we (don't) know about the famine-migration nexus,' *Disasters*, forthcoming; Maharatna, A. 'Food Scarcity and Migration: An Overview.' *Social Research*. 81 (2014), pp. 277-298.

3 N. M. Zagre and G. Quince, 'Child hunger and its long-term effects,' UNICEF connect, 24 September 2014, available at: <https://blogs.unicef.org/blog/child-hunger-and-its-long-term-effects/> (last visited 20 March 2019); C. Zimmer, 'The Famine Ended 70 Years Ago, but Dutch Genes Still Bear Scars,' *New York Times*, 31 January 2018, available at: <https://www.nytimes.com/2018/01/31/science/dutch-famine-genes.html> (last visited 2 May 2019) on intergenerational harms suffered by the Dutch people during their 'hongerwinter' causing a famine in German Occupied Netherlands. P. E. Kamper, 'Independent and additive association of prenatal famine exposure and intermediary life conditions with adult mortality between age 18–63 years,' *119 Social Science and Medicine* (2014), at 232-239.

4 European Parliament, The social and economic consequences of malnutrition in ACP countries, Background Document, available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/acp/dv/background/_background_en.pdf (last visited 20 March 2019), World Food Programme, New Study Reveals Huge Impact of Hunger On Economy Of Malawi, 13 May 2015, available at: <https://www.wfp.org/news/news-release/new-study-reveals-huge-impact-hunger-economy-malawi-0> (last visited 20 March 2019). See also World Bank, Famine Action Mechanism, available at: <http://www.worldbank.org/en/programs/famine-early-action-mechanism> (last visited 2 May 2019).

5 *Supra*, note 1. Supported by the Netherlands Ministry of Foreign Affairs, see www.starvationaccountability.org for more details.

6 Art. 54(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I) and Art. 14 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (AP II).

7 Rule 53, ICRC Customary IHL Database, 2005, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul (last visited 2 May 2019). The first criminalisation of the crime of starvation at the international level was recognised in the 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was a commission established at the Paris Peace Conference, which listed 'deliberate starvation of civilians' as a violation of the laws and customs of war subject to criminal prosecution. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 29 March 1919, reprinted in 14(1/2) *American Journal of International Law* (1920), at 144.

8 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/ColSyria/PolicyPaperSieges_29May2018.pdf (last visited 2 May 2019); *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, UN Doc A/HRC/39/43, 17 August 2018, §§ 46-64; *Report of the Commission on South Sudan*, UN Doc A/HRC/37/71, 13 March 2018, § 25.

9 Global Rights Compliance and the World Peace Foundation appointed country experts on South Sudan, Syria and Yemen in order to analyse the use of starvation as a method of warfare in these countries. The results will be published on our website www.starvationaccountability.org, followed by other countries analysis on the use of starvation in Ethiopia, Cambodia and in the Former Yugoslavia. In those studies, the authors of the Policy Papers, consider starvation as a method of warfare that includes the destruction of houses and small businesses; forced displacements of civilian populations; comprehensive looting of civilian property, especially livestock, and repeated violent attacks against humanitarian aid workers and health, water and sanitation facilities; 'kneel or starve' policies in Syria; blockade tactics against civilians and civilian objects, the impeding of access to the cultivation of crops or to fisheries, and the creation of economic conditions that prevent the purchase food or fuel (e.g., the impacts of hyperinflation and the failure to provide salaries).

10 The legal paper has been drafted by Wayne Jordash QC, Catriona Murdoch, Margherita Stevoli, Joe Holmes and Anna Mykytenko. Wayne Jordash QC is an internationally recognised expert in the global network of international tribunals and courts and international humanitarian law (IHL) and the managing partner of Global Rights Compliance. He is ranked as a leading silk in both the Legal 500 and Chambers and Partners, where he was recommended as 'one of the world's leading international criminal lawyers'. Catriona Murdoch leads the 'Accountability for Mass Starvation: Testing the Limits of the Law' project and is an international criminal and human rights law expert. Called to the Bar of England and Wales she is ranked as a leading junior in both the Legal 500 and Chambers and Partners where she was recommended as 'star of the future'. Margherita Stevoli is an IHL specialist and wrote her LLM Thesis at the Geneva Academy of International Humanitarian Law and Human Rights on UNSC Resolution 2417, and the link between conflict and hunger. Margherita has worked extensively with victims of torture, sexual and gender-based violence and human trafficking. Joe Holmes is an international criminal law specialist, recognised as a tier 1 leading practitioner in that field by the Legal 500. He has acted in cases before the ICC as well as the ad hoc international tribunals for Sierra Leone, Rwanda and the former Yugoslavia. Joe is a dual qualified lawyer both in New York and as a barrister in the UK. Anna Mykytenko is a Ukrainian lawyer specialising in international humanitarian, criminal and human

rights law. Prior to joining GRC, she worked at the United Nations International Residual Mechanism for Criminal Tribunals.

11 [Alex de Waal](#) is the Executive Director of the World Peace Foundation (WPF) and a Research Professor at The Fletcher School of Law and Diplomacy. Considered one of the foremost experts on Sudan and the Horn of Africa, his scholarship and practice on humanitarian crisis, famine and starvation is unparalleled. He was a member of the African Union mediation team for Darfur (2005-2006) and senior adviser to the African Union High-Level Implementation Panel for Sudan (2009-2012) and on the list of Foreign Policy's 100 most influential public intellectuals in 2008. [Bridget Conley](#) is Assistant Professor of Research at the Fletcher School and Research Director at the WPF. Her specialisations include mass atrocities, genocide, museums, and memorialization. Before joining the WPF, she served as research director for the U.S. Holocaust Memorial Museum's Committee on Conscience, where she helped establish the Museum's programme on contemporary genocide.

12 See, [GRC's Basic Investigative Standard's App](#), a unique tool for private actors, investigators and journalists. The BIS App aims at enabling investigators, journalists and prosecutors to collect, protect and preserve the integrity of information and documentation gathered on crime scenes in order to enhance accountability. The App will be available for free download in May, with a Starvation BIS Manual and forthcoming App currently under development.

13 It appears only nine national jurisdictions criminalising starvation in both an IAC and a NIAC, namely Art. 91 Criminal Code, Croatia (2011), available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2011_11_125_2498.html (last visited 17 May 2019); Art. 5(5)(l) International Crimes Act, Netherlands (2003, amended 2018), available at: https://iccdb.hrlc.net/documents/implementations/pdf/Netherlands_ICC_Implementation_Act_2002.pdf (last visited 17 May 2019); Art. 13 Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court, Republic of Korea (2007), available at: <https://cjad.nottingham.ac.uk/en/legislation/206/> (last visited 17 May 2019); Sec. 11(1)(5) Law Introducing the International Crimes Code, Germany (2002), available at: <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (last visited 17 May 2019); Arts 461-1 and 461-25 Criminal Code, France (November 2017 version), available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719> (last visited 17 May 2019); Art. 463 Draft Penal Code, Nicaragua (1999); Article entitled 'Omission y obstaculización de medidas de socorro y asistencia humanitaria' Draft Amendments to the Penal Code, El Salvador (1998), Nicaragua and El Salvador taken from J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I (ICRC, 2005). Note that Criminal Code of the Socialist Federal Republic of Yugoslavia 1977, in operation during the conflict in the former Yugoslavia (and discussed by the ICTY, see Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, § 2145) also listed starvation as a war crime capable of commission in both a NIAC and an IAC. Given the use of starvation tactics during that conflict this prescient piece of 1977 legislation underscores the longstanding nature of the prohibition across both conflict designations. There are approximately 22 countries which reference starvation or willfully impeding humanitarian access in their criminal legislation but do not specify whether the conduct is criminalised in a NIAC or an IAC. Approximately 8 countries follow the ICC and feature the crime only in an IAC (Australia, Georgia, Iraq, Mali, New Zealand, Slovenia, Trinidad and Tobago, and The United Kingdom).

14 Art. 54(1) AP I, Art. 14 AP II.

15 Rule 53 ICRC Customary IHL Database.

16 See *supra* note 6.

17 K. Dörmann, L. Doswald-Beck, and R. Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2003), online publication, 2009, available at http://www.mpil.de/files/pdf3/mpunyb_doermann_7.pdf (last visited 19 May 2019); see also O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., C.H. Beck, Hart, Nomos, 2016) at 510; W. A. Schabas, *An Introduction to the International Criminal Court* (5th edn., Cambridge University Press, 2017) at 285.

18 *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*, ICC-ASP/17/35, 20 September 2018, § 11, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-35-ENG.pdf (last visited 2 May 2019).

19 *Ibid.*

20 The proposal in its current form does not include reference to the Geneva Conventions as it does under Article 8(2)(b)(xxv) ICCSt., given that, save for Common Article 3 to the Geneva Conventions, these are not applicable in a NIAC.

21 For an expanded note on the benefits of the proposed amendment to the Rome Statute see www.starvationaccountability.org. The website will release three reasons to support the amendment sequentially in May, June and the beginning of July to mirror the dates when the UN Working Group on Amendments will meet to discuss the proposed amendment. Thereafter, and until the ASP meeting in December it will continue to feature articles and interviews linked to the proposed amendment.

22 SC Res. 1265 (1999) was the UNSC's first thematic resolution on the protection of civilians in armed conflict, condemning the targeting of civilians, calling for respect for IHL, refugee law and IHRL and expressing willingness to take measures to ensure compliance amongst other commitments to better address the impact of conflict on civilians. The UNSC has progressively identified the protection of civilians in armed conflict as being a core part of this mandate in a number of UNSC Resolutions, available at: <https://poc-aide-memoire.unocha.org/about> (last visited 19 May 2019). In SC Res. 2417 (2018) § 13, the UNSC requested the Secretary General 'to brief the Security Council every 12 months on the implementation of this resolution within his annual briefing on the protection of civilians', inserting the issue of conflict and hunger in the Protection of Civilians agenda.

23 Arts 48 and 52(1) AP I, Rules 1 and 7 ICRC Customary IHL Database.

24 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, § 119.

25 Art. 5(5)(l) International Crimes Act, Netherlands (2003, amended 2018), available at: https://iccdb.hrlc.net/documents/implementations/pdf/Netherlands_ICC_Implementation_Act_2002.pdf (last visited 17 May 2019).

26 Whilst an amendment of Article 8(2)(b)(xxv) would offer a useful avenue for prosecuting future starvation crimes, due to the principle of non-retroactivity, the amendment is unlikely to cover prosecutions of past starvation crimes at the ICC. The Rome Statute precludes criminal responsibility under the Rome Statute 'unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court', Art. 22 ICCSt.

27 Noting that whilst the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the ICTY did adjudicate upon starvation, it did so in the context of alternative crimes, starvation as such not being a crime on the statutes of the respective courts. Our research indicates that only two prosecutions of the modern era have pleaded starvation as a distinct crime, all at the national level: Verdict, *Public Prosecutor v. M.P. et al* (K. 74/96), District Court in Zadar, Croatia, 24 April 1997; and Federal High Court, Ethiopia File No. 1/87 *Special Prosecutor v. Col. Mengistu Hailamariam et al.* [2006].

28 Judgment, *Kvočka et al.* (IT-98-30/1-T), Trial Chamber, 2 November 2001, § 707.

29 P. Gwin, 'Revisiting the Rwandan Genocide: How Churches Became Death Traps', National Geographic, 2 April 2014, available at: <https://www.nationalgeographic.com/photography/proof/2014/04/02/revisiting-the-rwandan-genocide-how-churches-became-death-traps/> (last visited 6 May 2019).

30 Human Rights Watch, *Shocking War Crimes in Sierra Leone New Testimonies on Mutilation, Rape of Civilians*, 24 June 1999, available at: <https://www.hrw.org/news/1999/06/24/shocking-war-crimes-sierra-leone> (last visited 6 May 2019).

31 Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 7; *Situation of human rights in Yemen, including violations and abuses since September 2014*, *supra* note 7.

32 How these pre-existing factors may play out, when calculating legally relevant causes, is discussed further below in 'Mapping of the Chain of Causation'.

33 Art. 8(2)(b)(xxv), Elements of Crimes.

34 Note that the phrase 'wilfully impeding relief supplies' is not included in the Elements of Crimes, reflecting a literal interpretation of the crime that suggests it is not an essential element of the crime, but illustrative of the ways in which the deprivation of OIS might be achieved.

35 See Art. 21 ICC St.

36 See Art. 8(b) ICC St.; Introduction, Art. 8, Elements of Crimes.

37 Reiterated in the Elements of Crimes which mandates that '[t]he elements for war crime shall be interpreted within the established framework of the international law of armed conflict', Elements of Crimes, at 13.

38 O. Triffterer and K. Ambos, *supra* note 16, § 766.

39 ICRC, *Commentary on the Additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) (hereinafter the 'ICRC Commentary to the APs'), § 2087. See also J.-M. Henckaerts and L. Doswald-Beck, *supra* note 12, Commentary on Rule 53.

40 K. Dörmann, L. Doswald-Beck, and R. Kolb, *supra* note 16, at 363. See also O. Triffterer and K. Ambos, *supra* note 16, § 769 at 512: 'the meaning of "starvation" is not necessarily restricted to a deprivation of food and water, but may also cover the deprivation of other essential things such as clothing, medical supplies or objects needed to harvest and process food.'

41 K. Dörmann, 'Preparatory Commission for the International Criminal Court: The Elements of War Crimes – Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts', 83(842) *International Review of the Red Cross* (2001) at 475-476 citing to O. Triffterer and K. Ambos, *supra* note 16, at 256. See also J. Lobel, 'Regarding the Threatened Destruction of Solar Panels in the Village of Imneizel that are Essential to the Survival of the Protected Civilian Population', 20 April 2012, at 9, available at: <https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl-expert-opinions/the-threatened-destruction-of-solar-panels-of-the-village-of-imneizel.pdf> (last visited 6 May 2019); C. Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press, 2009) at 164.

42 K. Dörmann, L. Doswald-Beck, and R. Kolb, *supra* note 16, at 363-364; K. Dörmann, *ibid.* at 475: '[d]elegations agreed that the deprivation of not only food and drink, but for example also medicine or in certain circumstances blankets, could be covered by this crime, if, in the latter case, such blankets were indispensable for survival owing to the very low temperature in a region. On the basis of this understanding, a footnote was inserted into an initial Rolling Text of the Working Group to underline that the intention to starve would also include the broader approach of deprivation of something necessary to live.'

43 Art. 54 AP I and Art. 14 AP II.

44 Art. 59 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (GC IV), which is considered to be part of CIL applicable also in NIACs (Rule 55, ICRC Customary IHL Database). See also Art. 23 GC IV which includes 'clothing and tonics intended

for children under fifteen, expectant mothers and maternity cases'

45 Art. 69 AP I.

46 O. Triffterer and K. Ambos, *supra* note 16, § 771 at 513. See also, M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn., Martinus Nijhoff Publishers, 2013) at 382; K. Dörmann, L. Doswald-Beck, and R. Kolb, *supra* note 16 at 363-364; SC Res. 2451 (2018), which links the respect for medical facilities to the protection of civilians from starvation linking them contextually to OIS, and see § 10, noting that the definition of OIS appears to have been slightly enlarged to include 'all those objects which are necessary for food distribution, processing and storage'. Consideration will be given in a follow up paper on Social Nutrition and Starvation by Susanne Jaspers on whether the ability to 'care for young children' to act as a caregiver could be construed as a OIS. In several contexts the majority of those who die are young children and the deprivation of the ability of mothers to care for them, including breastfeeding, will emerge as a crucial factor in the causes of mortality.

47 Art. 70(1) AP I, Art. 18(2) AP II; See also ICRC Commentary to the APs, § 2795.

48 Examples defined in Art. 54 AP I and Art. 14 AP II. See also ICRC Commentary to the APs, § 2795; K. Dörmann, L. Doswald-Beck, and R. Kolb, *supra* note 16, at 363-364.

49 ICRC Commentary to the APs, § 2101.

50 *Ibid.*, § 4800. O. Triffterer and K. Ambos, *supra* note 16, § 784 at 516.

51 O. Triffterer and K. Ambos, *supra* note 16, § 782 at 515: '[e]conomic sanctions or blockades that deprive civilians of objects indispensable to the survival of civilians could also be prohibited under article 8 para. 2 (b) (xxv) Rome Statute, insofar these measures take place in the context of and are associated with an armed conflict and insofar the requisite mental elements are present, except if one of the exceptions to the prohibition applies.' The obligation to allow humanitarian relief inside a blockaded area is provided under Arts 103 and 104 of L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995) (hereinafter the 'San Remo Manual'), whereas the obligation to allow humanitarian relief in besieged areas is considered to be part of customary IHL, see Rule 55 ICRC Customary IHL Database. United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, 2004 (hereinafter the 'UK Manual'), § 15.19.1, which states that the destruction of crops, foodstuffs and water sources, to such an extent that starvation is likely to follow, is also prohibited. The same applies to sieges, blockades, embargos, or the blocking of relief supplies with the intention of causing starvation. See also: Y. Dinstein, 'Siege warfare and the starvation of civilians', in A. J. M. Delissen and G. J. Taja (eds), *Humanitarian Law of armed conflict: Challenges ahead* (Martinus Nijhoff, 1991); B. Van Schaack, 'Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime', *Just Security*, 4 April 2016, available at: <https://www.justsecurity.org/29157/siege-warfare-starvation-civilians-war-crime/> (last visited 6 May 2019).

52 This reference is understood to include also the framework applicable to the distribution of relief supplies included in the APs (Arts 69 and 70 AP I and Art. 18 AP II). See Art. 1(3) AP I and Art. 1(1) AP II, which clarify that the Additional Protocols are intended to supplement the Geneva Conventions of 1949; O. Triffterer and K. Ambos, *supra* note 16, § 795.

53 See for example Judgment, *Galić* (IT-89-29-T), Trial Chamber, 5 December 2003, § 54, where the Court referred to the commentary to Art. 85 AP I in defining the concept of the term 'wilfully', acknowledging that 'the notion of 'wilfully' incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts 'wilfully'. See also § 54, where the Court finds that attacks 'were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness'. See also J. Loveless, *Complete Criminal Law: Text, Cases, and Materials* (5th edn., Oxford University Press, 2016) at 91-150; Recklessness, *The Canadian Criminal Law Notebook*, available at: <http://criminalnotebook.ca/index.php/Recklessness> (last visited 6 May 2019).

54 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba et al.* (ICC-01/05-01/08), Pre-Trial Chamber, 15 June 2009, § 369; Concurring Opinion of Judge Van den Wyngaert, *Ngudjolo* (ICC-01/04-02/06-271-Anx2), Appeals Chamber, 18 December 2012, § 15; Public Redacted Judgment on the appeal of Mr Thomas Lubanga Dylio against his conviction, *Lubanga* (ICC-01/04-01/06-3121-Red), Appeals Chamber, 1 December 2014, § 449, which departed from the position held in Judgment, *Delalić et al.* (IT-96-21-T), Trial Chamber, 16 November 1998, §§ 437 and 439 that the term 'wilful' can include both intentional and reckless conduct, finding that recklessness and negligence do not meet the intent and knowledge requirement of Art. 30 and concluding that Art. 30 excludes *dolus eventualis* or recklessness from the scope of the Rome Statute. See further, W. A. Schabas, *supra* note 16, at 222.

55 See, K. Dörmann, *supra* note 40, at 476.

56 W. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn., Cambridge University Press, 2009) at 214.

57 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 518.

58 *Ibid.*, § 498; Judgment, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 December 1999, § 47; Judgment, *Seromba* (ICTR-2001-66-I), Trial Chamber, 13 December 2006, §§ 319-320; Judgment, *Kambanda* (ICTR 97-23-S), Trial Chamber, 4 September 1998, § 16; Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, § 571; Judgment, *Blagojević and Jokić* (IT-02-60-T), Trial Chamber, 17 January 2005, § 656; Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 52.

59 On this question, starvation, like genocide, is a specific intent crime in the sense that the mental element exceeds any essential act required by the offence. Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 498; Judgment, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 Dec-

ember 1999, § 47; Judgment, *Seromba* (ICTR-2001-66-I), Trial Chamber, 13 December 2006, §§ 319-320; Judgment, *Kambanda* (ICTR 97-23-S), Trial Chamber, 4 September 1998, § 16; Judgment, *Krstić* (IT-98-33-T), Trial Judgement, 2 August 2001, § 571; Judgment, *Blagojević and Jokić* (IT-02-60-T), Trial Chamber, 17 January 2005, § 656; Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 52.

60 Art. 8(2)(b)(xxv), Elements of Crimes.

61 Other authoritative commentators have also likened starvation with incitement to genocide, denying quarter, displacing civilians and intentionally directing attacks against civilians not taking direct part in hostilities. These are all offences that do not require proof of result of the consequences intended. Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, 1999), at 141-142; O. Triffterer and K. Ambos, *supra* note 16, § 531 at 448, citing to Report of the Preparatory Committee on the Establishment of an International Criminal Court, GA Supplement No.22 (A/51/22), 1996, at 635, fn. 74.

62 O. Triffterer and K. Ambos, *supra* note 16, at. 634-635

63 The US had proposed to include the element '[t]hat as a result of the accused's acts, one or more persons died from starvation', see United States of America, *Proposal regarding an Annex on Definitional Element for Part 2 Crimes*, UN Doc A/CONF.183/C.1/L.10, 19 June 1998; *Proposal Submitted by the United States of America: Draft Elements of Crime*, UN Doc PCNICC/1999/DP.4/Add.2, 4 February 1999, § 18.

64 O. Triffterer and K. Ambos, *supra* note 16, § 790 at 571: '[t]he only material element required by the elements of crimes is that there is a deprivation of certain objects. This suggests that it is not required that people actually die of starvation, and it would not even seem necessary that people actually starve as a result of the deprivation of indispensable objects. It appears sufficient that civilians are deprived of objects indispensable to their survival, that is, a deprivation that would cause them in the future to starve, without requiring that the deprivation takes its effect over time' See also: S. Hutter, *Starvation as a Weapon – Domestic Policies of Deliberate Starvation as a Means to an End under International Law* (Brill-Nijhoff International Humanitarian Law Series, 2015) at 32; R. Provost, 'Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait', 30 *Columbia Journal of Transnational Law* (1992), 577-639.

65 Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, § 5669; Judgment, *Tolimir* (IT-05-88/2-T), Trial Chamber, 12 December 2012, §§ 772-773; Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, § 820; Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, § 55; A. Cassese and P. Gaeta (eds), *Cassese's International Criminal Law* (3rd edn., Oxford University Press, 2013) at 57-58; K. Ambos, 'Karadzic's Genocidal Intent as the 'Only Reasonable Inference'?', EJIL: Talk!, 1 April 2016, available at: <https://www.ejiltalk.org/karadzics-genocidal-intent-as-the-only-reasonable-inference/> (last visited 2 May 2019).

66 R. Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, 1944) at 14-16, 77, 86-87. Lemkin, when coining the term 'genocide' in 1944, included within its definition a range of ways in which starvation could fulfil the crime. Lemkin divided the techniques of genocide into eight fields within the field of physical debilitation and annihilation of national groups (political, social, cultural, economic, biological, physical, religious and moral), and specified two ways in which this objective could be achieved through food deprivation. First, 'racial discrimination in feeding' relating to the Nazi occupation guidelines; and, second, endangering health through overcrowding in the ghettos and transportation. This second category listed 'elemental necessities for preserving health and life' (e.g., warm clothing, blankets in winter, firewood, fuel and medicine and fresh air) akin to the language of 'objects indispensable to survival' which came later with the Rome Statute.

67 Art. 6, Elements of Crimes; R. S. Lee (ed.), *The International Criminal Court: elements of crimes and rules of procedure and evidence* (Transnational Publishers, 2001) at 47; W. Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations*, Minority Rights Group International, 2006, at 24, available at: <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-157-Preventing-Genocide-and-Mass-Killing-The-Challenge-for-the-United-Nations.pdf> (last visited 6 May 2019).

68 Judgment, *Kayishema and Ruzindana* (ICTR-95-I-T), Trial Chamber, 21 May 1999, §§ 96-97; Judgment, *Semanza* (ICTR-97-20-T), Trial Chamber, 15 May 2003, § 316; Judgment, *Bagilishema* (ICTR-95-1A-T), Trial Chamber, 7 June 2001, § 64.

69 *Ibid.* at 1112, noting that with respect to elements of culpability such as specific intent, consensus could not be achieved on their definition nor on their appropriateness for general application in the Rome Statute. It was decided to leave the incorporation of such mental states of culpability in specific definitions or modes of responsibility.

70 O. Triffterer and K. Ambos, *supra* note 16, at 1112, outlining that the Preparatory Committee felt that '[a] clear understanding of the general legal framework in which the court would operate was important for the Court, States Parties and the accused so as to provide guidance, predictability and certainty, and to promote consistent jurisprudence on fundamental questions, including the issue of moral culpability or mens rea'.

71 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 498; Judgment, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 December 1999, § 59; Judgment, *Seromba* (ICTR-2001-66-I), Trial Chamber, 13 December 2006, §§ 319-320; Judgment, *Kambanda* (ICTR 97-23-S), Trial Chamber, 4 September 1998, § 16; Judgment, *Krstić* (IT-98-33-T), Trial Judgement, 2 August 2001, § 571; Judgment, *Blagojević and Jokić* (IT-02-60-T), Trial Chamber, 17 January 2005, § 656; Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 52.

72 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 498.

73 For example, in relation to genocide, reports from the Ad Hoc Committees suggest that the delegates were open to the possibility that the specific genocidal intent might, for different categories of perpetrators, encompass a lower knowledge-based standard. C. Kreß, 'The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) at 694; A. K. A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', 99 *Columbia Law*

Review (1999) at 699 - 700, citing to the statements by the delegates of the Soviet Union, France, Greece, and the USA in UNGAOR, 3rd session, 6th Committee at 96, 97, 306, 307, and 310; O. Triffterer, 'Genocide, its particular intent to destroy in whole or in part the group as such', 14 *Leiden Journal of International Law* (2001), 399-408; K. Goldsmith, 'The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' 5(3) *Genocide Studies and Prevention: An International Journal* (2010); K. Ambos, 'What does 'intent to destroy' in genocide mean?' 91 (876) *International Review of the Red Cross* (2009).

74 C. Kreß, *ibid.*; A. K. A. Greenawalt, *ibid.* at 2288.

75 A. Cassese, *International Criminal Law* (2nd edn, Oxford University Press, 2008) at 137; P. Akhavan, 'The crime of genocide in the ICTR jurisprudence', 4 *Journal of International Criminal Justice*, vol. 3 (2005), 989-1006, at 992; D. Nsereko, 'Genocide: A crime against mankind', in: K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. I, (Kluwer, 2000) at 117, 124; D. Nersessian, 'The contours of genocidal intent', 37 *Texas International Law Journal* (2002), 231-276, at 265; Johan D. Van de Vyver, 'Prosecution and punishment of the crime of genocide', 23 *Fordham International Law Journal* (1999), 286-356, at 308; S. Kirsch, 'Two notions of genocide', 42 *Creighton Law Review* (2009), 347-360, at 352; F. Jessberger, 'The definition and the Elements of the Crime of Genocide' in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) at 105-108; S. Kim, *A Collective Theory of Genocidal Intent* (Springer, 2016) at 48.

76 Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, § 684; Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 498; Judgment, *Kambanda* (ICTR 97-23-S), Trial Chamber, 4 September 1998, § 16; F. Jessberger, *ibid.*; S. Kim, *ibid.*

77 See the example provided in paragraph 51, wherein a targeted population migrates to avoid starving to death and survives without casualty. Notwithstanding the absence of proof of death, all of the essential elements of starvation are established.

78 N. Melzer and G. Gaggioli, 'Methods of warfare', in D. Akande and B. Saul (eds), *Oxford Guide to International Humanitarian Law* (Oxford University Press, 2019 forthcoming), citing to ICRC Commentary to APs, § 4799.

79 ICRC Commentary to APs, §§ 1402 and 1957.

80 Art. 54(1) AP I, Art. 14 AP II.

81 Arts 38 and 39 AP I.

82 Art. 37 AP I.

83 Art. 40 AP I.

84 N. Melzer and G. Gaggioli, *supra* note 78, at 4.

85 *Ibid.*, citing to M. Sassòli, A. Bouvier and A. Quintin, *How Does Law Protect in War?* (ICRC, 2011) at 280.

86 N. Melzer and G. Gaggioli, *supra* note 78, at 4.

87 *Ibid.* (emphasis added).

88 Military operations such as resupply, transportation of troops and communications 'do not constitute methods of warfare unless they adversely affect the enemy's military operations or military capacity', see Humanitarian Policy and Conflict Research (eds), *Commentary to the Humanitarian Policy and Conflict Research Manual on International Law Applicable to Air and Missile Warfare* (Harvard University, 2010) at 35.

89 *Ibid.*, at 34. According to the ICRC Commentaries to the APs, §§ 1402 and 1957, the term 'methods of warfare' generally refers to the way in which weapons are used. This definition includes aerial and naval blockades and sieges. On the legality of sieges under IHL, see, ICRC Commentary to the APs, § 4796: 'the use of blockade and siege as methods of warfare remain legitimate, provided they are directed exclusively against combatants.' For the use of sieges as methods of warfare, see ICRC Commentary to the APs, § 2096, which recognises that the prohibition of the use of starvation as a method of warfare, applies in case of besiegement. See also: E. Rosenblad, 'Starvation as a Method of Warfare, Conditions for regulation by Convention' 7 *International Lawyer* (1973) at 252-270. For blockades as methods of warfare see ICRC Commentary to the APs, §§ 2092-2095 and San Remo Manual §§ 93-104.

90 See also P. J. Cameron, 'The limitations on Methods and Means of Warfare', 9 *Australian Yearbook of International Law* (1980) 247-261, which similarly defines them as 'all strategies and tactics and every other measure which, by the use of manpower and weapons systems, an armed force may employ'. Another interpretation is given in Humanitarian Policy and Conflict Research (eds), *supra* note 88, at 34, which defines them as 'attacks and other activities designed to adversely affect the enemy's military operations or military capacity'. This interpretation has been criticised since it does not include attacks against enemy civilians, see S. Casey-Maslen and S. Haines, *Hague Law Interpreted: The Conduct of Hostilities Under the Law of Armed Conflict* (Bloomsbury Publishing, 2018) at 54-55.

91 See, e. g., Art. 51 AP I.

92 O. Triffterer and K. Ambos, *supra* note 16, at 400, 403; K. Ambos, *supra* note 73, at 844-845.

93 Judgment, *Niyitegeka* (ICTR-96-14-A), Appeals Chamber, 9 July 2004, § 53; Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 49.

94 See the analysis in Section 'Testing the Limits of the Crime', below

95 Two judgments that concern starvation as a stand-alone crime are national judgments, see Verdict, *Public Prosecutor v. M.P. et al* (K. 74/96), District Court in Zadar, Croatia, 24 April 1997; and Federal High Court, Ethiopia File No. 1/87 *Special Prosecutor v. Col. Mengistu Hailamariam et al.* [2006]. The ECCC adjudicated upon starvation, it did so in the context of alternative crimes, see Judgment, *Khieu and Nuon* (002/19-09-2007-ECCC/SC), Supreme Court Chamber, 23 November 2016.

96 For a description of common purpose liability in domestic law, see Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, §§ 224-225. See for example: *R. v. Hyde* [1991] 1 QB 134; *R. v. Anderson*; *R. v. Morris* [1966] 2 QB 110; *McAuliffe v. R.* (1995) 183 CLR 108 at 114; § 25(2) Strafgesetzbuch, Germany; Art. 121-7 Code Pénal, France; Sec. 21(2) Criminal Code, Canada; Art. 22 Penal Code, Zambia.

97 Art. 25(3)(a) ICCSt.

98 The predecessor to the ICC's co-perpetration mode of liability was joint criminal enterprise (JCE), which at the ad hoc tribunals (ICTY, ICTR and SCSL) has been the favoured mode of responsibility enabling political and military leaders to be successfully prosecuted for crimes. There are three forms of JCE, the basic, the systemic and the extended. All three forms involve the following common elements: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (iii) the significant participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute. The three forms are distinguished as follows. The basic form requires proof that the defendant, a member of the JCE, shared the principal perpetrator's intention to commit the crime in question. The systemic (or concentration camp) form is characterised by the existence of an organised system set in place to achieve the common purpose. The defendant, a member of the JCE, will be held responsible for all crimes intended as part of the JCE and all crimes that were a natural and foreseeable consequence of the JCE. In the extended form, like the systemic form, the defendant may be responsible for all crimes that were a natural and foreseeable consequence of the common criminal purpose. See Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 196; Judgment, *Brđanin* (IT-99-36-A), Appeals Chamber, 3 April 2007, § 430; Judgment, *Kvočka* (IT-98-30/1-A), 28 February 2005, § 83, 86.

99 Decision on the confirmation of charges, *Lubanga* (ICC-01/04-01/06-803-tEN), Pre-Trial Chamber, 7 February 2007, §§ 343, 346; Judgment on the Appeal of Thomas Lubanga Dyilo against his Conviction, *Lubanga* (ICC-01/04-01/06-3122), Appeals Chamber, 1 December 2014, § 445; Decision on the Confirmation of Charges against Ahmad Al Faqi Al Mahdi, *Al Mahdi* (ICC-01/12-01/15-84-Red), Pre-Trial Chamber, 24 March 2016, § 24; Decision on the Confirmation of Charges, Abu Garba (ICC-02/05-02/09-243-Red), Pre-Trial Chamber, 8 February 2010, § 160; Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba et al.* (ICC-01/05-01/08), Pre-Trial Chamber, 15 June 2009, § 350; Decision on the Confirmation of Charges, *Banda* (ICC-02/05-03/09-121-Corr-Red), Pre-Trial Chamber, 13 March 2011, § 128; Judgment pursuant to Article 74, *Bemba et al.* (ICC-01/05-01/13-1989-Red), Trial Chamber, 19 October 2016, § 64.

100 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Ruto and Sang (ICC-01/09-01/11-373), Pre-Trial Chamber, 23 January 2012, § 292; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Muthaura* (ICC-01/09-02/11), Pre-Trial Chamber, 23 January 2012, § 297; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *Ntaganda* (ICC-01/04-02/06), Pre-Trial Chamber, 9 June 2014, §§ 104-135. In brief, indirect co-perpetration exists when: (i) an accused was part of a common plan or an agreement with one or more persons; (ii) he and other co-perpetrator(s) carried out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime; (iii) an accused had control over the organisation; (iv) the organisation consisted of an organised and hierarchical apparatus of power; (v) the execution of the crimes was secured by almost automatic compliance with the orders issued by the suspect; (vi) the accused satisfied the subjective elements of the crimes; (vii) the accused and 'the other co-perpetrators were mutually aware and accepted that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (viii) the accused was aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person. For further analysis on this mode of liability see forthcoming JICJ article and Starvation Textbook.

101 See Art. 25(3)(c) ICCSt., which states that a person shall be liable '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'. The ICC requires the provision of assistance to the main perpetrator by an aider and abettor with the purpose of facilitating the commission of the crime, as opposed to sharing the intent of the perpetrator. The purpose requirement means that the aider and abettor must have lent his or her assistance with the aim of facilitating the offence, which exceeds the mere awareness that his or her conduct will assist the principal perpetrator in the commission of the offence. See example: Decision on the confirmation of charges, *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber, 16 December 2011, § 281.

102 Also known as the 'thin skull' rule. *Dulieu v. White & Son* [1901] EWHC KB 1, § 12; *Page v Smith* All ER 736, [1995] UKHL 7; British Military Court, Elten, Germany, *Trial of Hans Renoth and Three Others*, Case No. 68, 8-10 January 1946, at 76; *Alcock and others v. Chief Constable of South Yorkshire Police* [1992] 1AC 310; *Bourhill v. Young* [1943] A.C. 92 (HL), 110; Judgment, *Samphan and Chea* (002/19-09-2007-ECCC/SC), Supreme Court Chamber, 23 November 2016, § 534.

103 Judgment, *Čelebići* (IT-96-21-T), Trial Chamber, 16 November 1998, § 909: '[i]t is a well-recognised legal principle that a wrongdoer must take the victim as he finds him. Thus, if a perpetrator by his acts shortens the life of his victim, it is legally irrelevant that the victim may have died shortly thereafter from another cause. To establish criminal liability in situations where there are pre-existing physical conditions which would cause the victim's death, therefore, it is only necessary to establish that the accused's conduct contributed to the death of the victim.'

104 Judgment, *Khieu and Nuon* (002/19-09-2007-ECCC/SC), Supreme Court Chamber, 23 November 2016, §§ 529-535. The defence raised on appeal that the multiplicity of plausible causes of death broke the chain of causation, excluding the accused from criminal responsibility for those who starved to death. This argument was rejected as 'inapt' in breaking the lack of a causal link between the conditions of the evacuation and the death

of the victims. The Appeals Chamber held that it is irrelevant whether the victims might have died for other reasons, or that the conditions generally in the area were dire. The civilians had died because of the conditions to which they were exposed during the evacuation.

105 *Ibid.*; Judgment, Čelebići (IT-96-21-T), Trial Chamber, 16 November 1998, § 823; British Military Court, Elten, Germany, *Trial of Hans Renoth and Three Others*, Case No. 68, 8-10 January 1946, at 76.

106 Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, § 823, citing to Judgment, *Gacumbitsi* (ICTR-2001-64-A), Appeals Chamber, 7 July 2006, § 40; Judgment, *Kayishema et al.* (ICTR-95-1-A), Appeals Chamber, 1 June 2001, § 159; Judgment, *Rutaganda* (ICTR-96-3-A), 26 May 2003, § 525; Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 47; Judgment, *Muhimana* (ICTR-95-1B-A), Appeals Chamber, 21 May 2007, § 31; Judgment, *Semanza* (ICTR-97-20-A), Appeals Chamber, 20 May 2005, § 262; Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, § 20; Judgment, *Blagojević and Jokić* (IT-02-60-A), Appeals Chamber, 9 May 2007, § 123.

107 Public Redacted Judgment on the appeal of Mr Thomas Lubanga Dyllo against his conviction, *Lubanga* (ICC-01/04-01/06 A 5), Appeals Chamber, 1 December 2014, § 447: 'absolute certainty about a future occurrence can never exist; therefore the Appeals Chamber considers that the standard for the foreseeability of events if virtual certainty'; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba et al.* (ICC-01/05-01/08), Pre-Trial Chamber, 15 June 2009, § 362. Nevertheless, the words 'will occur' read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as 'virtual certainty' or 'practical certainty', namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence'. See discussion on the legal basis for this standard, section 'Can intent to starve be established on the basis of knowledge of virtual certainty or does it require, more narrowly, proof of a concrete desire to achieve the outcome of starving someone?'; above.

108 Putting aside the jurisdictional question (that currently only allows the crime of starvation under Art.8(2)(b)(xxv) ICCSt. to be prosecuted at the ICC if it arises in a IAC) and that States where starvation is happening are not parties to the ICC.

109 Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', *Bemba et al.* (ICC-01/05-01/13 A A2 A3 A4 A5), Appeals Chamber, 8 March 2018, § 868: '[w]here a factual finding is based on an inference drawn from circumstantial evidence, the finding is only established beyond reasonable doubt if it was the only reasonable conclusion that could be drawn from the evidence. It is indeed well established that it is not sufficient that a conclusion reached by a trial chamber is merely a reasonable conclusion available from that evidence; the conclusion pointing to the guilt of the accused must be the only reasonable conclusion available. If there is another conclusion reasonably open from the evidence, and which is consistent with the innocence of the accused, he or she must be acquitted.' Public Redacted Judgment on the appeal of Mr Thomas Lubanga Dyllo against his conviction, *Lubanga* (ICC-01/04-01/06-3121-Red), Appeals Chamber, 1 December 2014, § 447; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba et al.* (ICC-01/05-01/08), Pre-Trial Chamber, 15 June 2009, § 362; Judgment pursuant to Article 74 of the Statute, *Bemba et al.* (ICC-01/05-01/08-3343), Trial Chamber, 21 March 2016, § 192; Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, § 970.

110 See Art. 51(2) AP I, Art. 13(2) AP II; Rule 2 ICRC Customary IHL Database for the prohibition against acts or threats of violence with the primary purpose of terrorising the civilian population, which prohibits acts such as indiscriminate and widespread shelling, and the regular bombardment of cities.

111 See Art. 75 AP I; Art 4 AP II; Rule 103 ICRC Customary IHL Database for the prohibition against collective punishment, which prohibits the imposition of collective penalties such as sanctions and harassment of any sort, administrative, by police action or otherwise, except on the basis of individual criminal responsibility.

112 See Art. 51(5) AP I; Rule 97 ICRC Customary IHL Database, Art. 8(2)(b)(xxiii) ICCSt. for the prohibition on the use of human shields, which prohibits its utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

113 See Art. 49 GC IV, Art. 17 AP II; Rule 129 ICRC Customary IHL Database for the prohibition against displacement, which prohibits the deportation or transfer of civilians unless the security of the civilians involved or imperative military reasons so demand.

114 See the authors' three country case studies. The authors commissioned Syrian experts from Damaan Humanitarian Organisation to prepare a case study on starvation tactics in Syria. The authors and Damaan produced the final product. The strategy of 'kneel / surrender or Starve' was initially used in Homs and shortly thereafter was deployed across Syria, where the warning to 'kneel / surrender or starve' appeared on the walls in the areas where the Assad regime established his check-points around the areas outside his control. Amnesty International, 'Syria: Surrender or starve strategy displacing thousands of amounts to crimes against humanity', 13 November 2017, available at: <https://www.amnesty.org/en/latest/news/2017/11/syria-surrender-or-starve-strategy-displacing-thousands-amounts-to-crimes-against-humanity/> (last visited 19 May 2019).

115 See for example the prohibition against acts or threats of violence, the primary purpose of which is to spread terror among the civilian population. The *mens rea* of this crime is composed of the specific intent to spread terror among the civilian population, however, the purpose of the unlawful acts or threats to commit such unlawful acts needs not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration. Judgment, *Galić* (IT-89-29-A), Appeals Chamber, 30 November 2006, § 104; Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, §§ 424, 1774.

116 Attacks during ceasefires and truces or long-term and persistent attacks against civilians, as well as indiscriminate attacks, may be taken as indi-

cia of the intent to spread terror. The specific intent may also be inferred from the site of the attack. Judgment, *Milošević* (IT-98-29/1-T), Trial Chamber, 12 December 2007, § 881.

117 See Judgment, *Mladić* (IT-09-92-T), Trial Chamber, 22 November 2017, §§ 3514, 3515, 3519, 3524, where the intent to destroy by the physical perpetrators was inferred from the intensity of the prohibited acts, their widespread and discriminatory nature, and the fact that many were perpetrated by the same individuals or units.

118 Indications of genocidal intent are rarely overt, and thus intent must often be inferred on the basis of the totality of the evidence, taking into account such factors as the scale of atrocities and the systematic targeting of victims on account of their membership in a particular group, Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, § 5825. See also the Elements of Crimes, which add a 'contextual element' to the *actus reus*, requiring that the conduct for which the defendant is on trial takes place in the context of 'a manifest pattern of similar conduct'. See Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber, 4 March 2009, § 119 vs. Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber, 4 March 2009, § 19, fn. 26.

119 Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 47; Judgment, *Nyiramasuhoko et al.* (ICTR-98-42-T), Trial Chamber, 24 June 2011, § 5732.

120 *Ibid.*

121 Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, §§ 1314-1318, 1399; Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, §§ 47 and 494; Judgment, *Karadžić* (IT-95-5/18-AR98bis.1), Appeals Chamber, 11 July 2013, § 80; Judgment, *Tolimir* (IT-05-88/2-A), Appeals Chamber, 8 April 2015, § 246.

122 Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, § 983; Judgment, *Ndindabahizi* (ICTR-2001-71-I), Trial Chamber, 15 July 2004, § 460.

123 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, §§ 523, 730; Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, § 549.

124 Judgment, *Nyiramasuhoko et al.* (ICTR-98-42-T), Trial Chamber, 24 June 2011, § 6012.

125 Art. 54 AP I, Art. 14 AP II and Rule 53 ICRC Customary IHL Database.

126 Art. 8(2)(b) ICCSt.

127 Art. 54(3)(a) AP I (emphasis added).

128 *Ibid.*

129 *Ibid.*

130 Art. 54 (5) AP I.

131 See Art. 54(5) AP I, which speaks to territory under the own control of the Party. The ICRC Customary IHL Database states that "It is doubtful, however, whether the exception of scorched earth policy applies to non-international armed conflicts because Article 14 of Additional Protocol II does not contain it."

132 For sieges: on the purpose requirement see Rule 53 ICRC Customary IHL Database: 'the prohibition of starvation as a method of warfare does not prohibit siege warfare as long as the purpose is to achieve a military objective and not to starve a civilian population.' See also Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 7, which 'in order to alleviate the suffering of the civilian population who remain in besieged areas in the Syrian Arab Republic' called for compliance 'with international humanitarian law and Security Council resolution 2[41]7 (2018), which denounces the starvation of civilians as a method of warfare and the unlawful denial of humanitarian access to those in need'. For blockades: see San Remo Manual, § 102(a): '[t]he declaration or establishment of a blockade is prohibited if: it has the sole purpose of starving the civilian population or denying it other objects essential for its survival'.

133 Art. 54 AP I, Art. 14 AP II and Rule 53 ICRC Customary IHL Database.

134 Rule 1 ICRC Customary IHL Database.

135 Art. 54 AP I, Art. 14 AP II and Rule 53 ICRC Customary IHL Database.

136 BBC, 'Yemen crisis: Why is there a war?'; 21 March 2019, available at: <https://www.bbc.com/news/world-middle-east-29319423> (last visited 19 May 2019).

137 The obligation to allow humanitarian relief inside a blockaded area is provided under §§103 and 104 of the San Remo Manual, whereas the obligation to allow humanitarian relief in other areas, including besieged ones, is considered to be part of customary IHL, see Rule 55 ICRC Customary

IHL Database.

138 *Final report of the Panel of Experts on Yemen*, UN Doc. S/2018/68, 26 January 2018, at 53, fn. 194.

139 Pillage requires a particular mental element that consists of a general knowledge that the appropriation was without the consent of the owner and a specific intent 'to deprive the owner of the property and to appropriate it for private or personal use', see Judgment pursuant to article 74 of the Statute, *Katanga* (ICC-01/04-01/07-3436-tENG), Trial Chamber, 7 March 2014, §§ 913-914; Judgment pursuant to Article 74, *Bemba et al.* (ICC-01/05-01/13-1989-Red), Trial Chamber, 19 October 2016, §§ 319-320; Decision on the Confirmation of Charges, *Banda* (ICC-02/05-03/09-121-Corr-Red), Pre-Trial Chamber, 13 March 2011, §§ 118-123.

140 The crime of terror is a 'specific intent crime' which consists of a general intent (to have wilfully made the civilian population or an individual civilian the object of acts or threats of violence) and a specific intent (to spread terror among the civilian population). The intent to spread terror must be the 'primary purpose' of the acts or threats of violence, but it need not be the only purpose of the acts or threats of violence, see Judgment, *Milošević* (IT-98-29/1-T), Trial Chamber, 12 December 2007, § 878; Judgment, *Galić* (IT-89-29-A), Appeals Chamber, 30 November 2006, §§ 73 and 106; Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, § 1774.

141 The same approach has been taken to persecution. So long as there is the intent to discriminate against a person on one of the listed grounds, specifically, race, religion, or politics, any additional motive of pursuing a military goal is irrelevant, see Judgment, *Popović et al.* (IT-05-88-A), Appeals Chamber, 30 January 2015, § 733; Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, § 422; Judgment, *Milutinović et al.* (IT-05-87-T), Trial Chamber, 26 February 2009, § 109.

142 Although torture as a war crime at the ad hoc requires an act to have been carried out with the specific purpose of obtaining information or a confession, or to punish, intimidate, or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person, there is no requirement that the severe pain or suffering be inflicted exclusively for one or more of the purposes mentioned, but only that such a purpose or purposes be part of the motivation for the conduct, see Judgment, *Limaj et al.* (IT-03-66-T), Trial Chamber, 30 November 2005, § 239; Judgment, *Mrkšić et al.* (IT-95-13/1-T), Trial Chamber, 27 September 2007, §§ 515 and 679; Judgment, *Haridanaj et al.* (IT-04-84bis-T), Trial Chamber, 29 November 2012, § 418.

143 Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 49; Judgment, *Niyitegeka* (ICTR-96-14-A), Appeals Chamber, 9 July 2004, § 53; Judgment, *Blagojević and Jokić* (IT-02-60-A), Appeals Chamber, 9 May 2007, § 127; Judgment, *Kayishema et al.* (ICTR-95-1-A), Appeals Chamber, 1 June 2001, § 161.

144 Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 49: '[t]he existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.' Same in Judgment, *Kvočka et al.* (IT-98-30/1-A), Appeals Chamber, 28 February 2005, § 106; Judgment, *Kayishema et al.* (ICTR-95-1-A), Appeals Chamber, 1 June 2001, § 161: 'criminal intent (mens rea) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility'; Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, §§ 268-269 'motive is generally irrelevant in criminal law, ... subject to the caveat that motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence'.

145 See *supra* note 108.

146 A detailed analysis of sieges and blockades will be included in the forthcoming Starvation Textbook. For more discussions on the use of sieges and their effects on starvation see E.-C. Gillard, *Sieges: Legal Limitations for the Protection of Civilians*, Chatman House Briefing (forthcoming), G. Gaggioli, *Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?*, EJIL: Talk!, 30 January 2019, at 6, available at: <https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/> (last visited 2 May 2019), and Y. Dinstein, *supra* note 50, at 151; See also US Department of Defence, *Law of War Manual* (2015) (hereinafter the 'US Manual'), § 5.19.4.1.

147 See examples in the country case studies in Syria and Yemen. See further, Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 7; UN OHCHR, *Living under Siege: The Syrian Arab Republic*, February 2014, available at: <https://www.ohchr.org/Documents/Countries/SY/LivingUnderSiege.pdf> (last visited 19 May 2019); G. Gaggioli, *ibid.*

148 See *supra* note 88.

149 Whilst it has been argued that sieges which constitute the mere encirclement of a town without any bombardment or physical force, cannot be considered a military attack, (see, H. Lauterpacht: 'with regard to the mode of carrying out siege without bombardment, no special rules of International Law exist, and ... only the general rules respecting offence and defence apply' in L. Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II (7th edn., Longmans, 1952) at 419. See also, M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary to the two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn., Martinus Nijhoff Publishers, 2013) at 329 and Art. 49(1) AP I that defines military attacks as 'acts of violence against the adversary, whether in offence or in defence'. The traditional understanding of this norm links the term 'attack' to the use of kinetic force. See for example the *travaux préparatoires* of the Additional Protocols, where 'violence' is equated to physical violence, in Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section A 184 (1949).

150 Supported by J. Kraska, 'Siege', Max Planck Encyclopaedia of Public International Law (2009) at 9 and S. Watts, *Under Siege*, International Humanitarian Law and Security Council Practice concerning Urban Siege Operations, Research and Policy Paper, Counterterrorism and Humanitarian Engagement Project, May 2014, at 5-14, available online at: <http://blogs.law.harvard.edu/cheproject/> (last visited 19 May 2019). See also UK Manual, § 5.34 at 87 which observes that '[t]he principles of the law of armed conflict, particularly the rules relating to attacks, apply equally to situations of

siege or encirclement.' Support for this view in relation to blockades can be found, where the principle of proportionality is considered to apply see G. Gaggioli, Sieges and Urban Warfare: Starvation and evacuations, Background Paper presented for the Transatlantic Workshop on International Law and Armed Conflict, July 26-27 2018, European University Institute, Florence, Italy, at 6, available at: <https://www.ejiltalk.org/joint-blog-se-ries-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/> (last visited 19 May 2019). The author points out that both the San Remo Manual, § 102b and the Manual on International Law Relating to Air and Missile Warfare, § 157b provide for the application of the principle of proportionality to blockades.

151 Arts 48, 51(2) and 52(2) AP I, Art. 13(2) AP II, Rules 1 and 7 ICRC Customary IHL Database.

152 Arts 51(5)(b), 57(2)(a)(iii) and (b) AP I; Rules 14, 18 and 19 ICRC Customary IHL Database, which ban parties to launch an attack which might be expected to cause excessive damage to civilians or civilian objects in relation to the concrete military advantage anticipated.

153 Arts 57(1) and 58 AP I, Rules 15 and 22 ICRC Customary IHL Database which entail a duty to avoid or, in any event, minimise the infliction of collateral damage occurring from military attacks.

154 Art. 27 Hague Convention IV on Laws and Customs of War on Land and Art. 17 GC IV require parties to endeavour to conclude local agreements for the removal from the besieged town or place of the wounded, sick, infirm and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas. See also US Manual, § 5.19.4.1. These prescriptions are included specifically in the context of IACs, but the see ICRC Commentary to the APs, § 4649 gives an identical reading in the context of NIACs.

155 Art. 70(2) AP I and Arts 59 and 61 (for occupied territories) GC IV, Art. 18(2) AP II, Rule 55 ICRC Customary IHL Database.

156 See section 'Identifying Intent in a Multi-Causal Environment', above.

157 Art. 48 AP I and Art. 13(2) AP II.

158 Arts 48, 51(2) and 52(2) AP I, Art. 13(2) AP II and Rule 1 ICRC Customary IHL Database. ICRC Commentary to APs, §§ 2095 and 4796: '[t]he use of blockade and siege as methods of warfare remain legitimate, provided they are directed exclusively against combatants.' See also UK Manual, § 5.34.1: '[s]iege is a legitimate method of warfare as long as it is direct against enemy armed forces'; US Manual, § 5.19 '[i]t is lawful to besiege enemy forces'. See also S. Watts, 'Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions', 95 *International Law Studies* (2019), at 19.

159 Arts 51(5)(b) and 57(2)(a)(iii) AP I, Rule 14 ICRC Customary IHL Database.

160 See J.-M. Henckaerts and L. Doswald-Beck (eds), *supra* note 12, Rule 53 'Practice', referring to several Military Manuals which adopt the principle of proportionality in the context of sieges. See also S. Watts, *supra* note 158, at 19: '[o]nly civilian starvation on a scale that is clearly excessive in relation to the anticipated military advantage of enemy defeat through encirclement and isolation from support or relief is prohibited', mentioning US Manual, § 5.20.1.

161 Arts 57(1) and 58 AP I, Rules 15 and 22 ICRC Customary IHL Database.

162 Art. 57(2)(c) AP I, Rule 20 ICRC Customary IHL Database.

163 Art. 70(2) AP I and Arts 59 and 61 (for occupied territories) GC IV, Art. 18(2) AP II, Rule 55 ICRC Customary IHL Database. For blockades, see San Remo Manual, §§ 103-104.

164 Art. 70 AP I states that such operations must take place when the civilian population is 'not adequately provided with the supplies mentioned in Article 69'. ICRC Commentary to APs, § 2794 states that '[t]he expression "not adequately provided", similar to the wording of Article 55 of the fourth Convention, is not very precise, but this is justified. The need for a relief action and the extent of its urgency must be assessed in every case individually, depending on the real requirements. It is the "essential" character of such requirements that must be the determining factor. This is a matter of common sense which cannot be formulated in precise terms.' Moreover, if it is established that civilian population is threatened with starvation and a humanitarian organisation which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent, see J.-M. Henckaerts and L. Doswald-Beck (eds), *supra* note 12, Rule 54.

165 For example, Israel blocked some relief supplies intended to reach Gaza because they were transporting cement which was then used by Hamas to build bunkers, see: C. Heminson, 'UN Aid Group: Israel Deliberately Hampering West Bank, Gaza Relief Efforts', Haaretz, 30 May 2010, available at: <https://www.haaretz.com/1.5126675> (last visited 2 May 2019).

166 Arts 59 and 61 GC IV require the humanitarian organisation to be impartial, and Art. 70 AP I requires relief actions to be humanitarian and impartial in character. See also Art. 71(4) AP I which prohibits relief personnel to exceed the terms of their mission.

167 Art. 71(4) AP I allows parties to terminate the mission of relief personnel if they exceed their mandate. See also Art. 23(2)(c) GC IV.

168 Art. 23(2)(a) GC IV.

169 Art. 70(3) AP I, Arts 23(a), 59 and 61 (for occupied territories) GC IV.

170 Art. 70(3)(a) AP I, Art. 59(3) GC IV

171 Art. 70(3)(b) AP I, Arts 23(3) and 61 GC IV. These safeguards, must in no case be misused 'in order to make the rule itself inoperative or unduly delay the forwarding of relief'. See ICRC Commentary to Art. 59 GC IV, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15B5740DF2203BE4C12563CD0042C966> (last visited 19 May 2019).

172 Art. 71(3) AP I allows temporary restriction only for imperative military necessity.

173 Art. 70(3)(c) AP I, Art. 23(4) GC IV, Art. 60 GC IV.

174 Sieges imposed in areas where only combatants are present or those imposed without the view to cause the starvation of the population and not causing disproportionate effects among civilians are considered to be lawful. See above section 'Sieges and Blockades as lawful purposes'.

175 *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs) 29 March 2006.

176 GRC and the WFP are currently drafting a complaint to be submitted to the Special Rapporteur on the Right to Food which will be released in the following months.

177 *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/CRP.1, 7 February 2014, §§ 78, 1115-1137.

178 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, 155/1996 (2001).

179 GRC and the WFP are undertaking a number of steps in order to ensure that the issue of starvation is the focus of the work of several accountability mechanisms and other international bodies such as the UN Group of Eminent Experts on Yemen, the International, Impartial and Independent Mechanism on Syria and the UNSC.

180 The origin of truth commissions are linked to the political transitions in Latin America in the 1980s and the end of the cold war (P. Arthur, 'How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice', 31 *Human Rights Quarterly* (2009) at 327; P. B. Hayner, *Unspeakable Truths, Transitional Justice and the Challenge of Truth Commissions* (2nd edn., Routledge, 2011) at 3 and 7. See the examples of the South African Truth and Reconciliation Commission, which was established after the end of apartheid. The mandate of the commission was to bear witness to, record, and in some cases grant amnesty to the perpetrators of crimes relating to human rights violations, as well as offering reparation and rehabilitation to the victims. See also the Canadian Truth and Reconciliation Commission, investigating the policy of the Canadian Government concerning the indigenous people, and the Guatemala's 'unofficial truth project': The Guatemalan Catholic Church's 'Project for the Recovery of Historical Memory' which collected testimonies of victims from the military suppression in the country. A. de Waal and B. Conley, 'What Justice for Starvation Crimes?' in: J. Bhabha and M. Matache (eds), *Time for Reparation? Addressing State Responsibility for Collective Injustice* (University of Pennsylvania Press, 2019, forthcoming) at 13, which notes that '[a]pologies for starvation are perhaps more common in their absence or absolute refusal to recognize responsibility'. The article gives the example of the lack of formal apologies issued by German Government in the context of the genocide of the Herero and Nama, at 10, but notes that in the context of the English inflicted famine in Ireland, 'an almost apology was issued in 1997', at 13.

181 A. de Waal and B. Conley, *ibid.* at 13, which gives the examples of memorialisation in the cases of Ireland, USA and Ukraine.

182 Art. 4(h), Constitutive Act of the African Union, 2002.

183 GRC-WFP Starvation Compendium.