

# Strategies for Prosecuting Mass Starvation

Wayne Jordash QC\*, Catriona Murdoch\*\* and Joe Holmes\*\*\*

## Abstract

*Every instance of famine or acute food insecurity today is, at its core, man-made, and the current scale of consequential suffering and death is unprecedented in modern history. Deliberate starvation is a crime under international law, including under Article 8(2)(b)(xxv) of the Rome Statute. Notwithstanding, there has been a dearth of prosecutions of those suspected of committing the crime or engaging in any of the underlying conduct. The reasons for this neglect may be many, including a lack of clarity around the elements of the crime and particularly the mental elements that must be established. This article explores the challenges that might exist in investigating and prosecuting the crime of starvation and seeks to clarify its elements with a particular focus on the mens rea requirement under Article 8(2)(b)(xxv). The authors aim to draw a roadmap for practitioners to ensure better international recognition of the deliberate nature of starvation, and in order that attribution of fault and accountability become less elusive.*

## 1. Introduction

We are at the start of a long road to the effective criminalization of starvation. Despite the growth of modern international criminal law (ICL) over the last

\* Wayne Jordash QC is an internationally recognized expert in the global network of international tribunals and courts and international humanitarian law (IHL) and the managing partner of Global Rights Compliance (GRC). [waynejordash@globalrightscompliance.co.uk]

\*\* Catriona Murdoch leads the 'Accountability for Mass Starvation: Testing the Limits of the Law' project of the World Food Programme (WFP) and the GRC and is an international criminal and human rights law expert. She was called to the Bar of England and Wales. [catrionamurdoch@globalrightscompliance.co.uk]

\*\*\* Joe Holmes, an international criminal law specialist, is a dual-qualified lawyer in New York and a barrister in the UK. [joeholmes@globalrightscompliance.co.uk]

Invaluable contributions have been made by: Margherita Stevoli, an IHL expert and Geneva Academy Alumna; and Anna Mykytenko of GRC, a Ukrainian lawyer specializing in international humanitarian, criminal and human rights law. The authors are grateful to Salvatore Zappalà, Antonio Coco and Claus Kreß for their comments and edits.

25 years, there has been a dearth of prosecutions for starvation. The current scale of suffering and death as a result of these crimes is unprecedented in modern history. It has a compound effect surpassing the rising death tolls: intergenerational physical and cognitive harm,<sup>1</sup> economic repercussions<sup>2</sup> and mass displacement<sup>3</sup> — to mention just a few. The intersection of this crime with a wide range of other, (more) well-trodden violations seems obvious but remains broadly unexplored.<sup>4</sup>

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. Whether the ‘hellish environment’ of persecutory rapes in Bosnia,<sup>5</sup> the slaughter of Tutsis across Rwanda<sup>6</sup> or the amputations of civilians in Sierra Leone,<sup>7</sup> it is this type of behaviour that appears to have shaped the perception of the type of deaths and injury that are most appropriate for prosecution in international criminal courts.

In light of the re-emergence of famine and rise in the deliberate use of starvation, the United Nations (UN) Security Council (SC) responded by unanimously passing S/RES/2417 (UNSC 2417), which underscored that the deliberate use of starvation as a method of warfare is a war crime, and implored Member States to investigate robustly, and where appropriate seek accountability. The consensus around UNSC 2417 and its express demands suggest that the problem is not that states fail to recognize that using starvation as a method of warfare is an international crime, or that international law

1 N.M. Zagre and G. Quince, ‘Child Hunger and its Long-term Effects’, UNICEF Connect, 24 September 2014, available online at <https://blogs.unicef.org/blog/child-hunger-and-its-long-term-effects/> (visited 20 March 2019); 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 & Medicine* (2014) 232–239.

2 Kamper, *ibid.*, at 1; ‘The Social and Economic Consequences of Malnutrition in ACP Countries’, Background document (European Parliament), available online at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/acp/dv/background/background\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/acp/dv/background/background_en.pdf) (visited 20 March 2019); see also ‘Famine Action Mechanism (FAM)’ (The World Bank), available online at <http://www.worldbank.org/en/programs/famine-early-action-mechanism> (visited 18 July 2019).

3 See *infra* section 4.

4 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, available online at [www.starvationaccountability.org](http://www.starvationaccountability.org) (visited 18 July 2019). Launched in May were a compendium of expert policy papers entitled ‘Accountability for Mass Starvation: Testing the Limits of the Law’ (GRC-WPF Starvation Compendium) which 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.

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

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

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

obliges them to investigate and take appropriate penal action when violations occur. The problem seems to be a different one, including, perhaps, a lack of understanding of the deliberate nature of the occurrence, its status as a violation of international law and how it may be prosecuted.

The article comprises four sections:

- (i) an outline of the current legal prohibitions constituting the crime of starvation;
- (ii) a clarification of the relevant law and its prospective application in future prosecutions;
- (iii) a discussion on potential strategies for prosecuting the crime; and,
- (iv) a brief conclusion which addresses how to increase the prospects of accountability for starvation, including through use of alternative crimes and an amendment to the Rome Statute.

It then concludes with the way in which prosecutions may play a role in rendering deliberate starvation morally toxic, an essential aim if we are to begin the journey towards starvation being deemed a medieval practice with no justifiable use in modern warfare.

## 2. The Development of the Legal Prohibition

Starvation is an age-old scourge and has been used extensively as a method of warfare,<sup>8</sup> that is, a strategy for overcoming the enemy and compelling it to surrender.<sup>9</sup> The Hague Regulations concerning the Laws and Customs of War on Land (18 October 1907), began a slow process of restraint and moderation, limiting the destruction of the enemy's property to cases of imperative military

<sup>8</sup> S. Watts, 'Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations', Harvard Law School: Counterterrorism and Humanitarian Engagement Project, May 2014, available online at <http://blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-IHL-and-SC-Practice-concerning-Urban-Siege-Operations.pdf> (visited 18 July 2019), at 3–4; K.J. Riordan, 'Shelling, Sniping and Starvation: The Law of Armed Conflict and the Siege of Sarajevo', 41 *Victoria University Wellington Law Review* (VUWLR) (2010), 149–178 at 158; E. Rosenblad, 'Starvation as a Method of Warfare - Conditions for Regulation by Convention', 7 *The International Lawyer* (1973) 252–270, at 255; GRC-WPF Starvation Compendium; A. de Waal, 'The Nazi's Used It, We Use It', 39 *London Review of Books* (2017) 9–12.

<sup>9</sup> See *United States v. Wilhelm von Leeb ('High Command Case')* in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, October 1946 – April 1949*, Volume X (1950), 563 (hereafter the '*United States v. W. von Leeb*'); G.A. Mudge, 'Starvation as a Means of Warfare', 4 *The International Lawyer* (1970) 228–268; Art. 17, General Orders No. 100: The Lieber Code, Instructions for the Government of Armies of the United States in the Field; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (1st edn., Cambridge University Press, 2004), at 133.

necessity.<sup>10</sup> Some 12 years later, in 1919, we find one of the earliest references to starvation as a prosecutable crime.<sup>11</sup>

Despite these early flashes of recognition, starvation of civilians was not criminalized during the Nuremberg Trials.<sup>12</sup> However, shortly after World War II, the legitimacy and legality of starvation as a method of warfare began to be challenged with the enactment of the Geneva Conventions.<sup>13</sup> The prohibition of deliberate starvation of the civilian population as a method of warfare was introduced in the Additional Protocols to the Geneva Conventions of 1977,<sup>14</sup> in Article 54(1) of Additional Protocol I (API) and Article 14 of Additional Protocol II (APII), rendering it unlawful for parties to starve civilians both in international armed conflicts (IACs) and non-international armed conflicts (NIACs),<sup>15</sup> a development considered by some as 'one of the great achievements' of the Additional Protocols.<sup>16</sup>

From this point on, its status as an important international humanitarian law (IHL) prohibition was accepted, leading to the recognition that its violation amounted to not only a gross affront to the protection of civilians in armed

<sup>10</sup> Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (The Hague, 18 October 1907), available online at <https://ihl-databases.icrc.org/ihl/INTRO/195> (visited 4 October 2019).

<sup>11</sup> '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', 14 *American Journal of International Law* (1920) 95–154, at 144.

<sup>12</sup> Including analysis that starvation should be considered as a form of genocide by R. Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, 1944); *United States v. W. von Leeb*, *supra* note 9. Despite expressing significant unease with the state of the law, the judges stated: 'The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off every source of sustenance from without is deemed legitimate. ...We might wish the law were otherwise, but we must administer it as we find it.'

<sup>13</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (hereafter the 'First Geneva Convention' or 'GC I'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (hereafter 'Second Geneva Convention' or 'GC II'); Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (hereafter 'Third Geneva Convention' or 'GC III'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereafter the 'Fourth Geneva Convention' or 'GC IV'). See also obligations under Art. 23 GC IV and Art. 17 GC IV.

<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereafter the 'Additional Protocol I' or 'AP I'); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 8 June 1977 (hereafter 'Additional Protocol II' or 'AP II').

<sup>15</sup> With regard to NIACs which do not fall into the definition of Art. 1(l) AP II, and are therefore only regulated by Common Article 3, the prohibition of starvation is included in the obligation to treat humanely all persons taking no active participation in the hostilities, included in § 1 of said Article.

<sup>16</sup> Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 653, at 2087.

conflict, but also an international crime.<sup>17</sup> Yet, despite this recognition, starvation has remained on the margins of prosecutorial practice, allowing other more 'traditional', but not necessarily more serious, atrocity crimes to take centre stage.

#### A. Article 8(2)(b)(xxv) of the Rome Statute

The Rome Statute entered into force in 2002, featuring for the first time on the international level the war crime of starvation. Article 8(2)(b)(xxv) of the Rome Statute criminalizes: '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.' As stated in the Elements of Crimes, there are four elements required to establish the offence: (i) the perpetrator deprived civilians of objects indispensable to their survival; (ii) the perpetrator intended to starve civilians as a method of warfare; (iii) the conduct took place in the context of and was associated with an international armed conflict; and (iv) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements three and four are the well-established chapeau elements applicable to any war crime. Element two describes the *actus reus* of the offence, namely depriving civilians of objects indispensable to their survival. It seems clear from a plain reading of Article 8(2)(b)(xxv) that one of the ways in which this element may be achieved is through 'wilfully impeding relief supplies as provided for under the Geneva Conventions'. The absence of any reference to this in the Elements of Crimes seems to confirm that it is a non-essential and merely illustrative means of fulfilling the *actus reus* of the offence.

The *mens rea* requirement of Article 8(2)(b)(xxv) is twofold:

- (i) the perpetrator must have *intentionally* deprived civilians of objects indispensable to their survival; and
- (ii) the perpetrator must have *intended* to starve civilians as a method of warfare.

The first of these requirements follows from the application of Article 30 of the Rome Statute that mandates that, 'unless otherwise provided' all material elements of crimes within the jurisdiction of the Rome Statute are committed 'with intent and knowledge'. Thus, 'depriving civilians of objects indispensable

<sup>17</sup> ICRC, *War Crimes: Working Paper Prepared by the ICRC for the United Nations Preparatory Committee for the Establishment of an International Criminal Court* (1997), 1 May 2004; Reports of International Arbitral Awards, 'Eritrea Ethiopia Claims Commission - Partial Award: Western Front, Aerial Bombardment and Related Claims', UN Doc., Vol. XXVI, 291–349, at 104–105; see also J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* ('ICRC Customary IHL Database'), Vol. 1 (ICRC, 2005), Rule 54, at 186. Noting that the prohibition does not feature as a grave breach in Art. 85 AP I.

to their survival' is a distinct and severable 'material element' for the purpose of Article 30 with its own distinct mental element standard.<sup>18</sup> By virtue of Article 30(2)(a), the perpetrator must 'mean' (i.e. desire) to engage in conduct which deprives civilians of objects indispensable to their survival. In addition, the requirement that a material element be committed 'with knowledge ... means [that such conduct will amount to the relevant crime if performed with an] awareness that a circumstance exists' (Article 30(3) ICC Statute). Thus, it is an essential feature of the commission of starvation that the perpetrator is aware that the objects of which he or she is depriving the civilian population are essential to their survival.

The interpretation of the second of these *mens rea* requirements is likely to pose the most significant challenges to prosecutorial practice, the principal amongst which are considered below.

### **B. Clarifying 'Intention to Starve as a Method of Warfare'**

In reaching a considered view of the overall parameters of 'intention to starve as a method of warfare', the following questions, each of which will impact upon the scope of the offence overall, will need to be considered:

- (i) Does starvation require proof of result/consequence, i.e. that people in fact starved (to death)? In our view, starvation does not require proof of such a consequence.
- (ii) Can intent to starve be established on the basis of an appreciation of a virtual certainty (i.e. oblique intent) or does it require, more narrowly, proof of a concrete desire to achieve the outcome of starving someone (i.e. direct intent)? We conclude that intention to starve may be established through intentionally embarking on a course of conduct (the deprivation of objects indispensable to survival) with an oblique intent, namely an appreciation of a virtual certainty that starvation will result in the ordinary course of events.
- (iii) What is the significance of the phrase 'method of warfare' in the legal construction of the crime of starvation and does it alter the nature of the required intent? We consider that the inclusion of the term 'method of warfare' creates a contextual element that has the effect of requiring that the perpetrator's conduct be linked to the conduct of hostilities. It does not, in our view, add a purposive element to

<sup>18</sup> § 2 of the General Introduction to the Elements of Crimes, containing guidance for the application of Art. 30 to the Elements of Crimes, provides that, 'Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in Art. 30 applies. Given that the essential element of depriving civilians of objects indispensable to their survival is conduct (and a consequence) without an express associated mental standard, Art. 30 operates to require that that element be committed intentionally.'

the crime of starvation (such as the intention to gain a military advantage).<sup>19</sup>

### 1. 'Intention to Starve' Does Not Require Proof of Consequence

Whilst the crime appears to require the deprivation of objects indispensable to survival as both a conduct *and* a consequence, the crime does not appear to require proof that civilians did in fact starve in terms of the intention to starve requirement. 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 is actualized. Conventionally, in those circumstances, proof of consequence is not required.

There is support for this conventional reading of the Rome Statute and Elements of Crimes from discussion amongst the Statute's drafters during the Rome Conference. Most persuasively, the drafters 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, these proposals were not adopted.<sup>20</sup> In addition, it is now generally accepted by scholars that IHL prohibits starvation as a method of warfare, independently of whether its effects become visible on the population.<sup>21</sup>

19 See Global Rights Compliance, *The Crime of Starvation and Methods of Prosecution and Accountability Policy Paper* (2019), available online at <https://starvationaccountability.org/resources/publications/the-crime-of-starvation-and-the-method-of-prosecution-and-accountability-policy-paper> (visited 26 August 2019).

20 The USA 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/CONE183/C.1/L.10, 19 June 1998; *Proposal Submitted by the United States of America: Draft Elements of Crime*, UN Doc. PCNICC/1999/DP4/Add.2, 4 February 1999, at 18.

21 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 517, § 790: '[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 ... 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. 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 the consequences intended; R.S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, 1999), at 141–142; Triffterer and Ambos (eds), *supra* note 21, at 448, § 531, citing to *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, GA Supplement

Related to the issue of whether the crime requires proof of starvation is the question of the relationship between the required intent and the specific acts of deprivation, namely, whether the crime is a specific intent crime in as much as the intent 'goes beyond the mere performance of the act'.<sup>22</sup> As found, the only essential act or consequence within the offence of starvation is depriving civilians of objects indispensable to their survival. Thus, Article 8(2)(b)(xxv) requires an intent that goes beyond this act and *toward* starvation and is, therefore, as defined, a specific intent crime.<sup>23</sup>

## 2. Oblique Intent: A Knowledge-Based Approach to the Intention to Starve?

The starting point for addressing this issue is Article 30 of the Rome Statute. As described above, this sets out the 'default' mental standard that needs to be established in relation to each material (physical) element. It does this in two ways. First, Article 30(1) attaches a mental standard of intent and/or

No.22 (A/51/22), 1996, at 635, fn. 74. This is not to argue that the consequences of any deprivation of objects indispensable to survival will be irrelevant to any assessment of individual criminal responsibility. On the contrary, *mens rea* is very often inferred from the consequences of the defendant's conduct. The consequences of the conduct will be important at the sentencing stage and during any reparations to be awarded; Judgment, Karadžić (IT-95-5/18-T), Trial Chamber, 24 March 2016 (hereafter the 'Karadžić Trial Judgment'), § 5669; Judgment, Popović *et al.* (IT-05-88-T), Trial Chamber II, 10 June 2010 (hereafter the 'Popović Trial Judgment'), § 820; A. Cassese and P. Gaeta (eds), *Cassese's International Criminal Law* (3rd edn., Oxford University Press, 2013), at 57–58; K. Ambos, 'Karadžić's Genocidal Intent as the 'Only Reasonable Inference?' EJIL: Talk! Blog of the European Journal of International Law, 1 April 2016, available online at <https://www.ejiltalk.org/karadzics-genocidal-intent-as-the-only-reasonable-inference/> (visited 2 May 2019).

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

23 We note that 'specific intent' has also been used in ICL in the context of genocidal intent to describe direct intent (a concrete desire that genocide occur (i.e. that the group is destroyed in whole or in part)), rather than oblique intent (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 ICL in the International Criminal Tribunal for Rwanda (ICTR) case of *Akayesu* that 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'. See Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber I, 2 September 1998 (hereafter the 'Akayesu Trial Judgment'), §§ 498, 518 and has been adopted in ICTR and ICTY cases since Judgment, *Rutaganda* (ICTR-96-3-T), Trial Chamber I, 6 December 1999, §§ 47–49; 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 (hereafter the 'Krstić Trial Judgment'), § 571; Judgment, *Blagojević and Jokić* (IT-02-60-T), Trial Chamber I, 17 January 2005 (hereafter the 'Blagojević and Jokić Appeal Judgment'), § 656; Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001 (hereafter the 'Jelisić Appeal Judgment'), §§ 51–52. However, as discussed below, this type of intent is more accurately described as direct intent. We consider below whether or not the specific intent to starve requires proof of direct intent or whether oblique intent will suffice.

knowledge to each material element — conduct, consequence or circumstance<sup>24</sup> of an offence, ‘unless otherwise provided’ within the specific definition of the offence. Secondly, Article 30(2) and (3), respectively, define and interpret the scope of the intent and knowledge standards created by Article 30(1) and their relationship to the conduct, consequence or circumstance (as the case may be) to which they attach.

Thus, in relation to conduct, Article 30(2)(a) mandates that the only intent that leads to criminal liability is direct intent.<sup>25</sup> Oblique intent<sup>26</sup> is not sufficient to give rise to criminal liability. In other words, a person may only be shown to have intent where he/she: ‘means to engage in the conduct’. By contrast, where the intent is ‘in relation to a consequence’, Article 30(2)(b) provides that such intent may be shown where the perpetrator:

<sup>24</sup> The *conduct* of a crime includes a prohibited action (see e.g. Art. 6, Elements of Crimes: ‘killing’, ‘causing serious bodily or mental harm’, ‘inflicting … conditions of life’, ‘imposing measures’ and ‘forcibly transferring’) or prohibited omission (see e.g. Art. 28(a)(ii) and (b)(ii) ICCSt. (‘failed to take all necessary and reasonable measures’)) that is described in the definition of a crime. The *consequences* of a crime can refer either to a completed result, such as the causing of death (see e.g. Art. 8(2)(b)(vii) Elements of Crimes: improper use of a flag of truce ‘resulting in death or serious personal injury’; Art. 8(2)(b)(x), Elements of Crimes: subjecting persons to physical mutilation or to medical or scientific, or the creation of a state of harm or risk of harm, such as endangerment). ‘Material element of a crime’ can also include some kind of harmful result. Needless to say, that for harm to be a constituent element of a crime, it must be provided for by a definition thereof (Art. 22 (Elements of an International Crime) of the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other International Crimes provided that ‘[t]he element of harm shall depend upon the definition of the crime …’). See GA Res. 3068 (XXVIII), 28 UN GAOR Supp. (No. 30) at 75, UN Doc. A/9030 (1974), 1015 UNTS 243, entered into force 18 July 1976, E/CN.4/1426, 1981, 37. That harm must be provided for by a definition of a crime does not mean, however, that it must necessarily be verbally stated; it is possible to arrive at the respective conclusion by means of deduction if a particular crime has been conceived of as including a certain harm requirement. Thus, for instance, the concept of crimes defined in terms of directing attacks against civilian population or certain objects perhaps implies that there must be some harmful result, even though definitions of such crimes in the Statute and the Elements do not contain any reference to harm. In other words, whenever a crime is conceived of as including harmful result and a definition of that result is provided, harm becomes an indispensable material element of the crime concerned which the Rome Statute subsumes under the category of ‘consequences’. The *circumstances* of a crime qualify the conduct and consequences. They may, for example, describe the requisite features of the persons: for example, that the victims who are killed must be ‘members of the group’ (Art. 6(a) Elements of Crimes), or be ‘combatants’ (Art. 8(2)(b)(vi) Elements of Crimes), or that the persons who are forcibly transferred must be ‘children of the group’ (Article 6(e) Elements of Crimes) or things (e.g. that the attacks or bombardment must be directed against ‘towns, villages, dwellings or buildings which are undefended and which are not military objectives’, per Art. 8(2)(b)(v) Elements of Crimes or ‘buildings dedicated to religion, education, art, science …’ per Art. 8(2)(b)(ix) Elements of Crimes) mentioned in the conduct and consequence elements. See Triffterer and Ambos (eds), *supra* note 21, 1115–1116.

<sup>25</sup> Direct intent is synonymous with ‘*dolus directus* in the first degree’.

<sup>26</sup> Oblique intent is synonymous with ‘indirect intent’ or ‘*dolus directus* in the second degree’.

- (i) ‘means to cause that consequence’ (i.e. with direct intent); or
- (ii) ‘is aware that it will occur in the ordinary course of events’ (i.e. with oblique intent).

The question thus arises whether Article 30 operates in relation to Article 8(2)(b)(xxv) and, if so how: does it limit the core intent to starve to a direct intent only? In relation to the depriving conduct and consequence discussed above, there can be little doubt that Article 30(2)(a) will engage to attach a specific mental standard to the first of the essential elements of starvation, meaning that the perpetrator must intend, that is ‘mean’ to deprive civilians of objects indispensable to their survival.<sup>27</sup> However, Article 30’s relationship with the (distinct) ‘intention to starve’ requirement<sup>28</sup> is less clear. There are reasons to doubt that Article 30 applies to this crucial mental element requirement. However, as discussed below, despite those doubts, there is ample room to conclude that the intention should, nonetheless, be interpreted in line with the same mental standards as those contained within Article 30(2)(b), namely that the ‘intention to starve’ element of the crime might be satisfied by either direct or oblique intent.<sup>29</sup>

Our doubts about the technical applicability of Article 30 to the ‘intention to starve’ requirement are based upon the following two-part analysis. First, Article 30 only applies to define the mental element requirement, ‘unless [one is] otherwise provided’. Since starvation does expressly provide for its own mental element requirement, namely ‘intentionally using starvation’, it may be argued that no other mental element requirement is required and that Article 30 does not operate. However, it must also be observed that ‘intention to starve’ arguably only repeats the requirements established in Article 30(1), rather than providing ‘otherwise’. Thus, the qualifier ‘unless otherwise provided’ may not by itself preclude the application of Article 30 to the ‘intention to starve’ element.<sup>30</sup>

27 Art. 8(2)(b)(xxv)(l), ICC Elements of Crimes.

28 *Ibid.*

29 Public Redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, *Lubanga* (ICC- 01/04-01/06 A 5), Appeals Chamber, 1 December 2014 (hereafter the ‘Lubanga Appeal Judgment’), § 447: ‘absolute certainty about a future occurrence can never exist; therefore the Appeals Chamber considers that the standard for the foreseeability of events is 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 II, 15 June 2009 (hereafter the ‘Bemba Pre-Trial Decision’), § 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 the discussion on the legal basis for the application of this mental element standard to the war crime of starvation, in Section 2 of this contribution.

30 Note that the ICC Trial Chamber took a similar view in the context of the war of attacking civilians, that the inclusion of an explicit intentional requirement did not preclude the application of the Art. 30 and actually ‘that regard must be had to Article 30’, see Judgment, *Katanga*

However, the second and more persuasive argument for the technical inapplicability of Article 30 is the fact that ‘intention to starve’ is not comprised of any ‘material element’ (i.e. consequence, conduct or circumstance) immediately capable of engaging Article 30(1). As outlined above, Article 30 requires a conduct, consequence or circumstance for the default mental standards or intent or knowledge to attach to. Put differently, where an element is defined as an intent *not* requiring the establishment of a conduct, consequence or circumstance, then Article 30(1) does not apply.

Read in isolation, the text of Article 8(2)(b)(xxv) could be construed as creating a single inseparable essential material element of ‘using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival’. However, read in the context of the Elements of Crimes, as we suggest it should be, it seems clear that ‘depriv[ing] civilians of objects indispensable to their survival’ (the first element) will be analysed and treated as an element distinct from the requirement that the ‘perpetrator intends to starve civilians as a method of warfare’ (the second element). On that analysis, whilst the Elements of Crimes refer to an intention to bring about the consequence of starvation, neither the consequence of starvation per se nor any other material conduct, consequence or circumstances is intrinsic within the ‘intention to starve’ element. In these circumstances, whilst the first element described in the Elements of Crimes does appear to require the deprivation of objects indispensable to survival as both a conduct *and* a consequence, in terms of the *additional* intent requirement under the second element (i.e. the intent to starve), the crime does not appear to require either any additional proof that civilians did in fact starve or any proof of any conduct distinct from the latter prohibited deprivation. In sum, the intent to starve sits alone without any (direct) reference to a consequence or any conduct that might constitute a ‘material element’ for the purpose of Article 30. As such, in our view, Article 30 does not technically apply to it.

However, even if our doubts about the technical application of Article 30 to the ‘intention to starve’ element are correct, this does not automatically mandate reversion to the more restrictive direct intent approach. There is nothing within the Rome Statute, or the general principles of criminal law, to suggest that, absent the application of Article 30(1), the applicable intent must be automatically interpreted and restricted to direct intent. For the reasons expanded upon now, we argue that, on the contrary, this intent is likely to be interpreted to allow oblique intent to be sufficient to give rise to criminal liability.

First, the rationale underlying the Rome Statute’s approach to mental standards generally, reflected in the introduction of Article 30, tends to this view. 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 should be the norm as a means of creating or enhancing consistency in the standards of culpability required for individual

---

(ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014 (hereafter the ‘Katanga Trial Judgment’), §§ 804–806.

responsibility to be established and criminal liability to follow at the International Criminal Court (ICC).<sup>31</sup> In other words, Article 30 reflects the prevailing view that, to the extent possible, consistency of specific mental states required across the ICC crimes should be the default position.

Secondly, it is also noteworthy that although individual responsibility under Article 8(2)(b)(xxv) does not require the establishment of any ‘starvation consequence’, many, if not most, prosecutions will still require a focus upon *some* ‘starvation consequences’. This evidence will be highly probative of any intent to starve. Even putting aside policy arguments (that likely tend towards ensuring that the crime retains its utility through a less demanding interpretation of intent), the practical distinction between a crime of starvation requiring proof of ‘starvation consequences’ as matter of law and Article 8(2)(b)(xxv) (that, in practical terms, requires a focus on starvation as a matter of evidence) tends towards favouring an interpretation in line with Article 30(2)(b)’s direct and oblique approach to intent.

In this regard it may also be relevant that had the drafters of the Rome Statute required proof of the consequence of starvation,<sup>32</sup> Article 30(1) would almost certainly have applied to the ‘intention to starve’ element, as it would have involved proving a material consequence. In that case, the relevant intent would automatically have been interpreted consistently with Article 30(2)(b), in other words, encompassing both direct and oblique intent. As mentioned above, the drafters specifically rejected that formulation opting instead for the less legally demanding construction that did not require proof that a civilian population starved. Having adopted this less demanding construction, it would appear inconsistent with the drafters’ intentions to require that the relevant intent be established according to the more demanding direct intent standard.

Similarly, it should also be noted that, even if the intent were to be interpreted to exclude oblique intent and require direct intent, the perpetrator would not have to be shown to have acted with the *exclusive* purpose (or desire) of starving the civilian population. As with genocide,<sup>33</sup> a desire to commit the offence may form extemporaneously and temporarily amidst a course of otherwise lawful (or unlawful) purposes. Thus, notwithstanding the importance of analysing ‘intention to starve’ accurately from a legal perspective, even from a practical perspective, in relation to many future prosecutions, a direct intent to starve may well look very similar to, if not indistinguishable from, oblique (knowledge-based) intent.

31 Triffterer and Ambos (eds), *supra* note 21, at 1112, § 2, 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*.

32 So, for example, expressing the element as ‘the perpetrator intentionally starved a civilian population’.

33 Judgment, *Niyitegeka* (ICTR-96-14-A), Appeals Chamber, 9 July 2004 (hereafter the ‘*Niyitegeka* Appeal Judgment’), § 53; *Jelisić* Appeal Judgment, *supra* note 23, § 49.

### 3. The Meaning of 'as a Method of Warfare'

As discussed above, a knowledge-based approach is likely to suffice to establish an intention 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 import a purposive requirement into the required intent? If so, does this requirement impact or even remove the possibility that oblique intent is sufficient, namely that it may be established on the knowledge-based standard? These issues will be discussed below.

#### (a) What does 'method of warfare' mean in this context?

There are a variety of views concerning the meaning of methods of warfare and it is useful to consider them to understand the question of how the inclusion of this concept qualifies or refines Article 8(2)(b)(xxv) intent.

As pointed out by Gaggioli and Melzer, the concept was not defined in treaty law prior to the adoption of the Additional Protocols to the Geneva Conventions.<sup>34</sup> The Commentaries to the Additional Protocols state that the term 'methods of warfare' refers to the way in which weapons are used.<sup>35</sup> However, as Gaggioli and Melzer argue, this definition appears to be too restrictive 'given that even methods not necessarily involving the use of a weapon, such as starvation,<sup>36</sup> improper use of emblems,<sup>37</sup> perfidy<sup>38</sup> or denial of quarter<sup>39</sup> 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).<sup>40</sup>

Instead, Gaggioli and Melzer propose that a 'partly' more convincing interpretation of 'methods of warfare' may be defined as: '(i) the way and manner in which the weapons are used; and (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'.<sup>41</sup> This definition has the merit of highlighting that methods of warfare are more than just the manner in which weapons are used<sup>42</sup> and may be more accurately understood as 'referring to any particular manner of using weapons *or otherwise*'

<sup>34</sup> 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 the ICRC Commentary to the Additional Protocols, § 4799.

<sup>35</sup> Sandoz et al., *Commentary to the APs*, *supra* note 16, §§ 1402 and 1957.

<sup>36</sup> Art. 54(I) AP I, Art. 14 AP II.

<sup>37</sup> Arts 38 and 39 AP I.

<sup>38</sup> Art. 37 AP I.

<sup>39</sup> Art. 40 AP I.

<sup>40</sup> Melzer and Gaggioli, *supra* note 34, at 4.

<sup>41</sup> *Ibid.*, citing M. Sassoli, A. Bouvier and A. Quintin, *How Does Law Protect in War?* (ICRC, 2011), at 280.

<sup>42</sup> *Ibid.*, at 4.

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'.<sup>43</sup>

(b) Does it add a purposive requirement?

Nonetheless, despite the greater precision of this definition, the final element — to 'overwhelm and weaken the adversary' — raises the possibility that the adoption of this objective introduces a purposive element into the crime, namely the offence is only made out if the individual intends it to generate a military advantage.

In our view, there appears to be no basis in IHL for introducing this additional element into the definition or interpreting it to require the identification of a military advantage, let alone that this specific advantage is desired. IHL operates under a presumption that all hostilities are intended to overwhelm and weaken an adversary. Understood in this way, conduct that is intended to overwhelm and weaken an adversary describes the boundaries of armed conflict that triggers the applicability of IHL. As such, in our view, it does no more than describe conduct that is part of hostilities, ensuring that the contours of the crime of starvation are aligned with the fundamental principle of IHL, namely that civilians should be spared and protected from the effects of hostilities.<sup>44</sup> This broader definition of 'method of warfare' also has the practical (and arguably logical) benefit of encompassing a subcategory of military operations,<sup>45</sup> which includes aerial and naval blockades, sieges or the establishment of a no-fly zone.<sup>46</sup> The intended starvation must have been intended to be a 'specific, tactical or strategic, way of conducting hostilities'<sup>47</sup> but nothing more demanding than this is required.

<sup>43</sup> *Ibid.*

<sup>44</sup> See e.g. Art. 51 AP I.

<sup>45</sup> Military operations such as re-supply, 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 on the Humanitarian Policy and Conflict Research Manual on International Law Applicable to Air and Missile Warfare* (Harvard University Press, 2010), at 44.

<sup>46</sup> *Ibid.*, at xlviii; According to the ICRC Commentary to the APs (Sandoz et al., *supra* note 16), §§ 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 § 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 § 2096, which recognizes 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) 252–270. For blockades as methods of warfare see Sandoz et al., *Commentary to the APs*, §§ 2092–2095; L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995), Arts 93–104.

<sup>47</sup> See also P.J. Cameron, 'The Limitations on Methods and Means of Warfare', 9 *Australian Yearbook of International Law* (1980) 247–261, at 247, which similarly defines them as 'all strategies and tactics and every other measure which, by the use of manpower and weapons systems, an

- (c) Does the requirement that the starvation is intended as a 'method of warfare' exclude knowledge-based intent?

In other words, the reference to 'method of warfare' would appear to demand merely that deprivation and starvation were intended to become part of the conduct of hostilities. 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 capability to achieve strategic success. In some circumstances, this intent may actually take the form of a purposive component, but, in its mildest form, it may well be nothing more than an awareness that there is a contextual link between the intention to starve and the military activity.

In sum, despite the vagueness in the construction of Article 8(2)(b)(xxv), a literal or teleological interpretation of 'methods of warfare', and an examination of it in context, does not appear to demand the establishment of a purposive or direct intent to starve. On the contrary, there appears to be little to exclude oblique intent, namely where the 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 overall military endeavour.

### 3. Strategies for Prosecuting Starvation — Applying the Law

There has yet to be a prosecution of starvation on the international level.<sup>48</sup> In common with all international crimes, the process of identifying the contours of the material elements of starvation will rest in large part upon judges of an actual case 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 upon the creativity of the judges who will be called upon to ensure that the law remains an effective tool for delineating individual criminal responsibility, whilst ensuring respect for the fundamental principles of due process, including the principle of legality and culpability.

This creative process will require engagement from all relevant judicial actors and will include grappling with a range of practical trial process issues

armed force may employ'. Another interpretation is given in Humanitarian Policy and Conflict Research (eds), *supra* note 45, at 43, which defines them as 'attacks and other activities designed to adversely affect the enemy's military operations or military capacity'. This interpretation has been criticized 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.

<sup>48</sup> Our research indicates that only two prosecutions of the modern era have pleaded starvation as a distinct crime, all on the domestic level (Croatia and Ethiopia): *Public Prosecutor v. M.P. et al.*, in the District Court in Zadar, Croatia, K. 74/96, Verdict, 24 April 1997; and *Special Prosecutor v. Col. Mengistu Hailamariam et al.*, File No. 1/87, Ethiopian Federal High Court (2006).

designed to ensure that ICL is fit for purpose. As the above analysis suggests, the *mens rea* requirement of Article 8(2)(b)(xxv) is likely to be the most pressing challenge for any trial.

Even though there may be 'starvation cases' that are straightforward or lend themselves to easier analysis, many starvation prosecutions will be called upon to assess crowded causal environments where lawful military activity and violations of IHL are intermingled. In these cases, identifying the relevant misconduct and drawing inferences concerning criminal intent will be challenging.

This analysis will invariably raise specific issues that include: (i) challenges arising from the need to map causation (i.e. the connection between the alleged perpetrator's acts and omissions and deprivation of objects indispensable to survival and any consequential impacts upon civilian populations); (ii) the role of direct and indirect (circumstantial) evidence in establishing the elements of the offence, particularly the intent requirement; and (iii) the possible approaches to identifying intent in a multi-causal environment, particularly where the deprivation of objects indispensable to survival occurs during the pursuit of a lawful purpose (including sieges and blockades). These will be discussed below.

#### **A. Mapping the Chain of Causation**

Establishing causation will be important as a matter of evidence, not law. Whilst intention to starve does not require proof of result, linking the actions of individuals to deprivation of objects indispensable to survival and these in turn to the result of the population suffering from such deprivation will provide the clearest illustration of the required intention to starve.

A range of evidence will need to be carefully examined to assess causation, especially any alleged perpetrators' awareness of, and proximity to, relevant deprivations. Starvation and famines rarely occur in a vacuum; countries often face pre-existing or concurrent food insecurity, malnutrition and disease, resources may be limited and climate and other natural factors may impact upon the availability of objects indispensable to survival, as well as the ability of communities to absorb, or at least survive, fluctuations in the availability of food, shelter or medicine. Despite the 'eggshell skull rule'<sup>49</sup> by which pre-existing conditions or circumstances will not automatically break the chain of causation,<sup>50</sup> these challenges will be many and varied. Teasing out the factors

49 Also known as the 'thin skull' rule; *Dulieu v. White & Son* [1901] EWHC KB 1, § 12; *Page v. Smith* [1995] All ER 736, 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] 1 AC 310; *Bourhill v. Young* [1943] AC 92, [1942] UKHL 5, 110; Judgment, *Samphan and Chea* (002/19-09-2007- ECCC/SC), Supreme Court Chamber, 23 November 2016(hereafter the '*Samphan and Chea* ECCC Judgment'), § 534.

50 Judgment, Čelebić (IT-96-21-T), Trial Chamber, 16 November 1998 (hereafter the '*Čelebić* Trial Judgment'), § 909: '[t]o establish criminal liability in situations where there are pre-existing

that led to the deprivation and ascertaining their foreseeability (that they would lead to the starvation of a civilian population) will undoubtedly tax judicial minds.

However, these challenges ought not to be considered unique or insurmountable in the context of ICL prosecutions before international or national courts 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. Usually, these issues can be disentangled through a common-sense analysis of context, cause, effect and an accused's awareness of risk.<sup>51</sup> In this vein, it is worthwhile recalling that, 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.<sup>52</sup>

### **B. Direct and Circumstantial (Indirect) Evidence**

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'.<sup>53</sup> Accordingly, prosecutions at the international level often 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.<sup>54</sup>

In other words, most ICL prosecutions (be they before national or international courts or tribunals) rest in large part upon circumstantial evidence. The various factual scenarios that are amenable to prosecution for the crime of starvation are no exception.<sup>55</sup> These range from attacks against

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.'

51 *Samphan and Chea ECCC Judgment*, *supra* note 49, §§ 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 was 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.

52 *Samphan and Chea ECCC Judgment*, *supra* note 49, §§ 529–535. *Čelebići Trial Judgment*, *supra* note 50, § 823; *Trial of Hans Renoth and Three Others*, *supra* note 49.

53 Judgment, *Gacumbitsi* (ICTR-2001-64-A), Appeals Chamber, 7 July 2006 (hereafter the 'Gacumbitsi Appeal Judgment'), § 40.

54 See *supra* note 29.

55 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 an international armed conflict (IAC) and that states where starvation is happening are not parties to the ICC).

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.<sup>56</sup> It is inevitable in the context of an international case involving any of these starvation scenarios that circumstantial evidence will play a critical role in establishing the elements of the crime.

As a final point, it should be recalled that distinct from direct evidence, calculations based upon circumstantial evidence require 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.<sup>57</sup>

### C. Identifying Intent in a Multi-Causal Environment

As outlined above, in broad terms, the question of the existence of an intention to starve will ultimately rest upon a thorough analysis of the chain of

<sup>56</sup> Human Rights Watch, '*They Burned It All*', *Destruction of Villages, Killings, and Sexual Violence in Unity State South Sudan* (2015), available online at <https://www.hrw.org/report/2015/07/22/they-burned-it-all/destruction-villages-killings-and-sexual-violence-unity-state> (visited 19 September 2019). The Yemen data project database recorded between March 2015 and March 2018, 16,449 airstrikes, with the majority targeting Sa'ada and Sana'a: available online at <http://yemendataproject.org> (visited 19 September 2019). See also M. Mundy, 'The Strategies of the Coalition in the Yemen War: Aerial Bombardment and Food War', World Peace Foundation, available online at <https://reliefweb.int/sites/reliefweb.int/files/resources/Strategies%20of%20Coalition%20in%20Yemen%20War.pdf> (visited 19 September 2019); *Report of the Group of Eminent International and Regional Experts as submitted to the UN High Commissioner for Human Rights*, UN Doc. A/HRC/42/17, 9 August 2019, §§ 51–56; Amnesty International, *Syria: Surrender or Starve Strategy Displacing Thousands of Amounts to Crimes Against Humanity* (2017), available online at <https://www.amnesty.org/en/latest/news/2017/11/syria-surrender-or-starve-strategy-displacing-thousands-amounts-to-crimes-against-humanity/> (visited 23 September 2019); the UN Human Rights Council's 2014 damning report detailing violations of international law, entitled OHCHR, '*Living Under Siege: The Syrian Arab Republic*', February 2014. See further detailed analysis in conjunction with country experts on South Sudan, Syria and Yemen in the GRC-WPF Starvation Compendium forthcoming on [www.starvationaccountability.org](http://www.starvationaccountability.org).

<sup>57</sup> 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; *Lubanga* Appeal Judgment, *supra* note 29, § 447; *Bemba* Pre-Trial Decision, *supra* note 29, § 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 (hereafter the 'Brđanin Trial Judgment'), § 970.

causation. In turn, this will depend upon mapping that chain according to various critical issues, namely how alleged perpetrators pursued their military goals, what risks they took (especially in relation to objects indispensable to survival and civilian protection more broadly) and whether sufficient action was taken in light of the awareness of risk to mitigate against it.

Defined instances of deprivation of objects indispensable to survival that are accompanied by a clear causative link to human starvation, such as deprivation in a detention environment or repeat destruction of clearly identified food stores or hospitals, may allow relatively straightforward 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 co-existing purposes (whether lawful or unlawful). This presents obvious analytical 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 to starve. In this section, we assess how direct and indirect/circumstantial evidence might be approached in a prosecution, particularly what might provide relevant and probative evidence of an alleged perpetrator's intent to starve as a method of warfare.

In assessing whether an individual intended to use the starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, relevant evidential considerations (or indicators) will include a vast array of assessments including: the nature, manner, timing and duration of any deprivations of objects indispensable to survival or attacks on civilians,<sup>58</sup> including whether such attacks were long-term, persistent and/or indiscriminate;<sup>59</sup> whether the attacks were widespread and perpetrated in an organized manner;<sup>60</sup> and whether they took place as part of a campaign that systematically targeted civilians including on account of their membership in a

<sup>58</sup> See, for example, the prohibition against acts or threats of violence, the primary purpose of which is to spread terror among the civilian population (Art. 51(2) AP I; Art. 13(2) AP II). 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 need 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 (hereafter the '*Galić* Appeal Judgment'), § 104; Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, §§ 424, 1774.

<sup>59</sup> Attacks during ceasefires and truces or long-term and persistent attacks against civilians, as well as indiscriminate attacks, may be taken as indicia 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 (hereafter the '*Milošević* Trial Judgment'), § 881.

<sup>60</sup> 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

particular group.<sup>61</sup> The analysis will encompass all relevant issues, including the general context in which the crime was committed,<sup>62</sup> the repetition of destruction and discriminatory acts,<sup>63</sup> attacks against civilians more generally,<sup>64</sup> involvement of a range of modes of perpetration,<sup>65</sup> the scale of those attacks<sup>66</sup> and relevant policies or speeches encouraging the targeting of those civilians.<sup>67</sup>

The overall challenge will involve assessing the evidence, especially with regard to the central question of whether and how civilians and civilian objects were attacked or otherwise subject to interference. As noted above, there will be scenarios where those attacks or apparent interference will be straightforward, distinct and may provide straightforward analysis. How to approach the array of indicators will be key to a successful prosecution.

In many ‘military’ campaigns where the lawful and unlawful action is temporally and geographically wide in scope and intermingled, these issues will test the analytical skills of all concerned. In circumstances where the deprivation occurs in circumstances where no lawful purpose can reasonably be discerned, such as the attacks upon humanitarian workers in South Sudan, or the ‘kneel or starve’ tactics adopted against civilians in Syria,<sup>68</sup> 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. In cases where the alleged deprivation(s)

prohibited acts, their widespread and discriminatory nature, and the fact that many were perpetrated by the same individuals or units.

61 *Karadžić Trial Judgment*, *supra* note 21, § 5825. 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; see also the ICC 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’; and 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. Contrast this with the 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.

62 *Jelisić Appeal Judgment*, *supra* note 23, § 47; Judgment, *Nyiramasuhoko et al.* (ICTR-98-42-T), Trial Chamber, 24 June 2011(hereafter the ‘Nyiramasuhoko et al. Trial Judgment’), § 5732.

63 *Ibid.*

64 *Popović Trial Judgment*, *supra* note 21, §§ 1314–1318, 1399; *Jelisić Appeal Judgment*, *supra* note 23, §§ 47, 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.

65 *Brdanin Trial Judgment*, *supra* note 57, § 983; Judgment, *Ndindabahizi* (ICTR- 2001-71-I), Trial Chamber, 15 July 2004, § 460.

66 *Akayesu Trial Judgment*, *supra* note 23, §§ 523, 730; *Krstić Trial Judgment*, *supra* note 23, § 549.

67 *Nyiramasuhoko et al. Trial Judgment*, *supra* note 62, § 6012.

68 GRC-WPF Compendium on Syria. 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 check-points around the areas outside his control. See Amnesty International, *supra* note 56.

occurred during ostensibly lawful action, a more systematic examination of those indicators will be required.

At a minimum, triers of fact will be required to consider the following factors:

- (i) Awareness of the risk that interference with objects indispensable to survival would lead to starvation (including where the deprivation occurs in pursuit of an ostensibly lawful purpose);
- (ii) Respect for the full range of relevant IHL prohibitions (e.g., the prohibition against terrorising the civilian population;<sup>69</sup> the prohibition against collective punishment;<sup>70</sup> the prohibition on the use of human shields<sup>71</sup> and the prohibition against displacement);<sup>72</sup>
- (iii) Implementation of positive obligations flowing from IHL principles applicable in the context of the conduct of hostilities;<sup>73</sup> and

<sup>69</sup> See Art. 51(2) AP I, Art. 13(2) AP II and Rule 2 ICRC Customary IHL Database for the prohibition against acts or threats of violence with the primary purpose of terrorizing the civilian population, prohibit acts such as indiscriminate and widespread shelling and the regular bombardment of cities.

<sup>70</sup> See Art. 75 AP I, Art. 4 AP II and Rule 103 ICRC Customary IHL Database for the prohibition against collective punishment, prohibit 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.

<sup>71</sup> See Art. 51(7) AP I, Rule 97 ICRC Customary IHL Database and Art. 8(2)(b)(xxiii) Rome Statute for the prohibition on the use of human shields, prohibit utilizing the presence of a civilian or other protected persons to render certain points, areas or military forces immune from military operations.

<sup>72</sup> See Art. 49 GC IV, Art. 17 AP II and Rule 129 ICRC Customary IHL Database for the prohibition against displacement, prohibit the deportation or transfer of civilians unless the security of the civilians involved is endangered or imperative military reasons so demand.

<sup>73</sup> The principle of precaution places a duty on warring parties to avoid or, in any event, minimize the infliction of collateral damage occurring from military attacks (Arts 57(1) and 58 AP I, Rules 15 and 22 ICRC Customary IHL Database) including the desirability of warnings to enable civilians to evade the worst effects of any military operation (Art. 57(2)(c) AP I and Rule 20 ICRC Customary IHL Database). There is also an obligation to protect the natural environment (Art. 55 AP I) which may be relevant when considering destruction to agricultural areas. The obligation to allow humanitarian aid is paramount (Art. 70(2) AP I and Arts 59 and 61 (for occupied territories) GC IV, Art. 18(2) AP II and Rule 55 ICRC Customary IHL Database). For blockades, *San Remo Manual*, *supra* note 46, §§ 103–104. Art. 70(1) AP I states that such operations must take place when the civilian population is ‘not adequately provided with the supplies mentioned in Article 69’. The ICRC Commentary to Art. 70 AP I (Sandoz et al., *supra* note 16), § 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 organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent. See Rule 55 ICRC Customary IHL Database.

- (iv) The concrete steps taken (or not taken) to alleviate civilian suffering, especially those that are capable of facilitating delivery of objects indispensable to survival to affected civilian populations.

In assessing these essential factors in cases where the deprivation is connected to a lawful purpose, the trier of fact will need to wrestle with IHL that permits, in limited circumstances, the interference with objects indispensable to survival. Notwithstanding that starvation is prohibited under IHL,<sup>74</sup> there are a range of military actions that warring parties may pursue that permit attacks on objects indispensable to survival in defined circumstances. Whilst this does not provide an entitlement to starve, it does complicate any interpretation of what is criminalized 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).<sup>75</sup>

Warring parties are permitted to attack objects indispensable to survival in a range of circumstances or for different purposes, including:

- (i) If objects indispensable to survival are used solely by the armed forces of the opposing Party;<sup>76</sup>
- (ii) If such targeting or other forms of interference with objects indispensable to survival are used ‘in direct support of military action’ 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;<sup>77</sup>
- (iii) If such attacks are pursuant to an imperative military necessity (employed in order to prevent or slow down the enemy from invading a territory).<sup>78</sup> The Additional Protocol allows Parties to adopt these necessary actions only in defence of their own national territory that is under their effective control;<sup>79</sup> and
- (iv) 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<sup>80</sup> (provided that such starvation is not a virtually certain consequence of the siege, as explained above in Section 2).

<sup>74</sup> Art. 54 AP I, Art. 14 AP II and Rule 53 ICRC Customary IHL Database.

<sup>75</sup> Art. 8(2)(b) ICCSt.

<sup>76</sup> Art. 54(3)(a) AP I.

<sup>77</sup> *Ibid.*

<sup>78</sup> Art. 54 (5) AP I.

<sup>79</sup> Art. 54(5) AP I, which speaks to territory under the own control of the Party. The ICRC Customary IHL Database states that ‘[i]t 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.’

<sup>80</sup> 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, *Sieges as a Weapon of War: Encircle, Starve, Surrender, Evacuate*, 29 May 2018, available online at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PolicyPaperSieges.29May2018.pdf> (visited 18 July

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 starvation of the civilian population (which remains unlawful in all cases).<sup>81</sup> Additionally, there is an unconditional and absolute prohibition on the targeting of civilians in customary international law,<sup>82</sup> which aligns with the fundamental IHL protection in both IACs and NIACs against starving civilians.<sup>83</sup> It follows that the pursuit of any of the said objectives *sub (i)-(iv)* 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(2)(b)(xxv) Rome Statute (or the equivalent crime before tribunals other than the ICC).

Moreover, as a matter of principle and practice, ICL recognizes 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<sup>84</sup> (in principle a lawful military purpose). Notwithstanding this purpose, the implementation of the blockade appears to have violated a number of fundamental IHL rules on the obstruction of humanitarian aid to populations deemed in need.<sup>85</sup> 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'.<sup>86</sup>

This is true across a range of crimes, including those with equally or more demanding intent requirements such as pillage,<sup>87</sup> the crime of terror,<sup>88</sup>

2019). For blockades: see *San Remo Manual*, *supra* note 46, § 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.'

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

82 Rule 1 ICRC Customary IHL Database.

83 See *supra* note 73.

84 See 'Yemen Crisis: Why Is There a War?' BBC, 21 March 2019, available online at <https://www.bbc.com/news/world-middle-east-29319423> (visited 19 May 2019).

85 The obligation to allow humanitarian relief inside a blockaded area is provided under *San Remo Manual*, *supra* note 46, §§ 103, 104, 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.

86 *Final report of the Panel of Experts on Yemen*, UN Doc. S/2018/68 (now S/2018/594 after corrigendum), 26 January 2018, § 190, at 53.

87 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 *Katanga Trial Judgment*, *supra* note 30, §§ 913–914; *Decision on the Confirmation of Charges*, *Banda* (ICC-02/05-03/09-121-Corr-Red), Pre-Trial Chamber, 13 March 2011, §§ 118–123.

88 See *supra* note 43; see also *Milošević Trial Judgment*, *supra* note 59, § 878; *Galić Appeal Judgment*, *supra* note 58, §§ 73, 106; *Judgment, Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017 (hereafter the 'Prlić Appeal Judgment'), § 1774.

persecution,<sup>89</sup> torture<sup>90</sup> and genocide.<sup>91</sup> 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.<sup>92</sup>

In sum, in the circumstances where an alleged perpetrator pursues a lawful purpose but, in that pursuit, adopts the requisite starvation intent, Article 8(2)(b)(xxv) may, with all the other elements being fulfilled, be 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.

The challenge for any ICC Chamber in adjudicating upon such Article 8(2)(b)(xxv) cases will be to discern whether the alleged perpetrator, whilst pursuing other lawful or unlawful purposes — such as for example attacking objects indispensable to survival 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.

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.

<sup>89</sup> 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; *Prlić* Appeal Judgment, *ibid.*, § 422; Judgment, *Milutinović et al.* (IT-05-87-T), Trial Chamber, 26 February 2009, § 109.

<sup>90</sup> Although torture as a war crime, in the UN ad hoc Tribunals' jurisprudence, 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, *Mrksić et al.* (IT-95-13/1-T), Trial Chamber, 27 September 2007, §§ 515, 679; Judgment, *Haradinaj et al.* (IT-04-84bis-T), Trial Chamber, 29 November 2012, § 418.

<sup>91</sup> *Jelisić* Appeal Judgment, *supra* note 23, §§ 47, 49; *Niyitegeka* Appeal Judgment, *supra* note 33, § 53; *Blagojević and Jokić* Appeal Judgment, *supra* note 23, §§ 123, 127; *Popović* Trial Judgment, *supra* note 21, § 823, citing Judgment, *Gacumbitsi* Appeal Judgment, *supra* note 53, § 40; Judgment, *Kayishema et al.* (ICTR-95-1-A), Appeals Chamber, 1 June 2001 (hereafter the 'Kayishema Appeal Judgment'), § 159, 161; Judgment, *Rutaganda* (ICTR-96-3-A), Appeals Chamber, 26 May 2003, § 525; 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.

<sup>92</sup> *Jelisić* Appeal Judgment, *supra* note 23, § 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; *Kayishema* Appeal Judgment, *supra* note 91, § 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.'

In sum, 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 ongoing lawfulness or otherwise of any military attack and whether, in the circumstances, an intent to starve developed.

Thus, for example, the principle of distinction that prohibits making civilians the object of the besiegement<sup>93</sup> will provide an indication 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.<sup>94</sup>

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.<sup>95</sup> When this damage concerns the 'collateral' starvation of civilians,<sup>96</sup> it will be highly relevant to any assessment of the warring party's Article 8(2)(b)(xxv) intent.

This is especially true of the principle of precaution that places a duty on warring parties to avoid or, in any event, minimize the infliction of collateral damage occurring from military attacks,<sup>97</sup> including the desirability of warnings to enable civilians to evade the worst effects of any military operation.<sup>98</sup> 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.

As is well known, warring parties have a clear obligation to allow humanitarian access.<sup>99</sup> Warring parties must allow the rapid and unimpeded passage

<sup>93</sup> Art. 48 AP I and Art. 13(2) AP II.

<sup>94</sup> Arts 48, 51(2) and 52(2) AP I, Art. 13(2) AP II and Rule 1 ICRC Customary IHL Database. Sandoz et al., *supra* note 16, Commentary to the APs, §§ 2095, 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) 1, at 19.

<sup>95</sup> Arts 51(5)(b) and 57(2)(a)(iii) AP I, Rule 14 ICRC Customary IHL Database.

<sup>96</sup> See Henckaerts and Doswald-Beck (eds), *supra* note 17, Rule 53 'Practice', referring to several Military Manuals which adopt the principle of proportionality in the context of sieges. See also Watts, *supra* note 8: '[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.

<sup>97</sup> Arts 57(1) and 58 AP I, Rules 15 and 22 ICRC Customary IHL Database.

<sup>98</sup> Art. 57(2)(c) AP I, Rule 20 ICRC Customary IHL Database.

<sup>99</sup> 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*, *supra* note 46, §§ 103–104.

of relief when the population is inadequately supplied.<sup>100</sup> 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 objects indispensable to their survival 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.

They broadly fit into three categories:

- (i) Where the relief supplies are not humanitarian in nature<sup>101</sup> or do not emanate from an organisation being impartial and humanitarian in character;<sup>102</sup>
- (ii) 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 Party<sup>103</sup> or if the consignments may be diverted from their destination<sup>104</sup>); and
- (iii) Where technical arrangements are imposed for the passage of humanitarian relief,<sup>105</sup> including searches of the relief consignments of convoys transporting them,<sup>106</sup> the imposition of the condition to provide delivery under the local supervision of the Protecting Power<sup>107</sup> or the temporary limitation of movements of relief personnel.<sup>108</sup> 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.<sup>109</sup>

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.

<sup>100</sup> Art. 70 AP I. See also Henckaerts and Doswald-Beck (eds), *supra* note 17, Rule 54.

<sup>101</sup> 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 'UN Aid Group: Israel Deliberately Hampering West Bank, Gaza Relief Efforts', *Haaretz*, 30 May 2010, available online at <https://www.haaretz.com/1.5126675> (visited 18 July 2019).

<sup>102</sup> 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.

<sup>103</sup> 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.

<sup>104</sup> Art. 23(2)(a) GC IV.

<sup>105</sup> Art. 70(3) AP I, Arts 23(a), 59 and 61 (for occupied territories) GC IV.

<sup>106</sup> Art. 70(3)(a) AP I, Art. 59(3) GC IV.

<sup>107</sup> 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 of 1858 to Art. 59 GC IV, at 322, available online at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15B5740DF2203BE4C12563CD0042C966> (visited 18 July 2019).

<sup>108</sup> Art. 71(3) AP I allows temporary restriction only for imperative military necessity.

<sup>109</sup> Art. 70(3)(c) AP I, Art. 23(4) GC IV, Art. 60 GC IV.

As is obvious from the foregoing, blanket assertions of the lawfulness of sieges,<sup>110</sup> ignoring the adverse impact to the 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, including intentional starvation of the civilian population, and so fulfilling the requirements of the relevant war crime.

## 4. Increasing the Prospects of Accountability for Starvation

As outlined above, there is much work to be done in terms of prosecuting starvation as a distinct crime. We thus consider the three main practical avenues for increasing the prospects of a starvation prosecution.

First, utilizing a range of alternative crimes. This would overcome the fact that the war crime of starvation is currently only justiciable in an IAC at the ICC. Accordingly, the prosecutors will need to look beyond the ICC and Article 8(2)(b)(xxv) to be able to provide meaningful accountability for the multiple global starvation-related crises.

A starvation prosecution (under Article 8(2)(b)(xxv) or an equivalent national crime) will invariably involve the concurrent prosecution of additional or alternative crimes, whose purpose would be to ensure that relevant 'starvation conduct' (that may in the final analysis not fulfil the material and/or mental elements of Article 8(2)(b)(xxv)) is effectively prosecuted and adjudicated.

There is an array of alternative crimes that may serve the purpose of ensuring that the relevant 'deprivation of objects indispensable to survival' misconduct is captured in its entirety and that the trier of fact is provided with a range of prospective bases for conviction arising from relevant 'starvation facts'.<sup>111</sup> With respect to the alternative war crimes (with some available in a NIAC as well as a IAC), each involve to a greater or lesser degree either the targeting of objects indispensable to survival, including humanitarian relief operations, and/or the predictable results of such deprivation, including destruction of civilian populations, displacement and a variety of personal injury, including harm arising from discrimination based on political, racial, national, ethnic, cultural, religious or gender.<sup>112</sup>

<sup>110</sup> As explained above, sieges imposed in areas where only combatants are present or those imposed without the intent to cause the starvation of the population and not causing disproportionate effects among civilians are considered to be lawful.

<sup>111</sup> Such crimes include crimes against humanity (notably persecution, deportation or forcible transfer of population and other inhumane acts), genocide and a large number of war crimes like the following ones listed in the ICC Statute: Art. 8(2)(b)(xiii) and 8(2)(e)(xii); Art. 8(2)(b)(i).

<sup>112</sup> For more on the range of alternative crimes see in this special issue, M.J. Ventura, 'Prosecuting Starvation under International Criminal Law: Exploring the Legal Possibilities', in this special issue of the *Journal of International Criminal Justice*.

In terms of utility, much will depend upon the nature of the fact pattern that underpins the starvation prosecution. Although it is not practicable to identify in this article the full range of starvation fact patterns, we anticipate there will be broadly three types that will engage any prosecutor tasked with prosecuting starvation and deciding upon viable and useful alternatives. These include: ‘narrow’ cases (involving a finite number of identifiable attacks against civilian objects, such as the attacks in Aleppo, and Eastern Ghouta<sup>113</sup> during the Syrian war); ‘broad’ cases (where deprivations occur in the midst of protracted violence, encompassing large swathes of military action spanning time and geography — such as in large parts of the Yemen conflict, involving coordinated and repeated attacks on objects indispensable to survival, siege and blockade warfare, and discriminatory economic policies);<sup>114</sup> and ‘consequence’ cases (where deprivations are aimed at, or lead to, clearly defined consequences, such as the forcible displacement of civilians in South Sudan).<sup>115</sup>

In ‘narrow’ cases, the elements of intentionally directing attacks against civilian objects pursuant to Article 8(2)(b)(ii) may be easier to fulfil than those constituting the crime of starvation. In the case of the Rome Statute, the war crime has no requirement of specific intent and has proven to be a useful vehicle for capturing criminal conduct,<sup>116</sup> in particular in its ability to encompass and describe the violations of the fundamental rules of IHL. Similar to the war crime of starvation, intentionally directing attacks against civilian objects does not require a particular result; it is sufficient that, for example, an

<sup>113</sup> For example, during the Syrian war, repeated attacks against markets, bakeries and other food sources indispensable for civilian life have been a hallmark of the prolonged siege of eastern Aleppo, and has been considered by the Independent International Commission of Inquiry on the Syrian Arab Republic as indicative of a pattern of intentionally violating the right to access to food by targeting civilian infrastructure. See *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/S-17/2/Add.1, 23 November 2011, § 82.

<sup>114</sup> Such as the relocation of the central bank, the seizure of assets, destruction of the means of subsistence and the destruction of businesses, unpaid salaries, or the imposition of collective fines against certain groups. For more on the economic arguments of starvation, see the authors’ joint expert report on Yemen co-authored by Yemeni political analyst Samā'a Al-Hamdani, the World Peace Foundation, Alex de Waal and GRC, ‘Accountability for Mass Starvation: Starvation in Yemen’, September 2019, available online at <https://starvationaccountability.org/resources/expert-report> (visited 15 October 2019).

<sup>115</sup> ‘Millions of civilians have been displaced and thousands are sheltering in the bush, resulting in untold deaths from starvation, thirst, exposure and lack of access to medical care. Such deaths are a direct and foreseeable result of the conflict and no less part of the casualties of war than those shot, beheaded, burned in their tukuls (thatched huts) or strung up from a tree.’ *Report of the Commission on Human Rights in South Sudan*, UN Doc. A/HRC/37/71, 14 March 2018, § 25.

<sup>116</sup> Milošević Trial Judgment, *supra* note 59; Judgment, Blaškić (IT-95-14-T), Trial Chamber, 3 March 2000 (hereafter the ‘Blaškić Trial Judgment’); Judgment, Strugar (IT-01-42-T), Trial Chamber, 31 January 2005 (hereafter the ‘Strugar Trial Judgment’); Judgment, Boškoski & Tarčulovski (IT-04-82-T), Trial Chamber, 10 July 2008 (hereafter the ‘Boškoski & Tarčulovski Trial Judgment’); Galic Appeal Judgment, *supra* note 58; Karadžić Trial Judgment, *supra* note 21; Judgment, Kordić and Čerkez (IT-65-14/2-A), Appeals Chamber, 17 December 2004.

attack is launched against a civilian object, even though the intended target is not hit.<sup>117</sup>

With regard to the mental element, the intention behind the attack can be established when a civilian object is intentionally attacked and the perpetrator had knowledge that this object had civilian status.<sup>118</sup> This offence may be established through oblique intent, namely from knowledge that the destruction was a virtually certain consequence of one's acts (as discussed above in Section 2(B)).<sup>119</sup>

Similarly, 'broad' cases involving a plurality of participants, acts and circumstances, resulting in a multitude of crimes, may be susceptible to being prosecuted using crimes such as the crime against humanity of persecution, consisting of a course of conduct giving rise to the infringements of fundamental rights, which may well include depriving civilians of objects indispensable to their survival. Mass starvation is usually the outcome of a range of violations and policies which when individually assessed may not give rise to criminal responsibility, but when taken together may provide the basis for inferring a persecutory intent aimed at a specific purpose, including the deliberate starvation of civilians. In this way, a crime like persecution under Article 7(1)(h) of the Rome Statute — as an 'umbrella' offence or a type of compound crime — offers prosecutors the option to capture not just the malice of a single conduct but the widespread or systematic nature of a broader campaign, and its identifiable result.<sup>120</sup>

Finally, 'consequence' cases, such as deprivations aimed at, or giving rise to, unlawful forced displacement,<sup>121</sup> offer an important alternative framework for prosecuting starvation due to the frequency with which starvation manifests in forced displacement.<sup>122</sup> Forced displacement frequently results in civilians

<sup>117</sup> *San Remo Manual*, *supra* note 46, at 148.

<sup>118</sup> *Blaškić Trial Judgment*, *supra* note 116, § 180; see also Prosecutor's Pre-trial Brief, *Kordić and Čerkez* (IT-95-14/2-PT), at 49; see further, *Strugar Trial Judgment*, *supra* note 116, § 283.

<sup>119</sup> *Boškoski & Tarčulovski Trial Judgment*, *supra* note 116, § 358; *Lubanga Appeal Judgment*, *supra* note 29, § 447, fn. 827. The 'awareness that a consequence will occur in the ordinary course of events' means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger'; Judgment pursuant to Article 74 of the Statute, *Lubanga* (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012, § 1012; *Katanga Trial Judgment*, *supra* note 30, § 777.

<sup>120</sup> *Bemba Pre-Trial Decision*, *supra* note 29, §§ 80, 109; Decision on the Confirmation of Charges, *Muthaura* (ICC-01/09-02/11-382-Red), Pre-Trial Chamber, 23 January 2012, § 223; Judgment, *Kupreškić et al.* (IT-95-16-A), Appeals Chamber, 23 October 2001, § 97.

<sup>121</sup> Amounting to an international crime in several provisions of the ICCSt. alone, respectively: Art. 7(1)(d) as a crime against humanity; Art. 8(2)(a)(vii) as a grave breach of the Geneva Conventions; Art. 8(2)(b)(viii) as a war crime in IAC, concerning the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies; Art. 8(2)(e)(viii) as a war crime in NIAC; and Art. 6(e) as an act of genocide by forcibly transferring children of a protected group to another group (provided the relevant requirements are satisfied). See further, Triffterer and Ambos (eds), *supra* note 21, at 144; See also GRC Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute, *Situation in Bangladesh/Myanmar* (ICC-RoC46(3)-01/18), Pre-Trial Chamber, 30 May 2018.

starving and starvation crimes (such as the destruction of crops or livestock) in turn causes civilians to flee, creating a vicious cycle of potential criminality and harm. This has occurred on a massive scale in many of the most relevant starvation crises, most notably in Syria<sup>123</sup> and in South Sudan.<sup>124</sup> Major population transfers and forcible evacuation also occurred during the Khmer Rouge regime in Cambodia.<sup>125</sup> Forced displacement crimes have been a regular focus across international courts and tribunals and ICL has developed detailed substantive and procedural guidance enabling prosecutions. This may readily be applied to starvation facts, particularly in light of displacement being one of the most visible effects of starvation.

To perhaps state the obvious, the second approach to increasing the prospects of a prosecution for starvation must lie in an amendment to the Rome Statute. As noted above, Article 8(2)(b)(xxv) only applies in IAC. However, most instances of starvation occurring today are in the context of NIACs. On this basis alone, victims will be denied access to international justice. This gap was recognized by Switzerland which has submitted a proposal to amend the Rome Statute to include starvation within the list of war crimes capable of being committed in a NIAC.<sup>126</sup> It ought to go without saying that the proposed amendment underscores a commitment to the protection of civilians,<sup>127</sup> regardless of the technical characterization of the conflict in which they find themselves embroiled.<sup>128</sup>

<sup>122</sup> The link between starvation and forced displacement is also underscored in SC Res. 2417 (2018). For a detailed analysis of the resolution, see S. Zappalà, 'Conflict Related Hunger, 'Starvation Crimes', and UN Security Council Resolution 2417 (2018)' in this special issue of the *Journal of International Criminal Justice*.

<sup>123</sup> More than 5.5 million refugees have fled the country, and more than 6.5 million internally displaced civilians are subsisting inside the Syrian Arab Republic. *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/39/65, 12 September 2018, § 64.

<sup>124</sup> '[M]illions of civilians have been displaced and thousands are sheltering in the bush, resulting in untold deaths from starvation, thirst, exposure and lack of access to medical care. Such deaths are a direct and foreseeable result of the conflict and no less part of the casualties of war than those shot, beheaded, burned in their tukuls (thatched huts) or strung up from a tree.' *Report of the Commission on South Sudan*, UN Doc. A/HRC/37/71, 13 March 2018, § 25.

<sup>125</sup> See generally R.C. DeFalco, 'Justice and Starvation in Cambodia: International Criminal Law and the Khmer Rouge Famine' (LLM Thesis on file at the University of Toronto Faculty of Law, Canada), available online at <http://hdl.handle.net/1807/67245> (visited 24 September 2019), at 32–34.

<sup>126</sup> 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 online at <https://asp.icc-cpi.int/iccdocs/asp-docs/ASP17/ICC-ASP-17-35-ENG.pdf> (visited 2 May 2019). For an expanded note on the benefits of the proposed amendment to the Rome Statute, see Global Rights Compliance, 'Accountability for Mass Starvation: Testing the Limits of the Law', available online at [www.starvationaccountability.org](http://www.starvationaccountability.org) (visited 23 September 2019). See also F. D'Alessandra and M. Gillett, 'The War Crime of Starvation in Non-International Armed Conflict', in this special issue of the *Journal of International Criminal Justice*.

Making the law consistent across NIACs and IACs would not only strengthen enforcement worldwide and increase the prospects of a prosecution, but would also provide a platform for awareness building and associated legal development and action. As shown by the Netherlands — which altered their domestic legislation ahead of UNSC 2417's vote in 2018 to ensure that the crime of starvation may be prosecuted in both a NIAC and an IAC<sup>129</sup> — focus and debate at the international level may act as an important driver of change on the domestic front.

## 5. Conclusion

As a final postscript, it is worthwhile noting that an international criminal prosecution for the crime of starvation, whilst long overdue, is not the panacea. We must aim to increase the likelihood that global leaders act to avoid mass starvation when they are in a position to inflict it, facilitate it, or prevent it. One of the vital steps must be to encourage the use of prosecutions for the crime of starvation with a proper criminal label, to ensure effective penal sanction and proportionate stigma for the underlining misconduct. However, this will only be a step along the road, albeit a significant one. We cannot rest on this aim alone, but we must be more ambitious and seek to render mass starvation morally toxic.

Any meaningful movement in this direction must rest upon the full range of legal and advocacy tools, including domestic prosecutions, universal jurisdiction claims, claims before relevant UN treaty bodies, international human rights law litigation,<sup>130</sup> UN investigative bodies and a range of transitional justice instruments. There is an array of roads away from the Rome Statute that can and should be taken now not only to enhance accountability, but also to strengthen the prohibition and prevention of the crime and associated conduct more generally.

129 See digest of domestic criminal codes with original translations. Global Rights Compliance, 'Accountability for Mass Starvation: Testing the Limits of the Law', available online at <https://starvationaccountability.org/resources> (visited 23 September 2019). There are approximately 22 countries which reference starvation or wilfully impeding humanitarian access in their criminal legislation but do not specify whether the conduct is criminalized in a NIAC or IAC. Approximately eight countries follow the ICC and feature the crime only in an IAC (Australia, Georgia, Iraq, Mali, New Zealand, Slovenia, Trinidad and Tobago and the UK).

130 E.g. *Sawhoyamawa Indigenous Community v. Paraguay*, IACtHR (2006); or *M.S.S. v. Belgium and Greece*, ECtHR (2011) (Appl. no. 30696/09), 263.

127 A long-standing UNSC objective implemented in SC Res. 1265 (1999). 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. 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.

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