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Criminalizing Starvation in an Age of Mass Deprivation in War: Intent, Method, Form, and Consequence

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ABSTRACT

Mass starvation in war is resurgent. Across a range of conflicts, belligerents have attacked farmers and humanitarian workers; destroyed, looted, or rendered unusable food and food sources; and cut off besieged populations from the external supply of essential goods. Millions have been left in famine or on the brink thereof. Increasingly, this has elicited calls for accountability. However, traditional criminal categories are not promising in this respect. The situation and nature of objects indispensable to survival is such that they typically provide sustenance to both civilians and combatants; the conduct that deprives people of those objects often involves acting on the objects, rather than acting directly on the affected persons; and the causal chain from deprivation to civilian suffering is long and complex. Appropriately, then, attention has turned instead towards the recently codified and largely untested war crime of starvation of civilians as a method of warfare. Whether and how this framework can underpin a legal response to mass deprivation hinges on how key debates as to the crime's meaning are resolved. Entering those debates, this Article debunks the common view that the starvation crime attaches only to conduct that seeks to weaponize civilian suffering. Instead, it presents an alternative theory according to which the crime should be understood transitively as focused primarily on the act of deprivation, rather than the outcome it produces. This approach would reshape how to think about the crime, with particularly acute implications for the regulation of sieges and blockades.

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* Associate Professor of International Law, The Fletcher School of Law & Diplomacy, Tufts University. The author is grateful for conversations on this and related working papers at the Hauser Colloquium at New York University School of Law, the Junior International Law Scholars Association Workshop at Cornell Law School, the U.S. Consultative Meeting for the Revision of the San Remo Manual on International Law Applicable to Conflicts at Sea at the United States Naval War College, and the ICC Scholars Forum, hosted virtually by Leiden University. All errors are the responsibility of the author.

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I. INTRODUCTION

In January 2016, a resident of Madaya, Syria gave a harrowing account of life under siege: "[Y]ou see walking skeletons. The children

are always crying. We have many people with chronic diseases."[1] Another dispatch described inhabitants eating grass and neighbors "fail[ing] to recognize neighbors in the streets because their faces [were] so sunken."[2] Madaya was emblematic of the deprivation affecting hundreds of thousands of Syrians at the time.[3] The situation there was not unique. In 2017, United Nations (UN) Under-Secretary-General for Humanitarian Affairs Stephen O'Brien told the UN Security Council, "we are facing the largest humanitarian crisis since the creation of the United Nations . . . more than 20 million people across four countries face starvation and famine."[4] Four years later, Peter Maurer, President of the International Committee of the Red Cross (ICRC), warned that the enduring problem of inadequate civilian access to objects indispensable to their survival risked "humanitarian disaster on a vast scale."[5] With the global situation deteriorating, UN Secretary-General António Guterres reported recently that the number of people facing crisis or worse levels of acute food insecurity related to armed conflict rose from 99 million to 140 million from 2020 to 2021.[6]

These crises cannot be attributed simply to intractable scarcity or to a failure of humanitarian will; they are, in significant part, the consequence of belligerent parties' decisions about how to wage war.[7]

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1. *'In Madaya You See Walking Skeletons': Harrowing Accounts of Life Under Siege in Syria*, AMNESTY INT'L (Jan. 8, 2016, 7:01 PM), https://www.amnesty.org/en/latest/news/2016/01/harrowing-accounts-of-life-under-siege-in-syria/ [https://perma.cc/63ZJ-6RKB] (archived Feb. 5, 2022).

2. Anne Barnard, Hwaida Saad, & Somini Sengupta, *Starving Syrians in Madaya Are Denied Aid Amid Political Jockeying*, N.Y. TIMES (Feb. 9, 2016), https://www.nytimes.com/2016/01/11/world/middleeast/syria-starvation-madaya-siege-united-nations.html [https://perma.cc/F8L8-W2EF] (archived Feb. 5, 2022).

3. ALEX DE WAAL, MASS STARVATION: THE HISTORY AND FUTURE OF FAMINE 191 (2018).

4. Associated Press, *World Faces Worst Humanitarian Crisis Since 1945, Says UN Official*, GUARDIAN (Mar. 10, 2017), https://www.theguardian.com/world/2017/mar/11/world-faces-worst-humanitarian-crisis-since-1945-says-un-official [https://perma.cc/FHL2-D8KQ] (archived Feb. 7, 2022). The four countries that O'Brien referred to are Somalia, Yemen, South Sudan, and Nigeria. *See id.* Alex de Waal described O'Brien's framing as "hyperbolic" but agreed that he spoke at "a critical turning point, a moment at which famine could return." DE WAAL, *supra* note 3, at 179.

5. Peter Mauer, President, Int'l Comm. Red Cross, UNSC Open Debate on the Protection of Objects Indispensable to the Survival of the Civilian Population (Apr. 27, 2021), https://www.icrc.org/en/document/without-urgent-action-protect-essential-services-conflict-zones-we-face-vast-humanitarian [https://perma.cc/3FC5-JF66] (archived Feb. 5, 2022).

6. U.N. Secretary-General, *Protection of Civilians in Armed Conflict*, ¶ 25, U.N. Doc. S/2022/381 (May 10, 2022), https://reliefweb.int/attachments/625495cf-7a6a-4264-a29d-f83fdd431c8a/N2232173.pdf [https://perma.cc/R9WB-P89Q] (archived May 30, 2022).

7. *See* DE WAAL, *supra* note 3, at 6–7. On the role of methods of warfare, see FOOD SEC. INFO. NETWORK, 2021 GLOBAL REPORT ON FOOD CRISES 22 (May 5, 2021), https://www.ifpri.org/cdmref/p15738coll2/id/134397/filename/134609.pdf [https://perma.cc/XAH8-79JP] (archived Apr. 23, 2022); UN Secretary-General, Full Transcript of Secretary-General's Joint Press Conference on Humanitarian Crises in Nigeria,

In 2020, almost half of the population of South Sudan was in "crisis" or worse due to food deprivation that could be attributed primarily to armed conflict.[8] Isolated by a Saudi- and Emirati-led blockade on one side and subject to the confiscation of food and medicine by the Houthis on the other, the people of Yemen have endured years of what remains one of the gravest humanitarian crises in the world.[9] In Myanmar, the military's counterinsurgency and ethnic cleansing strategy has included the destruction, pillage, and denial of food and other essentials.[10] The 2021 Report of the Independent International Commission of Inquiry on Syria described "modern day sieges in which perpetrators deliberately starved the population along medieval scripts," imposing "indefensible and shameful restrictions on

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Somalia, South Sudan, and Yemen (Feb. 22, 2017), https://www.un.org/sg/en/content/sg/press-encounter/2017-02-22/full-transcript-secretary-generals-joint-press-conference [https://perma.cc/LV8G-7GPQ] (archived Feb. 6, 2022). On why starvation tactics are used, see generally Bridget Conley & Alex de Waal, *The Purposes of Starvation: Historical and Contemporary Uses*, 17 J. INT'L CRIM. JUST. 699 (2019). Arguing more generally that famine is caused by political choices, see ALEX DE WAAL, FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA 7 (1997); AMARTYA SEN, DEVELOPMENT AS FREEDOM 160–88 (1999); David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT'L L. 245, 248–61 (2003).

8. Comm'n on Hum. Rts. in S. Sudan, There is Nothing Left for Us: Starvation as a Method of Warfare in South Sudan, ¶¶ 3–4, 6, U.N. Doc. A/HRC/45/CRP.3 (2020).

9. *See* Hannah Summers, *Yemen on Brink of 'World's Worst Famine in 100 Years' if War Continues*, GUARDIAN (Oct. 15, 2018), https://www.theguardian.com/global-development/2018/oct/15/yemen-on-brink-worst-famine-100-years-un [https://perma.cc/LEF4-4YYG] (archived Feb. 7, 2022). Even as food was allowed in, the blockade limited the quantity, impeded its delivery, caused dramatic price spikes, and devastated the economy. *See* Rep. of the Detailed Findings of the Grp. of Eminent Int'l & Reg'l Experts on Yemen, ¶¶ 768–72, U.N. Doc. A/HRC/42/CRP.1 (2019) [hereinafter Group of Experts on Yemen (2019)]; Jane Ferguson, *Is Intentional Starvation the Future of War?*, NEW YORKER (July 11, 2018), https://www.newyorker.com/news/news-desk/is-yemen-intentional-starvation-the-future-of-war [https://perma.cc/9MF2-L89H] (archived Feb. 8, 2022). In 2019, a World Food Programme spokesperson warned that 10 million Yemenis were "one step away from famine." *10 Million Yemenis 'One Step Away from Famine', UN Food Relief Agency Calls for 'Unhindered Access' to Frontline Regions*, UN NEWS (Mar. 26, 2019), https://news.un.org/en/story/2019/03/1035501 [https://perma.cc/H7QV-N6XF] (archived Feb. 8, 2022). In mid-2021, Mark Lowcock described the situation as "the world's largest humanitarian crisis." Mark Lowcock, Under Sec'y Gen. for Humanitarian Affs. & Emergency Relief Coordinator, Briefing to the Security Council on the Humanitarian Situation in Yemen 1 (Apr. 15, 2021), https://reliefweb.int/sites/reliefweb.int/files/resources/15April2021%20USG%20Statement%20to%20Security%20Council%20on%20Yemen.pdf [https://perma.cc/LQB3-W6N6] (archived Feb. 8, 2022); *see also* Report of the Secretary-General, *supra* note 6, ¶ 26.

10. This is seen as a revival of the 1960s "Four Cuts" doctrine. *See, e.g.*, Detailed Findings of the Indep. Int'l Fact-Finding Mission on Myan., ¶¶ 10, 49–50, U.N. Doc. A/HRC/42/CRP.5 (2019) [hereinafter IIFFMM, Detailed Findings (2019)]; Rep. of the Detailed Findings of the Indep. Int'l Fact-Finding Mission on Myan., ¶¶ 1367–69, U.N. Doc. A/HRC/39/CRP.2 (2018) [hereinafter IIFFMM, Detailed Findings (2018)]; Andray Abrahamian, *The Tadmadaw Returns to the 'Four Cuts' Doctrine*, LOWY INSTITUTE: INTERPRETER (Sept. 4, 2017), https://www.lowyinstitute.org/the-interpreter/tadmadaw-ominous-return-four-cuts-doctrine [https://perma.cc/5FUF-QK9R] (archived Feb. 8, 2022).

humanitarian aid."[11] Since November 2020, evidence has accumulated that Ethiopian and Eritrean belligerents have used starvation tactics to devastating effect in Tigray.[12] Russian forces appear to have resorted to similar methods in Ukraine.[13]

The deprivation takes many forms. Warring parties have attacked humanitarian workers and farmers;[14] destroyed or rendered unusable livestock, crops, farmland, fishing systems, water and irrigation infrastructure, health systems, and food markets;[15] looted farms,

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11. Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, ¶ 96, U.N. Doc. A/HRC/46/54 (2021) [hereinafter IICI Syria Report 2021].

12. *See* WORLD PEACE FOUND., STARVING TIGRAY: HOW ARMED CONFLICT AND MASS ATROCITIES HAVE DESTROYED AN ETHIOPIAN REGION'S ECONOMY AND FOOD SYSTEM AND ARE THREATENING FAMINE 23–40 (Apr. 6, 2021), https://sites.tufts.edu/wpf/files/2021/04/Starving-Tigray-report-final.pdf [https://perma.cc/UEH3-RU2D] (archived Feb. 8, 2022); Tom Dannenbaum, *Famine in Tigray, Humanitarian Access, and the War Crime of Starvation*, JUST SEC. (July 26, 2021), https://www.justsecurity.org/77590/famine-in-tigray-humanitarian-access-and-the-war-crime-of-starvation/ [https://perma.cc/4J9N-CXD7] (archived Feb. 8, 2022).

13. *See, e.g.*, Tom Dannenbaum, *Legal Frameworks for Assessing the Use of Starvation in Ukraine*, JUST SEC. (Apr. 22, 2022), https://www.justsecurity.org/81209/legal-frameworks-for-assessing-the-use-of-starvation-in-ukraine/ [https://perma.cc/FYL6-ANQF] (archived May 30, 2022).

14. *See* IIFFMM, Detailed Findings (2018), *supra* note 10, ¶ 302; Report of the Secretary-General, *supra* note 6, ¶ 27; The Int'l Comm'n of Inquiry on the Cent. African Republic, Final Rep., transmitted by Letter dated 19 December 2014 from the Secretary-General Addressed to the President of the Security Council, ¶¶ 591–92, U.N. Doc. S/2014/928 (Dec. 22, 2014); Final Rep. of the Panel of Experts Established Pursuant to S.C. Res. 2374 (2017) on Mali and Renewed Pursuant to Res. 2484 (2019), transmitted by Letter dated 7 August 2020 from the Panel of Experts Established Pursuant to Res. 2374 (2017) on Mali Addressed to the President of the Security Council, ¶¶ 129–33, U.N. Doc. S/2020/785/Rev.1 (Aug. 7, 2020) [hereinafter Mali Panel of Experts]; Final Rep. of the Panel of Experts on Som., transmitted by Letter dated 28 September 2020 from the Chair of the Security Council Comm. Pursuant to Res. 751 (1992) Concerning Somalia Addressed to the President of the Security Council, ¶¶ 124–25, 127, U.N. Doc. S/2020/949 (Sept. 28, 2020) [hereinafter Somalia Panel of Experts]; GLOB. RTS. COMPLIANCE & WORLD PEACE FOUND., THE CRIME OF STARVATION AND METHODS OF PROSECUTION AND ACCOUNTABILITY ¶ 105 (June 13, 2019), https://sites.tufts.edu/wpf/files/2019/06/The-Crimes-of-Starvation-and-Methods-of-Prosecution-and-Accountability.pdf [https://perma.cc/NH83-UYU6] (archived Feb. 8, 2022).

15. *See* Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 15 (Aug. 2, 2001), https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf [https://perma.cc/VW99-ZZ69] (archived Feb. 9, 2022); WORLD PEACE FOUND., *supra* note 12, at 5, 8, 11–12, 31–37; Mali Panel of Experts, *supra* note 14, ¶ 135; Final Rep. of the Panel of Experts on the Sudan, transmitted by Letter dated 14 January 2020 from the Panel of Experts on the Sudan Addressed to the President of the Security Council, ¶ 117, U.N. Doc. S/2020/36 (Jan. 14, 2020) [hereinafter Experts on the Sudan]; Rep. of the Group of Eminent Int'l and Reg'l Experts on Yemen, ¶¶ 48–52, U.N. Doc. A/HRC/45/6 (2020) [hereinafter Group of Experts on Yemen (2020)]; IIFFMM, Detailed Findings (2019), *supra* note 10, ¶ 166; Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, ¶¶ 53, 58, U.N. Doc. A/HRC/39/65 (2018); Comm'n on Hum. Rts. in S. Sudan, *supra* note 8, ¶¶ 88–92, 100; Report of the Secretary-General, *supra* note 6, ¶ 27–28; MARTHA MUNDY, WORLD PEACE FOUND., THE STRATEGIES OF THE COALITION IN THE YEMEN WAR: AERIAL BOMBARDMENT AND FOOD WAR 2–3, 9–17 (Oct. 9, 2018), https://sites.tufts.edu/wpf/files/2019/11/Strategies-of-the-Coalition-in-the-Yemen-War-

markets, businesses, households, and humanitarian aid;[16] impeded pastoralists' free movement and farmers' access to their land;[17] disrupted coping strategies;[18] and sequestered populations from humanitarian aid, while attacking civilians seeking to access essential goods.[19] Often, many of these measures have been adopted simultaneously.[20]

Starvation has long been weaponized in war.[21] However, the current resurgence has motivated calls for accountability in a context in which there are now the legal tools necessary to pursue that

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20181005.pdf [https://perma.cc/92W2-AYPX] (archived Feb. 8, 2022); ; Marcus, *supra* note 7, at 257.

16. *See* WORLD PEACE FOUND., *supra* note 12, at 27–31, 34; Comm'n on Hum. Rts. In S. Sudan, *supra* note 8, ¶¶ 79, 88, 104, 106; IIFFMM, Detailed Findings (2019), *supra* note 10, ¶¶ 161, 163, 253, 412–18; IIFFMM, Detailed Findings (2018), *supra* note 10, ¶¶ 134, 434, 437; Full Rep. of the Int'l Comm'n of Inquiry on Libya, ¶ 456 U.N. Doc. A/HRC/19/68, Annex I (2012) [hereinafter ICIL Full Report (Annex I)] https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_19_68_en%20_1_.pdf [https://perma.cc/8967-R9RP] (archived Apr. 23, 2022); Somalia Panel of Experts, *supra* note 14, ¶ 136.

17. DE WAAL, FAMINE CRIMES, *supra* note 7, at 2; Report of the Secretary-General, *supra* note 6, ¶¶ 27–28.

18. *See* Marcus, *supra* note 7, at 257–58; WORLD PEACE FOUND., *supra* note 12, at 6–8, 12, 49; Rep. of the Indep. Int'l Fact-Finding Mission on Myan., ¶ 23, U.N. Doc. A/HRC/39/64 (2018).

19. *See* Comm'n on Hum. Rts. In S. Sudan, *supra* note 8, ¶¶ 101, 105–06, 109, 124–27; IIFFMM, Detailed Findings (2019), *supra* note 10, ¶¶ 156–60, 168–69, 404–06, 584–85; IIFFMM, Detailed Findings (2018), *supra* note 10, ¶¶ 575–77, 1165–68; ICIL Full Report (Annex I), *supra* note 16, ¶¶ 88, 90, 128, 160, 542, 563; IICI Syria Report 2021, *supra* note 11, ¶¶ 39, 46; Rep. of the United Nations High Comm'r for Hum. Rts Containing the Findings of the Grp. of Eminent Int'l and Reg'l Experts and a Summary of Tech. Assistance Provided by the Off. of the High Comm'r to the Nat'l Comm'n of Inquiry, ¶¶ 46–64, U.N. Doc. A/HRC/39/43 (2018); Experts on the Sudan, *supra* note 15, ¶ 132; Somalia Panel of Experts, *supra* note 14, ¶ 124; MUNDY, *supra* note 15, at 2–3, 7; Dannenbaum, *supra* note 12; GLOB. RTS. COMPLIANCE & WORLD PEACE FOUND., *supra* note 14, ¶ 100; Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, Judgment, ¶¶ 208, 937 (Dec. 12, 2007), https://www.icty.org/x/cases/dragomir_milosevic/tjug/en/071212.pdf [https://perma.cc/V593-WFFJ] (archived Feb. 14, 2022); Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶¶ 26, 28, 566; Prosecutor v. Karadžić, Case No. MICT-13-55-A, Judgement, ¶¶ 565–73 (Mar. 20, 2019), https://www.irmct.org/sites/default/files/casedocuments/mict-13-55/appeals-chamber-judgements/en/190320-judgement-karadzic-13-55.pdf [https://perma.cc/Q955-ACWE] (archived Feb. 14, 2022).

20. *See, e.g.,* Group of Experts on Yemen (2020), *supra* note 15, ¶¶ 48–55; *supra* notes 14–19.

21. *See* Esbjörn Rosenblad, *Starvation as a Method of Warfare: Conditions for Regulation by Convention*, 7 INT'L LAW. 252, 255–56 (1973); Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 4–8, 31–32 (1989); James Kraska, *Siege*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 3, 8 (Dec. 2009); Wolf Heintschel von Heinegg, *Blockade*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 6–22 (Oct. 2015) Conley & de Waal, *supra* note 7, at 709–11; Nicholas Mulder & Boyd van Dijk, *Why Did Starvation Not Become the Paradigmatic War Crime?*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 370, 370–88 (Ingo Venzke & Kevin Jon Heller eds., 2021).

objective.[22] In the last century, international law has transitioned from permitting the starvation of the civilian population in war to weakly regulating it, subsequently prohibiting it, and ultimately classifying it as a war crime, most prominently through codification in the International Criminal Court (ICC) Statute in 1998.[23] For two decades, the court's jurisdiction over the crime was restricted to international armed conflicts (IACs).[24] However, a parallel provision for non-international armed conflicts (NIACs) was incorporated by amendment in 2019.[25] A strong case can now be made that the crime has customary status in both forms of conflict.[26]

And yet, the prohibition remains something of an enigma. Constrained by jurisdictional factors, the ICC prosecutor has yet to open an investigation implicating the starvation war crime.[27] Domestic provisions incorporating the crime have also remained almost entirely fallow.[28] In this jurisprudential vacuum, fundamental interpretive

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22. Advocating accountability, see Hilal Elver (Special Rapporteur on the Right to Food), *Interim Report of the Special Rapporteur on the Right to Food*, ¶¶ 27–34, 70–90, U.N. Doc. A/72/188 (July 21, 2017); Alex de Waal, *Mass Starvation Is a Crime—It's Time We Treated It That Way*, BOS. REV. (Jan. 14, 2019), https://bostonreview.net/articles/alex-de-waal-starvation-crimes/ [https://perma.cc/CE8V-LWPH] (archived Feb. 15, 2022).

23. Rome Statute of the International Criminal Court art. 8(2)(b)(xxv), July 17, 1998, 2187 U.N.T.S. 90, *amended by* Resolution ICC-ASP/18/Res.5 (2019) [hereinafter ICC Statute]. On how the legal framework has developed, see *infra* Part II.

24. *See* ICC Statute, *supra* note 23; *infra* Part III.A.

25. *See* Assembly of States Parties [ASP], *Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court*, Resolution ICC-ASP/18/Res.5 (Dec. 6, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res5-ENG.pdf [https://perma.cc/H89U-KPRJ] (archived Feb. 15, 2022) [hereinafter ASP, NIAC Starvation Resolution]; *infra* notes 100–104.

26. *See infra* Part III.B.

27. The ICC's jurisdiction attaches ordinarily only to crimes perpetrated on the territory, or by the nationals, of a State Party. *See* ICC Statute, *supra* note 23, arts. 12–13. Eritrea, Ethiopia, Myanmar, Saudi Arabia, South Sudan, Syria, the United Arab Emirates, and Yemen are not parties to the Statute. On the possible starvation crimes with a territorial or nationality nexus to these states, see *supra* Part I. For a list of ICC States Parties, see *The States Parties to the Rome Statute*, Assembly of States Parties to the Rome Statute, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Feb. 15, 2022) [https://perma.cc/WAK8-QRFR] (archived Feb. 15, 2022).

28. For a limited (and *in absentia*) exception, see District Court in Zadar, K. 74/96, Apr. 24, 1997 (Croatia), *unofficially translated in* HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/Docs/NLP/Croatia/M.P_et_al._verdict_24-4-1997.pdf [https://perma.cc/K9HV-FNH9] (archived Feb. 19, 2022). The Swedish Prosecution Authority's recently announced intention to prosecute Lundin Oil AB executives for complicity in alleged war crimes in Sudan between 1999 and 2003 includes mention of the "burning [of] . . . crops so that people did not have anything to live by" as a "grave war crime[]." *Prosecution For Complicity in Grave War Crimes in Sudan*, ÅKLAGARMYNDIGHETEN (SWEDISH PROSECUTION AUTH.) (Nov. 11, 2021, 9:39 AM), https://www.aklagare.se/en/media/press-releases/2021/november/prosecution-for-complicity-in-grave-war-crimes-in-sudan/ [https://perma.cc/3R79-27MT] (archived Feb. 15, 2022). However, it does not appear that this will be prosecuted as the specific crime of starvation of civilians as a method of warfare. For an overview of relevant

questions have yet to be resolved. What precisely is meant by "[i]ntentionally using starvation of civilians as a method of warfare," as the ICC codification frames the crime?[29] Does criminal liability attach only to those who seek to weaponize a particular form of civilian suffering? Or does it attach also to those who act in the knowledge that such suffering will occur as a consequence of their conduct? Alternatively, should the legal focus be on the deprivation of "objects indispensable to civilian survival" given that concept's key role in the underlying international humanitarian law (IHL) framework and as the central element of the war crime?[30]

Sharpening what is at stake in these questions are two features of the practical reality of starvation in war. First, the situation and nature of objects indispensable to survival is often such that they can be expected to provide sustenance to both civilians and combatants. This is particularly obvious in a siege or blockade, where the encircling party may exercise tight control over what goes into the besieged area, while retaining very little influence over the distribution of consignments once permitted through. However, it is true also of agricultural land and resources in enemy territory. Second, conduct that deprives people of those objects often involves acting on the objects (destroying them, impeding their delivery, removing them, rendering them useless, or otherwise), rather than acting directly on the affected persons (as occurs when those persons are prevented from pursuing coping strategies). When these features combine—such that a belligerent acts directly on objects of sustenance value to both civilians and combatants (hereinafter "nonexclusive sustenance")—much turns on how the relevant legal authorities answer the interpretive questions identified above.[31]

At one end of the interpretive spectrum, the crime would attach only to acts that seek to weaponize the civilian suffering associated with starvation. That, the argument goes, is what it means to

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jurisprudence, see generally *Starvation Jurisprudence Digest*, GLOB. RTS. COMPLIANCE (Nov. 8, 2021), https://starvationaccountability.org/wp-content/uploads/2019/07/Starvation-Jurisprudence-Table-update-November-2021.pdf [https://perma.cc/F6ZC-45DF] (archived Feb. 15, 2022).

29. ICC Statute, *supra* note 23, arts. 8(2)(b)(xxv), 8(2)(e)(xix).

30. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 54(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 14, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]; INT'L CRIM. CT., ELEMENTS OF CRIMES 31 (2013), https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf (last visited Feb. 16, 2022) [https://perma.cc/VCS3-W4Q9] (archived Feb. 16, 2022).

31. The term "nonexclusive sustenance" is used here instead of the commonly recognized, but distinct concept of "dual-use objects," because objects indispensable to civilian survival are not subject to the ordinary framework regulating dual-use objects. *See infra* notes 290–295.

intentionally use starvation of civilians as a *method* of warfare.[32] In a context of nonexclusive sustenance, this would imply a crime of narrow scope. For example, a "surrender or starve" siege that deprives an encircled population of essentials on a grand scale might be thought to fall short of the criminal threshold if pursued for the specific purpose of starving out the combatants ensconced within.[33] Even operations that *do* seek to weaponize civilian suffering may be difficult to prosecute, given the challenge of proving purpose in such contexts.[34]

This Article offers a different interpretation. "Intentionally using starvation of civilians as a method of warfare" should be read to refer not to the weaponization of a particular form of civilian suffering, but to the deliberate deprivation of objects indispensable to civilian survival.[35] Reframing the crime in this way changes the analysis fundamentally. Neither the deliberateness of the deprivation nor the indispensability of the objects to civilians is contingent on the ultimate objective(s) of those engaged in that deprivation. As such, on the view advanced here, the crime attaches even if the perpetrators do not seek to weaponize civilian suffering and in fact endeavor to mitigate that harm. Thus construed, rather than being limited to a vanishingly narrow range of scenarios, the crime involves a broad and categorical ban that reflects the torturous nature of societal deprivation.[36]

The argument proceeds as follows. Part II provides a brief legal history of starvation in war and details the key features of the current IHL framework. Part III identifies the key steps to criminalization and explains why the crime ought to be understood as customarily applicable, despite the dearth of prosecutions thus far. Parts IV and V recount and rebut the case for a narrow crime. Part IV focuses on the dimension of *mens rea*, advocating an interpretation that is inclusive of oblique, and not just purposive, intent. Part V advances a transitive theory of starvation as a method of warfare and makes the case for a criminal prohibition inclusive of operations not targeted at civilians. In the alternative, Part V also considers the implications of applying a civilian targeting requirement to the transitive understanding of the crime, emphasizing that, properly understood, it would still include

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32. *See infra* Parts IV.A, V.A.

33. Other terms sometimes used include "kneel or starve," "surrender or starve," or "surrender-or-die." *See* GLOB. RTS. COMPLIANCE & WORLD PEACE FOUND., *supra* note 14, ¶ 105; Amnesty Int'l, *We Leave or We Die: Forced Displacement under Syria's Reconciliation Agreements*, at 15–17, AI Index: MDE 24/7309/2017 (Nov. 13, 2017); Brian Lander & Rebecca Vetharaniam Richards, *Addressing Hunger and Starvation in Situations of Armed Conflict—Laying the Foundations for Peace*, 17 J. INT'L CRIM. JUST. 675, 677 (2019).

34. There are occasional exceptions. *See* MUNDY, *supra* note 15, at 7 (quoting a Saudi diplomat off the record: "Once we control then, we will feed them.").

35. The quoted language is that of the ICC war crime. *See* ICC Statute, *supra* note 23, arts. 8(2)(b)(xxv), 8(2)(e)(xix).

36. *See* Tom Dannenbaum, *Siege Starvation: A War Crime of Societal Torture*, 22 CHI. J. INT'L L. 368 (2022).

many contemporary sieges and blockades. Part VI evaluates the relevance of IHL's humanitarian access rules, arguing that nothing in that framework can authorize what the starvation crime prohibits and offering a way to make sense of the reference to the Geneva Conventions' provisions on relief supplies in the ICC war crime.

II. A BRIEF LEGAL HISTORY OF STARVATION AND ARMED CONFLICT[37]

For much of the modern history of international law, the starvation of civilians was deemed a necessary and permissible belligerent practice. Hugo Grotius[38] and Emer de Vattel[39] endorsed the method. Francis Lieber's influential codification of the existing customs of war for the purposes of the US Civil War provided both that "it is lawful to starve the hostile belligerent, armed *or unarmed*, so that it leads to the speedier subjection of the enemy"[40] and that "it is lawful, though an extreme measure, to drive [expelled civilians] back [into a besieged location], so as to hasten on the surrender."[41] And the first significant multilateral treaties on the conduct of hostilities (the Hague Regulations of 1899 and then 1907)[42] omitted any restriction on starvation as a method of warfare.[43]

A novel crime of "[d]eliberate starvation of civilians" was contemplated in the move to prosecute alleged German war criminals after World War I, but the international prosecution efforts collapsed

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37. For an overview of the history of starvation in international law, see Mulder & van Dijk, *supra* note 21. For a discussion of the history of starvation with a focus on IHL's regulation of naval blockades, see Tom Dannenbaum, *Encirclement, Deprivation, and Humanity: Revising the* San Remo Manual *Provisions on Blockade*, 97 INT'L L. STUD. 307, 312–32 (2021).

38. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE: THREE BOOKS] Book III, Ch. 1, ¶¶ V–VI (Francis W. Kelsey, Arthur E. R. Boak, Henry A. Sander, Jesse S. Reeves, & Herbert F. Wright trans., Clarendon Press 1925) (1625).

39. EMER DE VATTEL, LAW OF NATIONS Book III, §112 (Joseph Chitty ed., 6th Am. ed., T. & J. W. Johnson 1844) (1758).

40. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, art. 17 (Gov't Printing Off. 1898) (1863) (emphasis added). On the code's history and relationship to the law of war, see generally JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

41. *See* General Orders No. 100, *supra* note 40, art. 18.

42. Convention with Respect to the Laws and Customs of War on Land July 29, 1899, T.S. No. 403 [hereinafter Hague Regulations (II) 1899]; Convention Respecting the Laws and Customs of War on Land, Oct. 18 October, 1907, T.S. No. 539 [hereinafter Hague Regulations (IV) 1907)].

43. It was left out of both their "especially prohibited" methods of warfare and their rules on the siege of defended localities. *See* Hague Regulations (II) 1899, *supra* note 42, at annex, arts. 23, 27; Hague Regulations (IV) 1907, *supra* note 42, at annex, arts. 23, 27. Only undefended localities are protected from attack "by whatever means." Hague Regulations (IV) 1907, *supra* note 42, at annex, art. 25. The non-binding London Declaration was also silent on starvation in the naval context. *See* Declaration of London Concerning the Laws of Naval War, Feb. 26, 1909, 208 Consol. T.S. 338.

and no such crime was established.[44] Although the Allies were more successful in holding their defeated adversaries to criminal account after World War II,[45] the use of starvation in the conduct of hostilities remained legally unconstrained. [46] Evaluating the Nazi siege of Leningrad, in which over one million Russians died, one of the Nuremberg Military Tribunals (NMT) determined that there was no legal violation,[47] relying in that respect on Charles Cheney Hyde's formulation:

> A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate.[48]

Although they may have "wish[ed] the law were otherwise,"[49] the judges were unequivocal that those who starved populations as part of the war effort broke no existing rule.[50] As in the First World War, the Allies had themselves used mass starvation as a method of warfare.[51]

Less than a year after that judgment, states adopted a dichotomous regime on starvation in the Geneva Conventions of 1949. Articles 55 and 59 of the Fourth Convention impose upon occupying powers the robust duty to use all available means to ensure adequate food and medical supplies for the occupied population, including by

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44. Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference* (March 29, 1919), *reprinted* in 14 AM. J. INT'L L. 95, 114 (1920). On the efforts to pursue criminal justice after World War I, see generally Matthias Neuner, *When Justice is Left to the Losers: The Leipzig War Crimes Trials*, *in* 1 HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 333 (Morten Bergsmo, Cheah Wui Ling, & Yi Ping eds., 2014); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 58–105 (2000).

45. On the politics that led to this result, see BASS, *supra* note 44, at 147–205.

46. However, convictions were issued for the distinct practice of starving detained or otherwise controlled persons. *See* Göring et al., Judgment, *in* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 456, 474, 477–78, 480, 482–84, 495, 541–44 (1948).

47. *See United States v. von Leeb et al.*, Judgment, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 555, 563 (1949) [hereinafter High Command Case].

48. *Id.* at 563 (citing CHARLES CHENEY HYDE, 3 INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1802–03 (2d rev. ed. 1945)).

49. High Command Case, *supra* note 47, at 563.

50. *See id.* This was affirmed shortly thereafter by Hersch Lauterpacht, a key architect of the criminal code employed at Nuremberg. *See* Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 374 (1952). On Lauterpacht and Nuremberg, see PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY 3, 113–15 (2016), and more generally *id.* at 63–118.

51. *See* Mulder & van Dijk, *supra* note 21, at 374–80; ARTHUR HERMAN, TO RULE THE WAVES: HOW THE BRITISH NAVY SHAPED THE MODERN WORLD 535, 545 (2004). On the role of food in World War II, see generally LIZZIE COLLINGHAM, THE TASTE OF WAR: WORLD WAR TWO AND THE BATTLE FOR FOOD (1st Am. ed. 2012) (2011).

consenting to and facilitating the delivery of humanitarian relief when necessary.[52] However, outside of the narrow context of belligerent occupation, efforts to prohibit starvation methods failed.[53] The Fourth Convention is largely permissive of states denying the passage of essential goods through to adversary territory[54] and fails to impose meaningful constraints on their discretion to deny access to impartial humanitarian organizations seeking to assist those in need.[55] Article 17 requires besieging parties merely to "*endeavour* to conclude local agreements" for the evacuation of "wounded, sick, infirm, and aged persons, children and maternity cases" and does not demand that they even try to conclude such agreements for civilians not in those categories.[56] Considerable room remained for starvation tactics in armed conflict.[57]

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52. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 55, 59, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV].

53. *See* INT'L COMM. OF THE RED CROSS, 4 COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 178–79 (Jean S. Pictet ed., 1958); Mulder & van Dijk, *supra* note 21, at 380–82; 3 COMMISSION OF GOVERNMENT EXPERTS FOR THE STUDY OF CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, GENEVA APRIL 14 TO 26, 1947: PRELIMINARY DOCUMENTS SUBMITTED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS 24–25 (1947), https://library.icrc.org/library/docs/CD/CEG_1947_DOC_PROTCIV_ENG.pdf (last visited Feb. 18, 2022) [https://perma.cc/6R7X-TXMP] (archived Feb. 18, 2022); INT'L COMM. OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS 15 (1947) (discussing how a proposed addition to the Geneva Convention permitting the passage of humanitarian aid through belligerent lines to besieged and blockaded areas was denied).

54. Such relief must be allowed only if "intended for children under fifteen, expectant mothers and maternity cases" *and* a string of other conditions are satisfied, including that the party determining access lacks "serious reasons for fearing" that the consignment would be "diverted" or would grant the adversary a "definite advantage" by substituting for goods that it would have provided. GC IV, *supra* note 52, art. 23. Although medical supplies are to be allowed through to *all* civilians, the latter caveats obtain. *Id.* On these loopholes' eviscerating impact, see Marcus, *supra* note 7, at 266; René Provost, *Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait*, 30 COLUM. J. TRANSNAT'L L. 577, 591–93 (1992); Lauterpacht, *supra* note 50, at 376.

55. GC IV, *supra* note 52, art. 10. This article is replicated for combatants rendered hors de combat by wounds, sickness, shipwreck, or detention in article 9 common to Geneva Conventions I–III. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 9, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 9, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 9, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III].

56. GC IV, *supra* note 52, art. 17 (emphasis added).

57. That attitude prevailed in some quarters long after the Conventions' agreement. *See, e.g.*, British Foreign Minister Michael Stewart, United Kingdom of Great Britain and Northern Ireland, 7 July 1969, 786 HC Deb (1969) col. 953 ("We must accept that, in the whole history of warfare, any nation which has been in a position to starve its enemy out has done so."); U.S. DEP'T OF THE ARMY, FM 27-10: THE LAW OF LAND WARFARE 20 (1956) (stating that it is within a besieging commander's discretion to fire upon civilians attempting to leave or enter a besieged area). The US did not formally reverse its affirmation of the lawfulness of driving fleeing civilians back into a

It took almost thirty years for that paradigm to shift, with a direct and explicit prohibition of the starvation of civilians as a method of warfare in Protocols I and II Additional to the Geneva Conventions.[58] That prohibition is the foundation for the war crime today.

The Protocol I rule, enshrined in Article 54, is more detailed. It bans the starvation of civilians as a method of warfare and prohibits the attack, destruction, removal, or rendering useless of objects indispensable to civilian survival as a reprisal or "for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive."[59] Due to the broad reference to indispensable objects, few understand the ban to cover only the deprivation of food and water.[60] Rather, it is thought also to include the deprivation of other goods essential to human survival, such as medical supplies or clothing.[61] Additionally, in the absence of any reference to a specific prohibited consequence, it is commonly recognized that the deprivation of essential items in a context in which that deprivation threatens survival violates the starvation ban, whether or not victims die or suffer a particular level of malnourishment as a result.[62] It may even be that depriving civilians of such objects in order to deny sustenance is enough to violate the prohibition regardless of whether civilian survival is immediately endangered.[63]

The third paragraph of Article 54 clarifies that indispensable objects *may* be attacked, destroyed, removed, or rendered useless if used by the adverse party "as sustenance solely for the members of its

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besieged place by firing on them until the publication of its updated *Law of War Manual* in 2015. *See* U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 5.19.4.1 (rev. ed., Dec. 2016) [hereinafter U.S. DoD, Law of War Manual]; *see also* U.S. DEP'T OF THE ARMY, FM 6-27/MCTP 11-10C: THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE ¶ 2-102 (2019) [hereinafter COMMANDER'S HANDBOOK, LAND WARFARE] (stating that forcibly driving fleeing civilians back into a besieged area is prohibited).

58. *See* AP I, *supra* note 30, art. 54; AP II, *supra* note 30.

59. AP I, *supra* note 30, art. 54(1)–(2), (4).

60. *But see* Manuel J. Ventura, *Prosecuting Starvation under International Criminal Law: Exploring the Legal Possibilities*, 17 J. INT'L CRIM. JUST. 781, 789 (2019) ("'[S]tarvation' would be stretched beyond recognition if it were to encompass a well-fed person that is deprived of clothing.").

61. Group of Experts on Yemen (2019), *supra* note 9, ¶ 740; Dapo Akande & Emanuela-Chiara Gillard, *Conflict-Induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law*, 17 J. INT'L CRIM. JUST. 753, 758–60 (2019); Knut Dörmann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 341, 388 (2003). Conley and de Waal link this to starvation's plain meaning by emphasizing the "relationship between food insecurity, care and health." Conley & de Waal, *supra* note 7, at 701.

62. ICC Elements of Crimes, *supra* note 30, at 31; Akande & Gillard, *Conflict-Induced Food Insecurity*, *supra* note 61, at 760–61; Group of Experts on Yemen (2019), *supra* note 9, ¶ 741.

63. *See infra* Parts V.D–F.

armed forces" or if otherwise used "in direct support of military action," but it specifies that in "no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement." [64] The sole (and very narrow) exception arises via the so-called scorched-earth exception, pursuant to which a party faced with a defensive imperative to do so may destroy essential objects in its own territory, in the face of an invasion of that territory, at a time when the territory is still under its control.[65]

The scorched-earth exception notwithstanding, civilians are protected by Article 54 regardless of nationality.[66] Moreover, despite an effort to exclude the ban from the NIAC context, the analogous rule in Article 14 of Protocol II was adopted by consensus.[67] It prohibits "[s]tarvation of civilians as a method of combat" and "therefore" bans acts that "attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population." [68] The NIAC provision allows no scorched-earth or other military-necessity exception.[69]

Both protocols also updated the law on humanitarian access in contexts other than belligerent occupation. Article 70 of Protocol I states that when the civilian population

> is not adequately provided with [food, medical supplies, clothing, bedding, means of shelter, and other supplies essential to its survival], relief actions which are humanitarian and impartial in character and conducted without any adverse

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64. AP I, *supra* note 30, art. 54(3).

65. *Id.* art. 54(5). These conditions are in some respects analogous to the *levée en masse* exception to the requirements for privileged belligerency. GC III, supra note 55, art. 4(A)(6).

66. *Cf.* GC IV, *supra* note 52, art. 4 (limiting the protections of Geneva Convention IV according to nationality).

67. On attempting to exclude the ban, see Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Table of Amendments to the Draft Additional Protocols, Annexes I – IV to the Table of Amendments and Information Documents*, 87, vol. IV CDDH/427, (31 May 1975) (reflecting Pakistan's statement against inclusion). On its adoption, see Federica D'Alessandra & Matthew Gillett, *The War Crime of Starvation in Non-International Armed Conflict*, 17 J. INT'L CRIM. JUST. 815, 819 (2019).

68. AP II, *supra* note 30, art. 14.

69. *See* INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4795 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987). As such, the ICRC understands this to be a rare area of law in which the corollary customary NIAC prohibition is more comprehensive than is its IAC counterpart. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW Rule 54 (2005), https://ihl-databases.icrc.org/ customary-ihl/eng/docs/v1 (Click on "See Rules," "View by Rule," and scroll down to Rule 54) (last visited April 25, 2022) [https://perma.cc/522E-WU5D] (archived Apr. 25, 2022).

> distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions.[70]

It provides further that the parties to the conflict (and all other Protocol I parties) "shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party."[71] Notably, this system protects all civilians (not just children, expectant mothers, and maternity cases), applies to all supplies essential to their survival (not just essential foodstuffs, clothing, and tonics), and eschews the loopholes that so eviscerate the Geneva Convention IV protections.[72] Article 18 of Protocol II adopts a similar framework for NIACs.[73]

Having consented to humanitarian access, Protocol I parties are limited to imposing "technical arrangements, including search," and to making the passage of relief "conditional on the distribution of this assistance being made under the local supervision of a Protecting Power."[74] Restrictions on the delivery of agreed relief must be temporary and justified by "imperative military necessity."[75] Additionally, whereas Article 10 of Convention IV provides that an "impartial humanitarian organization *may*" undertake humanitarian activities "subject to the consent of the Parties to the conflict concerned,"[76] Article 70 of Protocol I provides that such actions "*shall* be undertaken" subject to the concerned parties' agreement—a change the implications of which are discussed below.[77]

A strong case can be made that most elements of the starvation and humanitarian access rules codified in the protocols now have customary status.[78] The starvation ban gained consensus support in Protocol I negotiations, including from those that ultimately eschewed

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70. AP I, *supra* note 30, art. 70(1).
71. *Id.* art. 70(2).
72. *Cf. supra* notes 53–54 and accompanying text.
73. AP II, *supra* note 30, art. 18.
74. AP I, *supra* note 30, art. 70(3).
75. *Id.* art. 71(3).
76. GC IV, *supra* note 52, art. 10 (replicated for combatants rendered hors de combat by wounds, sickness, shipwreck, or detention in common article 9 of Geneva Conventions I–III).
77. *Infra* notes 377–383 and accompanying text.
78. HENCKAERTS & DOSWALD-BECK, *supra* note 69, at Rules 53, 54, 55; Provost, *supra* note 54, at 628–38; DAPO AKANDE & EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT ¶¶ 95–96, ¶ 136 n.105 (2016). *But see* Salvatore Zappala, *Conflict Related Hunger, 'Starvation Crimes' and UN Security Council Resolution 2417*, 17 J. INT'L CRIM. JUST. 881, 899 (2019). The customary status of the Protocol provisions matters. Among the states not party to Protocol I are Azerbaijan, Eritrea, India, Indonesia, Iran, Israel, Pakistan, Somalia, Turkey, and the United States. Protocol II is limited to a subset of NIACs, namely those between a state and a non-state group in a context in which the latter controls territory. AP II, *supra* note 30, art. 1. In addition to the states listed above, Protocol II also lacks Iraq, North Korea, and Syria.

ratifying the treaty on other grounds.[79] A wide range of states (including those party to neither protocol) have incorporated the starvation ban into their military manuals,[80] proscribed it in domestic law,[81] or ratified other treaties that would seem to be predicated on the customary status of the prohibition.[82] As well as indicating *opinio juris*, such actions manifest the official and deliberate framework for those states' practice in armed conflict.[83] Israel, which has ratified neither protocol and which objects readily to assertions of custom when it deems them erroneous, has relied on the customary status of the rules codified in Articles 54 and 70 of Additional Protocol I in both executive and judicial analyses of practices *vis-à-vis* Gaza.[84] Similarly, despite equivocating on what to make of "all of [the] particulars" of Article 54, the United States (another non-party that is not shy about objecting to assertions of custom) has also affirmed the customary status of the core prohibition in its *Law of War Manual*.[85]

The postures and actions of multilateral institutions and expert bodies further boost the case for recognizing the rule to have customary status. The Security Council has issued multiple resolutions condemning the "denial of humanitarian access," identifying "willfully impeding relief supply and access" as a violation of IHL, and classifying the starvation of civilians as illegal and a threat to international peace and security, including in its flagship Resolution 2417 on the topic in

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79. Provost, *supra* note 54, at 631.

80. ICRC, PRACTICE RELATING TO RULE 53. STARVATION AS A METHOD OF WARFARE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53 [https://perma.cc/V4G5-22GZ] (archived Mar. 10, 2022) (including: Azerbaijan, Indonesia, Iran, Israel, United States). On the U.S. and Israel, *see infra* notes 84–85 and accompanying text.

81. ICRC, PRACTICE RELATING TO RULE 53. STARVATION AS A METHOD OF WARFARE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53 [https://perma.cc/V4G5-22GZ] (archived Mar. 10, 2022) (including Azerbaijan). For prohibitive legislation in another state not party to the Protocols, see Criminal Code of the Republic of Kosovo, Code No. 06/K-074, Official Gazette of the Republic of Kosovo No. 2 (Jan. 14, 2019) art. 145(2)(25).

82. *See infra* Part III.B on the ways in which Rome Statute codification appears to be predicated on an assumption of customary status. Three ICC States Parties are among the states not party to the Additional Protocols: Andorra, Kiribati, and the Marshall Islands.

83. Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to the US Comments*, 89 INT'L REV. RED CROSS 473, 475 (2007).

84. HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v. Prime Minister & Minister of Defence, ¶¶ 13–22 (2008). Controversially, the ruling also denied Israel's enduring belligerent occupation of Gaza, following the 2005 withdrawal. *See, e.g.*, Shane Darcy & John Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SEC. L. 211, 228–42 (2010).

85. U.S. DoD, Law of War Manual, *supra* note 57, § 5.20.1.. Exemplifying U.S. pushback on customary IHL claims, see John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 443 (2007).

2018.[86] Notably, the United States has endorsed recent resolutions in this vein despite being party to neither of the protocols.[87] The UN General Assembly has long condemned the denial of humanitarian access and other starvation methods in armed conflict as "serious violation[s] of international humanitarian law."[88] So, too, have the UN Secretary-General and the Human Rights Council.[89] Additionally, the leading expert restatements of IHL on naval warfare, air and missile warfare, and cyber operations all deem some version of the starvation ban and humanitarian access requirements codified in the protocols to be customarily binding.[90] In recent decades, blockades and sieges have often included humanitarian corridors of one form or another.[91] When starvation tactics have been used, they have been widely condemned.[92]

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86. *See, e.g.*, S.C. Res. 733 (Jan. 23, 1992); S.C. Res. 761 (June 21, 1992); S.C. Res. 2139 (Feb. 22, 2014); S.C. Res. 2417 (May 24, 2018); S.C. Res. 2564 (Feb. 25, 2021).

87. S.C. Res. 2139 ¶¶ 4–8 (Feb. 22, 2014); S.C. Res. 2417 preamble, ¶¶ 5, 6, 10 (May 24, 2018). Atypically, the United States has been taciturn on the customary status of the Protocols' rules on humanitarian access. The Law of War Manual focuses exclusively on the framework provided in article 23 of Geneva Convention IV. *See* U.S. DoD, Law of War Manual, *supra* note 57, § 5.19.3. Article 70 of Protocol I is referenced only tangentially in the Manual. *See* U.S. DoD, Law of War Manual, *supra* note 57, at 317, n.724. In 1985, the Joint Chiefs of Staff insisted that humanitarian access could be denied on the grounds of "imperative considerations of military necessity." Understanding article 70 to allow such denial, they argued, would be necessary to avoid a "radical, if perhaps unintended, change in the customary law of siege and blockade warfare, which has always allowed the besieging and blockading power to cut off all supplies going to areas of enemy control." Memorandum from the Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, to Secretary of Defense (May 3, 1985), at 72–73, https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Joint_Staff/1985_JCSM_152-85_Review_of_GC_AP_I.pdf [https://perma.cc/CS28-JQSY] (archived Mar. 10, 2022).

88. *See, e.g.*, G.A. Res. 49/196, ¶ 14 (Dec. 23, 1994); G.A. Res. 74/149, preamble (Jan. 24, 2020).

89. H.R. Res. 26/23: The continuing grave deterioration in the human rights and humanitarian situation in the Syrian Arab Republic ¶ 6 (Jul. 17, 2014); *Starvation 'as a weapon' is a War Crime, UN Chief Warns Parties to Conflict in Syria*, U.N. NEWS (Jan. 14, 2016), https://news.un.org/en/story/2016/01/519982-starvation-weapon-war-crime-un-chief-warns-parties-conflict-syria [https://perma.cc/6W8G-XP2K] (archived Feb. 5, 2022).

90. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA §§ 102–04 (Louise Doswald-Beck ed., 1995); PROGRAM ON HUMANITARIAN POL'Y CONFLICT RESEARCH AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE §§ 97, 100–04, 157–59 (2009) [hereinafter HPCR MANUAL]; TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 459–60; 531–33; 540–42 (Michael N. Schmitt gen. ed., 2017) (on rules 107, 141, and 145 of the Tallinn Manual). For a critique of gaps in the San Remo Manual's framework on starvation, see Dannenbaum, *supra* note 37.

91. *See, e.g.*, Heintschel von Heinegg, *supra* note 21, ¶¶ 20, 56; Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, 35 INT'L REV. RED CROSS 583, 584 (1995). Such exceptions have sometimes been criticized as falling short of what customary law requires. *See, e.g.*, Provost, *supra* note 54, at 638.

92. D'Alessandra & Gillett, *supra* note 67, at 823; Provost, *supra* note 54, at 634. On the significance of the condemnation of breaches in customary international law analysis, see Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 54, ¶ 186 (June 27).

III. CRIMINALIZATION: CODIFICATION AND THE COMPLICATED BUT ESSENTIAL QUESTION OF CUSTOM

Proscription in IHL, of course, does not entail criminalization. Only serious IHL violations to which individual liability attaches qualify as war crimes.[93] The Additional Protocols were crucial in codifying the IHL prohibition and providing a focal point for its customary crystallization. However, starvation as a method of warfare was absent from Protocol I's list of grave breaches.[94] It was also omitted from the statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR). Thus, despite the deprivations inflicted in the sieges of Sarajevo and Srebrenica, the only acts of starvation prosecuted before the tribunals were those perpetrated against detainees.[95] In the same vein, neither of the International Law Commission's (ILC) 1994 and 1996 drafts of an international criminal code for a permanent court include anything on starvation as a method of warfare.[96]

A. *Criminalization by Treaty and its Limits*

It was in the period between those drafts that a key step towards criminalization occurred. The UN General Assembly provided for a preparatory committee, open to all states, for the establishment of what would become the ICC.[97] Shortly after the ILC's 1996 draft, the new committee published its own compilation of proposed crimes, including the "starving of the civilian population and prevention of humanitarian assistance from reaching them."[98] The proposal stuck.

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93. *See* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995); ICC Statute, *supra* note 23, art. 8(2)(a)–(e).

94. AP I, *supra* note 30, art. 85. Protocol II has no grave breaches regime.

95. *See, e.g.*, Prosecutor v. Mladić, Case No. IT-09-92, Trial Judgment, ¶¶ 1029, 1204, 1207, 1232, 1252, 1265, 1291, 1303–07, 3232, 3287–99, 3306, 3312, 3450–55 (Nov. 22, 2017). On the starvation conditions in Srebrenica and Sarajevo, see, e.g., *id.* ¶¶ 2330–36, 2389, 4557, 4599–06, 4845 (Nov. 22, 2017); Final report of the Commission of Experts Established Pursuant to S.C. Res. 780, ¶ 204 (1992), *in* U.N. Doc. S/1994/674/Add.2 (vol. I) (May 31, 1995).

96. Draft Statute for an International Criminal Court, Int'l L. Comm'n, 46th Sess., U.N. Doc. AICN.4/L.491/Rev.2 (1994); Draft Code of Crimes Against the Peace and Security of Mankind, Int'l Law Comm'n with Commentaries, 48th Sess., U.N. Doc. A/51/10 (1996). The only mention of starvation in the Commission's commentaries is in the context of superior responsibility for detainee mistreatment. Draft Code of Crimes Against the Peace and Security of Mankind, Int'l Law Comm'n with Commentaries, 48th Sess., U.N. Doc. A/51/10, at 25 (1996).

97. G.A. Res. 50/46, Establishment of an International Criminal Court (Dec. 11, 1995).

98. Michael Cottier & Emilia Richard, *Article 8(2)(b)(xxv), in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 508, 510 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016); Report of the Preparatory Committee on the Establishment

The final Rome Statute provision criminalizes "intentionally using starvation of civilians as a method of warfare [in an IAC] by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions."[99]

This was a landmark development. However, a gap remained. Although the crime had been drafted for both IACs and NIACs,[100] the latter provision was dropped late in the drafting process in what appears to have been an oversight.[101] This imbalance lasted for two decades before Switzerland led an effort to remedy the omission by statutory amendment.[102] The Swiss proposal was approved unanimously by the ICC's Assembly of States Parties.[103] The new provision is identical to its IAC analogue, but for lacking the original's reference to the Geneva Conventions. It enters into force on a state-by-state basis for every state party that ratifies it.[104]

Assuming a nexus to either an IAC or a NIAC and the perpetrator's awareness of the factual circumstances establishing that armed conflict, the ICC crime is established when it is shown that a perpetrator, acting with the intent to starve civilians as a method of warfare, deprived civilians of objects indispensable to their survival.[105] As with the underlying IHL prohibition, it is not necessary to establish that civilians suffered any specific harm as a consequence of that deprivation.[106]

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of an International Criminal Court, Volume II: Compilation of Proposals, GAOR 51st Sess. Suppl. No.22, U.N. Doc. A/51/22, at 61 (1996).

99. ICC Statute, *supra* note 23, art. 8(2)(b)(xxv).

100. Rogier Bartels, *Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict*, 48 ISR. L. REV. 281, 297–98 (2015).

101. Rogier Bartels argues that the omission was likely "an oversight, perhaps caused by the unfortunate placing of the proposed crime together with various versions of disproportionate use of force," which (unlike the starvation provision) lacked underlying codification in Protocol II. *Id.* at 298. Ultimately, however, the reasons remain hazy even for those who participated in the final Rome Conference or who have explored its records. Geneva Academy of International Humanitarian Law and Human Rights, *Panel on Starvation in Armed Conflicts*, YOUTUBE (May 6, 2019), https://www.youtube.com/watch?v=tmg7kAB27Qg (Charles Garraway at 28:50; Matthias Lanz at 36:18) [https://perma.cc/TLQ5-XY73] (archived Mar. 10, 2022); Cottier & Richard, *supra* note 98, at 510; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 285 (5th ed. 2017).

102. 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 (Sept. 20, 2018), in Assembly of States Parties, Report of the Working Group on Amendments, Seventeenth Session, The Hague 5-12 December 2018, CC-ASP/17/35, Annex IV; Report of the Working Group on Amendments, Assembly of States Parties, ICC-ASP/18/32 (Dec. 3, 2019), Appendix I, art. 8(2)(e)(xix).

103. *See* ASP, NIAC Starvation Resolution, *supra* note 25.

104. ICC Statute, *supra* note 23, art. 121(5). For the list of ratifying states, *see infra* note 110.

105. ICC Elements of Crimes, *supra* note 30, at 31.

106. *See id.*

In the absence of UN Security Council referral, the ICC has jurisdiction only over crimes perpetrated on the territory or by nationals of the court's 123 States Parties or a state accepting its authority on an ad hoc basis.[107] Jurisdiction over crimes introduced by amendment is even more limited, extending only to the nationals and territory of States Parties that ratify the amendment.[108] For these reasons, the widespread starvation methods recently alleged in non-ICC states, such as Syria, Yemen, South Sudan, and Ethiopia, are currently beyond the court's reach.[109] Even NIAC starvation on the territories of States Parties, such as Nigeria and Mali, will remain beyond the court's jurisdiction until those states ratify the NIAC amendment.[110]

In this context, and given the absence of the prohibition from Protocol I's list of grave breaches, much turns on whether the starvation crime also has customary status.[111] Without it, the principle of legality would preclude the crime's incorporation into the statute of any hybrid or special tribunal charged with examining crimes predating that statute,[112] official immunity would present a stronger obstacle to the exercise of universal jurisdiction by domestic courts, [113]

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107. ICC Statute, *supra* note 23, arts. 12–13; *see also infra* note 124.

108. *See supra* note 104.

109. On the apparent use of starvation methods in contexts with a territorial or nationality nexus to one of these states, see *supra* notes 1–20 and accompanying text.

110. *See supra* notes 7, 14–15, 104. *See also* Report of the Secretary-General, *supra* note 6, ¶¶ 26–27. At the time of writing, the ratifying states are Andorra, Croatia, Liechtenstein, the Netherlands, New Zealand, Norway, Portugal, and Romania. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-g&chapter=18&clang=_en [https://perma.cc/8TD2-6WHB] (archived Mar. 4, 2022).

111. *See supra* note 94.

112. On the possible hybrid court for South Sudan, see *infra* note 160. On retroactivity, see *infra* notes 124-140 and accompanying text.

113. On the issue of official immunity and international crimes, see generally INT'L L. COMM'N, Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/L.893, draft art. 7 (2017); Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815 (2010); Rohan Sinha, *Federal Court of Justice Rejects Functional Immunity of Low-Ranking Foreign State Officials in the Case of War Crimes*, GPIL (July 6, 2021) https://gpil.jura.uni-bonn.de/2021/07/federal-court-of-justice-rejects-functional-immunity-of-low-ranking-foreign-state-officials-in-the-case-of-war-crimes/ [https://perma.cc/3QSY-9UHJ] (archived Feb. 8, 2022). Noting the ongoing controversy while emphasizing the significant support for an international crime exception to official immunity, see Adil Ahmad Haque, *Immunity for International Crimes: Where do States Really Stand?*, JUST SEC. (Apr. 17, 2018), https://www.just security.org/54998/immunity-international-crimes-states-stand/ [https://perma.cc/JH87-KJG4] (archived Feb. 8, 2022); *Symposium on the Present and Future of Foreign Official Immunity*, 112 AM. J. INT'L L. 1, 1–37 (2018) https://www. cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/the-present-and-future-of-foreign-official-immunity [https://perma.cc/A2JE-BHNL] (archived Feb. 8, 2022). On universal jurisdiction authority as rooted in part in the nature of the crimes prosecuted, see Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes, INST. INT'L L. ¶ 2 (2005); U.N. GAOR, 69th Sess., at 172, ¶ 122, U.N. Doc. A/72/10 (2017); U.N. GAOR, 69th Sess., at 176, art. 7, U.N. Doc. A/72/10

and starvation may be less likely to be included in the mandates of international investigative mechanisms created for case-building and evidence preservation.[114] Beyond the courtroom, the ban's value as a focal point for political mobilization may be enhanced by its customary criminality.[115]

B. *Customary Criminalization in the Absence of Prosecution*

Viewed from one angle, the case for the customary status of the starvation crime may seem weak. The crime has yet to be implicated at any stage of investigation or prosecution at the ICC and prosecutions remain extremely rare across domestic jurisdictions.[116] However, countervailing factors militate in favor of affirming the crime's customary status. For reasons elaborated below, incorporation into the Rome Statute itself carries presumptive customary weight. In the case of starvation, that baseline is supplemented by the crime's widespread domestic codification (including by non-parties to the ICC Statute), by its invocation in the work of key international bodies (including with the support of non-parties to the ICC Statute), by the overt motivation for the recent NIAC amendment at the ICC, and by other assertions of *opinio juris*. These points are addressed in turn.

The fact of a widely ratified multilateral treaty is not itself determinative of custom.[117] However, by ratifying or acceding to the Rome Statute, 123 States Parties have affirmed the authority of the ICC, as outlined therein, and have committed to cooperating with the institution in ways necessary to render that authority practically

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(2017); U.N. GAOR, 70th Sess., at 307, ¶ 3, U.N. Doc. A/73/10 (2018); Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), Judgment, (2002) I.C.J. Rep. 3, ¶¶ 46, 58, 60–65 (Feb. 14); RESTATEMENT (FOURTH) ON FOREIGN RELATIONS LAW 217 (2017). On the revival of universal jurisdiction, see Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779, 779 (2019); HUM. RTS. WATCH, THE LONG ARM OF JUSTICE (Sept. 2014) www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf [https://perma.cc/89ZZ-RVNG] (archived Feb. 8, 2022); TRIAL INT'L, UNIVERSAL JURISDICTION ANNUAL REVIEW 2021 (2021) https://trialinternational.org/wp-content/uploads/2021/04/TRIAL_International_UJAR-2021.pdf [https://perma.cc/WD99-447G] (archived Feb. 8, 2022).

114. *See International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011* https://iiim.un.org/ [https://perma.cc/E6XV-6MH8] (archived Feb. 8, 2022); U.N. GAOR, 39th Sess., ¶ 22, U.N. Doc. A/HRC/RES/39/2 (Oct. 3, 2018); *Independent Investigative Mechanism for Myanmar*, U.N. https://iimm.un.org/ [https://perma.cc/HF29-YSRU] (archived Feb. 8, 2022); U.N. GAOR, 71st Sess., ¶¶ 1, 4, U.N. Doc. A/RES/71/248 (Jan. 11, 2017).

115. *See, e.g.*, de Waal, *supra* note 22.

116. For exceptions, see *supra* note 28.

117. Rendering state practice explicable under treaty obligation, it can actually complicate identifying *opinio juris*. *See* Richard R. Baxter, *Treaties and Custom*, *in* 129 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INT'L 64, 64 (1970).

effective.[118] Additionally, a number of states *not* party to the Rome Statute, including the United States, China, Russia, India, Lebanon, Japan (at the time), and the Philippines (at the time) have enabled the application of the statute in the territory of other non-parties by voting affirmatively for the Security Council to refer one or both of the situations in Darfur and Libya to the ICC.[119] They did so without restricting which statutory crimes would apply, even as they purported to restrict the court's jurisdiction in other controversial ways.[120]

These various contributions to ICC authority (themselves a form of state practice) can be reconciled most straightforwardly with the relevant states' fidelity to human rights and respect for the immunity of foreign officials if those states understand the crimes codified in the Rome Statute to have customary status (*opinio juris*).

Consider first the human rights dimension. A core element of the principle of legality is the prohibition of the retroactive application of criminal law.[121] Conforming to this rule, ICC jurisdiction predicated on a state's ratification or accession applies only to conduct after the statute's entry into force for that state.[122] However, a non-party's ad hoc acceptance of ICC jurisdiction under Article 12(3) or a Security

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118. *The States Parties to the Rome Statute*, INT'L CRIM. CT. https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [https://perma.cc/X26S-4SE7] (archived Feb. 8, 2022). On the obligations to cooperate and facilitate, see ICC Statute, *supra* note 23, arts. 86–99. ICC States Parties approved the NIAC starvation crime by consensus in 2019. *See* ASP, NIAC Starvation Resolution, *supra* note 25. Two former State Parties (Burundi and the Philippines) had made the same commitments before withdrawing for reasons unrelated to the starvation crime. *See* Agence France-Presse, *Burundi Becomes First Nation to Leave International Criminal Court*, GUARDIAN, (Oct. 27, 2017), https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court [https://perma.cc/VGZ6-F9M6] (archived Feb. 8, 2022); *Duterte's Statement on International Criminal Court Withdrawal*, RAPPLER (Mar. 14, 2018), https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal [https://perma.cc/L4XB-FF3J] (archived Feb. 8, 2022).

119. *See* U.N. S.C., 6491st mtg. at 2, U.N. Doc. S/PV.6491 (Feb. 26, 2011) (recording the unanimous vote in favor of Resolution 1970 on Libya, including the United States, China, Russia, India, and Lebanon); U.N. S.C., 5158th mtg. at 2, U.N. Doc. S/PV.5158 (March 31, 2005) (recording 11 votes in favor of Resolution 1593, including Japan and the Philippines, neither yet an ICC State Party, and Russia, which never became a State Party). As noted above, the Philippines subsequently became a State Party, before later withdrawing. *See* RAPPLER *supra* note 118.

120. Providing for the exclusion of "nationals, current or former officials or personnel" of nonparty states other than Sudan and Libya in certain circumstances, see S.C. Res. 1593 ¶ 6 (Mar. 31, 2005); S.C. Res. 1970 ¶¶ 4–6 (Feb. 26, 2011).

121. International Covenant on Civil and Political Rights, art. 15, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, Nov. 4, 1950, 213 U.N.T.S. 221, [hereinafter ECHR]; American Convention on Human Rights, art. 9, Nov. 22, 1969, 1144 U.N.T.S. 123, [hereinafter ACHR]; African Charter on Human and Peoples' Rights, art. 7(2), Oct. 21, 1986, 1520 U.N.T.S. 217 [hereinafter ACHPR].

122. ICC Statute, *supra* note 23, art. 11. The legality principle is also reflected in articles 22 and 24 of the Statute. *Id.* arts. 22, 24.

Council referral per Article 13(b) can retroactively underpin ICC jurisdiction that would otherwise not have been available (and that was therefore not available at the time of the alleged crimes).[123] The court has asserted retroactive jurisdiction on the former basis in Côte d'Ivoire, Palestine, Uganda, and Ukraine[124] and on the latter basis in Darfur and Libya.[125] The arrest warrant for former Sudanese President Omar al-Bashir,[126] the ongoing trial of alleged Janjaweed leader Ali Muhammad Ali Abd-Al-Rahman,[127] and the conviction of former Lords Resistance Army commander Dominic Ongwen[128] rely in part on

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123. *Id.* arts. 11(2), 12(3), 13(b); *see also id.* art. 24 (precluding the Statute's application prior to its general entry into force). On the retroactivity of articles 12(3) and 13(b), see Talita de Souza Dias, *The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations*, 16 J. INT'L CRIM. JUST. 65, 68 (2018).

124. Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, ICC-02/11-14-Corr ¶¶ 10–15 (Nov. 15, 2011); Decision on the 'Prosecution request pursuant to article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine', Pre-Trial Chamber I, ICC-01/18-143 ¶ 1, p.37 nn.256–57 (Feb. 5, 2021); *Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine*, ICC-CPI (Mar. 3, 2021) https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine [https://perma.cc/GRA3-SYAN] (archived Feb. 17, 2022). Uganda lodged its Article 12(3) declaration after having ratified the Statute in order to cover conduct that occurred after that ratification, but before the Statute entered into force for Uganda (July 1, 2002 to Sept. 1, 2002). This was material in the *Ongwen* case. *See* William A. Schabas & Giulia Pecorella, *Article 12*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 672, 686–87 (Triffterer & Ambos eds., 3rd ed. 2016). *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, ICC-CPI (Mar. 2, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states [https://perma.cc/KPE9-YBUG] (archived May 30, 2022). Arguing against Article 12(3) retroactivity, see Andreas Zimmerman, *Palestine and the International Criminal Court* Quo Vadis, 11 J. INT'L CRIM. JUST. 303, 311–18 (2013).

125. S.C. Res. 1970 ¶ 4 (Feb. 26, 2011); S.C. Res 1593 ¶ 1 (Mar. 31, 2005). Progress has been difficult due to the challenge of gaining state cooperation, but the Court has issued multiple arrest warrants in each situation. *See* Darfur, Sudan, ICC-CPI, https://www.icc-cpi.int/darfur (last visited Feb. 17, 2022) [https://perma.cc/6ZHF-39MB] (archived Feb. 17, 2022); Libya, ICC-CPI, https://www.icc-cpi.int/libya, (last visited Feb. 17, 2022) [https://perma.cc/HY88-QBFK] (archived Feb. 17, 2022).

126. The warrant includes the war crimes of directing attacks at the civilian population or individual civilians and pillage in a NIAC—crimes that both lack prior treaty basis and allegedly occurred prior to the Security Council's Darfur referral. Prosecutor v. al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 55–78 (Mar. 4, 2009). Although not codified in treaty law (much less treaty law applicable to Sudan), the war crime of pillage in NIACs was listed in the ICTR Statute prior to Rome Statute codification. S.C. Res. 955 (Nov. 8, 1994).

127. Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05- 01/20-433, Decision on the Confirmation of Charges Against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), ¶¶ 50–70 (July 9, 2021).

128. Ongwen was convicted of several acts prior to the entry into force of the Rome Statute for Uganda. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Judgment, ¶¶ 1, 32–36, 3116 (Feb. 4, 2021). Among these was forced pregnancy, which had never before

precisely this retroactive authority. *Prima facie*, such actions may appear to violate the principle of legality. However, the central human rights imperative inherent in that principle is that the accused must have been "put on notice, by *some* prior source of criminal law, that his/her conduct was criminal and punishable," optimally in the applicable form and with the same elements as that with which the individual is charged.[129] For ICC jurisdiction predicated on a state's ratification or accession, the Rome Statute provides that notice. For retroactive cases under Articles 12(3) or 13(b), an alternative source is necessary.

Custom has long performed an analogous role in other international criminal tribunals.[130] In that tradition, some argue that crimes charged retroactively at the ICC must be evaluated in each instance for their customary credentials.[131] However, neither States Parties nor other states that "welcome[d]" the conviction of Dominic Ongwen raised legality concerns about its retroactive elements, despite the court's failure to perform such an evaluation.[132] And the court's approval of retroactive arrest warrants for Omar al-Bashir and others in the Darfur situation was followed by ICC States Parties and non-parties on the UN Security Council voting unanimously to refer the Libya situation to the court with retroactive effect and no specific legality safeguards.[133]

States' dearth of attention to this issue could simply be a pervasive oversight. Alternatively, it may reflect their widespread presumption

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been prosecuted under international criminal law and the analysis of which was rooted very much in the ICC Statute and Elements of Crimes. *Id.* ¶ 2717–29.

129. Dias, *supra* note 123, at 67 (emphasis in original).

130. *See, e.g.*, Prosecutor v. Göring, Judgment, *in* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 464 (1948); Prosecutor v. Stakić, Case No. IT-97-24-A ¶ 315 (Mar. 22, 2006); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of SC Resolution 808 (1993)*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993). Laying the foundation for customary international humanitarian law analysis at the ICTY, see Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 87–137 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). In some circumstances, they may rely instead on general principles of law. *See, e.g.*, ICCPR, *supra* note 121, art. 15(2); ECHR, *supra* note 121, art. 7(2); ICC Statute, *supra* note 23, art. 21(1)(b), (c) This source may be more helpful in clarifying the elements of a crime than its existence. *See, e.g.*, Prosecutor v. Furdundžija, Case No. IT-95-17/1-T, Judgement, ¶¶ 174–84 (10 Dec. 1998). Domestic crimes are unlikely to be as helpful due to their different elements, nature, and stigma. *See, e.g.*, Dias, *supra* note 123, at 77–84.

131. Dias, *supra* note 123, at 69–89 (evaluating various approaches and arguing in favor of applying the customary rule as such, rather than using custom in the statutory analysis); Yudan Tan, *The Identification of Customary Rules in International Criminal Law*, 34 UTRECHT J. INT'L & EUR. L. 92, 97 (2018).

132. *See e.g.*, Press Release, Ned Price, U.S. DEP'T OF JUST., *Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity* (Feb. 4, 2021) https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity/ [https://perma.cc/N57B-6FX8] (archived Feb. 17, 2022).

133. S.C. Res. 1970 ¶¶ 4–8 (Feb. 26, 2011).

that Rome Statute crimes have been customary since at least 2002, such that there is no legality problem with the court's retroactive jurisdiction under Articles 12(3) or 13(b).[134]

Notably, the Appeals Chamber was recently confronted with this issue directly in the case against Abd-Al-Rahman.[135] Acknowledging that "the crimes in the Statute were not directly applicable to Mr[.] Abd-Al-Rahman at the relevant time," the Appeals Chamber nonetheless denied his appeal because he "was in a position to understand and comply with his obligations in armed conflict under international law" generally.[136] The chamber emphasized in that respect that Rome Statute crimes "were intended to be generally representative of the state of customary international law when the Statute was drafted" and that "this weighs heavily in favour of the foreseeability of facing prosecution crimes within the jurisdiction of this Court, even in relation to conduct occurring in a State not party to the Statute."[137] Although leaving open the possibility of a crime-specific challenge, this ruling suggests a (rebuttable) presumption that Rome Statute crimes have customary status.[138] Other domestic[139] and international[140] courts have adopted similar postures with respect to the customary status of Rome Statute crimes.

In addition to reconciling support for the ICC with fidelity to human rights, the prevalence of such a presumption at the court and among States Parties and other supportive states would also help to make sense of the court's posture on the status and functional immunities of their officials.

The dominant view is that the functional immunity of nonparty state officials does not block the ICC from hearing cases against

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134. *See infra* notes 151–163 and accompanying text. This is not to say the ICC Statute was ever intended to codify a comprehensive and exhaustive list of customary crimes. See *infra* notes 150–151 and accompanying text.

135. Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05-01/20 OA8, Judgment on the Appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II's 'Decision on the Defence '*Exception d'incompétence*', (Nov. 1, 2021).

136. *Id.* ¶¶ 87, 89.

137. *Id.* ¶ 89.

138. *Id.* ¶ 91.

139. *See e.g.*, Sapkota v. Minister of Citizenship and Immigration, 2013 F.C. 790 ¶ 28 (July 15, 2013).

140. Prosecutor v Simić, Case No. IT-95-9-PT, Decision on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, ¶¶ 56, 75 (July 27, 1999); Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgement, ¶ 223 (July 15, 1999); Prosecutor v Krnojelac, Judgement, Case No. IT-97-25-A, ¶ 221 (Sept. 17, 2003); Prosecutor v. Furundžija, Judgement, Case No. IT-95-17/1-T, ¶ 227 (Dec. 10, 1998); Prosecutor v. Sesay (RUF case), Case No. SCSL-04-15-T, Trial Judgement, ¶ 218 (Mar. 2, 2009); M.C. v. Bulgaria, App. no. 39272/98 ¶ 128 (Dec. 4, 2003). *See also* Streletz, Kessler & Krenz v. Germany, App. Nos. 34044/96, 35532/97, 44801/98 (Mar. 22, 2001) (Loucaides, J., concurring); HUM. RTS. COMM., *Sarma v. Sri Lanka, Comm. No. 950/2000*, ¶ 9.3, U.N. Doc. CCPR/C/78/D/950/2000 (July 16, 20080); Goiburú v. Paraguay, Merits, Reparation, Costs, Inter-Am. Ct. H.R. ¶ 82 (Sept. 22, 2006); Miguel Castro-Castro Prison v. Peru, Merits, Reparation, Costs, Inter-Am. Ct. H.R. ¶ 402 (Nov. 25, 2006).

them.[141] Notwithstanding objections from certain non-parties,[142] the court has approved multiple investigations implicating persons in precisely that category.[143] The primary argument against the application of functional immunity in those cases is that this immunity is generally not applicable when international crimes are at stake.[144] Although provoking a more fraught response among States Parties,[145] and distinctively reliant on the ICC's status as an international court,[146] the ICC Appeals Chamber's rationale for the inapplicability

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141. ICC Statute, *supra* note 23, arts. 12(2)(a), 13(b), 27; *see, e.g.*, Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618 (2003).

142. The United States has long questioned the Court's authority to hear cases against nationals of states that are not party to the ICC Statute. *See* David Scheffer, U.S. Dep't of State, Address at the Annual Meeting of the American Society Of International Law, International Criminal Court: The Challenge of Jurisdiction (Mar. 26, 1999); Anthony J. Blinken, Press Statement, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court (Apr. 2, 2021), https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/ [https://perma.cc/3Z9R-J3L3] (archived Feb. 18, 2022). Israel has alluded to a similar argument. *The International Criminal Court'[]s Lack of Jurisdiction over the So-Called 'Situation in Palestine'*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Dec. 20, 2019), https://mfa.gov.il/MFA/PressRoom/2019/Pages/ICCs-lack-of-jurisdiction-over-so-called-situation-in-Palestine-20-Dec-2019.aspx [https://perma.cc/SL3P-JL5H] (archived Mar. 10, 2022); *see also* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, at 123 ¶ 15 UN Doc. A/CONF-183/13 (vol. II) (June 15–July 17, 1998).

143. *See, e.g.*, Situation in Georgia, Case No. ICC-01/15, Decision on the Prosecutor's Request for Authorization of an Investigation (Jan. 27, 2016); Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-138, Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020); Situation in the State of Palestine, Case No. ICC-01/18, Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine (Feb. 5, 2021); *Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine*, ICC-CPI (Mar. 3, 2021) https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine [https://perma.cc/GRA3-SYAN] (archived Feb. 17, 2022). Indeed, in one case, an open investigation is focused exclusively on nonparty nationals (including officials). Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Nov. 14, 2019). The Appeals Chamber has also taken the position that, when the Court has jurisdiction, even status immunities cannot block its authority over a nonparty national or override States Parties' duty to cooperate with the Court vis-à-vis that individual. *See* Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶¶ 113–19 (May 6, 2019).

144. *See* S.C. Res. 1970 (2011); S.C. Res. 1593 (2005).

145. *See, e.g.*, Briefing to the Media, Minister Michael Masutha, The Matter of International Criminal Court and Sudanese President Omar Al Bashir (Oct. 21, 2016), https://www.justice.gov.za/m_statements/2016/20161021-icc.html [https://perma.cc/X9QN-L6UV] (archived Feb. 18, 2022).

146. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶¶ 106–19 (May 6, 2019). There is not an international-crime-exception to the applicability of status immunities in *domestic*

of the *status* immunities of relevant nonparty officials is also contingent on the claim that international crimes are at stake.[147]

For the international nature of a crime to carry normative weight in nullifying either kind of immunity, that characterization must be cognizable to the state that would otherwise bear the immunity. When the immunity is held by a nonparty, that imperative is most likely to be satisfied by the determination that the statutory crimes codify a rule applicable to them under customary law.[148] Notably in that respect, the ILC has pointed to the code of war crimes in the ICC Statute in defining the category of war crimes to which official immunity before foreign domestic courts does not obtain. [149]

Ultimately, States Parties' and non-parties' conduct supporting the ICC's authority (state practice) can be reconciled most easily with those states' fidelity to human rights (in the form of nonretroactivity) and sovereign equality (in the form of immunities) if predicated on their understanding that all Rome Statute crimes have customary status (*opinio juris*).

To be clear, the statute explicitly does not *exhaust* the category of customary international crimes.[150] However, the argument offered

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courts. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J., Rep. 3, ¶¶ 47–61 (Feb. 14). Criticizing the ICC Appeals Chamber decision, see Dov Jacobs, *You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case*, SPREADING THE JAM (May 6, 2019), https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/ [https://perma.cc/ES35-J6EB] (archived Feb. 18, 2022); Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL:*TALK!* (May 6, 2019), https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals [https://perma.cc/ATK3-GC7R] (archived Feb. 18, 2022).

147. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶¶ 106, 112–13 (May 6, 2019). Defending the ICC decision in *al-Bashir*, Leila Sadat writes, "every court and every judge asked to rule on the question of head of state immunity before the ICC or another international court found they had no immunity under international law *if properly indicted on charges of committing genocide, crimes against humanity, or war crimes*." Leila Sadat, *Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising*, JUST SEC. (July 12, 2019) (emphasis added), https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/ [https://perma.cc/33UY-NQ4E] (archived Feb. 18, 2022).

148. U.N. GAOR, U.N. Doc. A/72/10, *supra* note 113 (statements of Australia, China, France, Germany, India, Indonesia, Iran, Ireland, Israel, Japan, Korea, Malawi, Malaysia, Singapore, Spain, Sri Lanka, Switzerland, Thailand, United Kingdom, United States). But on the German position, see more recently Sinha, *supra* note 112.

149. INT'L L. COMM'N, *supra* note 113, at Annex.

150. ICC Statute, *supra* note 23, art. 10; Bruce Broomhall, *Article 22*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 949, 963 (Otto Triffterer & Kai Ambos eds., 3rd ed. 2016). Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909, 918–19 (2000); WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 335 (2d ed., 2016);

here is that states' conduct in support of the ICC is most coherent if they are taken to assume each of the statutory crimes to codify a minimum core of existing custom. This is also consistent with the understanding expressed by many of the delegations during the statute's negotiation and agreement.[151]

The argument for this reading is particularly strong in the case of war crimes, which are codified explicitly as "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law."[152] Invoking that language, the ICC prosecutor has suggested that any war crime listed in the statute is understood to be customary "simply by virtue of being listed thereunder."[153]

At a minimum, the analysis above suggests that a state's ratification of the Rome Statute or involvement in a Security Council

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International Committee of the Red Cross Statement of 8 July 1998 Relating to the Bureau Discussion Paper in Document, ¶ 4, A/CONF.183/C.1/L.53, UN Doc. A/CONF.183/INF/10.

151. Sadat, *supra* note 150, at 919–20; Dapo Akande, *Customary International Law and the Addition of New War Crimes to the Statute of the ICC*, EJIL:Talk! (Jan. 2, 2018) https://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/ [https://perma.cc/VP97-CMDM] (archived Feb. 18, 2022). Notably, many state delegations at the Rome Conference based their support for, or opposition to, the statute on their evaluations of the crimes' customary credentials. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *supra* note 142, at 67, ¶ 44 (Japan), 159, ¶ 55 (Germany), 161, ¶ 68 (Spain) 163, ¶ 24 (Thailand), 168, ¶ 89 (Slovakia), 187, ¶ 15 (Jordan), 277 ¶ 41 (Switzerland), 278 ¶ 55 (Republic of Korea), 283 ¶ 4 (Algeria), 285 ¶¶ 43–45 (Bosnia & Herzegovina). Objecting to the Statute because of concerns that it exceeds custom, see *id.* at 86 ¶ 48 (India), 105–06, ¶ 3 (Sudan), 124 ¶ 38, 270 ¶ 36, 299 ¶ 75 (China), 158 ¶ 44 (Syrian & Arab Republic), 158–59 ¶¶ 49, 51–52, 54 (United States), 167 ¶¶ 77, 79) (Israel), 280 ¶ 102 (Islamic Republic of Iran), 288 ¶ 80, 314 ¶ 10 (Sri Lanka) 335 ¶¶ 2, 4 (Egypt). None of those raising concerns about the Statute's purported extension beyond customary law cited the starvation crime as an example, with the possible and ambiguous exception of Israel, which offered a general objection to drawing rules from Protocol I that had not attained customary status. *Id.* at 167 ¶ 79. Some described Security-Council-referred situations as predicated on universal jurisdiction (rooted traditionally in the customary status of the crimes). *Id.* at 187 ¶ 10) (Spain). This included the United States, which has been wary of the Court from the beginning. *Id.* at 123 ¶ 28, 297 ¶ 42. Other states argued for broader ICC jurisdiction precisely because of its crimes' presumed customary status. *Id.* at 74 ¶ 21 (Czech Republic), 194 ¶ 20 (Italy).

152. ICC Statute, *supra* note 23, art. 8(2). This is the language of customary international criminal law. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Akande & Gillard, *Conflict-Induced Food Insecurity*, *supra* note 61, at 755.

153. Prosecutor v. Ntaganda, On the Appeal of Mr Ntaganda against the 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9', Case No. ICC-01/04-02/06 OA5, ¶ 35 (June 15, 2017). Although the ICC Appeals Chamber insisted on the need to look to the underlying custom "to ensure an *interpretation* of article 8 of the Statute that is fully consistent" with customary IHL, it did not question the implication that the crimes listed are, by definition, understood by States Parties to be customarily criminal. *Id.* ¶ 53.

referral to the ICC is itself a manifestation of practice and *opinio juris* supporting the customary status of statute crimes. The rarity of its prosecution notwithstanding, several additional factors weigh in favor of the customary status of the starvation war crime in particular.

The criminality of starvation of civilians as a method of warfare has been invoked by the Security Council, by UN experts, and by fact-finding missions operating in non-ICC states.[154] Similarly, the UN General Assembly has long condemned the denial of humanitarian access and other starvation methods in armed conflict as "serious violation[s] of international humanitarian law," thus invoking the customary war crimes threshold.[155]

Several states not party to the ICC have incorporated the crime into their domestic war crimes legislation.[156] Additionally, although not technically required to do so as a matter of treaty law, many States Parties have replicated the Rome Statute framework in their domestic war crimes codes, some of which provide for universal jurisdiction (and thus application to crimes committed by nonparty nationals in nonparty territories).[157]

The practice of replicating ICC crimes in domestic law has also meant that the Rome Statute's original focus on IAC starvation has been replicated in many states' war crimes legislation[158] and in the

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154. S.C. Res 2417 at pmbl., ¶ 6 (2018); Group of Experts on Yemen (2019), *supra* note 9; IIFFMM, Detailed Findings (2019), *supra* note 10, ¶ 420; Comm'n. on Hum Rts. in S. Sudan, *supra* note 8, ¶ 17, 34–36, 42–43; Independent International Commission of Inquiry on the Syrian Arab Republic, The Siege and Recapture of Eastern Ghouta, U.N. Doc. A/HRC/38/CRP.3, ¶¶ 27, 27n.14 (June 20, 2018).

155. G.A. Res. 49/196, ¶ 14 (Dec. 23, 1994); *see* G.A. Res. 74/149, pmbl. (Jan. 24, 2020). On the threshold, see *supra* note 152.

156. ICRC, PRACTICE RELATING TO RULE 53. STARVATION AS A METHOD OF WARFARE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53 (last visited Feb. 18, 2022) [https://perma.cc/HU5A-NA9J] (archived Feb. 18, 2022) (citing the criminal proscription of starvation methods in Azerbaijan, a state not party to the Protocols or the Rome Statute; and Belarus, Burundi, Ethiopia, and Rwanda, states not party to the Rome Statute). Beyond the ICRC Study, two further states have criminalized starvation of civilians as a method of warfare despite not being party to the ICC. *See* Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Official Gazette of the Republic of Kosovo No. 2 (Jan. 14, 2019) art. 145(2)(25); Republic of the Philippines, Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, No. 9851, § 4(c)(21) (2009), 106(9) Official Gazette p. 1120–30 (2010). Finally, several states criminalized the practice before the Rome Statute was agreed in 1998, including Croatia, Ireland, the Netherlands, and Norway. ICRC, PRACTICE RELATING TO RULE 53. STARVATION AS A METHOD OF WARFARE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53 (last visited Feb. 18, 2022) [https://perma.cc/HU5A-NA9J] (archived Feb. 18, 2022).

157. *See generally* International Criminal Court Legal Tools Database, National Implementing Legislation Database, https://www.legal-tools.org/national-implementing-legislation-database (last visited Feb. 18, 2022) [https://perma.cc/ZDC8-WY93] (archived Feb. 18, 2022).

158. Based on the ICC legal tools database *id.*, and the ICRC's customary IHL database *supra* note 156, states that have criminalized starvation in IACs, but not NIACS (often due to having transposed the ICC Statute provisions) include: Australia,

statutes of several hybrid and regional tribunals.[159] As the ICC amendment takes effect, both domestic codes and the statutes of new hybrid courts are likely to extend the starvation crime to NIACs.[160] A significant number of states and the (still unratified) Malabo Protocol for a criminal chamber in the African Union system had already incorporated a NIAC version of the crime prior to the ICC change.[161]

In fact, the need to bring the Rome Statute into conformity with the asserted customary status of the NIAC crime was an explicit motivation for the incorporation of Article 8(2)(e)(xix).[162] The Assembly of States Parties adopted the amendment by consensus, describing the crime as "a serious violation of the laws and customs applicable in armed conflict not of an international character."[163]

Ultimately, the combination of domestic legislation, explicit *opinio juris*, and inclusion in the ICC Statute supports the notion that the starvation war crime is customary in both IACs and NIACs. After a longstanding posture of permission, international law has now prohibited and criminalized the starvation of civilians as a method of warfare in armed conflicts of all kinds.

IV. INTENTIONAL DEPRIVATION

Establishing that a rule exists, of course, does not entail clarity on all aspects of its content. In the absence of case law on the starvation

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Burundi, Canada, Congo, France, Georgia, Ireland, Kenya, Latvia, Lesotho, Mali, Malta, Mauritius, New Zealand, Samoa, Slovenia, South Africa, Timor-Leste, Trinidad & Tobago, United Kingdom.

159. UNTAET Regulation No. 2000/15, art. 6.1(b)(xxv) (June, 6 2000); The Statute of the Iraqi Special Tribunal, art. 13(b)(25) (Dec. 10, 2003); Law No. 05/L-053, Law on Specialist Chambers and Specialist Prosecutor's Office, Kosovo, art. 14(1)(b)(xxv) (Aug. 3, 2015).

160. Recommending including the starvation crime in the Statute of the promised (but not yet created) Hybrid Court for South Sudan, see Comm'n. on Hum. Rts. in S. Sudan, *supra* note 8, ¶ 148(e). On the status of the court, see Nyagoa Tut Pur, *A Glimmer of Hope for South Sudan's Victims*, HUM. RTS. WATCH (Jan. 31, 2021), https://www.hrw.org/news/2021/01/31/glimmer-hope-south-sudans-victims [https://perma.cc/ZV3N-AFW8] (archived Feb. 18, 2022); Robbie Gramer, *U.S. Quietly Gives Up on South Sudan War Crimes Court*, FOREIGN POL'Y (July 20, 2021), https://foreignpolicy.com/2021/07/20/south-sudan-war-crimes-court-state-department-africa-biden-human-rights/ [https://perma.cc/M5R2-BB2H] (archived Feb. 18, 2022).

161. Based on a search of the ICC legal tools database, *supra* note 157, and the ICRC's customary IHL database, *supra* note 156, states codifying starvation as a war crime, regardless of conflict classification include: Belgium, Bosnia and Herzegovina, Croatia, Ethiopia, Norway, the Philippines, Rwanda, Spain. States that provide explicitly that starvation can be perpetrated in a NIAC include: Azerbaijan, Cambodia, Germany, Kosovo, the Netherlands, Peru, Portugal, Philippines, South Korea, Switzerland, Uruguay. *See also* D'Alessandra & Gillett, *supra* note 67, at 5, n.20 (also including Austria, North Macedonia, Romania, Serbia, Sweden). Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, arts. 28D(b)(xxvi), 28D(e)(xvi), (June 27, 2014).

162. Non-paper submitted by Switzerland, *supra* note 102, ¶ 3.

163. ASP, NIAC Starvation Resolution, *supra* note 25, preambular ¶ 5.

crime, questions remain on fundamental issues, such as *mens rea*, what it means to perpetrate starvation as a "method of warfare," and whether starvation caused by attack is distinct from that caused by encirclement.[164] The crime's relevance to the current resurgence of starvation in war will depend on how those questions are answered.[165] Given their customary significance, the ICC Statute and the court's Elements of Crimes document provide the appropriate starting point for such interpretive debate.[166]

In addition to the general circumstance elements applicable to all war crimes, there are two crime-specific elements in the ICC framework. First, the perpetrator must have "deprived civilians of objects indispensable to their survival." [167] Second, the perpetrator, must have "intended to starve civilians as a method of warfare."[168] The latter element follows the statutory codification, which stipulates that the crime is that of "[i]ntentionally using starvation of civilians as a method of warfare."[169] As noted above, there is no requirement that the prosecutor establish that the impugned conduct caused civilians to starve or suffer any particular form of harm.[170]

Focusing on the use of terms such as "intentionally" and "method of warfare" in this aspect of the crime, many analysts understand it to cover only those actions that deprive civilians of food and other essential objects with a view to weaponizing their suffering in the service of the war effort.[171] On this view, much starvation in armed conflict would be excluded from the crime as part of the collateral damage of deprivations of "non-exclusive sustenance."[172] Rather than being proscribed through the starvation crime, civilian starvation in that category would be restricted, if at all, by the general rules on collateral effects (proportionality and precautions). The implications would be significant. In IHL, precautions and proportionality attach formally only to "attacks," raising questions about their applicability to other forms of deprivation, such as encirclement denial. [173]

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164. On the jurisprudential vacuum, see *supra* note 28.

165. On the resurgence of starvation in war, see *supra* notes 7–20.

166. On the customary status of the ICC's statutory codification and specification of elements, see *supra* Part III.B.

167. ICC Elements of Crimes, *supra* note 30, at 31; ASP, NIAC Starvation Resolution, *supra* note 25, at Annex II.

168. ICC Elements of Crimes, *supra* note 30, at 31; ASP, NIAC Starvation Resolution, *supra* note 25, Annex II.

169. ICC Statute, *supra* note 23, art. 8(2)(b)(xxv).

170. *See supra* note 106.

171. *See infra* Parts IV.A, V.A.

172. The term "non-exclusive sustenance" is used here instead of the commonly recognized, but distinct concept of "dual-use objects," because objects indispensable to civilian survival are not subject to the ordinary framework regulating dual-use objects. *See infra* Part IV.

173. AP I, *supra* note 30, arts. 51(5)(b), 57. Protocol I defines attacks as "acts of violence against the adversary, whether in offence or in defence." AP I, *supra* note 30, art. 49(1). This could be argued to exclude encirclement, removal, and rendering useless.

Moreover, even when clearly applicable, precautions underpin no ICC war crime and disproportionate attacks are criminal at the ICC only in IACs.[174] As such, those rules provide only a partial accountability backstop for the civilian harm arising from starvation operations.

This common interpretation of the crime is not compelling in its approach to intent, method, or the civilian population. Nor is it compelling to apply such an approach in a more limited way to the specific context of encirclement deprivation. This Part focuses on the question of intent, advocating an interpretation that is inclusive of oblique, and not just purposive, intent. Subsequent Parts turn to the meaning of method, targeted starvation, and encirclement.

A. *Intent as Purpose?*

The default *mens rea* framework at the ICC requires that the perpetrator meant to engage in the relevant conduct and either meant to cause any objective consequence element—here, the deprivation of the protected objects—or was aware that that deprivation would occur in the ordinary course of events.[175] However, these default standards attach only to the material elements of the crime and apply only as long as the mental element is not "otherwise provided" in the provisions specific to the crime in question.[176] In each respect, the starvation crime might be thought to deviate from the standard approach.

Given that the prosecutor does not need to show that civilians starved as a result of the impugned deprivation,[177] the requirement that the accused must have "intended to starve civilians as a method of warfare" appears to be a mental element that is not attached to any material element of the crime.[178] As such, it would bypass the default

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On the other hand, some advocate a broader understanding of the term "attack" in other scenarios and the ICC jurisprudence on the issue is murky, after a strikingly ambiguous analysis in the *Ntaganda* appeal. *See* Ori Pomson, *Ntaganda Appeals Chamber Divided on Meaning of 'Attack,'* ARTICLES OF WAR (May 12, 2021), https://lieber.westpoint.edu/ntaganda-appeals-chamber-judgment-divided-meaning-attack/ [https://perma.cc/X6CW-XX8G] (archived Feb. 18, 2022). On encirclement deprivation as an "attack," see Gloria Gaggioli, *Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?*, EJIL:TALK! (Jan. 30, 2019), https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/ [https://perma.cc/UC3A-86Q8] (archived Feb. 18, 2022); Emanuela-Chiara Gillard, *Sieges, The Law Protecting Civilians*, CHATHAM HOUSE (June 27, 2019), https://reader.chathamhouse.org/sieges-law-and-protecting-civilians [https://perma.cc/DR8Z-X3XN] (archived Feb. 18, 2022).

174. *See* ICC Statute, *supra* note 23, art. 8(2)(b)(iv).

175. *Id.* art. 30(2).

176. *Id.* art. 30 (specifying that the definitions apply only "for the purposes of this article," which defines the *mens rea* thresholds only as they attach to "material elements," and even then, only as long as *mens rea* is not "otherwise provided").

177. *See supra* note 106.

178. ICC Elements of Crimes, *supra* note 30, at 31.

mens rea framework provided in Article 30 of the Rome Statute.[179] Additionally, and quite apart from the question of whether it attaches to a material element of the crime, the use of "intentionally" in the statutory codification of the crime and "intended" in its elements is a way of "otherwise provid[ing]" for *mens rea* in the starvation war crime, per the terms of Article 30.[180] This opens the door for an elevated *mens rea* threshold.

The heightened demands of that threshold might be thought to arise on two levels. First, the mere fact of the special intent element entails an evidentiary requirement above and beyond the ordinary *mens rea* requirements. Second, and more significantly, commentators have interpreted the use of "intentionally" in the Rome Statute and "intended" in the Elements of Crimes to mean that starvation is criminalized under the ICC regime only when the operation in question was undertaken with the *purpose* of weaponizing civilian suffering. [181] Notably, several delegations at the Rome Conference argued that the war crime should attach only when starvation was "used as a weapon to annihilate or weaken the population."[182]

In support of this reading, it might be argued that when "intentionally" or a variant thereof is used in other crime-specific provisions of the Rome Statute, it tends to be associated with a purposive *mens rea* threshold. For example, several war crimes involve a form of "intentionally directing attacks against" a protected category of persons or objects (civilians and civilian objects, peacekeepers and peacekeeping objects, cultural property, medical units, and personnel using the Geneva emblems), with the Elements of Crimes specifying in each case that the perpetrator must have "intended" the person(s) or object(s) in question to be "the object of the attack."[183] Gerhard Werle and Florian Jeßberger argue that the "wording of the criteria of the

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179. *See* ICC Statute, *supra* note 23, art. 30(1); Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 INT'L COMP. L.Q. 325, 357 (2012).

180. *See* ICC Statute, *supra* note 23, art. 30(1).

181. *See* Randle C. DeFalco, *Conceptualizing Famine as a Subject of International Criminal Justice*, 38 U. PA. J. INT'L L. 1113, 1145 (2017) ("[I]ntentionally" imposes "a rather stringent *mens rea*" pursuant to which the crime applies only when there is a "specific strategy to starve civilians as such."); GERHARD WERLE & FLORIAN JEßBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 506 (3d ed., 2014) ("[I]t must have been the perpetrator's purpose to use starvation as a weapon against the civilian population."); Marcus, *supra* note 7, at 269 (The perpetrator must have engaged in the "deliberate starvation of civilians."). Other scholars have equivocated, sometimes indicating a purpose requirement (Cottier & Richard, *supra* note 98, at 518–19; Ventura, *supra* note 60, at 13) but at other times suggesting that oblique intent would suffice. *See infra* note 199.

182. Daniel Frank, *The Elements of War Crimes – Article 8(2)(b)(xxv), in* THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 203, 205 (Roy S. Lee ed., 2001).

183. *See* ICC Statute, *supra* note 23, arts. 8(2)(b)(i)–(iv), (ix), (xxiv), 8(2)(e)(i)–(iv); ICC Elements of Crimes, *supra* note 30, at 18–19, 23, 30, 34–36.

offence ('intentionally') and the Elements of Crimes ('intended')" is a key factor, alongside the underlying principles of IHL, in establishing a purposive *mens rea* threshold in these cases.[184]

Case law might be invoked to bolster that claim. Interpreting a provision identical to the ICC's on "intentionally directing attacks" against peacekeepers and peacekeeping objects, the Special Court for Sierra Leone (SCSL) held, "this offence has a specific intent *mens rea*. The Accused must have therefore intended that the personnel, installations, material, units or vehicles of the peacekeeping mission be the primary object of attack."[185] Several pre-trial chambers at the ICC have interpreted the various war crimes of "intentionally directing attacks against" various protected categories of persons or objects as imposing *mens rea* requirements stricter than the Article 30 default, elevating the threshold to "*dolus directus* of the first degree."[186] The Trial Chamber in *Prosecutor v. Ntaganda* interpreted the war crime of "intentionally attacking civilians" as requiring that the direct perpetrator "select[ed] the intended target and decid[ed] on the attack,"[187] and the *Prosecutor v. al-Mahdi* Trial Chamber similarly interpreted the crime of "intentionally directing attacks against" cultural property under Article 8(2)(e)(iv) as involving a "specific intent" threshold.[188]

Beyond the war crimes context, the use of the term "intent" is central to genocide, which is limited to acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[189] The dominant view is that this limits the crime to conduct undertaken with the purpose of destroying the group in whole or in part.[190] The use of "intent" or a variant thereof in crimes against

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184. *See* WERLE & JEßBERGER, *supra* note 181, at 482.

185. Prosecutor v. Sesay (RUF Case), Case No. SCSL-04-15-T, Judgment, ¶ 232 (Mar. 2, 2009). Neither party challenged this interpretation on appeal. Prosecutor v. Sesay (RUF Case), Case No. SCSL-04-15-A, Appeals Judgment, ¶ 511 (Oct. 26, 2009). Citing this case in the context of interpreting "intentionally" in the ICC's starvation provision, see Ventura, *supra* note 60, at 7–8.

186. *See* Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 271 (Sept. 30, 2008); Prosecutor v. Abu Garda, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, ¶ 93 (Feb. 8, 2010); *see also* Prosecutor v. Banda, ICC-02/05-03/09-Corr-Red, Decision on the Confirmation of Charges, ¶ 61 (Mar. 7, 2011).

187. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment, ¶ 744 (July 8, 2019).

188. Prosecutor v. Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence, ¶ 12 (Sept. 27, 2016).

189. *See* ICC Statute, *supra* note 23, art. 6.

190. *See, e.g.*, Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶¶ 45–46 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001); Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgment, ¶¶ 182, 246 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 550 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 520 (Sept. 2, 1998); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶¶ 89–91 (May 21, 1999); Prosecutor v. Al Bashir, ICC-

humanity provisions is also often associated with purpose. Forced pregnancy must be perpetrated with the "intent of affecting the ethnic composition of any population or carrying out other grave violations of international law."[191] Interpreting the crime for the first time, the Trial Chamber in *Prosecutor v. Ongwen* held that the wrongful acts must be perpetrated "in order" to achieve one of the proscribed ends.[192] Commentators have offered similar analyses of apartheid and enforced disappearance, each of which specifes a particular "intention."[193] Multiple authorities have interpreted the discriminatory "intent" that is constitutive of persecution to entail harming victims *because* of their membership in a protected group.[194]

Understood in this light, the war crime of "intentionally using starvation of civilians as a method of war" might appear limited inevitably to the deliberate weaponization of civilian suffering through deprivation. The narrowest version of this reading could exclude most deprivation of nonexclusive sustenance.[195] Relatedly, it is sometimes argued that a besieging party that allows protected persons safe passage out of the besieged area thereby provides the justificatory foundation for starving those that remain.[196] This claim is sometimes

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02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest, ¶ 139 n.154 (Mar. 4, 2009). Articulating the minority view against this position, see, for example, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, (July 8) (Weeramantry J., dissenting); *id.* at 577 (Koroma J., dissenting); Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999).

191. ICC Statute, *supra* note 23, art. 7(2)(f).

192. Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment, ¶ 2729 (Feb. 4, 2021). Leading commentators had already used terms such as "purpose" or "aim" to explain the meaning of "intent" in the provision. *See* WERLE & JEßBERGER, *supra* note 181, at 371; Christopher K. Hall, Joseph Powderly, & Niamh Hayes, *Article 7(2)(f), in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 274 (Otto Triffterer & Kai Ambos eds., 3rd ed. 2016).

193. *See* ICC Statute, *supra* note 23, art. 7(2)(h)–(i); WERLE & JEßBERGER, *supra* note 181, at 382, 385 (stating with respect to each, "the perpetrator must act with the intention (purpose)."). On apartheid, see Ariel Bultz, *Redefining Apartheid in International Criminal Law*, 24 CRIM. L. FORUM 205, 230 (2013); John Dugard & John Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, 24 EUR. J. INT'L L. 867, 904, 911 (2013); Yaffa Zilbershats, *Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds*, 24 EUR. J. INT'L L. 915, 923 (2013); Christopher K. Hall & Larissa van den Herik, *Article 7(2)h, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 282, 285 (Otto Triffterer & Kai Ambos eds., 3rd ed. 2016).

194. *See, e.g.*, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 500 (Int'l Crim. Trib. For the Former Yugoslavia Mar. 24, 2016); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 165 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgement, ¶ 111 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); *Ongwen*, ICC-02/04-01/15-1762-Red ¶ 2739.

195. On "nonexclusive sustenance" see *supra* note 31 and accompanying text. On the limited reach of the crime, see DeFalco, *supra* note 181, at 1145.

196. *See* U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 5.34.3 (2004) [hereinafter UK LOAC Manual]; A.P.V. ROGERS, LAW ON THE

justified on the grounds that allowing civilians to exit both attenuates the protected status of those who remain voluntarily[197] and shifts responsibility to the besieged party for the starvation of those it refuses to let leave.[198] These are points that will be examined in greater detail in Parts V and VI, below. Suffice it to note at this stage that allowing civilian egress might also be thought to negate *mens rea* by showing that civilian starvation was not the ultimate purpose of the operation.

B. *"Intent" in the ICC Statute (and Beyond): Direct and Oblique*

In contrast to those who assert a strictly purposive understanding of "intentionally" in the starvation provisions, some commentators have argued that the term should be interpreted in accordance with the default standards in Article 30.[199] This would allow for an individual to have "intent" with respect to a criminal consequence when that "person means to cause that consequence *or* is aware that it will occur in the ordinary course of events."[200] On that reading, criminal intent can arise in either of two ways—as direct intent, which incorporates

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BATTLEFIELD 140–41 (3d ed. 2012); Kraska, *supra* note 21, at ¶ 21. It is worth noting that Rogers drafted the UK LOAC MANUAL.

197. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 255 (3d ed. 2016); George Alfred Mudge, *Starvation as a Means of Warfare*, 4 INT'L LAW. 228, 236, 241 (1970) (channeling such arguments). Classically, see JAMES MOLONY SPAIGHT, WAR RIGHTS ON LAND 164 (1911); General Orders No. 100, *supra* note 40, art. 156. This line of thinking has clear connections to theories of total war. *See* Rosenblad, *supra* note 21, at 267. On the issue of human shields, see *infra* note 360.

198. *See* DINSTEIN, *supra* note 197, at 255–56. On the long tradition of this line of reasoning, see Kraska, *supra* note 21, ¶ 7; Provost, *supra* note 54, at 618; Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities and Targets*, 39 VA. J. INT'L L. 353, 363 (1999). On the responsibility of the Bosnian government for the impact on civilians of the Bosnian Serb siege of Sarajevo, see Waxman, *supra*, at 420. For the relevant duties of the besieged party not to use human shields and to take precautions for the protection of the civilian population under its control, see AP I, *supra* note 30, arts. 58, 51(7); ICC Statute, *supra* note 23, art. 8(2)(b)(xxiii).

199. D'Alessandra & Gillett, *supra* note 67, at 30; Wayne Jordash, Catriona Murdoch, & Joe Holmes, *Strategies for Prosecuting Mass Starvation*, 17 J. INT'L CRIM. JUST. 849, 854, 858–60 (2019) (arguing that although article 30 is not technically applicable, its purpose was to render awareness presumptively sufficient and that the drafters of 8(2)(b)(xxv) specifically declined to require proving a consequence, such that it would be contradictory to require special intent). Although equivocal on the issue, Cottier and Richard argue that "intentionally" is designed to exclude "starvation as a result of unintended mismanagement." Cottier & Richard, *supra* note 98, at 518. They also suggest that "if the outcome of impeding humanitarian assistance is obvious according to the ordinary course of events, the intention can be inferred." *Id.* at 519. In an earlier edition, Cottier had suggested that the wording "underlines that the conduct must be associated with an armed conflict and that the rule does not criminalize, for instance, a failure to generally live up to internationally promoted standards of good governance." Michael Cottier, *Article 8(2)(b)(xxv)*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 466 (Otto Triffterer ed., 2d ed. 2008). *See also* the equivocation in Ventura, *supra* note 60, at 22.

200. ICC Statute, *supra* note 23, art. 30(2)(b) (emphasis added).

purpose, or as oblique intent, which includes acting in the knowledge that the relevant consequence will arise, whether or not it is the purpose of the impugned conduct.[201] At the ICC, the latter threshold is satisfied when the accused acts with a virtual certainty that the prohibited outcome will occur.[202]

It is true that Article 30's exclusive formal function is to specify the default *mens rea* thresholds and that this precludes its technical application to the use of "intentionally" in Articles 8(2)(b)(xxv) and 8(2)(e)(xix), both because the term is "otherwise provided" there and because it is not attached to a material element of the crime.[203] However, it does not follow that the term as used in Articles 8(2)(b)(xxv) and 8(2)(e)(xix) ought to be read as if there were no definition in Article 30. On the contrary, several factors support the application of oblique intent to civilian starvation.

First, not all crime-specific *mens rea* terms were codified with a view to deviating from the default standards. Roger Clark recalls that the appearance of the word "intentionally" in ICC war crimes provisions was often "not done deliberately," but was instead a product of different parts of the treaty being "negotiated in different committees, working groups, informal consultations and the like," leading to some uses of "intentionally" that "appear to be redundant" with Article 30.[204] On this view, the interpretive relevance of a crime-specific *mens rea* term is contingent; it can be determined only through an analysis of the crime as a whole.

Second, the same term used in different provisions of a treaty should be interpreted consistently, unless there is a clear reason for deviation.[205] Although provided explicitly "for the purposes of" defining the default *mens rea* attached to "material elements," the definition of "intent" in Article 30 is the only codified definition of the term (or any derivative) in the ICC system.[206] The most straightforward approach to discerning the meaning of "intentionally" in the starvation provisions would be to read it in light of that definition.[207] The ICC

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201. For a detailed examination, see Finnin, *supra* note 179, at 328–33, 341–49.

202. *See* Prosecutor v. Lubanga, ICC-01/04-01/06-3121-Red, Appeals Judgment, ¶¶ 447–50 (Dec. 1, 2014).

203. *See supra* note 176 and accompanying text; ICC Statute, *supra* note 23, art. 30(1).

204. Roger S. Clark, *The Mental Element in the International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L.F. 291, 313, 315 (2001).

205. *See* Vienna Convention on the Law of Treaties, arts. 31(1)–(2), May 23, 1969, 1155 U.N.T.S. 331; 1 OPPENHEIM'S INTERNATIONAL LAW 1273 n.12 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); 83 ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 106–07 (2007); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 203 (6th ed. 1987).

206. *See* ICC Statute, *supra* note 23, art. 30.

207. Perhaps with this in mind, commentators have interpreted some uses of "intentionally" or its analogues in crime-specific provisions of the Rome Statute to implicate the Article 30 definition. *See, e.g.*, WERLE & JEßBERGER, *supra* note 181, at

Appeals Chamber has taken precisely this approach in grappling with the meaning of "intentionally" in the Rome Statute provision criminalizing offenses against the court's "administration of justice," holding, "the reference to 'intentionally' in article 70 does not depart from the standard set out in article 30 of the Statute, but simply clarifies that the same standard applies to offences listed therein."[208] In the same vein, the starvation crime might be thought to attach either when a perpetrator means to cause civilian starvation *or* when she engages in the deprivation of essentials knowing that civilian starvation will result, regardless of whether that is her aim.[209]

Third, even if Article 30 were understood *not* to inform the meaning of crime-specific uses of "intent" and its derivatives, it would not follow that the term should be interpreted to entail a purpose threshold in those uses. The oblique meaning included in Article 30 is not an idiosyncrasy of the Rome Statute. Quite the opposite, it is a meaning with broad transnational pedigree and would be a plausible interpretation of the term even in the absence of any definitional resources within the statute itself.[210] Moreover, in the absence of direction from Article 30, the ICC would need to draw on "another source of law to which the Court can have reference under Article 21" to fill the definitional "gap."[211] This could quite easily result in an even broader understanding of the term, given that "intent" is understood in many contexts, including in the jurisprudence of international criminal tribunals, to include *dolus eventualis* or recklessness.[212]

352–53, 382; *see also* Antonio Vallini, *Mens Rea: Mistake of Fact and Mistake of Law*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 412, 414 (Antonio Cassese ed., 2009).

208. Prosecutor v. Bemba, ICC-01/05-01/13-2275-Red, Appeals Judgment, ¶ 677 (Mar. 8, 2018).

209. This approach takes "consequences" to include "all effects of the punishable conduct," including those that need not be realized for the crime to attach. Gerhard Werle & Florian Jeßberger, *Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law*, 3 J. INT'L CRIM. JUST. 35, 40 (2005). Despite indicating elsewhere that the use of the term in the starvation provision may indicate a purpose requirement, Cottier and Richard also suggest that the term "[a]ppears to be an application of the default rule codified by Article 30" such that the prosecutor need *only* prove intent "as referred to in Article 30(2)" (where oblique intent is identified), and not knowledge, as defined in Article 30(3). Cottier & Richard, *supra* note 98, at 518. *Cf. supra* note 207.

210. *See, e.g.*, Finnin, *supra* note 179, at 331–33; Vallini, *supra* note 207, at 413. Beyond the criminal context, see Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, CHATAM HOUSE, ¶¶ 65–78 (2016) https://www.chathamhouse.org/2016/11/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism [https://perma.cc/JA2Q-ZP9K] (archived Feb. 18, 2022).

211. Finnin, *supra* note 179, at 357.

212. *See id.*; *see also* WERLE & JEßBERGER, *supra* note 181, at 177–78; Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 99-104 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006). Article 30's allowance for crime-specific provisions to "otherwise provide[]" their *mens rea* allows equally for reducing that threshold and for elevating it. *See* Werle & Jeßberger, *supra* note 209, at 44–47; Finnin, *supra* note 179,

Fourth, and most importantly, in those cases in which the use of "intentionally" in a crime-specific provision *does* (by current interpretive consensus) attach to a requirement to show purpose *vis-à-vis* the relevant consequence, this can be explained by the context in which the term is used.[213] That contextual significance is detailed in the remainder of this subpart. It is crucial here because, as established in the subsequent subpart, the context of "intentionally" in the starvation crime militates against an exclusively purposive understanding and in favor of including oblique intent.

It is true that each of the ICC war crimes provisions on attacks directed at protected persons or objects uses the term "intentionally" and requires a purposive posture with respect to the prohibited target. Engaging in an attack on a military objective that is certain to harm civilians, for example, would not constitute the war crime of attacking civilians, as codified in Articles 8(2)(b)(i) or 8(2)(e)(i)—for that, civilians must have been the target.[214]

However, it would be a mistake to infer that the term "intentionally" is the textual basis for that reading. Each of the relevant provisions criminalizes "intentionally *directing* attacks *against*" the protected persons or objects. The italicized terms are critical. Both the ICC and the ad hoc and hybrid tribunals have held consistently that requirements that attacks be "directed against" a protected category means that the latter "must be the primary object of the attack and not the incidental victim of the attack."[215] That language was also implicated in the SCSL case invoked above in support of the notion that "intentionally" can indicate a "specific intent *mens rea*."[216]

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at 354; Clark, *supra* note 204, at 321; *see, e.g.*, ICC Elements of Crimes, *supra* note 30, at 39.

213. *See* WERLE & JEßBERGER, *supra* note 181, at 184 ("The terms 'intent', 'intentional' and 'intentionally', 'wilful', 'wilfully' and 'wantonly' are frequently employed. Whether the different wordings involve a departure from the standard laid down in Article 30 of the ICC Statute, and to which mental element the departure applies, must be determined on a case-by-case basis.").

214. *See supra* notes 184–188 and accompanying text.

215. *See* Prosecutor v. Katanga, ICC-01/04-01/07, Trial Chamber II Judgment Pursuant to Article 74 of the Statute, ¶ 49 (Mar. 7, 2014); Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision on the Confirmation of Charges ¶¶ 76–77 (June 15, 2009); Prosecutor v. Bemba, ICC-01/05-01/08-3343, Judgment, ¶ 154 (Mar. 21, 2016); Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment, ¶ 668 (July 8, 2019). For prior case law from the ICTY, ICTR, and SCSL, see, for example, Prosecutor v. Kunarac, Case No. IT-96-23-T IT-96-23/1-A, Judgment, ¶¶ 91–92 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2001); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 105 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 330 (May 15, 2003); Prosecutor v. Fofana (CDF Case), Case No. SCSL-04-14-A, Appeals Judgment, ¶ 299 (May 28, 2008), http://hrlibrary.umn.edu/instree/SCSL/SCSL-04-14_files/SCSL-04-14-A-829.htm [https://perma.cc/JXM8-4F3T] (archived Feb. 9, 2022).

216. Prosecutor v. Sesay (RUF Case), Case No. SCSL-04-15-T, Judgment, ¶¶ 219, 232 (Mar. 2, 2009); *see* Prosecutor v. Sesay (RUF Case), Case No. SCSL-04-15-A, Appeals

Additionally, as noted above, ICC war crimes are framed as serious violations of laws and customs applicable in armed conflict.[217] It is of some interpretive significance, then, that the IHL rules prohibiting attacks on the persons and objects mentioned above do *not* proscribe attacking legitimate military objectives in the knowledge that doing so will also harm, kill, or damage those protected persons or objects.[218] On the contrary, such collateral harm is very clearly addressed separately through the rule on disproportionate attacks.[219]

Among other war crimes with purpose thresholds, torture is particularly illuminating.[220] The ICC Elements of Crimes use "purpose," and not "intent," to define the special *mens rea* threshold of the war crime.[221] Similarly, while the ICTY jurisprudence defined the proscribed conduct as "intentionally" inflicting severe pain or suffering, it supplemented that crucially with the requirement that the harm be inflicted "for [certain kinds of] purposes."[222] The *Prosecutor v. Karadžić* Trial Chamber interpreted the first part with reference to direct *or* oblique intent and only the second as requiring purpose.[223] Moreover, at the ICC, the crime against humanity of torture (as distinct from the war crime) lacks any purpose requirement, despite retaining the use of the term "intentional"—a point discussed further below.[224]

Ultimately, only one ICC war crime other than starvation includes the term "intentionally" (or any variant on "intent") without supplementary language clearly specifying a particular target or purpose. That sole exception is the crime of "[i]ntentionally launching an attack in the knowledge that such attack will cause" clearly disproportionate civilian or environmental harm.[225] This is unambiguously a crime that does *not* require a purposive posture *vis-à-vis*

Judgment, ¶ 511 (Oct. 26, 2009). Citing this case in the context of interpreting "intentionally" in the ICC's starvation provision, see Ventura, *supra* note 60, at 7–8.

217. *See* ICC Statute, *supra* note 23, arts. 8(2)(b), 8(2)(e).

218. *See* WERLE & JEßBERGER, *supra* note 181, at 482.

219. *See id.* at 482, 487, 490; *see also* ICC Statute, *supra* note 23, art. 8(2)(b)(iv); AP I, *supra* note 30, art. 51(5)(b). *See infra* note 225 and accompanying text.

220. Pillage, the elements of which include the perpetrator having "intended . . . to appropriate [the relevant items] for private or personal use" has also been framed in purposive terms by the *Ongwen* Trial Chamber. *See* ICC Elements of Crimes, *supra* note 30,, at 26, 36; Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment, ¶¶ 2767, 2873, 2926 (Feb. 4, 2021). Here, too, however, the supplementary language is critical. To appropriate an item "*for* private or personal use" is to appropriate it with a specific purpose.

221. *See* ICC Elements of Crimes, *supra* note 30, at 14, 32; Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment, ¶ 2706 (Feb. 4, 2021).

222. *See* Prosecutor v. Kunarac, Case No. IT-96-23-T IT-96-23/1-A, Judgment, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2001); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 494 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

223. *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 508 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

224. *See infra* note 232.

225. ICC Statute, *supra* note 23, art. 8(2)(b)(iv).

the consequence of normative concern (the disproportionate civilian harm).[226] Its function, and the function of the underlying rule of IHL, is precisely to cover attacks in which excessive civilian damage arises despite not having been the purpose of the operation. Of course, the text itself might be thought to demand an oblique interpretation due to the use of "intentionally" with respect to conduct and "knowledge" with respect to consequence, but this only emphasizes the importance of parsing terms in their full context.

The notion that the use of "intent" alone can underpin a purpose requirement is no better supported by a close reading of the ICC provisions on genocide and crimes against humanity. If anything, it is refuted by such an analysis.

Recall that genocide applies when certain acts are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[227] Here, too, terms other than "intent" are crucial to the purpose threshold. In *Prosecutor v. Niyitegeka*, the ICTR Appeals Chamber explained:

> The words "as such" . . . constitute an important element of genocide . . . deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. The term "as such" has the effet utile of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term "as such" clarifies the specific intent requirement.[228]

Among crimes against humanity, the torture provision is particularly instructive. It parallels the corollary war crime in specifying that liability attaches only to the "intentional" infliction of pain or suffering, but eschews listing the purposes for which that harm must be inflicted.[229] In that different context, both the Elements of Crimes and the ICC's case law are explicit that "no specific purpose need be proven for torture as a crime against humanity."[230] Some argue that the term "intentional" in Article 7(2)(e) indicates no "deviation from the general requirements" of Article 30.[231] Others,

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226. *See* WERLE & JEßBERGER, *supra* note 181, at 494.

227. ICC Statute, *supra* note 23, art. 6.

228. Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Judgment, ¶ 53 (Jul. 9, 2004). In the ICC context, see Clark, *supra* note 204, at 315–16.

229. *See* ICC Statute, *supra* note 23, art. 7(2)(e).

230. ICC Elements of Crimes, *supra* note 30, at 7 n.14; Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment, ¶¶ 2706 (Feb. 4, 2021).

231. *See* WERLE & JEßBERGER, *supra* note 181, at 365. Arguably, this was the route taken by the Trial Chamber in *Ongwen*, where there did not appear to be any deviation from the standard *mens rea* analysis in sections on torture as a crime against humanity. *See Ongwen*, ICC-02/04-01/15-1762-Red at ¶¶ 2865–74. Interestingly, and possibly in contrast to the position articulated in *Bemba* (on which, see *infra* note 232), article 30(3) was cited (albeit somewhat confusingly) in relation to the *mens rea* for torture as a crime against humanity. *Ongwen*, ICC-02/04-01/15-1762-Red ¶ 2706, n.7140.

including the *Prosecutor v. Bemba* Pre-Trial Chamber, have reasoned that the use of "intentional" in the crime against humanity of torture at the ICC *lowers* the requirements as compared to Article 30, by requiring *only* intent (whether direct or oblique) and not also knowledge.[232]

Similarly, although "other inhumane acts" involve the perpetrator "intentionally causing great suffering, or serious injury to body or to mental or physical health,"[233] neither the ICC Elements of Crimes document nor the jurisprudence of the ad hoc tribunals supports a purposive reading of this requirement.[234] The same can be said of the "intentional" infliction of destructive conditions of life as a form of extermination.[235] In contrast, those ICC crimes against humanity that might be invoked to support a link between the crime-specific use of "intent" and a purpose requirement[236] are either (like the war crimes discussed above) defined by purposive contextual language other than "intent"[237] or of disputed and as-yet-untested meaning on this point.[238]

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232. *See* Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision on the Confirmation of Charges ¶¶ 194–95 (June 15, 2009); *see also* Christopher Hall & Carsten Stahn, *Article 7(2)(e), in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 269, 269 (Otto Triffterer & Kai Ambos eds., 3rd ed. 2016).

233. ICC Statute, *supra* note 23, art. 7(1)(k).

234. *See* ICC Elements of Crimes, *supra* note 30, at 12; *see also* WERLE & JEßBERGER, *supra* note 181, at 387. From the ad hoc tribunals, see, for example, Prosecutor v. Perišić, Case No. IT-04-81-T, Judgment, ¶ 112 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 153 (May 21, 1999); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶ 154 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 236 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002).

235. *See* WERLE & JEßBERGER, *supra* note 181, at 352. Debate arises only with respect to whether a higher threshold is implied by the statutory language specifying that those conditions must be "'*calculated*' to bring about the destruction of part of a population." *Id.* 352–53.

236. *See supra* notes 191–194 and accompanying text.

237. Persecution, for example, is defined as the "intentional and severe deprivation of fundamental rights contrary to international law *by reason* of the identity of the group or collectivity." ICC Statute, *supra* note 23, art. 7(2)(g) (emphasis added); ICC Elements of Crimes, *supra* note 30, at 10. On the significance of the invocation of a specific "reason" and *not* the use of "intentional," see WERLE & JEßBERGER, *supra* note 181, at 377.

238. On enforced disappearances, see WERLE & JEßBERGER, *supra* note 181, at 382. See also, offering an ambiguous take on the matter, Hall & van den Herik, *supra* note 193, at 289–92. The purposive interpretation of apartheid has yet to be tested in The Hague and appears to be informed by the definition used in the Apartheid Convention, which provides that the crime applies to "inhuman acts committed *for the purpose* of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them." International Convention on the Suppression and Punishment of the Crime of Apartheid art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243 (emphasis added). *See also* Hall & van den Herik, *supra* note 193, at 285; HUM. RTS. WATCH, A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION (Apr. 27, 2021), https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-

In sum, the mere use of "intent" or a derivative in an ICC provision does not support interpreting the relevant crime to have a purposive *mens rea*. The Rome Statute provides for a different and commonplace interpretation of the term in Article 30. Crime-specific examples in which "intent" is associated with a purposive threshold are shaped by the term's specific context. And, in the absence of such contextual scaffolding, the *mens rea* thresholds for ICC crimes that use the term vary, often including oblique, and not just direct, intent. The key question, then, is how to read "intent" and its derivatives in the specific context of the ICC's starvation provisions.

C. *Contextualizing Intent in the Starvation Crime*

Taking "method" to imply deliberate action in pursuit of an objective, the supplementary language most conducive to a purposive reading of intent in the starvation crime is "method of warfare."[239] On that reading, for civilian starvation to be used as a method of warfare, it must have been weaponized, and therefore have been inflicted purposefully.[240] Given its reliance on the terminology of the underlying IHL prohibition, this line of argument is addressed comprehensively in the next Part. First, it is worth emphasizing two countervailing points specific to the criminal provision (rather than the underlying IHL rule).

As a matter of historical context, it is notable that ICC States Parties eschewed a US proposal to include an element that would have settled the question unambiguously in favor of a purposive interpretation. That proposal had stipulated that the "accused's act was intended as a method of warfare *with the specific purpose* of denying such objects to the *targeted* civilian population."[241] The US draft specifically avoided relying on "intent" or "method of warfare" to support a purposive interpretation. In rejecting that proposal, states declined to foreclose the interpretive viability of oblique intent.

More importantly, oft-overlooked contextual language within the starvation provisions militates against a purposive *mens rea* threshold.[242] Articles 8(2)(b)(xxv) and 8(2)(e)(xix) criminalize "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival *including wilfully* impeding relief supplies."[243] The term "wilfully" is used in the grave breaches provisions of the Geneva Conventions and Additional

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crimes-apartheid-and-persecution# [https://perma.cc/FES3-PNWR] (archived Feb. 16, 2022).

239. For the contextual language indicating purpose in other crimes, see *supra* notes 215–216, 227–228, 237 and accompanying text.

240. *See infra* notes 263–271 and accompanying text.

241. Proposal submitted by the United States of America: Draft elements of crimes. UN Doc. PCNICC/1999/DP.4/Add.2, 18 (Feb. 4, 1999) (emphasis added).

242. *See infra* notes 225–226 and accompanying text.

243. ICC Statute, *supra* note 23, arts. 8(2)(b)(xxv), 8(2)(e)(xix) (emphasis added).

Protocol I and is referenced in the ICRC's *Customary International Humanitarian Law* study.[244] The commentaries to each treaty and the customary IHL study all affirm that acting "wilfully" includes acting with "recklessness" or engaging in "reckless conduct."[245] This, the Protocol I *Commentary* elaborates, amounts to "the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening."[246] This interpretation of the term has been affirmed repeatedly in the war crimes case law of the ICTY.[247] On the *mens rea* spectrum, it is a threshold cognitively lower than oblique intent (requiring the possibility, not certainty, of the relevant outcome) and volitionally lower than direct intent (requiring acceptance of that possibility, not pursuit of it).[248]

Any invocation of the use of "intentionally" to support a purposive interpretation of the crime ought to grapple with the fact that the willful impediment of relief supplies is included explicitly *as a form* of intentionally using starvation of civilians as a method of warfare.[249] And yet, most commentary on the starvation provisions, including from some who place interpretive weight on the use of "wilful" or "wilfully" elsewhere in the ICC Statute, focuses exclusively on the claimed "true" or "special" intent implied by "intentionally" in the starvation crime while ignoring the countervailing implications of the specific inclusion of "wilfully" as a form of that intent.[250]

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244. *See, e.g.*, GC IV, *supra* note 52, art. 147; AP I, *supra* note 30, art. 85(3); HENCKAERTS & DOSWALD-BECK, *supra* note 69, vol. I, at 574 (commenting on rule 156).

245. INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 3474; INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 2933 (Jean-Marie Henckaerts et al. eds., 2nd ed. 2016); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA,¶ 3043 (Jean-Marie Henckaerts et al. eds., 2nd ed. 2017); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, ¶ 5198 (Jean-Marie Henckaerts et al. eds., 2nd ed. 2021); HENCKAERTS & DOSWALD-BECK, *supra* note 69, vol. I, at 574.

246. INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 3474.

247. *See, e.g.*, Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Judgement, ¶¶ 270, 277 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008); Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Judgement, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeals Judgement, ¶ 261 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); Prosecutor v. Krstic, Case No. IT-98-33-T, ¶ 485; Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Appeals Judgement, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

248. *See* Finnin, *supra* note 179, at 328–29.

249. Recall that the provision criminalizes "[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, *including* wilfully impeding relief supplies . . ." ICC Statute, *supra* note 23, art. 8(2)(b)(xxv) (emphasis added).

250. Werle and Jeßberger emphasize the importance of wilfullness in reducing the *mens rea* of other crimes. Werle & Jeßberger, *supra* note 209, at 46–48; WERLE &

Taking the latter seriously might be thought to require considering whether the starvation crime deviates from the default *mens rea* standards of Article 30 by *lowering* the *mens rea* threshold, rather than elevating it. However, there are good reasons to be cautious about drawing such an implication. "Wilfully" is used explicitly only with respect to one form of deprivation (the denial of humanitarian access). It is not clear that it could be applied to others, such as the destruction, removal, or rendering useless of indispensable objects. Moreover, despite the clear jurisprudence from the tribunals and Geneva commentaries, the implications of references to "wilfulness" (or its derivatives) in the ICC system remain uncertain. The Elements of Crimes eschew any reference to the term (or to recklessness or *dolus eventualis*) in elaborating the starvation crime or other statutory crimes that use it.[251] The only decision thus far on any of these crimes was the confirmation of charges decision in *Katanga and Ngudjolo*.[252] The pre-trial chamber in that case avoided grappling with the term "wilful," relied on the Elements of Crimes for guidance, and held that "article 30 of the Statute sets out the subjective element" of the crime of wilful killing, focusing its analysis "first and foremost" on "*dolus directus* of the first degree."[253]

Whether that approach will endure is unclear. In principle, when the statute and the elements clash, the statute governs.[254] Thus, Knut Dörmann argues with respect to "wilfulness" crimes that "the elements are in conformity with the Statute only if the article 30 standard and the standard of 'wilful' are identical," while emphasizing that "wilfulness" is broader than direct or oblique intent and is "traditionally understood as covering both intent and recklessness."[255] Werle and Jeßberger argue that the sufficiency of recklessness "can be presumed for 'wilfulness'" crimes, including at the ICC.[256]

On the other hand, the blanket omission of the term from the Elements of Crimes could also be argued to reflect the subsequent understanding of the parties as to the meaning of the statutory

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JEßBERGER, *supra* note 181, at 187. However, in evaluating starvation, they focus on "intentionally" as indicating a purpose threshold, *supra* note 181, and do not examine what it means to "wilfully" deny humanitarian access *as a form of* "intentionally" using starvation as a method of warfare. *See* WERLE & JEßBERGER, *supra* note 181, at 187; VALLINI, *supra* note 207, at 414.

251. ICC Statute, *supra* note 23, arts. 8(2)(a)(i), (iii), (vi); ICC Elements of Crimes, *supra* note 30, at 13, 15, 16.

252. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 285–307 (Sept. 30, 2008).

253. *Id.*¶ 295.

254. ICC Statute, *supra* note 23, art. 9(3).

255. Knut Dörmann, *Article 8(2)(a)*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 329, 331, 339, 346 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016).

256. WERLE & JEßBERGER, *supra* note 181, at 187; *see also* VALLINI, *supra* note 207, at 414; Guénaël Mettraux, Murder, in THE OXFORD COMPANION TO IINTERNATIONAL CRIMINAL JUSTICE 426, 426–27 (Antonio Cassese ed., 2009).

provisions.[257] As Michael Cottier and Emilia Richard reason in their commentary on the starvation crime, although "'wilfully' includes recklessness," the Elements of Crimes document can be taken to indicate that states "may not have had the intent to deviate from the general rules regarding the mental element."[258]

In combination, these factors preclude the kind of clarity necessary to justify a reduction of the *mens rea* threshold from the ICC default, particularly in light of the importance of *ex ante* specificity to the rights of the accused.[259] However, the use of a crime-specific *mens rea* term with a lower threshold than that provided in Article 30 further strengthens the case for rejecting arguments advocating the *elevation* of the criminal threshold beyond the default requirement.

Ultimately, assuming "starvation" to refer to the harm and suffering arising from the deprivation of essentials, the definition expressed in Article 30 regarding what it means to intend such a consequence is presumptively the correct interpretation of what it means to intend the "starvation of civilians." This interpretation of the crime would require the prosecutor to establish that the perpetrator deprived civilians of essential objects either meaning to engage in starvation of civilians as a method of warfare *or* aware that her actions would starve civilians in the ordinary course of events.[260] The key remaining question is whether the concept of starvation of civilians as a "method of warfare" might warrant deviating from that standard.

V. STARVATION AS A METHOD OF WARFARE: PROCESS, OUTCOME, AND FORMS OF DEPRIVATION

As noted above, war crimes are defined in the Rome Statute and in international criminal law more broadly as "serious violations of the laws and customs applicable in international armed conflict."[261] Formalizing the implication of this, the statute requires that its war crimes provisions be understood "within the established framework of international law."[262] The term "method of warfare [or combat]"

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257. Vienna Convention on the Law of Treaties art. 31(3)(a)–(b), May 23, 1969, 1155 U.N.T.S. 331.

258. Cottier & Richard, *supra* note 98, at 518.

259. *See* Prosecutor v. Vasiljević, Case No. IT-98-32-T, Trial Judgement, ¶ 193 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); *supra* notes 121–129; ICC Statute, *supra* note 23, arts. 21(3), 22(2).

260. ICC Statute, *supra* note 23, art. 30. Cottier and Richard argue, "if the outcome of impeding humanitarian assistance is obvious according to the ordinary course of events, the intention [to use starvation as a method of warfare] can be inferred." Cottier & Richard, *supra* note 98, at 519. However, an inference is potentially rebuttable and becomes complicated in contexts in which the objects in question provide sustenance to both civilians and combatants.

261. ICC Statute, *supra* note 23, art. 8(2)(b); *see* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 87–137 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

262. ICC Statute, *supra* note 23, art. 8(2)(b).

qualifies the kind of starvation banned in the relevant IHL provisions just as in the corollary war crimes provisions.[263] Given the explicitly derivative structure of the latter, the term must be understood through its meaning in IHL.

A. *The Notion of Method as Inherently Purposive*

The narrow view is that for the starvation of civilians to qualify as a "method" of warfare, the deprivation must be inflicted with a specific view to using the resultant civilian suffering to advance the war effort.[264] This approach might be rooted in a notion of "methods" as inherently deliberate and purposeful forms of activity. On this view, civilian starvation arising from an operation of which it was not the purpose would not implicate the ban, because *it* would not be the method in that scenario—*it* would not be weaponized.[265]

Something like this view is reflected in the military manuals of some states,[266] in the work of a few investigative or expert bodies,[267]

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263. AP I, *supra* note 30, art. 54(1); AP II, *supra* note 30, art. 14; ICC Statute, *supra* note 23, arts. 8(2)(b)(xxv), 8(2)(e)(xix); ICRC, PRACTICE RELATING TO RULE 53. STARVATION AS A METHOD OF WARFARE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53 (last visited Apr. 23, 2022) [https://perma.cc/SFD9-QZCX] (archived Apr. 23, 2022).

264. *See* Phillip J. Drew, *Can We Starve the Civilians? Exploring the Dichotomy between the Traditional Law of Maritime Blockade and Humanitarian Initiatives*, 95 INT'L L. STUD. 302, 314 (2019); Sean Watts, *Humanitarian Logic and the Law of Siege: A Study of the* Oxford Guidance *on Relief Actions*, 94 INT'L L. STUD. 1, 18–19 (2019). One might point here to the ICRC *Commentary* to the Additional Protocols, which reasons that "[t]o use [starvation] as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies." INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 2089. However, the *Commentary* also includes observations that militate in the opposite direction. *See id.* ¶¶ 2095, 2098, 2111, 2805, 2808, 2828 n.27, 4798, 4800, 4806, 4885.

265. The UK LOAC MANUAL states, "The law is not violated if military operations are not intended to cause starvation but have that incidental effect, for example, by cutting off enemy supply lines which are also used for the transportation of food.". UK LOAC MANUAL, *supra* note 196, ¶ 5.27.1; *see also* AUSTL. DEF. HEADQUARTERS, ADDP 06.4, LAW OF ARMED CONFLICT, ¶ 5.37 (May 11, 2006) [hereinafter ADDP 06.4], https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf [https://perma.cc/9RCC-FLDY] (archived Feb. 16, 2022)

266. U.S. DoD, Law of War Manual, *supra* note 57, §§ 5.20.1, 17.9.2.1; ADDP 06.4, *supra* note 265, ¶ 5.37; UK LOAC MANUAL, *supra* note 196, ¶¶ 5.27.2, 5.34.3; N.Z. DEF. FORCE, DM 112, INTERIM LAW OF ARMED CONFLICT MANUAL, ¶¶ 504(2), 504(2)n.9, 613(2) (1992) [hereinafter NEW ZEALAND INTERIM LOAC MANUAL]; *see also* NEW ZEALAND INTERIM LOAC MANUAL ¶¶ 504(3), 613(3). *But see* ADDP 06.4, *supra* note 265, ¶¶ 7.12, 9.32. Note that the emphasis on the specific purpose in the 1992 Interim Manual is not replicated in the 2019 Manual. 4 N.Z. DEF. FORCE, DM 69, MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT §§ 8.8.25–8.8.26(a), (c) (2nd ed. 2019) [hereinafter NEW ZEALAND LOAC MANUAL]. The one exception is that of blockade, where the relevant provision replicates the SAN REMO MANUAL, including on the issue of proportionality. *Id.* §§ 8.8.26(b), 10.5.4.

267. *See, e.g.*, IIFFMM, Detailed Findings (2019), *supra* note 10, ¶ 420; Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Annex VI.B: The Battle of Sarajevo and the Law of Armed

in the ICRC's customary IHL study,[268] and (at least on a selective reading) in certain expert restatements of international law in domains lacking comprehensive treaty law.[269] The text of Article 14 of Additional Protocol II might also be invoked in this respect. It provides: "Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, *for that purpose*, objects indispensable to the survival of the civilian population."[270]

On the most limited reading along these lines, the rule would not proscribe operations that starve combatants through starving the population of the area within which they are encircled—a tactic that has been described as "draining the sea to catch the fish."[271] On such an interpretation, although operations of that kind may cause significant civilian suffering, they do not weaponize it. The normative rationale for this narrow reading of the ban relies on an assertion of military necessity.[272] Proscribing broad encirclement starvation operations, it is claimed, would require "besieging forces to alleviate starvation of . . . trapped enemy forces."[273] In so doing, it would tie the hands of those faced with an enemy ensconced within the civilian population of a defended location or region. This leads to "the unpalatable fact that . . . the only way to starve-out a besieged military force, a legitimate act of war, is to starve the civilian population."[274] For that reason, it is argued, "international humanitarian law allows warring parties to deny civilian populations food and other items as a means of preventing those supplies from getting to an enemy force."[275]

Some commentators contest not just the application of the starvation ban to such operations, but also the viability of the proportionality rule as a basis for limiting the civilian harm that may be caused as a result.[276] This position relies heavily on the fact that, in its codified form, proportionality applies only to "attacks," which are defined in Protocol I as "acts of violence against the adversary, whether

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Conflict, ¶ 76, U.N. Doc S/1994/674/Add.2 (vol. III) (Dec. 28, 1994) [hereinafter Sarajevo Report]; Group of Experts on Yemen (2019), *supra* note 9, ¶¶ 357, 511. The latter report is not entirely consistent on this point. Group of Experts on Yemen (2019), *supra* note 9, ¶¶ 738, 744–48, 791; *infra* notes 310, 330 and accompanying text.

268. HENCKAERTS & DOSWALD-BECK, *supra* note 69, at Rule 53.

269. *See* HPCR MANUAL, *supra* note 90, rule 97(a), rule 157(a); SAN REMO MANUAL, *supra* note 90, ¶ 102(a); TALLINN MANUAL 2.0, *supra* note 90, at 459–60 (rule 107, ¶¶ 2–3 on starvation).

270. AP II, *supra* note 30, art. 14 (emphasis added).

271. The quoted term was used to describe the Derg's strategy in 1980s Ethiopia. Jackson Nyamuya Maogoto, *Reading the Shadows of History: the Turkish and Ethiopian 'Internationalized' Domestic Crime Trials*, *in* THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 289, 300 (Kevin Jon Heller & Gerry Simpson eds., 2013).

272. Sarajevo Report vol. III, *supra* note 267, ¶ 76.

273. Watts, *supra* note 264, at 19.

274. Sarajevo Report vol. III, *supra* note 267, ¶ 76.

275. IIFFMM, Detailed Findings (2019), *supra* note 10, ¶ 420.

276. Watts, *supra* note 264, at 19; Drew, *supra* note 264, at 319–20.

in offence or in defence."[277] A strict interpretation of what counts as an "act of violence" could exclude encirclement deprivation, the removal of food and other essential objects, and certain forms of rendering those objects useless. Combined with a restrictive reading of the starvation ban, this narrow understanding of proportionality as a backstop would leave much non-violent deprivation unregulated in IHL.

Some other advocates of a restrictive reading of the core starvation prohibition instead invoke proportionality as the key safeguard that helps to justify a limited interpretation of the starvation ban precisely because it provides a robust backstop.[278] In principle, the distinction between these positions is material in contemplating the kinds of operations that would be deemed lawful from the perspective of IHL as a whole.[279] However, on either approach (whether supplemented by proportionality or not), the core starvation ban would be defined narrowly. So, too, by definition, would be the derivative war crime. Notably in this respect, the ICC Statute and thus many domestic war crimes codes criminalize disproportionate attacks only in IACs, thus limiting significantly the viability of that alternative route to criminal accountability in most contemporary armed conflicts.[280]

B. *The Categorical Protection of Objects Indispensable to Civilian Survival*

The narrow interpretation of "starvation of civilians as a method of warfare" is not persuasive. As a foundational matter, the term "method of warfare" has no settled definition in IHL.[281] Thus, in contrast to those who invoke it in support of a purposive reading, others take it to do "no more than describe conduct that is part of hostilities."[282] The context of the term's use in the starvation provision of Additional Protocol I is illuminating in this respect.[283] Paragraph 1 of Article 54 states simply, "[s]tarvation of civilians as a method of

277. AP I, *supra* note 30, art. 49.

278. *See, e.g.*, U.S. DoD, Law of War Manual, *supra* note 57, § 5.20.2; HPCR MANUAL, *supra* note 90, rules 97(b), 157(b); SAN REMO MANUAL, *supra* note 90, ¶ 102(b); TALLINN MANUAL 2.0, *supra* note 90, at 459–60 (rule 107, ¶¶ 2–4).

279. In practice the flexibility of the proportionality rule and the scale of encirclement operations may limit its impact. Dannenbaum, *supra* note 37, at 338–41.

280. *Cf.* ICC Statute, *supra* note 23, art. 8(2)(b)(iv).

281. The *Commentary* to Protocol I provides only, "The term 'means of combat' or 'means of warfare' generally refers to the weapons being used, while the expression 'methods of combat' generally refers to the way in which such weapons are used." INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 1957. Although comprehensible in framing what differentiates means from methods, this is not a viable definition of the term. The Protocol itself identifies methods of warfare that involve no direct use of weapons. Gloria Gaggioli & Nils Melzer, *Methods of Warfare*, *in* OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 235, 237 (Dapo Akande & Ben Saul eds., 2020).

282. Jordash, Murdoch, & Holmes, *supra* note 199, at 862; GLOB. RTS. COMPLIANCE & WORLD PEACE FOUND., *supra* note 14, ¶ 78.

283. *See* Vienna Convention on the Law of Treaties, *supra* note 205, arts. 31–32.

warfare is prohibited."[284] However, paragraphs 2 and 3 outline the implications of that ban for the destruction, removal, rendering useless, or attack of objects indispensable to civilian survival. Two key aspects of that elaboration are particularly worthy of note.

First, those paragraphs impose a broad prohibition that is unambiguously not limited to actions taken with a specific view to weaponizing civilian suffering. Paragraph 2 prohibits the deprivation of essential objects for the "specific purpose of denying them for their sustenance value to the civilian population *or to the adverse Party*, whatever the motive."[285] Paragraph 3 then stipulates that the ban shall not apply when the objects are used by the adverse party "as sustenance *solely* for the members of its armed forces,"[286] thus confirming by implication that objects that sustain members of the armed forces *and* civilians are covered by the ban. On both counts, it is clear that civilians need not be the target of sustenance denial in order for the prohibition to apply.

Second, paragraphs 2 and 3 in fact preclude an interpretation according to which the starvation of civilians is permissible as a collateral effect of the deliberate deprivation of objects indispensable to their survival. Paragraph 3 stipulates that the ban does not apply if the objects are used "not as sustenance" but "in direct support of military action, provided, however, that *in no event* shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."[287] Thus, even in the case of the genuinely incidental infliction of starvation conditions on civilians, as may occur when crops are targeted because they are providing cover for the enemy during a firefight,[288] the deprivation of essential objects would be prohibited if civilian starvation were an anticipated effect.[289] Indeed, it would be banned even if the affected civilians might be expected to avoid starvation by fleeing the conditions imposed upon them.

Far from narrowing the prohibition in a purposive direction, this broadens the prohibition as compared to the standard IHL rules that would otherwise apply. Ordinarily, "dual-use objects" (objects that contribute effectively both to civilians and to military action) would qualify as military objectives,[290] with the civilian damage expected

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284. AP I, *supra* note 30, art. 54(1).

285. *Id.* art. 54(2) (emphasis added).

286. *Id.* art. 54(3)(a) (emphasis added).

287. *Id.* art. 54(3) (emphasis added); *see also* Akande & Gillard, *Conflict-Induced Food Insecurity*, *supra* note 61, at 764.

288. See sources cited at *infra* note 317.

289. Provost, *supra* note 54, at 604; Allen, *supra* note 21, at 62; Antonio Coco, Jérôme de Hemptinne, & Brian Lander, *International Law Against Starvation in Armed Conflict: Epilogue to a Multi-faceted Study*, 17 J. INT'L CRIM. JUST. 913, 921 (2019).

290. *See* AP I, *supra* note 30, art. 52(2); *see also* DINSTEIN, *supra* note 197, at 120–25.

from their destruction prohibitive only if disproportionate to the military advantage anticipated, or if precautions for its minimization were not taken.[291] Article 54, however, applies a more restrictive framework to objects indispensable to civilian survival. In paragraph 2, it prohibits attacks on such objects even when they are also used for sustenance by combatants (thus eschewing the ordinary dual-use principle).[292] Paragraph 3 emphasizes this deviation, prohibiting the destruction of indispensable objects unless such action would either (i) deny sustenance *exclusively* to combatants, or (ii) deny the objects' use for other military purposes *and* avoid causing civilian starvation or forced movement.[293] That prohibition is prior to proportionality and precautions, which is to say that it applies irrespective of the military advantage anticipated or the civilian loss minimization measures undertaken.[294] As such, it is more restrictive of the non-purposive infliction of civilian harm than are the general rules of IHL.[295]

Ultimately, the IHL rules underpinning the war crime of starvation of civilians as a method of warfare prohibit the deprivation of objects indispensable for civilian survival whenever that deprivation either has the purpose of denying persons sustenance (except when only combatants are impacted) or may be expected to cause civilian starvation or forced movement. The scale of the military advantage anticipated from such operations and the degree to which civilian damage is minimized are irrelevant; such tactics are banned

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291. *See* AP I, *supra* note 30, arts. 51, 57.

292. *Id.* art. 54(2).

293. *Id.* art. 54(3).

294. Akande & Gillard, *Conflict-Induced Food Insecurity*, *supra* note 61, at 767 ("Article 54(3) AP I appears to modify or 'displace' the rule of proportionality with regard to measures that fall within the list of prohibited activities referred to in Article 54(2)."). Akande and Gillard are less sure whether this extends to measures taken to starve combatants other than those identified in 54(2). *Id.* at 762–65. Notably, most military manuals simply provide that objects indispensable to civilian survival may not be destroyed. *See* ICRC, PRACTICE RELATING TO RULE 54. ATTACKS AGAINST OBJECTS INDISPENSABLE TO THE SURVIVAL OF THE CIVILIAN POPULATION, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule54 (last visited Apr. 23, 2022) [https://perma.cc/7FJS-MRKT] (archived Apr. 23, 2022).

295. Rather than deeming it anomalously permissive, the working group charged with developing what became Article 54 at the Diplomatic Conference deemed it "one of the most important articles of humanitarian law." Summary Record of the Thirty-first Meeting, U.N. Doc. CDDH/III/SR.31 (Mar. 14, 1975), 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS (1974-1977) at 300, ¶ 8; *see also* INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶¶ 2087–88; Statement of the USSR Representative, U.N. Doc. CDDH/SR.52 (June 6, 1977), 7 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS (1974-1977) at 136, ¶ 84 (describing what became article 14 of Protocol II as "one of the most humane provisions" in the law of armed conflict).

categorically in virtue of qualifying as starvation as a method of warfare.[296]

C. *Indispensable Objects and Starvation as a Method of Warfare*

Some adopting a narrow reading of the prohibition simply reject or ignore this clear expansion beyond purposive civilian starvation in the rules codified in paragraphs 2 and 3 of Article 54, at least as a matter of customary law.[297] However, the more common path to narrowing the impact of those paragraphs involves two steps. First, the rules on indispensable objects in paragraphs 2–3 are distinguished and separated from the general prohibition on starvation as a method of warfare in paragraph 1.[298] Second, any mode of depriving civilians of essential objects other than those explicitly articulated in paragraphs 2–3 is claimed to fall outside their purview.[299] Thus, excluded from the reach of paragraphs 2 and 3 would be operations that use encirclement to block the delivery of essentials or impede civilians' coping strategies *without* attacking, destroying, removing, or rendering useless the indispensable objects to which civilian access is denied.[300]

Because the terms "intentionally using starvation of civilians as a method of warfare" in the ICC war crime modify all forms of deprivation without any identified distinction, the implications of this argument could, in theory, be amplified in the war crimes context. Specifically, one might take the lack of distinction across modes of deprivation at the war crimes level to imply that the only criminalized form of starvation would be the intentional use of the method proscribed in paragraph 1 of Article 54. This would amount to adopting the highest threshold across the modalities of starvation regulated in

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296. The sole exception to this is the very narrowly applicable scorched earth exception in IACs. *See* AP I, *supra* note 30, art. 54(5). These conditions are in some respects analogous to the *levée en masse* exception to the requirements for privileged belligerency. GC III, *supra* note 55, art. 4(a)(6).

297. *See, e.g.*, U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 8.3 (2017) ("The intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, *for the specific purpose* of denying the civilian population of their use, is prohibited.") (emphasis added); *see also* provisions in the military manuals of Australia, Ecuador, and New Zealand, cited in HENCKAERTS & DOSWALD-BECK, *supra* note 69, at vol. 1, Rule 54. It is worth noting, however, that these positions are complicated by some potentially confounding other provisions in the same law of war manuals. *See, e.g.*, NEW ZEALAND INTERIM LOAC MANUAL, *supra* note 266, §§ 504(3), 613(3). Moreover, as noted above, this focus on the specific purpose of civilian starvation is dropped from the more recent New Zealand Manual, except for in blockades. *See* NEW ZEALAND LOAC MANUAL, *supra* note 266, §§ 8.8.25–8.8.27; *see also* ADDP 06.4, *supra* note 265, ¶¶ 7.12, 9.32.

298. Drew, *supra* note 264, at 314; TURKEL COMM'N, THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 ¶ 78 (2011).

299. Drew, *supra* note 264, at 314.

300. *See* ROGERS, *supra* note 196, at 140–42. On the denial of coping strategies, see *supra* notes 17–18.

IHL so as to ensure both that the criminal proscription does not exceed the underlying IHL ban for each modality, as war crimes law generally requires, and that all modalities are regulated identically, as the starvation crime provision seems to demand. On this view, even those forms of deprivation that are subject to a broad and non-purposive IHL prohibition under Article 54(2–3) of Protocol I would be *criminal* only when inflicted with the purpose of weaponizing the civilian suffering associated with starvation.[301] That, one might conclude, is simply how to interpret "intentionally using starvation of civilians as a method of warfare" in light of the underlying IHL regime.

This is not a compelling interpretation. Far from codifying inexplicably distinct regulatory frameworks within the same article, the rules enshrined in the different paragraphs of Article 54 of Protocol I are best understood to be part of a single, coherent provision. Its internal integrity in this respect is reflected in the provision's terminology. The prohibition of the "starvation of civilians as a method of warfare" is included in the first paragraph of the article, which is itself entitled "protection of objects indispensable to the survival of the civilian population."[302] That, in turn, is the terminology used in paragraphs 2 and 3.[303] Emphasizing the clear intertwinement of the concepts, the ICRC *Commentary* describes paragraph 2 as "develop[ing] the principle formulated in paragraph 1" and "describ[ing] the most usual ways in which this may be applied."[304]

Read in that light, the application of paragraphs 2 and 3 to the non-purposive infliction of starvation conditions cannot but be relevant to a coherent interpretation of the general prohibition in paragraph 1. If that general prohibition applies only to acts that take the starvation of civilians as their purpose, how could the "most usual ways" in which it may be applied include the prohibition of acts that do not take the starvation of civilians as their purpose? At the very least, an internally dichotomous interpretation along those lines would need a robust explanation.

Superficially attractive as a candidate explanation for such a dichotomy might be the destructiveness or violence of attacking, destroying, or rendering useless indispensable objects, as distinct from blocking their delivery or otherwise obstructing civilians' efforts to access them. However, that basis for the dichotomous approach quickly breaks down. Article 54(2) is unambiguously not concerned with the preservation of such objects in and of themselves. It is violated equally whether they are removed (and thus maintained in both their form and

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301. On the importance of contextual language to purposive readings of "intent", see *supra* Part IV.B. On a purposive reading of method of warfare, see *supra* Part V.A.

302. AP I, *supra* note 30, art. 54.

303. *Id.*

304. INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 2098; *see also* Group of Experts on Yemen (2019), *supra* note 9, ¶ 742.

future utility) or destroyed.[305] The special concern for, and protection of, the objects is derived instead from their essential value to specific populations. The denial of that value is indistinguishable whether the object is destroyed, removed, or obstructed from delivery.

Far from limiting the criminal implications of the underlying IHL prohibition in paragraphs 2 and 3 of Article 54, the lack of distinction across forms of deprivation in the war crime *affirms* the unity and coherence of the regulation of starvation as a method of warfare and the protection of indispensable objects. The ICC Statute provision criminalizes the "starvation of civilians as a method of warfare" (drawing on the language of Article 54(1) of Protocol I) "*by* depriving them of objects indispensable to their survival" (drawing on the language of Article 54(2)).[306] Moreover, as noted above, it explicitly includes encirclement deprivation as one of the covered forms of deprivation and even modifies that specific form with "wilfully"—a term that is ordinarily understood to imply a lower *mens rea* threshold than is standard at the ICC.[307]

D. *A Transitive Interpretation of "Starvation of Civilians as a Method of Warfare"*

What, then, should be made of of the term "starvation of civilians as a method of warfare" as used in Protocol I? To satisfy the distinct desiderata of including the actions proscribed in paragraphs 2 and 3 of Article 54 *and* honoring the implication of deliberate action in the term "method," "starvation" should be interpreted in its transitive form. In other words, it should be understood to refer not to the harm that follows from deprivation, but to the act of deprivation itself. "Starvation as a method of warfare" would then refer not to the weaponization of the civilian suffering associated with starvation,[308] but simply to the deliberate deprivation of objects indispensable to civilian survival.[309] Along these lines, the Group of Experts on Yemen reasoned that "in order for starvation—*defined as the deprivation of essential items for the survival of the population*—to be considered as an international humanitarian law violation [i.e., as a method of

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305. AP I, *supra* note 30, art. 54(2).

306. ICC Statute, *supra* note 23, arts. 8(2)(b)(xxv), 8(2)(e)(xix) (emphasis added). The only objective non-contextual element of the crime of starvation as a method of warfare in the ICC system is that the perpetrator "deprived civilians of objects indispensable to their survival." ICC Elements of Crimes, *supra* note 30, at 31.

307. *See supra* notes 243–250 and accompanying text.

308. *See supra* notes 264, 298; *see also* Rep. of the Int'l Fact-Finding Mission to Investigate Violations of Int'l L., including Int'l Humanitarian & Hum. Rts. L., Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, U.N. Doc. A/HRC/15/21 (2010) ¶ 52 ("[T]he ordinary meaning of 'starvation' under the law of armed conflict is simply to cause hunger.").

309. MUDGE, *supra* note 197, at 236 (among the transitive definitions of starvation is "to deprive of nourishment").

warfare], it has to be used as a strategy to defeat the other party to the conflict."[310]

Engaging in the deprivation of objects essential to civilian survival as a strategy to defeat the other party is compatible with lacking the purpose of inflicting suffering or harm on the civilian population. Indeed, that is precisely what happens when a belligerent party deprives a population of non-exclusive sustenance with a view to starving out the adversary forces ensconced within. As such, this understanding would encompass within the overarching concept articulated in paragraph 1 of Article 54 the kinds of actions prohibited in paragraphs 2 and 3, thus flattening any distinction between deprivation by attack, destruction, removal, or rendering useless and deprivation by other means, such as encirclement or the denial of coping strategies.[311] On this reading, the role of paragraphs 2 and 3 would be to specify the ban through exemplification, while also clarifying how it diverges from the general Article 52 framework on object protection.[312] An alternative route to a similar result would be to understand the concept of "rendering useless" more broadly than is suggested by the ICRC *Commentary*,[313] such that the obstruction of deliveries would render the the blocked consignments useless to the civilians for whom they were destined.

The term "method of warfare" would not be redundant on this view. Most obviously, the destruction of foodstuffs as part of the collateral damage of a targeted attack on a legitimate military objective would cause deprivation only incidentally. In that instance, the essential objects would not themselves be the targets of the operation, so the deprivation would not be the method. Similarly, an attack on a dual-use artery of transportation, such as a road, would not necessarily qualify simply in virtue of impeding the delivery of food and other essentials. In both of these examples, precautions and proportionality would still apply and could prohibit the operation, at least as long as it constitutes an "attack" under IHL, but the starvation ban would not be applicable.[314]

The example of arteries of transport emphasizes an important point. If the definitional crux of starvation as a method of warfare is the deliberate deprivation of objects indispensable to civilian survival, rather than the weaponization of the ensuing suffering, much hinges on what qualifies as such an object. Here, it may be helpful to distinguish objects that are *intrinsically* indispensable to human survival, such as those listed indicatively in Article 54(2) of Protocol I

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310. Group of Experts on Yemen (2019), *supra* note 9, ¶ 741 (emphasis added); *see also* Jordash, Murdoch, & Holmes, *supra* note 199, at 862.

311. *See* INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶¶ 4800, 4885; S.C. Res 2417 ¶¶ 6, 10 (2018).

312. Compare *supra* notes 290–295 and accompanying text.

313. INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶¶ 2100–2101.

314. *Cf. supra* notes 278, 277–280, 288 and *infra* note 317 and accompanying text.

("foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works")[315] from those that are *derivatively* or *contingently* indispensable to survival, such as electricity necessary for refrigeration or fuel and arteries of transportation essential for food preservation and delivery.[316]

On the approach proposed here, to engage purposefully in the deprivation of objects *intrinsically* indispensable to survival is to engage in starvation as a method of warfare, regardless of ultimate aim and regardless of whether the object is scarce at the time of the deprivation. There are only two exceptions to this, both of which are informed by Article 54. The first exceptional circumstance is when the deprivation is inflicted due to a function of those objects unrelated to their indispensability.[317] Concretely, when food is destroyed *as food*, that destruction is itself an act of intentionally using starvation as a method of war, regardless of whether there is an ongoing situation of food scarcity. Conversely, the destruction of food as cover for the enemy (i.e., in its manifestation as something other than food) is only an act of starvation as a method of warfare if expected to deny civilians nourishment sufficient to sustain life. The second case in which the deliberate deprivation of intrinsically indispensable objects would not constitute starvation of civilians as a method of warfare is when the objects' exclusive use by combatants means that they are (again exceptionally) not indispensable to *civilian* survival at all. Across each of these scenarios, the crux of the prohibition remains focused on the deprivation of objects indispensable to civilian survival; the question is when objects that fall presumptively into that category might be understood exceptionally through a different lens.

The legal status of the deprivation of objects that are only *derivatively* indispensable, such as fuel, electricity, money, and arteries of transportation, is more complicated. Existing state practice in war and the indicative list of objects in Article 54(2) of Protocol I together make it difficult to view such items as themselves objects

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315. AP I, *supra* note 30, art. 54(2).

316. *See, e.g.*, HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v. Prime Minister & Minister of Defence, *supra* note 84 (explaining the supply of fuel and electricity to Gaza and its implication of article 54 of Protocol I).

317. For examples of the destruction of indispensable objects unrelated to sustenance deprivation, see IIFFMM, Detailed Findings (2019), *supra* note 10, ¶ 540; U.S. DEPT. OF DEF., LAW OF WAR MANUAL, *supra* note 57, § 5.20.4; UK LOAC MANUAL, *supra* note 196, ¶ 5.27.2; SWEDISH MINISTRY OF DEF., INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICT WITH REFERENCE TO THE SWEDISH TOTAL DEFENCE SYSTEM, § 3.2.1.5 (1991). *See also* ICRC, PRACTICE RELATING TO RULE 54. ATTACKS AGAINST OBJECTS INDISPENSABLE TO THE SURVIVAL OF THE CIVILIAN POPULATION, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule54 (last visited Apr. 23, 2022) [https://perma.cc/7FJS-MRKT] (archived Apr. 23, 2022); MICHAEL BOTHE, JOSEF PARTSCH, & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 339 (2013).

indispensable to civilian survival independent of context.[318] However, their connection to human survival cannot be ignored. Perhaps the most coherent way to think about such items is as objects that relate to the starvation ban in one of two ways.

First, they may be objects the deprivation of which can cause the deprivation of objects that are *intrinsically* indispensable. In that case, their deprivation would qualify as starvation as a method of warfare when pursued with a view to depriving the affected population of the intrinsically indispensable objects (whether or not this includes the further aim to weaponize the attendant civilian suffering). Here, the deprivation of the former objects is best understood as a means by which to engage in the deliberate deprivation of the latter. Conversely, when pursued with a view to some other military end, such as preventing the transportation of weapons and troops, the purposeful deprivation of derivative essentials, such as fuel, electricity, or key arteries of transportation, would *not* qualify as criminal starvation because it would not entail the deliberate deprivation of objects that are intrinsically indispensable. Here, again, any impact on indispensable objects would be regulated instead by the rules on precautions and proportionality.[319]

Second, when the circumstances prevailing at the time are such that *specific* sources of fuel, arteries of transport, or similar objects become indispensable to civilian survival, those specific objects would qualify for the heightened protection of Article 54. On this view, whereas the deliberate deprivation of food would qualify as starvation as a method of warfare regardless of the scarcity of food in the relevant context, a road would qualify for that protection only exceptionally and on a case-by-case basis, when the circumstances prevailing at the time are such that civilian survival depends directly upon the viability of the specific road in question.[320] As in the case of deliberate attacks on food, deliberate attacks on a road satisfying those criteria would constitute starvation as a method of warfare, even if undertaken for the purpose of denying military use.[321]

In sum, on the transitive reading, "intentionally using starvation of civilians as a method of warfare" refers not to the purposeful weaponization of the civilian suffering arising from starvation conditions, but to engaging intentionally in the transitive act of

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318. Electricity and arteries of transportation are often thought to qualify as military objectives. *See* DINSTEIN, *supra* note 197, at 121, 123; ICTY COMM. ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FED. REPUBLIC OF YUGOSLAVIA, Final Report to the Prosecutor (2000), ¶¶ 38–39, https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal [https://perma.cc/6LVY-NADJ] (archived Feb. 17, 2022).

319. *Cf. supra* notes 278, 277–280, 317, 288 and accompanying text.

320. The latter could occur in the case of a single available humanitarian access route to a region that is otherwise cut off. *See* Declan Walsh, *This Ethiopian Road is a Lifeline for Millions. Now It's Blocked.*, N.Y. TIMES, July 30, 2021, at A8.

321. *See supra* notes 64, 285–295 and accompanying text.

depriving civilians of essential objects. Interpreted thus, the underlying IHL framework and the terms used therein support the alternative structure of direct and oblique intent in the ICC Statute.

E. *"Purpose" in the Second Protocol*

The Second Protocol might be invoked to challenge this interpretation. Article 14 provides: "Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, *for that purpose*, objects indispensable to the survival of the civilian population."[322] The italicized terms might appear to ban only actions taken with a view to weaponizing civilian suffering.[323] However, rather than being undermined by this turn of phrase, the approach above suggests an alternative reading of it.

The ICRC *Commentary* describes Article 14 of Protocol II as "a simplified version" of Article 54 of Protocol I.[324] If the most coherent reading of "starvation of civilians as a method of warfare" in the latter is that it refers to the deliberate deprivation of objects indispensable to civilian survival, it would be natural to read the term in the same way in Protocol II—a treaty negotiated at the same time, as part of the same process, within the same overall framework. From that it would follow that the reference to "purpose" in the Protocol II rule would simply emphasize that the rule proscribes the purposeful deprivation of those objects, as opposed to the genuinely incidental deprivation of such objects, as would occur when they were destroyed as collateral damage in an attack on a distinct military objective.

Importantly, the list of proscribed actions in the second sentence of Article 14 was never intended to be exhaustive of the modes of engaging in starvation of civilians as a method of warfare.[325] On the contrary, as in Protocol I, and as affirmed in the recent Rome Statute amendment and in the work of the Security Council and expert bodies, it seems clear that starvation as a method of warfare can occur in NIACs via other processes, such as denying humanitarian access in the context of encirclement.[326] Here, too, the structure of the Protocol I rule can shed light on the meaning of the Protocol II prohibition, notwithstanding the latter's more laconic articulation.

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322. AP II, *supra* note 30, art. 14 (emphasis added).

323. *Supra* note 270 and accompanying text.

324. INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 4792.

325. The ICRC *Commentary* says of the reference to attack, destruction, removal, and rendering useless in Article 14 of Protocol II that the "list is not exhaustive. Starvation can also result from an omission," including "deliberately decid[ing] not to take measures to supply the population with objects indispensable for its survival." INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 4800.

326. *Id.*; *see also* ICC Statute, *supra* note 23, art. 8(2)(e)(xix); S.C. Res 2417 ¶¶ 6, 10 (2018); *see infra* note 330.

The ICRC *Commentary* draws on precisely that structure. Arguing that the prohibition in Article 14 of Protocol II would be "meaningless if one could invoke the argument that members of the government's armed forces or armed opposition might make use of the objects,"[327] it replicates the approach in Article 54, paragraphs 2 and 3(a) of the First Protocol, which prohibits the deprivation of indispensable objects for their sustenance value to adversary forces, unless the objects would be used exclusively by the latter. The *Commentary* then adds that if "used *for military purposes* by the adversary, [indispensable objects] may become a military objective and it cannot be ruled out that they may have to be destroyed in exceptional cases, though *always provided that such action does not risk reducing the civilian population to a state of starvation.*"[328] In so doing, it replicates the approach in paragraph 3(b) of Article 54 in Protocol I, which limits the deprivation of indispensable objects even for reasons unrelated to sustenance, if that deprivation would lead to civilian starvation or forced movement.

Reinforcing the point in the context of encirclement deprivation, the *Commentary* concludes:

> If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. . . . a refusal [without good grounds] would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat.[329]

Although declining to explain their interpretive reasoning, expert investigative bodies examining the use of encirclement deprivation under customary IHL in the NIACs in Yemen, Libya, and South Sudan have each found encirclement deprivation to violate the starvation ban, without determining whether the impugned conduct was undertaken for the purpose of harming civilians.[330]

Even assuming that "starvation of civilians as a method of combat" in Protocol II ought not be read in light of Protocol I, the structure of Article 14 of the Second Protocol does not itself provide a basis for understanding the term to implicate the weaponization of civilian suffering. At most, it suggests that the proscribed actions must be taken with the purpose of engaging in "starvation of civilians as a

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327. INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 4806.

328. *Id.* ¶ 4807 (emphasis added).

329. *Id.* ¶ 4885; *see also* S.C. Res 2417 ¶¶ 6, 10 (2018).

330. *See* ICIL Full Report (Annex I), *supra* note 16, ¶ 542 n.802; Group of Experts on Yemen (2019), *supra* note 9, ¶¶ 738, 744–48, 791. The Yemen Report is not entirely consistent on the issue of purpose. *Id.* ¶¶ 357–58, 511, 777; *see also* Comm'n on Hum. Rts. in S. Sudan, *supra* note 8, ¶¶ 9, 11, 105. On the report's implications, see Tom Dannenbaum, *A Landmark Report on Starvation as a Method of Warfare*, JUST SEC. (Nov. 13, 2020), https://www.justsecurity.org/73350/a-landmark-report-on-starvation-as-a-method-of-warfare/ [https://perma.cc/4KXK-TRV] (archived Feb. 18, 2022).

method of combat." But this still leaves the question of what that method entails. If it is to be understood differently from the functionally identical term in Protocol I, the burden is on those who would assert that distinction to justify and explain it.

Moreover, it is not clear that the use of "purpose" in the provision in fact refers to "starvation of civilians as a method of combat." It could also be read to refer to "attack, destroy, remove or render useless."[331] This would lead to the same conclusion via a different route. On that reading, the term "purpose" would simply emphasize that the ban does not include the incidental deprivation of essential objects.

F. *The Transitive Interpretation and the Rome Statute*

In addition to making sense of the underlying IHL framework, reading "starvation of civilians as a method of warfare" in this way also fits the war crime. The Rome Statute provisions refer not to seeking or aiming to starve civilians by depriving them of essential objects, but to *using* starvation as a method of warfare by so depriving them. If the term "starvation of civilians" were to refer to a form of civilian suffering or death, it could be meaningfully said to be *used* only if that suffering were in fact inflicted.[332] And yet, the ICC rule clearly allows for the starvation crime to be established without any indication that such suffering occurred.[333] Interpreting "starvation of civilians" to refer instead to the deprivation of objects indispensable to civilian survival avoids incoherence on this point because the occurrence of such deprivation *is* necessary to establishing the crime.

Understood in this way, "intentionally using the starvation of civilians as a method of warfare" (per the Rome Statute) and "intend[ing] to starve civilians as a method of warfare" (per the Elements of Crimes) mean intending to engage in the transitive act of depriving civilians of objects indispensable to their survival, rather than intending that civilians experience malnourishment or other harm as a result. As noted above, this might be understood in direct and oblique terms to cover both the deprivation of such objects qua indispensable and the deliberate deprivation of those objects due to their other functions in a context in which their specific indispensability is such as to preclude the sustenance necessary for civilian survival.[334]

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331. AP II, *supra* note 30, art. 14 ("Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population.").

332. The Statute does provide for criminal attempt. *See* ICC Statute, *supra* note 23, art. 25(3)(f)).

333. *See supra* notes 62, 106 and accompanying text; *see also* Dörmann, *supra* note 61, at 388–89.

334. *See supra* notes 201–202 and accompanying text.

At this point, however, an objection arises. Why use two quite different terms within the same provision to refer to the same phenomenon? Specifically, why define the key objective element of the crime using the language of depriving civilians of objects indispensable to their survival, while defining the key subjective element using the distinct terminology of starving civilians?[335] The differentiation is easy to explain if what the accused must have done (deprive civilians of essential objects) is distinct from the purpose he, she, or they must have held (the weaponization of civilian suffering).[336] The explanation is less obvious if the terms are supposed to share a common referent.

Less obvious, perhaps, but not unavailable. The terminology of "depriving persons of objects indispensable to survival" clarifies the central element of the crime and emphasizes that it is not necessary to establish civilian harm.[337] The terminology of "using starvation as a method of warfare" supplements that message in several distinct ways. "Starvation of civilians" expresses the normative crux of the crime (namely its implications for the affected civilians),[338] indicates the permissibility of denying sustenance to exclusively combatant populations,[339] and indicates that deprivation unrelated to sustenance denial would satisfy the legal threshold only if civilians would starve as a result.[340] Finally, "method of warfare" emphasizes that the deprivation must have been deliberate, rather than the incidental product of an attack on a legitimate military objective, and that it must have been part of fighting the war, thus excluding failures of good governance or harmful resource allocations that are not themselves methods of warfare, even when shaped by the context of armed conflict.[341]

VI. THE CIVILIAN POPULATION, ENCIRCLEMENT DEPRIVATION, AND THE GENEVA CONVENTIONS

Two final issues warrant discussion. The first reframes, in the alternative, what it would mean to limit the crime only to starvation actions targeted at civilians. Critical to that argument is clarifying the concepts of purpose and the civilian population. The second, which is specific to encirclement deprivation, arises due to the distinct humanitarian access rules in IHL and the reference to the impediment

335. ICC Elements of Crimes, *supra* note 30, at 31.
336. Compare *supra* Part III.
337. *See supra* notes 62, 106 and accompanying text.
338. *See generally* Dannenbaum, *supra* note 36.
339. *See supra* notes 285–286 and accompanying text.
340. *See supra* notes 287–289 and accompanying text.
341. Cottier, *supra* note 199, at 466. In this sense, method of warfare might be thought to impose a slightly stricter requirement than is demanded by war crimes' ordinary belligerent nexus requirement. On the latter, see Prosecutor v. Kunarac, IT-96-23 & IT- 96-23/1-A, Appeals Judgement, ¶¶ 58–60 (June 12, 2002).

of relief supplies "as provided for under the Geneva Conventions" in the ICC's starvation crime for IACs.[342] Here, the autonomous force of the starvation prohibition is critical to understanding the relevance of the humanitarian access rules.

A. *The Civilian Population, Discrimination, and the Issue of Egress*

One of the most significant claims of the argument thus far is that the deliberate deprivation of objects indispensable to civilian survival is proscribed and criminal even if not targeted specifically at civilians. This interpretation is grounded in the underlying IHL framework and consistent with the structure of intent in international criminal law. Suppose, however, that it is incorrect. One might accept that "starvation of civilians as a method of warfare" ought to be understood in transitive terms (as the process of deprivation, rather than the weaponization of suffering), and yet insist that the deprivation must be targeted specifically at civilians.

Such an interpretation would exclude deprivation actions undertaken with a view to achieving a military objective unrelated to sustenance, even if those actions would cause civilians to starve. However, it would *not* entail the narrowest constructions of the crime discussed above.[343] Many large-scale deprivation actions driven by the goal of starving out enemy forces would meet the criminal threshold.[344]

Starving out an encircled enemy force often entails denying essentials to all within the encircled area.[345] The ultimate goal may be the deprivation of essentials to enemy combatants with a view to compelling their capitulation. However, because the encircled combatants cannot be isolated from the population within which they are ensconced, that goal can be pursued only by purposively depriving the population as a whole. In that scenario, the population becomes the target; *its* deprivation becomes the method. In the language of *mens rea*, those who undertake such action do so meaning to starve the population as a whole, even if they lament the civilian harm and are motivated solely by the more specific aim of starving out the combatants ensconced within.[346] To drain the sea in order to catch the fish involves purposefully draining the sea, even if one is motivated exclusively by the goal of catching the fish.[347]

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342. ICC Statute, *supra* note 23, art. 8(2)(b)(xxv). *Cf. id.* art. 8(2)(e)(xix) (including no such language).

343. *See supra* Parts IV.A, V.A.

344. Such actions are central to the resurgence of starvation in war. *See supra* notes 8–20 and accompanying text.

345. This is the premise of arguments for broad rights of encirclement starvation. *See, e.g., supra* notes 272–273; *see also* Watts, *supra* note 264, at 7–16.

346. ICC Statute, *supra* note 23, art. 30(2)(b).

347. *See supra* note 271.

Emphasizing this distinction between purpose and motive, Protocol I proscribes various forms of deprivation "for the *specific purpose* of denying [indispensable objects] for their sustenance value to the civilian population or to the adverse Party, *whatever the motive*."[348] Similarly, the case law on genocidal intent has clarified that contributing to genocide in pursuit "of a personal goal, such as vengeance or lucre," the "elimination of business competitors," or "for the reason that [the accused] feared losing his job" is entirely compatible with holding the crime's purposive *mens rea*.[349]

Thus understood, even under a purposive interpretation of the starvation crime, one must evaluate not just the motive (the ultimate purpose) of the impugned conduct, but also the necessary steps towards that end (the predicate purpose(s)). In situations of mass deprivation, this means evaluating the purposeful deprivation of a population. Two questions arise. First, how is the population classified? Second, how does that classification relate to the ban on the starvation of civilians?

Protocol I provides that the presence of combatants within a civilian population "does not deprive the population of its civilian character."[350] Affirming this as a matter of customary law, the ICTY held repeatedly that "a population may qualify as civilian as long as it is predominantly civilian," finding on that basis that "the population of the urban areas inside the confrontation lines of Sarajevo between 1992 and 1995 had civilian status as a whole," notwithstanding the presence of combatants.[351] The ICC has taken a similar approach.[352] On this basis, seeking to starve combatants *through* starving the predominantly civilian population within which they are ensconced entails purposefully starving a civilian population.

Analogously, in the context of direct kinetic attacks, the principle of distinction underpins a categorical ban on attacking not just individual civilians, but also the civilian population as a whole.[353] On that issue, the ICC Appeals Chamber clarified recently that establishing that an attack was "directed against a civilian population" for the purposes of crimes against humanity does not include "a legal requirement that the *main* aim or object of the relevant acts was to

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348. AP I, *supra* note 30, art. 54(2) (emphasis added).

349. Prosecutor v. Kayishema & Ruzundana, ICTR-95-1-A, Appeals Judgement, ¶ 161 (Dec. 4, 2001); Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgement, ¶ 269 (July 15, 1999).

350. AP I, *supra* note 30, art. 50(3).

351. Prosecutor v. Karadžić, IT-95-5/18-T, Trial Judgement, ¶¶ 474, 4610 n.5510 (Mar. 24, 2016); *see also* Prosecutor v. Galić, IT-98-29-A, Appeals Judgement, ¶¶ 135–138 (Nov. 30, 2006); Prosecutor v. Kordić and Čerkez, IT-95-14/2-A, Appeals Judgement, ¶¶ 50, 97 (Dec. 17, 2004); Prosecutor v. Blaškić, IT-95-14-A, Appeals Judgement, ¶ 115 (July 29, 2004).

352. Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgment, ¶ 1105 (Mar. 7, 2014).

353. AP I, *supra* note 30, art. 54; AP II, *supra* note 30, art. (2); ICC Statute, *supra* note 23, arts. 8(2)(b)(i), 8(2)(e)(i).

attack civilians," affirming that the attack "may also serve other objectives or motives" and holding that targeting a civilian population "without distinction between civilians and combatants" can qualify.[354]

One might object here that whereas the ICC "attack" crimes include explicit reference to the "civilian population," the ICC starvation crime uses only the term "civilians." This might be thought to undermine interpretive reliance on the *population's* classification (as civilian or not) in the latter context. However, the underlying starvation ban in IHL focuses explicitly on objects indispensable to the "civilian population" under the umbrella of "starvation of civilians as a method of warfare."[355] Moreover, some of the criminal tribunals' analyses of attacks on the "civilian population" were themselves interpretations of the war crime of "attack on civilians" in those systems.[356] As such, there are strong grounds for interpreting "civilians" in the starvation war crime to encompass the "civilian population." Relatedly, an ICC Trial Chamber has determined that attacks inflicted "indiscriminately" on "civilians and fighters alike" amount to conduct undertaken with a dual purpose of targeting *both* combatants *and* civilians.[357]

Construed in this light, the starvation crime would capture a significant proportion of encirclement operations. Consider, in this respect, the multifaceted deprivation inflicted on large areas of Yemen and Tigray, the use of siege warfare across Syria, or the targeting of agricultural resources in enemy territory in South Sudan.[358] Undertaking such operations with a view to denying combatants sustenance entails targeting the civilian population with deprivation as the condition predicate to the ultimate objective of adversary capitulation.

Permitting civilian egress from the affected area cannot recharacterize the population or reframe such operations as non-purposive with respect to the starvation of those who remain.[359] To decline the opportunity to leave is not to forfeit civilian status or

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354. Prosecutor v. Ntaganda, ICC-01/04-02/06-2666, Appeals Judgment, ¶¶ 418, 424, 491 (Mar. 30, 2021) (emphasis added); *see also* Prosecutor v. Galić, IT-98-29-A, Appeals Judgement, ¶¶ 131–34 (Nov. 30, 2006).

355. AP I, *supra* note 30, art. 54; AP II, *supra* note 30, art. 14. On the interrelationship of the paragraphs within those provisions, see *supra* Sections V.CD.

356. Prosecutor v. Strugar, IT-01-42-A, Appeals Judgement, ¶¶ 270–71 (July 17, 2008); Prosecutor v. Galić, IT-98-29-T, Trial Judgement, ¶¶ 41, 44, 49–50, 56 (Dec. 5, 2003); Prosecutor v. Galić, IT-98-29-A, Appeals Judgement, ¶ 134 (Nov. 30, 2006).

357. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Trial Judgment, ¶ 923 (July 8, 2019); *see also id.* ¶¶ 926, 1057; Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgment, ¶ 802 (Mar. 7, 2014).

358. *See supra* notes 7–20 and accompanying text.

359. *Cf. supra* notes 196–198 and accompanying text (noting arguments that permitting civilian egress could help to authorize starvation methods with respect to the population that remains).

protection.[360] Similarly, although the besieged party would likely violate its obligations by forcing civilians to remain, this would not relieve the besieging party of its responsibilities *vis-à-vis* those persons.[361] The besieging party's duty to allow civilian egress in conditions of deprivation supplements its duty not to deprive a civilian population of objects indispensable to civilian survival.[362] Discharging the former does not exempt the besieging party from the latter.[363] In fact, inflicting a siege that combines an offer of civilian egress with the promise of starvation for those who remain would likely qualify as forced movement of the kind banned in Article 54(3)(b) of Protocol I[364]

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360. Provost, *supra* note 54, at 619; Gillard, *supra* note 173, at 12; AP I, *supra* note 30, art. 51(3). What surpasses the threshold for direct participation in hostilities is debated, with voluntary human shields a point of disagreement. *Compare* Nils Melzer, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 56–57 (2009) (arguing that voluntary human shields participate directly in hostilities only when providing a physical, and not merely normative, obstacle to military options), *with* HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 459, 498, ¶ 36 (2006) (Isr.), *reprinted in* 46 International Legal Materials 373 (holding that voluntary human shields participate directly in hostilities, without distinguishing between those who present a normative obstacle and those who present a physical obstacle to military operations). Whatever one makes of that debate, it is implausible to hold that declining to leave one's home could qualify a person as a voluntary human shield. Such a standard would eviscerate civilian protection. *See, e.g.*, Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), Walter Kälin (Representative of the Secretary-General on Human Rights of Internally Displaced Persons) & Miloon Kothari (Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living), *Mission to Lebanon and Israel*, ¶ 41, U.N. Doc. A/HRC/2/7 (Oct. 2, 2006) [hereinafter Report of U.N. Special Rapporteurs]; INT' COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 25 (2019) [hereinafter ICRC, 2019 CHALLENGES REPORT].

361. *See* AP I, *supra* note 30, arts. 51(7), 58 (on human shields and passive precautions). On the irrelevance of their violation for the duties of the besieging party, see *id.* art. 51(8); Gillard, *supra* note 173, at 7–8.

362. The United States recognizes the besieging party's obligation not to force fleeing civilians back into the besieged area, deriving this from the general requirement to take precautionary measures to minimize civilian loss. U.S. DoD, LAW OF WAR MANUAL, *supra* note 57, § 5.19.4.1; *see also* Gillard, *supra* note 173, at 12; ICRC, 2019 CHALLENGES REPORT, *supra* note 360, at 24.

363. By way of comparison, warning civilians in advance of an attack does not absolve the attacking force from responsibility for complying with distinction, discrimination, and proportionality in the ensuing operation. Report of U.N. Special Rapporteurs, *supra* note 357, ¶ 41.

364. AP I, *supra* note 30, art. 54(3)(b) (prohibiting any deprivation of indispensable objects "expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement"); *see also* ICRC, 2019 CHALLENGES REPORT, *supra* note 360, at 24.

and could implicate the distinct bans on spreading terror among the civilian population[365] and inflicting collective punishment.[366]

In addition to its other virtues, this reading of the starvation ban is arguably required by the foundational IHL principle that parties "shall at all times distinguish between the civilian population and combatants" and "shall direct their operations only against military objectives." [367] Although not all starvation operations constitute "attacks" under IHL, [368] this approach is also more normatively coherent with the customary criminalization of attacks that use methods of combat which "cannot be directed at a specific military objective."[369] In contrast, advocates of a narrower interpretation of the starvation ban must account normatively for why a besieging party would be permitted to starve a population that it may not subject to comprehensive bombardment.[370]

As argued in the previous Part, the more coherent reading of both the IHL framework and the derivative war crime in fact supports an interpretation according to which starvation methods are subject to restrictions *tighter* than those applicable to more direct modes of attack. Nonetheless, the alternative interpretation elaborated in this Part remains significantly more prohibitive than the approach according to which starvation crimes attach exclusively to operations that seek to weaponize civilian suffering. The central claim is that it is no defense against a starvation charge that the civilian population was deprived of essentials with a view to starving out ensconced combatants. Particularly in contexts of encirclement deprivation, this is likely to be definitive of the crime's relevance.

B. *Humanitarian Access and Starvation*

There is, however, a second line of argument associated with encirclement deprivation that requires attention. As outlined above, in addition to their rules on starvation as a method of warfare, the Additional Protocols also regulate humanitarian access in contexts of the inadequate supply of essentials. Specifically, impartial humanitarian actors are to be allowed through to hostile territory "subject to the agreement of the Parties concerned" per Article 70 of Protocol I or

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365. AP I, *supra* note 30, art. 51(2); AP II, *supra* note 30, art. 4(2)(d); HENCKAERTS & DOSWALD-BECK, *supra* note 69, vol. 1, Rule 2; Prosecutor v. Galić, Trial Judgement, IT-98-29-T, ¶¶ 94–138 (Dec. 5, 2003).

366. Hague Regulations (IV) 1907, *supra* note 42, art. 50; GC IV, *supra* note 52, art. 33; AP I, *supra* note 30, art. 75(2)(d); AP II, *supra* note 30, art. 4(2)(b).

367. AP I, *supra* note 30, art. 48.

368. *See supra* note 173.

369. Prosecutor v. Galić, Trial Judgement, IT-98-29-T, ¶ 387 (Dec. 5, 2003); Prosecutor v. Martić, Trial Judgement, IT-95-11-T ¶¶ 461–72 (June 12, 2007). For the underlying IHL rule, see AP I, *supra* note 30, arts. 51(4)(a)–(b).

370. AP I, *supra* note 30, art. 51(5)(a). On the possible distinction, see Gillard, *supra* note 173, at 5, 8.

"subject to the consent of the High Contracting Party concerned" per Article 18 of Protocol II.[371] With no explicit limit on concerned states' discretion,[372] some argue that they are free to deny humanitarian access as part of a comprehensive starvation siege.[373]

Separately, the United Kingdom, France, and the ICRC *Commentary* have all claimed that the basic starvation ban (articulated in the first paragraph of Article 54 of Protocol I) is inapplicable to naval blockades.[374] That argument combines an assertion of the longstanding customary legality of starvation blockades under the law of naval warfare[375] with a particular reading of Article 49(3) of Protocol I, which specifies that Article 54 (among other rules) is not to affect the law of war at sea, except in the case of naval operations that may affect civilians or civilian objects on land.[376]

Neither of these lines of argument is compelling. By stipulating that humanitarian operations "shall" occur subject to concerned parties' consent, the humanitarian access provisions are widely understood to prohibit withholding that consent arbitrarily.[377] Denying

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371. AP I, *supra* note 30, art. 70; AP II, *supra* note 30, art. 18.

372. Drew, *supra* note 264, at 315; Watts, *supra* note 264, at 22–23. Noting that Article 70 lacks language equivalent to that in Article 23 of Geneva Convention IV restricting the denial of relief to children, expectant mothers, and maternity cases only when there are "serious reasons for fearing" the consequences outlined in Part II (capacious as those are), Watts argues that "it appears States were only willing to abandon the GC IV limited scope of relief and protected persons [for coverage of all civilians and a wider range of relief] in exchange for discretion to permit or reject these broader relief actions during siege." Watts, *supra* note 264, at 22. He further argues that the assertion of a non-arbitrariness requirement (i) lacks textual support, (ii) does not reflect drafters' unambiguous shared intent, (iii) has not been states' dominant understanding, and (iv) ignores the viability of reading "shall" to define the obligations that flow from having granted consent (and not to limit the discretion to withhold it). At a minimum, he claims these factors indicate an ambiguity in which narrow construal is appropriate. *Id.* at 27–35. Sassòli, Bouvier, and Quintin describe the Article 70 consent clause as a "severe limitation" in the Protocol's protection of the right to humanitarian relief. MARCO SASSÒLI, ANTOINE A. BOUVIER, & ANNE QUINTIN, 1 HOW DOES LAW PROTECT IN WAR? 47 (3d ed. 2011).

373. Watts, *supra* note 264, at 4, 22–23.

374. UK LOAC MANUAL, *supra* note 196, ¶¶ 5.34.2, 9.12.4; INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 2092; Drew, *supra* note 264, at 314, 316; DINSTEIN, *supra* note 197, at 259.

375. *See, e.g.*, Drew, *supra* note 264, at 311–12; GEOFFREY S. CORN, VICTOR HANSEN, RICHARD B. JACKSON, CHRIS JENKS, ERIC TALBOT JENSEN, & JAMES A. SCHOETTLER, JR., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 446–48 (2012).

376. AP I, *supra* note 30, art. 49(3) ("The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.").

377. *Compare* GC IV, *supra* note 52, art. 10, *with* AP I, *supra* note 30, art. 70(1), *and* AP II, *supra* note 30, art. 18(2). *See* INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶¶ 2805, 4885; AKANDE & GILLARD, *supra* note 78, ¶¶ 43–49; *see also* G.A. Res. 68/182, ¶ 14 (Dec. 18, 2013); Human Rights Council Res. 29/13, U.N. Doc. A/HRC/Res/29/13, ¶ 1 (July 2, 2015); Rep. of the Hum. Rts. Comm., Concluding Observations on the Fourth

consent as part of a starvation operation would almost certainly be arbitrary in that respect.[378] Even assuming that blockades were excluded from the starvation prohibition in Article 54, they would at least be regulated by this aspect of the humanitarian access rule in Article 70, to which the Article 49(3) caveat does not attach.[379] Notably, leading restatements of naval and air warfare require granting humanitarian access if supplies are inadequate.[380]

There is also a more fundamental problem with the notion that the humanitarian access provisions authorize encirclement starvation. Whether or not a non-arbitrariness element can be read into those rules, the reference to consent in the latter cannot confer on states any authority to do what the starvation ban prohibits.[381] The latter imposes an autonomous and categorical limit on whatever discretion parties have under the terms of the humanitarian access provisions.[382] Thus, the Israeli Supreme Court has recognized, in the context of

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Periodic Report of the Sudan, ¶ 8(f), U.N. Doc. CCPR/C/SDN/CO/4 (Aug. 19, 20 14); Institut de Droit International, Resolution on Humanitarian Assistance art. VIII (Sept. 2, 2003); Francis M. Deng (Representative of the Secretary-General), *Report Submitted Pursuant to Commission Resolution 1997/39*, annex, princ. 25(2), U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

378. AKANDE & GILLARD, *supra* note 78, ¶ 51; Akande & Gillard, *Conflict-Induced Food Insecurity*, *supra* note 61, at 771; Jelena Pejic, *The Right to Food in Situations of Armed Conflict: The Legal Framework*, 83 INT'L REV. RED CROSS 1097, 1103 (2011) (suggesting that article 70 "remedied" the permissive Geneva Conventions framework "to a large extent"). Questioning the determinacy of arbitrariness, see Marcus, *supra* note 7, at 268.

379. *See, e.g.*, INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 2095. The UK and France took an interpretive position on article 54 (arguing that it did not extend to blockades), while issuing reservations to the application of article 70 to blockades. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Reservation/ Declaration,* INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ States.xsp?xp_viewStates=XPages_NOrMStatesParties&xp_treatySelected=470 (last visited Apr. 23, 2022) [https://perma.cc/L2EL-R5XX] (archived Apr. 23, 2022) (United Kingdom ¶ (p); France, ¶ 17).

380. HPCR MANUAL, *supra* note 90, at rules 100–02; SAN REMO MANUAL, *supra* note 90, ¶ 103.

381. ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR 29–31 (2017); U.S. DoD, Law of War Manual, *supra* note 57, § 1.3.3.1. Some resist this principle or claim exceptions, suggesting that compliance with IHL can provide an authority in relation to other regimes, such as domestic law and human rights law. *See, e.g.*, U.S. DoD, Law of War Manual, *supra* note 57, § 1.3.3.2; Janina Dill, *Towards a Moral Division of Labour Between IHL and IHRL During the Conduct of Hostilities*, *in* LAW APPLICABLE TO ARMED CONFLICT 197, 197–202 (Ziv Bohrer, Janina Dill, & Helen Duffy eds., 2020). Others have suggested that IHL compliance is facilitative of action even when not formally authorizing. Eliav Lieblich, *The Facilitative Function of Jus in Bello*, 30 EUR. J. INT'L L. 321, 326–27 (2019). However, even on these more complex views about the prohibitive character of IHL, compliance with one IHL rule does not permit the violation of another.

382. This is what it means to say that the inadequate supply of the civilian population can create scenarios in which "the international relief actions provided for in Article 18 of Protocol II should be authorized *to enable the obligation following from Article 14 to be respected.*" INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 4798 (emphasis added).

Israel's control over the entry of supplies into Gaza, the customary rules reflected in Articles 54 and 70 of Protocol I together preclude refusing "to allow the passage of foodstuffs and basic humanitarian equipment necessary for the survival of the civilian population."[383]

Naval blockades are no exception.[384] The very provision invoked to claim a blockade caveat (Article 49(3) of Protocol I)[385] in fact specifies precisely the opposite—namely, that those rules *do* apply to "sea warfare which may affect the civilian population, individual civilians or civilian objects on land."[386] Starvation blockades fit straightforwardly into that category.[387] Neither the ICRC *Commentary* nor isolated comments in the drafting history can overturn that plain meaning,[388] which has been affirmed by multiple authorities since.[389]

The war crimes provisions clarify and strengthen these points. The ICC rule is explicit in covering the denial of humanitarian access.[390] The Rome Statute as a whole applies in the naval domain[391] and provides no naval exception for war crimes generally or the starvation crime in particular.[392] To exclude starvation blockades from the war crime, one would need to invoke a blockade-exceptionalist reading of IHL and use that to argue that such actions are not "serious violations of the laws and customs applicable in international armed

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383. HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence, ¶ 14 (2008) (Isr.); *see also* Group of Experts on Yemen (2019), *supra* note 9, ¶ 738.

384. Dannenbaum, *supra* note 37, at 357–60.

385. *See supra* notes 374–376 and accompanying text.

386. AP I, *supra* note 30, art. 49(3).

387. Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 487, 554–55 (Dieter Fleck ed., 2009).

388. Vienna Convention on the Law of Treaties, *supra* note 205, arts. 31–32. Even the ICRC *Commentary* upon which blockade exceptionalists rely is equivocal, acknowledging that "there is some uncertainty as regards the present state of the customary law relating to blockades . . .[I]t is to be hoped that the rules relating to blockades will be clarified . . . to duly take into account the principles put forward in the Protocol which prohibit starvation as a method of warfare." INT'L COMM. OF THE RED CROSS, *supra* note 69, ¶ 2093.

389. SAN REMO MANUAL, *supra* note 90, ¶ 102. Despite divergent conclusions on the legality of Israel's blockade of Gaza, each of the various bodies tasked with evaluating the operation affirmed the starvation ban's applicability to naval blockades. U.N. DOC. A/HRC/15/21, *supra* note 308, ¶ 50; Rep. of the Secretary General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, ¶ 157 (Sept. 2011); TURKEL COMM'N, *supra* note 298, ¶ 61.

390. ICC Statute, *supra* note 23, arts. 8(2)(b)(xxv), 8(2)(e)(xix).

391. ICC Statute, *supra* note 23, art. 12(2)(a) (grounding the Court's jurisdiction in the ratification of "the State of registration of [the] vessel or aircraft" upon which the crime was committed); *see, e.g.*, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation, Pre-Trial Chamber I, ICC-01/13 (July 16, 2015).

392. ICC Statute, *supra* note 23, art. 8; ICC Elements of Crimes, *supra* note 30, at 31.

conflict, within the established framework of international law," as is required of ICC war crimes.[393]

Quite apart from the shakiness of the underlying IHL claim, that approach is undermined by two features of the context in which the Rome Statute was agreed and one aspect of the more recent NIAC amendment. First, the ICC Statute was concluded three years after the influential *San Remo Manual* asserted the applicability of starvation rules to blockades.[394] Second, it was agreed at a moment when international criminal judges at other tribunals were using their interpretive discretion to eliminate or mitigate normatively dubious formal distinctions.[395] Were a blockade exception intended by the drafters, it would be odd indeed to leave that exception unstated under these conditions. Third, blockade is generally understood to be a legal category only in IACs.[396] The implicit incorporation of a blockade exception would entail a gap between the NIAC and IAC crimes in the naval domain, contradicting the aim of the NIAC amendment to close the gap between the regimes, rather than opening a new one.[397]

C. *Relief Supplies and the Geneva Conventions*

A distinct but related issue arises from the language on encirclement deprivation in Article 8(2)(b)(xxv) of the Rome Statute, which focuses on the impediment of relief supplies "as provided for under the Geneva Conventions."[398] Given the limited restrictions on states' discretion to refuse humanitarian access to deprived civilian populations under Geneva Convention IV, this itself might be thought to circumscribe the criminal proscription of such denial.[399]

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393. ICC Statute, *supra* note 23, art. 8(2)(b).

394. SAN REMO MANUAL, *supra* note 90, ¶ 102.

395. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); ("We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards means and methods of warfare . . . [E]lementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.").

396. TURKISH NATIONAL COMMISSION OF INQUIRY, REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010 61–63 (2011); Heintschel von Heinegg, *supra* note 21, ¶ 25; Russell Buchan, *The Palmer Report and the Legality of Israel's Naval Blockade of Gaza*, 61 INT'L & COMPAR. L.Q. 264, 268 (2012); Martin D. Fink, *Naval Blockade and the Humanitarian Crisis in Yemen*, 64 NETH. INT'L L. REV. 291, 303–04 (2017). *But see* TURKEL COMM'N, *supra* note 298, ¶¶ 39–44.

397. *See infra* note 415.

398. ICC Statute, *supra* note 23, art. 8(2)(b)(xxv). *Cf. id.* art. 8(2)(e)(xix) (including no such language).

399. *See supra* notes 52–57 and accompanying text.

Before addressing the central thrust of that argument, it is worth noting the peculiarity of the reference. It is Additional Protocol I (and not the Geneva Conventions of 1949) that provides both the starvation ban from which the war crime is derived (in terminology as well as in spirit),[400] and the parallel rules on humanitarian access (in Article 70) that are thought to prohibit the arbitrary obstruction of relief supplies.[401] Defining the relevant component of the war crime with reference to the rules of the Geneva Conventions would create a bizarre dissonance between the humanitarian access clause of the war crime (which would be rooted in a 1949 humanitarian access framework that predates the starvation ban) and the rest of the provision (which would be rooted in the very different Protocol I framework).[402]

Seeking to avoid this dissonance, some have suggested that the reference to the "Geneva Conventions" in Article 8(2)(b)(xxv) should be read to implicate the humanitarian access rules of Additional Protocol I (and particularly Article 70), rather than those codified in the 1949 Conventions.[403] The attraction of that approach is obvious, but it is difficult to reconcile with the plain text. The term "Geneva Conventions" refers to the four Conventions of 1949 and not to their Additional Protocols of almost three decades later. To read it to implicate the latter would be to presume a stunning drafting infirmity. It would also raise the question of why Article 8(2)(e)(xix) of the Rome Statute lacks anything similar for NIACs. Protocol II has starvation and humanitarian access provisions parallel to those in Protocol I. Indeed, in the proposal that led to the 8(2)(e)(xix) amendment, Switzerland emphasized the illegality of refusals to consent to humanitarian relief under Protocol II.[404] And yet, no clause referencing the Protocol II rules on humanitarian access was proposed in

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400. The links to Article 54 are deep and obvious. *See generally* Cottier & Richard, *supra* note 98. Both the war crime and the Protocol I provision use the term "starvation of civilians as a method of warfare" and both are centered on objects indispensable to civilian survival. ICC Statute, *supra* note 23, art. 8(2)(b)(xxv); AP I, *supra* note 30, art. 54. The customary prohibition is itself deeply linked to that Protocol I rule. HENCKAERTS & DOSWALD-BECK, *supra* note 69, at Rule 53. Protocol I's humanitarian access provisions are clearly linked to the starvation ban. *See* INT'L COMM. RED CROSS, *supra* note 69, ¶¶ 2095, 2111, 2805, 2808, 2828 n.27. It is clear that the provisions "should be read in conjunction" with one another. *Id.* ¶ 2808. Convention IV has no direct prohibition of starvation methods at all. *Supra* notes 52–57 and accompanying text.

401. *See supra* notes 58–77 and accompanying text; *see also* Akande & Gillard, *Conflict-Induced Food Insecurity*, *supra* note 61, at 772 n.53.

402. Akande & Gillard, *Conflict-Induced Food Insecurity*, *supra* note 61, at 772 n.53. On the links between the starvation ban and humanitarian access rules in Protocol I, see INT'L COMM. RED CROSS, *supra* note 69, ¶¶ 2095, 2111, 2805, 2808, 2828 n.27. It is clear that the provisions "should be read in conjunction" with one another. *Id.* ¶ 2808.

403. Michael Bothe, *War Crimes*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 402 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); D'Alessandra & Gillett, *supra* note 67, at 839. Notably, Werle and Jeßberger also cite the AP I rules here, despite focusing primarily on the Convention IV rules. WERLE & JEßBERGER, *supra* note 181, at 504, 506 n.820. *Cf. infra* note 406.

404. Switzerland Non-paper, *supra* note 102, ¶ 12.

the drafting of 8(2)(e)(xix). Instead, the Swiss proposal explained the omission of any equivalent clause in the NIAC provision on the grounds that the 1949 Conventions apply specifically to IACs.[405]

How, then, should the reference to the Geneva Conventions in the IAC crime be understood? Among the conventions, it is Convention IV that focuses on the protection of civilians. Drawing on that treaty, Werle and Jeßberger focus their interpretative attention on the limited humanitarian access protections enshrined in Article 23 and the stricter, but occupation-specific, protections in Articles 55 and 59, which they describe as the "most important provisions" in shaping this aspect of the crime.[406] Taking the relevant clause of the IAC war crime to refer to these Convention IV rules would have two significant implications. First, this reading implies a divergence within the IAC crime between its scope in belligerent occupations and its scope in IACs other than occupation. Second, it entails a significant narrowing of the crime's application in contexts of encirclement deprivation as compared to other modalities of starvation.

The occupation provisions of Convention IV are strict. Article 55 provides that "the Occupying Power has the duty of ensuring the food and medical supplies of the population" by using "the fullest extent of the means available to it," including bringing essential items into the territory when internal resources are "inadequate."[407] Article 59 requires the occupier to "agree to relief schemes" when supplies remain inadequate.[408] Informed by these standards, one might read the ICC provision to specify that occupiers who impede relief supplies in contexts of inadequate supply would thereby satisfy the deprivation element of the IAC war crime of starvation. Thus understood, the substantive prohibition would be robust but narrowly applicable. The law of belligerent occupation (including Articles 55 and 59 of Convention IV) applies only when one state exercises effective control over the territory of another state without the latter's consent and in a way that displaces the latter as an effective authority.[409]

Outside of that narrow context, the requirements of the Fourth Convention on humanitarian relief (including in encirclement contexts) are far weaker. Article 23 requires parties to allow medical and religious supplies through to adversary territory only when those supplies are "intended *only* for civilians" and requires passage of

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405. *Id.* ¶ 14.

406. WERLE & JEßBERGER, *supra* note 181, at 504, 506 n.820.

407. GC IV, *supra* note 52, art. 55.

408. *Id.* art. 59.

409. These criteria are derived from Hague Regulations (IV) 1907, *supra* note 42, art. 42. How much control must be exercised by the external power is debated. Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 ICJ REP. 168, ¶¶ 172–73 (Dec. 19); INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, 2 REPORT 304–05 (2009); Prosecutor v. Prlić, Judgement, IT-04-74-A, ¶¶ 320–22 (Nov. 29, 2017).

"essential foodstuffs, clothing and tonics" only when those consignments are intended for the narrower constituency of "children under fifteen, expectant mothers and maternity cases."[410] There is no obligation not to impede the delivery of essential food to civilians other than children, expectant mothers, and maternity cases. Even in those cases, the commander may refuse access if she or he has "serious reasons for fearing" that the consignments may "be diverted from their destination," that control over them "may not be effective," or even that the relief consignments would provide a "definite advantage" to the adversary by substituting for goods it would have provided.[411]

With this as its underlying IHL framework, the war crime of starvation of civilians would attach to very little in the way of denials of humanitarian relief other than those inflicted by an occupying power on persons in the occupied territory. Beyond that context, even the purposive obstruction of humanitarian food consignments destined for civilians would satisfy the criminal threshold only if those consignments were intended for "children under fifteen, expectant mothers and maternity cases"[412] and there were no "serious reasons for fearing" diversion, ineffective control, or the substitution of goods that would have been provided by the adversary.[413] This would all but preclude the application of the war crime to encirclement deprivation.

More than that, it would create four normatively incoherent disparities within the ICC framework on criminal starvation. First, interpreting the term in this way would require treating the denial of humanitarian access in IACs radically differently from the treatment of other modes of starvation under Article 8(2)(b)(xxv), all of which protect civilians generally (rather than narrow constituencies within the civilian population) and none of which are limited by caveats rooted in anticipated military costs and benefits. Second, the clause on the denial of humanitarian access in Article 8(2)(e)(xix) includes no qualifier equivalent to the "Geneva Conventions" clause in the IAC provision.[414] If the latter clause were indeed intended to circumscribe the application of the IAC crime as severely as is suggested above, it is difficult to understand why a NIAC provision proposed to close the gap with the IAC crime would be approved by consensus and without controversy, despite lacking any equivalent restriction.[415] Third, even within the IAC crime, the interpretation invoking Articles 23 and 59 of Convention IV would incorporate profoundly divergent regimes for belligerent occupations and IAC scenarios other than occupation without any explicit acknowledgement of that divergence within the

410. GC IV, *supra* note 52, art. 23 (emphasis added).
411. *Id.*
412. *Id.*
413. *Id.*
414. ICC Statute, *supra* note 23, art. 8(2)(e)(xix).
415. Report of the Working Group on Amendments, Assembly of States Parties, ICC-ASP/17/35 ¶ 10 (Nov. 29, 2018); Switzerland Non-paper, *supra* note 102, ¶¶ 2, 6–7.

ICC system. Fourth, it is difficult to make sense of defining the scope of the prohibition of starvation methods with reference to humanitarian access predating that prohibition by almost three decades, particularly when the 1977 prohibition was codified alongside an updated and mutually compatible set of humanitarian access rules.

In short, notwithstanding the difficulty of reading the term to implicate Protocol I, it would be contrary to the context and coherence of Article 8(2)(b)(xxv) to take the reference to the "Geneva Conventions" to implicate Articles 23 and 59 of the Fourth Convention. It may even be contrary to the plain text, which references the conventions as a collective, not just Convention IV.

A more plausible interpretation of the clause's referent would ignore IHL's humanitarian access rules and focus instead on the *form* of humanitarian action "provided for," but not specifically protected from impediment, in common Articles 9, 9, 9, and 10 of the four conventions, respectively. [416] That would focus attention on "humanitarian activities" pursued by the ICRC or "any other impartial humanitarian organization" for the "protection of civilian persons and for their relief."[417] On this reading of the IAC war crime, the Geneva Conventions are referenced not to limit or define the scope of proscribed deprivation (a scope already determined by the starvation ban itself), but to clarify the kind of relief operations that are to be protected against impediment. This reading fits the text straightforwardly, coheres with the orientation of the provision, and emphasizes that the core proscriptive work is done by the starvation ban, rather than by the supplementary humanitarian access rules.[418]

Ultimately, the war crime applies to encirclement deprivation as it does to any other form of deprivation. If anything, the humanitarian access rules bolster the starvation ban in this respect. In any event, the latter has an autonomous prohibitive force. The reference to the Geneva Conventions in Article 8(2)(b)(xxv) is best understood not to limit the application of the crime to encirclement deprivation, but to identify the kind of relief operations protected.

VII. CONCLUSION

The return of mass starvation in armed conflict is one of the outrages of contemporary warfare. Civilians suffer from it in numbers far exceeding those associated with the kinetic attacks and detainee treatment cases that tend to draw the attention of war crimes investigators and prosecutors. Thus far, mass starvation has been largely ignored in that regime, but new legal resources and changes in

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416. *See supra* note 55.

417. GC IV, *supra* note 52, art. 10.

418. On the starvation ban restricting the denial of access, *see supra* notes 381–382.

the political climate are such that this area of law may now be at an inflection point.

The arguments advanced here have involved the careful parsing of technical terms. This ought not obscure what is at stake. Much of the conduct that contributes to starvation conditions in war involves direct engagement not with the persons affected, but with the objects upon which they depend. And those objects often serve both civilians and combatants. As such, on the widely held view that the purposive weaponization of civilian suffering is the key criterion of criminality in this category, many contemporary instances of mass starvation would fall outside the scope of the crime. Others would present an evidentiary hurdle sufficiently daunting to deter prosecution, despite reasons to believe that civilian suffering is in fact being weaponized.

This Article presents a different vision. The starvation war crime includes a robust and categorical prohibition of the deprivation of objects indispensable to civilian survival. Whatever the modality, regardless of motive or ultimate objective, and irrespective of military advantage, engaging in the deliberate deprivation of such objects is criminal, as long as those objects were denied *as* indispensable objects. Additionally, deprivation for reasons other than sustenance value should be understood to be criminal if the perpetrators knew with a virtual certainty that civilians would starve as a result.

To be clear, the crises detailed in the introduction to this Article cannot be solved by law alone. Criminal law in particular is a limited and blunt tool. Perhaps its most significant function is to serve as an imperfect conduit for collective moral expression. In that role, it must be used to complement more comprehensive structural and reparative responses. Clarifying the scope and implications of the crime is a necessary step towards that end.

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