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Abstract

The starvation of civilians is an all too frequent feature of armed conflict. While starvation may occur as an unintended consequence of military activities, it is also sometimes intentionally used by conflicting parties as a method of warfare. There is a broad consensus that the employment of starvation tactics during armed conflict is morally repugnant. This condemnation is reflected in many instruments of international law, which prohibit the use of starvation as a method of warfare in all armed conflicts. Despite this apparent consensus, the Rome Statute of the International Criminal Court only includes the starvation of civilians as a war crime when it is committed during international armed conflict. In the face of this anomaly, Switzerland has proposed an amendment to the Rome Statute, whereby the crime of starving civilians would also apply to non-international armed conflicts. The following analysis addresses the key issues arising from the Swiss proposal, including the legal basis for the prohibition under customary and conventional international law, the elements of the proposed formulation, and the policy implications of adopting such an amendment to the Rome Statute.

1. Introduction

In numerous conflicts around the world, civilians suffer from starvation and conflict-induced hunger. The Food and Agriculture Organization estimated in 2018 that 113 million people were at risk of acute food insecurity; the large majority of this (in 10 out of 13 situations) related to armed conflict.¹ In many situations parties to conflicts engage in deliberate practices that cause civilians to starve. The UN Commission of Inquiry on Syria, for example, has concluded that civilians are routinely denied medical evacuations, the delivery of vital foodstuffs, health items, and other essential supplies, all in an effort to compel their surrender, and has documented this conduct as being widespread in connection to sieges. Similarly, the Group of Eminent Experts on Yemen concluded that civilians, including women and children, have been hit by shelling and snipers while fetching water at local wells, on their way to purchase food, or travelling to seek medical attention and delivering critical supplies; it also concluded that the *de facto* blockade enforced by coalition naval forces on Yemeni seaports has imposed severe restrictions, and that it has been hindering imports of essential supplies

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¹ FAO and WFP, 'Monitoring Food Security in Countries with Conflict Situations', Joint FAO/WFP Update for the United Nations Security Council, August 2018, available at <http://www.fao.org/3/CA1315EN/ca1315en.pdf> (visited 7 March 2018).

to the country, having a devastating effect on the civilian population in combination with coalition airstrikes.²

Starving civilians in conflict is not only morally repugnant; it is prohibited under international humanitarian law (IHL), and can amount to a war crime under international criminal law (ICL).³ Article 8(2)(b)(xxv) of the Rome Statute of the International Criminal Court (ICC) recognises the war crime of intentionally starving civilians as a method of warfare in international armed conflict (IAC). However, there is no equivalent crime in the Rome Statute applicable during non-international armed conflict (NIAC). The absence of such a provision is conspicuous, as a broad-based body of practice supports the customary rule against the starvation of civilians during war irrespective of the legal characterization of the conflict. To address this imbalance, the Government of Switzerland is proposing an amendment to include the starvation of civilians as a war crime in NIAC into the Rome Statute.⁴

This article, which has been written in anticipation of some of the debates that will arise during the negotiations on the proposed amendment, offers an in-depth discussion of starvation as a war crime in NIAC, and the elements of the proposed Swiss amendment. It demonstrates that there is a robust basis under customary and conventional international humanitarian law and international criminal law for the prohibition of starvation as a method of warfare and its criminalization. The analysis assesses the applicability of the proposed crime to typical instances in which civilian populations are deprived of sustenance during conflict, and looks at the interplay between the prohibition against starvation and the IHL rules regulating certain conduct in NIACs. The article also briefly discusses the implications of the absence of a relevant provision under the Rome Statute, and makes recommendations on the adoption of the amendment.

2. The Explicit Prohibition Against Intentionally Starving Civilian as a Method of Warfare in NIAC

Starvation has always been part of war and, until relatively recently, starving civilians and combatants alike was considered by some to be a lawful means of seeking the enemy's capitulation.⁵ However, the tide has been steadily turning against the use of starvation tactics against civilians, and it is now widely prohibited under IHL.

The first treaty law provisions specific to the prohibition of starvation against all civilians in war only appeared in 1977. Absent such provisions, as with all customary law, it is difficult to pinpoint

² See i.e. Independent International Commission of Inquiry on the Syrian Arab Republic 'Sieges as Weapons of War: Encircle, Starve, Surrender, Evacuate', 29 May 2018, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/PolicyPaperSieges_29May2018.pdf (visited 1 August 2019); OHCHR, 'Situation of human rights in Yemen, including violations and abuses since September 2014', Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts, 17 August 2018, UN Doc A/HRC/39/43, §§ 46-64; OHCHR, 'Report of the Commission on South Sudan', 13 March 2018, UN Doc A/HRC/37/71, § 25.

³ See e.g. SC Res. 2417 (2018).

⁴ ICC Assembly of State Parties, 'Report of the Working Group on Amendments' ICC-ASP/17/35, 29 November 2018, at 12-13; UN Doc C.N.399.2019.TREATIES-XVIII.10, Switzerland: Proposal of Amendment, 30 August 2019.

⁵ See E. Rosenblad, 'Starvation as a Method: Conditions for Regulation by Convention', 7 *The International Lawyer* (1973) 252, at 266.

exactly when intentionally starving civilians became a prohibited act in war. Article 17 of the Lieber Code of 1863, for example, explicitly allowed for *enemy* starvation ('armed or unarmed') to force or speed up their surrender.⁶ Moreover, whereas the Hague Conventions contained provisions relevant to starvation (such as provisions on siege warfare and pillaging), it was not until the end of World War I that the report of the Commission on Responsibility of the Authors of the War listed the 'deliberate starvation of civilians' as being 'against the customs of war and the laws of humanity'.⁷ Notwithstanding this recognition, both General Lothar Rendulic and Field Marshall Wilhelm von Leeb, who were tried in the post-World War Two (WWII) Nuremberg proceedings on starvation-related charges (i.e. the deliberate use of scorched earth tactics during the Lapland war in the case of the former, and starving of civilians during the siege of Leningrad for the latter)⁸ were acquitted by the Tribunal that found that 'nothing in the Hague Regulations prohibited using starvation as a weapon of war'.⁹ By contrast, however, today both customary and treaty law directly prohibit the intentional starvation of civilians in war, as discussed forthwith.¹⁰

A. Treaty Law

If until WWII scarce evidence existed of specific conventional rules prohibiting the starvation of civilians, when the notion of protecting civilians in war begun to develop in the post-War period, a few treaty rules came to address civilians' access to food and sustenance in war.¹¹ Until 1977, however, when the prohibition against starving *all* civilians was directly addressed in the Additional Protocols (APs), only scant provisions could be found in Geneva Convention (GC) IV, which, combined with general principles of IHL, would have mitigated civilians' starvation during warfare.¹² For this reason, when the provision against starving civilians as a method of warfare was negotiated in the APs, some sense of discomfort reportedly existed regarding its applicability in NIAC.¹³ During the negotiation of

⁶ Art. 17 Lieber Code, 1863 reads: 'War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy'.

⁷ Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919, at 114.

⁸ Both were however convicted on separate charges, see: *The United States of America v. Wilhelm List, et al.* Nuremberg Military Tribunals Trial No. 7, 1948; *The United States of America vs. Wilhelm von Leeb, et al.* Nuremberg Military Tribunals Trial No. 12.

⁹ K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011), at 310.

¹⁰ Whereas other bodies of international law, such as International Human Rights Law, are relevant to the prohibition against starvation as well, in order to limit the scope of this article, only International Humanitarian Law (in this section), and International Criminal Law (in the next section) will hereby be discussed.

¹¹ S. Hutter, *Starvation as a Weapon: Domestic Policies of Deliberate Starvation as a Means to an End Under International Law* (Brill/Nijhoff, 2015), at 183-84. It is important to take into account the context in which the Protocols were being negotiated: with wars of liberation and decolonization under way, many countries hesitated to agree to the application of IHL rules in NIAC, see: J. Cuénoud, '40th Anniversary of the Additional Protocols of 1977 of the Geneva Conventions of 1949', EJIL:Talk!, 8 June 2017, available at <https://www.ejiltalk.org/40th-anniversary-of-the-additional-protocols-of-1977-of-the-geneva-conventions-of-1949/> (visited 1 August 2019).

¹² For example, Art. 33 GC IV prohibited pillaging and reprisals against protected persons and their property, Art. 23 GC IV introduced the free passage of food to civilians, but only in unoccupied territory, and Art. 17 GC IV improved agreements to evacuate the wounded, the sick, infirm and aged persons, children and maternity cases during sieges.

¹³ Hutter, *supra* note 11, at 185.

the APs, debate arose concerning the origins of the prohibition to starve civilians in war.¹⁴ Some claimed that the prohibition against starvation found its roots in Common Article 3 of the GCs,¹⁵ whereas others felt that such a wide interpretation of this ‘convention in miniature’ could not cover the ‘concrete protection of objects indispensable to civilian survival’.¹⁶ During the negotiations of AP II, the situation was so tense that Draft Article 27 (which later became Article 14) was at risk of being deleted by the Diplomatic Conference negotiating the Protocol, but the Article was ultimately adopted by consensus because of its ‘humanitarian substance’.¹⁷ Today, Article 54 of AP I, applicable in IAC, and Article 14 of AP II, applicable in NIAC, both address starvation directly, setting out a clear prohibition against intentionally starving civilians in war. Article 14 of AP II in particular, on the ‘protection of objects indispensable to the survival of the civilian population’, directly prohibits the ‘starvation of civilians as a method of combat’ in NIAC,¹⁸ by means of ‘attack[ing], destroy[ing], remov[ing], or render[ing] useless, for that purpose, objects indispensable to the survival of the civilian population’, specifying that ‘foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installation, and supplies, and irrigation works’ all qualify as protected civilian objects under the provision.¹⁹ Despite the fact that AP II only applies to NIACs fulfilling the restrictive criteria set out in its Article 1, it nonetheless shows that the intentional starvation of civilians in NIACs is prohibited under conventional law, just as it is prohibited in IACs. Furthermore, for those armed conflicts where international humanitarian treaty law potentially leaves a gap (for example, conflicts between armed groups not meeting the requirements of Article 1, or transnational conflicts between a State and an armed group outside its territory), contemporary State practice and *opinio juris* provide for a strong case that the gap has now been bridged by customary law, as addressed in the next section.

B. Customary Law

The fact that AP II itself has been adopted by 168 countries is indication enough of the widespread acceptance of the prohibition of starving civilians in NIACs subject to AP II. Unlike in 1977

¹⁴ M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, 1982), at 279.

¹⁵ Interpreted *-inter alia-* to protect civilians (and thus civilian objects) from becoming military targets and from becoming the object of deliberate attacks. G. A. Mudge, ‘Starvation as a Means of Warfare’, 4 *The International Lawyer* (1970) 228, at 254; Christine Breining-Kaufmann, *Hunger als Rechtsproblem: Völkerrechtliche Aspekte eines Rechtes auf Nahrung* (Schulthess, 1991), at 192; Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 1949* (Martinus Nijhoff, 1987), at 1456, § 4794.

¹⁶ This interpretation at the time directly contradicted the position of some States. See J. S. Pictet (ed), *The Geneva Conventions of 1949: Commentary* (Geneva: ICRC, 1958), at 34 and 38-40.

¹⁷ Bothe, Partsch and Solf, *supra* note 14, at 681. Subsequent authoritative scholarship has in fact credibly traced the prohibition to the principle of humanity and its demand for the humane treatment of civilians, which were clearly established far prior to 1977. See J. Pejic, ‘The Right to Food in Situations of Armed Conflict: The Legal Framework’, 83 *International Review of the Red Cross* (2011) 1097, at 1106.

¹⁸ Art. 54 (1) AP I first sentence reads similarly: ‘Starvation of civilians as a method of *warfare* is prohibited’ [emphasis added]. The ICRC Commentary explains that using different terminology (‘combat’ instead of ‘warfare’) has no legal consequences, and was at the time of the adoption considered the appropriate term for NIAC. For details, see Sandoz, Swinarski and Zimmermann, *supra* note 15, at 653, § 2089 and 1457, § 4799.

¹⁹ Art. 54 AP I also prohibits the direct and intentional starvation of civilians as a method of warfare, but unlike Art. 14 AP II, it adds specifications on the targeting of military and dual use objects to which we shall return later in the article.

however, the prohibition is today also supported by incorporation into a number of military manuals that are either applicable to or have been applied in NIACs, and other expressions of State practice, such as widespread incorporation into domestic criminal codes,²⁰ and *opinio juris*.²¹ Since 1993, there has been a series of UN resolutions condemning the widespread use of starvation in connection to sieges and related individual responsibility starting with the war in the former Yugoslavia.²² The International Committee of the Red Cross (ICRC)'s assessment of customary humanitarian law rules, which sought 'virtually uniform, extensive and representative' State practice to determine whether customary rules had crystalized and were applicable both in IAC and in NIAC,²³ found enough evidence of custom to conclude that customary Rules 53 and 54 respectively directly prohibit the 'use of starvation of the civilian population as a method of warfare', and 'attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population'.²⁴ Even countries that are not party to AP II have included the prohibition in their domestic War Manuals.²⁵ For those countries not party to the Protocol that have not included a provision in their domestic War Manuals, the ICRC tracked other expressions of State practice accompanied by *opinio juris* that helped them determine the unequivocal existence of the customary rule also applicable in NIAC.²⁶ The ICRC study did not seem to find any 'persistent objectors' to the prohibition against intentional starvation of civilians in NIAC.²⁷ Significantly for this article, the ICRC found that States have generally denounced alleged instances of the use of starvation as a method of warfare in NIAC.²⁸ Moreover, as set out

²⁰ The following countries have criminalised the starvation of civilians as a method of warfare irrespective of the characterisation of the conflict: Austria (§321(e)(1)(9) Penal Code), Bosnia and Herzegovina (Art. 173(1)(f) Penal Code), Cambodia (Art. 194(4) Criminal Code), Croatia (Article 158(1) Criminal Code), Ethiopia (Art. 270(b) Criminal Code), Finland (Chapter 11, Section 5(3) Penal Code), Germany (§11(1)(5) International Crimes Code), Republic of Korea (Art. 13(5) ICC Crimes Act), North Macedonia (Art. 404(1) Criminal Code), Norway (Section 106(b)), Portugal (Art 11(f) Law No. 31/2004 adapting Portuguese criminal legislation to the Statute of the International Criminal Court), Romania (Art 443(1)(e) Criminal Code), Rwanda (Art. 10(9) Law of 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes), Serbia (Art. 372(1) Penal Code), Spain (Art. 612(8) Penal Code), Sweden (Section 9(8) Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crime), The Philippines (Section 4(c)(21) Act Defining and Penalizing Crimes Against International Humanitarian Law), Uruguay (Art. 26(33) Law on Cooperation with the ICC), Switzerland (Art. 264g(1)(c), Art. 112c(1)(c) Military Penal Code), possibly among others. This list might in fact be restricted by the authors' linguistic barriers to accessing other domestic criminal codes.

²¹ J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 1: Rules* (CUP 2005, revised 2009), Rules 53 and 54, at 187-88 and 191.

²² See GA Res 48/88, 20 December 1993, which passed 109-0-57, GA Res 49/10, 3 November 1994, at 101-2-48, and GA Res 49/196, 23 December 1994, at 150-0-14, just to name a few. Most recently, SC Res. 2417 (2018), in which the SC unanimously underlined that 'using starvation of civilians as a method of warfare may constitute a war crime'.

²³ For a review of all state practice considered in the ICRC Study, see the Study's Volume II. J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 2: Practice* (Cambridge University Press, 2005).

²⁴ *Ibid.*, Rule 53 and 54, at 1123-73, §§ 1-360.

²⁵ Most notably, the US, see: US Department of Defense, Office of the General Counsel, LOAC Manual, 31 May 2016, § 5.20.

²⁶ See, for example, statements of Iraq and the United States in Henckaerts and Doswald-Beck, *supra* note 21, Rule 53, at 187-88, fn 15.

²⁷ *Ibid.*

²⁸ *Ibid.*

below, several States have criminalized starvation through the wilful impediment of relief supplies in their domestic criminal codes irrespective of the type of conflict.²⁹

3. The Obligation Not to Arbitrarily Impede the Passage of Humanitarian Aid

A. Treaty Law

Alongside the direct prohibition against intentionally starving civilians, an obligation to allow the timely and unimpeded passage of humanitarian goods and consignments exists under contemporary IHL, and is firmly entrenched both in treaty and in customary IHL. Article 23 GC IV, Article 70(2) AP I, and Article 18 AP II, for example, all regulate relief action in situations of active combat or in occupation. Irrespective of hostilities, all parties to a conflict are under a legal obligation to allow and facilitate the unimpeded passage of humanitarian aid.³⁰ Article 18(2) of AP II applicable in NIAC, in particular, provides that '[i]f the civilian population is suffering undue hardship owing to a lack of supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.'³¹ In relation to this consent clause, it is argued that 'the fact that consent is required should not be taken to mean that the decision is left to the discretion of the parties and the rule should be read as equivalent to the one applicable in international armed conflicts.'³²

Consequently, 'if the survival of the civilian 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 ... The authorities responsible for safeguarding the population in the whole of the territory of the state cannot refuse such relief without good grounds'.³³ The ICRC Commentary indicates that refusing to allow relief operations would amount to a violation of the rule prohibiting the use of starvation as a method of combat, as the population would be deliberately left without nourishment and thus at risk of dying of hunger.³⁴ Furthermore, whereas both parties might negotiate conditions to the delivery of such consignments, and the party 'in control' may retain the right to supervise (but *also the obligation to facilitate*) the distribution of humanitarian and emergency relief,³⁵ humanitarian relief operations have to be carried out impartially and without any adverse distinction.³⁶

²⁹ I.e. Austria (§321(e)(1)(9) Penal Code), Finland (Chapter 11, Section 5(3) Penal Code), Germany (§11(1)(5) International Crimes Code), Republic of Korea (Art. 13(5) ICC Crimes Act), Norway (Section 106(b)), Portugal (Art 11(f) Law No. 31/2004 adapting Portuguese criminal legislation to the Statute of the International Criminal Court), Romania (Art 443(1)(e) Criminal Code), Rwanda (Art. 10(9) Law of 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes), Spain (Art. 612(8) Penal Code), The Philippines (Section 4(c)(21) Act Defining and Penalizing Crimes Against International Humanitarian Law), Uruguay (Art. 26(33) Law on Cooperation with the ICC), Switzerland (Art. 264g(1)(c), Art. 112c(1)(c) Military Penal Code).

³⁰ Henckaerts and Doswald-Beck, *supra* note 21, Rule 55 and 56, at 193 and 200.

³¹ Art. 18(2) AP II; Pejic, *supra* note 17, at 1108.

³² *Ibid.*

³³ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1479, § 4885; See also Pejic, *supra* note 17, at 1108.

³⁴ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1479, § 4885.

³⁵ *Ibid.*, at 1479, § 4887.

³⁶ Art.70(1) AP I and Art.18(2) AP II.

The interpretation of IAC treaty law offers some insight on how the obligation should be understood in NIAC. Article 70 of AP I forms part of customary law. Thus, it might be fair to assume that the customary law rules regarding the diversion of humanitarian relief equally apply in NIAC.³⁷ Article 70(3)(c) AP I prescribes that parties to the conflict:

(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned’.

The strict exception in this paragraph may only be met in extreme circumstances, for example if it is impossible to enter the respective territory for security reasons or if perishable foodstuff might not reach the population in time; but under no other circumstances shall humanitarian aid destined to civilians be diverted to combatants, re-routed with adverse effect on some segments of the civilian population, or impeded. Wilfully impeding the passage of humanitarian aid or diverting such aid with discriminatory intent might in fact amount to a war crime under international law.³⁸

A. Customary Law

As with the prohibition against directly starving civilians, the ICRC has stated that it found ample evidence to determine that, since at least the 1990s, all parties to a conflict are under a legal obligation to allow the passage of humanitarian aid in both IACs and NIACs. This is reflected in customary Rules 55 (access to humanitarian relief for civilians in need) and 56 (freedom of movement of humanitarian relief personnel).³⁹ Contrary practice has been consistently condemned.⁴⁰ In addition, this conclusion has been further supported by contemporary international practice which has confirmed the application of these rules to State and non-State parties alike, irrespective of the type of NIAC.⁴¹ Similar to the respective treaty provisions, the customary law rule specifies that all parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, as long as it is impartial in character and conducted without any adverse distinction.⁴² Although most practice surveyed by the ICRC does not seem to mention a general requirement of consent, the study nevertheless concludes that consent of the parties concerned is required for humanitarian relief

³⁷ The ICTY did rule, in fact, that ‘[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’. See Decision on Interlocutory Appeal Challenging Jurisdiction, *Tadić* (IT-94-1-A) Appeals Chamber, 2 October 1995, § 119.

³⁸ See R. Bartels, ‘Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future’, 48 *Israel Law Review* (2015) 281-307. Depending on the circumstances, such discriminatory deprivation could potentially also constitute a crime against humanity, such as persecution, for example, as set out in Article 7(1)(h) of the Rome Statute of the ICC and as discussed below.

³⁹ Henckaerts and Doswald-Beck, *supra* note 21, Rule 55 and 56, at 193 and 200.

⁴⁰ *Ibid.*, at 198.

⁴¹ The UNSC noted in Resolution 2417, for example, that wilfully impeding relief supply and access for responses may constitute a violation of international humanitarian law without reference to any particular type of conflict. See SC Res. 2417 (2018). The Commission of Inquiry on Syria has concluded that, under customary law, there is an obligation for all parties to a NIAC to allow and facilitate rapid and unimpeded passage of humanitarian relief to those in need. See Commission of Inquiry on Syria, *supra* note 2, at 4.

⁴² Henckaerts and Doswald-Beck, *supra* note 21, Rule 55, at 193.

operations to be carried out.⁴³ While not allowed to arbitrarily refuse relief actions as such, parties to the conflict retain the discretion to control the content and supervise the delivery of humanitarian aid.⁴⁴

B. Is the Prohibition Against the Intentional Starvation of Civilians, Including by Wilfully Impeding Relief Supplies, during NIACs Criminalised?

In addition to establishing whether the starvation of civilians is prohibited in NIACs, it is important to examine whether this prohibition also entails individual criminal responsibility. Debate continues as to whether it is strictly necessary for crimes set out in the Rome Statute to reflect criminal prohibitions established under customary international law.⁴⁵ Irrespective of the position taken on this meta-question, however, the issue of whether a specific prohibition is criminalised under customary international law is clearly relevant when seeking to introduce a new crime (or at least new sub-provision) into the Rome Statute. Accordingly, it is significant that State practice and *opinio juris* confirm that the prohibition of intentionally starving civilians is well-established for IACs and NIACs alike, and wilfully impeding relief supplies would also contravene customary international law according to the ICRC, as set out above.

Following the adoption and entry into force of the Rome Statute, a considerable number of States have criminalized both starvation as a method of warfare and wilfully impeding relief supplies irrespective of the type of conflict in their domestic criminal codes.⁴⁶ The fact that these States have chosen to go beyond the scope of the Rome Statute in making the criminal prohibition applicable to all types of conflicts demonstrates that its existence is more than mere treaty practice.⁴⁷ Indeed, some States even explicitly mention in the legislation or their preparatory materials that they went beyond the requirements of the Rome Statute because they consider the provision to be reflective of customary law applicable to NIACs.⁴⁸ A smaller number of States have criminalized starvation as a method of warfare without also criminalizing wilfully impeding relief supplies, yet all of them for both

⁴³ *Ibid.*, at 196-97. Whereas the treaty provisions specify that the consent has to be that of the High Contracting Party (see Art 70(1) AP I and Art 18(2) AP II) it is less clear whether, under customary law, consent would have to be obtained by a non-State party to a conflict if the relief operation is to be carried out in a territory under its control. See D. Akande and E.-C. Gillard, 'Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict', United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), October 2016, § 24.

⁴⁴ *Ibid.*, at 198.

⁴⁵ See, more generally, M. Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' 9 JICJ (2010) 25-52.

⁴⁶ I.e. Austria (§321(e)(1)(9) Penal Code), Finland (Chapter 11, Section 5(3) Penal Code), Germany (§11(1)(5) International Crimes Code), Republic of Korea (Art. 13(5) ICC Crimes Act), Norway (Section 106(b)), Portugal (Art 11(f) Law No. 31/2004 adapting Portuguese criminal legislation to the Statute of the International Criminal Court), Romania (Art 443(1)(e) Criminal Code), Rwanda (Art. 10(9) Law of 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes), Spain (Art. 612(8) Penal Code), The Philippines (Section 4(c)(21) Act Defining and Penalizing Crimes Against International Humanitarian Law), Uruguay (Art. 26(33) Law on Cooperation with the ICC), Switzerland (Art. 264g(1)(c), Art. 112c(1)(c) Military Penal Code).

⁴⁷ Consider *North Sea Continental Shelf* (Judgment) ICJ Reports [1969] [75-77].

⁴⁸ E.g. Austria (Parliamentary Materials, ErlRV 304 BlgNR 25. GP at 14) and Germany (Deutscher Bundestag, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 13 March 2002, Drucksache 14/8524, 29).

IACs and NIACs.⁴⁹ Additional evidence for the criminalisation of wilfully impeding relief supplies can be found in Resolution 787 (1992), relating to the (at the time) ongoing conflict in Bosnia and Herzegovina. There, the UNSC condemned as a violation of IHL ‘the deliberate impeding of the delivery of food and medical supplies to the civilian population of the Republic of Bosnia and Herzegovina’ and reaffirmed that ‘those that commit or order the commission of such acts will be *held individually responsible* for such acts’.⁵⁰ In Resolution 794, the UNSC used the same language when it condemned ‘all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population’ and affirmed ‘that those who commit or order the commission of such acts will be *held individually responsible* in respect of such acts’.⁵¹ It is notable that at the time when the resolutions were passed, the two conflicts were either classified as NIACs or their classification was unclear.⁵² As regards starvation as a method of warfare, the UNSC unanimously underlined that ‘using starvation of civilians as a method of warfare may constitute a war crime’ without reference to any particular type of conflict in Resolution 2417.⁵³ In 2014, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) also explicitly criminalized starvation as a method of warfare and the wilful impediment of relief supplies in both IACs and NIACs.⁵⁴

Finally, convictions for the starvation of civilians in NIACs have already taken place,⁵⁵ and several UN special mandate holders have confirmed the existence of an according war crime in various NIACs.⁵⁶ Most recently, the Group of Eminent Experts on Yemen concluded in its report that ‘[w]hile the Rome Statute of the International Criminal Court includes starvation as a war crime in international armed conflicts only, it is also recognized as a war crime in non-international armed

⁴⁹ Bosnia and Herzegovina (Art. 173(1)(f) Penal Code), Cambodia (Art. 194(4) Criminal Code), Croatia (Article 158(1) Criminal Code), Ethiopia (Art. 270(b) Criminal Code), Serbia (Art. 372(1) Penal Code), North Macedonia (Art. 404(1) Criminal Code), Sweden (Section 9(8) Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crime).

⁵⁰ SC Res. 787 (1992) § 7 (emphasis added).

⁵¹ SC Res. 794 (1992) § 5 (emphasis added).

⁵² Whereas the civil war in Somalia had been clearly designated a NIAC, the classification of the conflict in Bosnia was less clear at the time. In May 1992, the UN Commission of Experts concluded that ‘[d]etermining when these conflicts [in Bosnia and Herzegovina] are internal and when they are international is a difficult task because the legally relevant facts are not yet generally agreed upon’. The general perception in 1992 seems to have been that after the withdrawal of JNA the conflict became a NIAC. However, *ex post facto*, the ICTY Trial and Appeals Chamber famously reached different conclusions in this regard. See Final report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) 205 (31 May 1995) UN Doc. S/1994/674/Add.2 (Vol. I) § 43 and Judgment, *Tadić* (IT-94-1-A) Appeals Chamber, 15 July 1999, § 150 and § 162.

⁵³ SC Res. 2417 (2018).

⁵⁴ Art 28D(b)(xxvi) and (e)(xvi) Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted at the Twenty-Third Ordinary Session of the Assembly of Heads of State and Government Held in Malabo, Equatorial Guinea, 27 June 2014) (‘Malabo Protocol’).

⁵⁵ Most notably in 1997 at the District Court of Zadar, which convicted several commanders for the shelling of Zadar, and, inter alia, violations of Article 14 AP/II, which had been incorporated into the Croatian Penal Code. See District Court of Zadar, *Prosecutor v Perišić and Others*, K. 74/96, Judgment of 24 April 1997.

⁵⁶ See e.g. the Special Rapporteur on the situation of human rights in Myanmar, who noted in 2018, that ‘any wilful impediment of relief supplies may amount to war crimes under international law’, OHCHR, ‘Myanmar: UN expert says civilians must be protected as Kachin violence mounts’, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23015&LangID=E> (visited 1 August 2019) or the Commission of Inquiry on Syria, which noted that the methods employed in Syria to carry out sieges have amounted to war crimes. See Commission of Inquiry on Syria, *supra* note 2, § 4.

conflict based on customary international humanitarian law'.⁵⁷ The endorsement of such reports within intergovernmental bodies such as the Human Rights Council may constitute an additional expression of *opinio juris*. In conclusion, there is strong evidence that using starvation as a method of warfare, including wilfully impeding relief supplies, already carries individual criminal responsibility under customary international law.

C. Corollary International Humanitarian Law Rules and Principles Relevant to Civilian Starvation and their Criminalisation

Even if a direct prohibition against starving civilians in war did not exist, the use of such tactics would violate several rules of IHL, some of which are reflected in criminal provisions. These include rules such as the prohibition against terrorizing civilians (Article 33, GC IV, and customary Rule 2 in the ICRC study),⁵⁸ the prohibition against collective punishment (customary Rule 103),⁵⁹ the prohibition against forced displacement for reasons other than the civilians' own security or imperative military necessity (customary Rule 129),⁶⁰ and still, to be carried out under certain conditions only, the prohibition against indiscriminate methods of warfare,⁶¹ and the general obligation to protect civilians from the adverse effects of conflict, among others, which is the *raison d'être* of contemporary IHL. The fact that the starvation of civilians violates several other criminalised provisions of IHL supports the contention that intentional starvation is also *per se* criminalized under international law.

D. Contentious Scenarios Involving the Starvation of Civilians

There are several instances in which the starvation of civilians may occur due to the actions of the parties to an armed conflict. Under the Rome Statute, a crime can be committed only with intent and knowledge. Thus far, the analysis has concentrated on the starvation of civilians that results from a *direct intent* to starve them as a method of warfare, including by wilfully impeding relief supplies. Under Article 30 of the Rome Statute however, 'intent' can be established if, *inter alia*, a foreseeable consequence of the conduct will incur in the ordinary course of events.⁶² This raises the question of whether the incidental starvation of civilians flowing from other lawful acts would be covered by the proposed amendment, and whether this would constitute a departure from current law on starvation. This is a particularly important question to answer, as many take the view that the *incidental* starvation of civilians is allowed if the means of subsistence served *both* civilians and combatants. This position, which needs to be unpacked, was taken by Antonio Cassese,⁶³ and is still taken today in the

⁵⁷ OHCHR, 'Situation of human rights in Yemen, including violations and abuses since September 2014', Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts, 3 September 2019, UN Doc A/HRC/42/CRP.1, § 748.

⁵⁸ Henckaerts and Doswald-Beck, *supra* note 21, Rule 2, at 8.

⁵⁹ *Ibid.*, Rule 103, at 374.

⁶⁰ *Ibid.*, Rule 129, at 457.

⁶¹ *Legality of the Threat or Use of Nuclear Weapons* (1970) ICJ Reports (1996) 226.

⁶² Art. 30 Rome Statute.

⁶³ A. Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law, 3 Pacific Basin Law Journal (1984) 57, at 92.

US DoD Manual,⁶⁴ the UK LOAC Manual⁶⁵ and the San Remo Manual on NIAC.⁶⁶ Notwithstanding the views in those instruments, that position has to be counterbalanced with the obligation to ‘allow and facilitate humanitarian assistance’.⁶⁷ This section of the paper will discuss three potential scenarios in which starvation of civilians could materialise as a result of *conduct the primary purpose of which is not* to starve civilians. The three case scenarios under consideration will be: the cumulative effects of the use of force on ‘dual-use’ objects; ‘scorched earth’ techniques; and methods of warfare — such as sieges, blockades, and suchlike — that, even though *per se* lawful, are by design aimed to impose hardship and isolation.

A. Attacks on ‘dual-use’ objects

Unlike Article 54 of AP I, Article 14 of AP II is silent on the issue of attacks on ‘dual-use’ objects, i.e. objects that are normally civilian ones but can become military objectives depending on the circumstances (in compliance with the definition enshrined in Article 52(2) of AP I). Some take the silence as an indication not to read any exceptions into the prohibition against targeting objects indispensable to the survival of the civilian population,⁶⁸ whereas others — including the present authors — take a more nuanced view, and look for guidance on the targeting of dual-use objects in Article 54 AP I.⁶⁹ This is confirmed by the ICRC itself, which in its commentary to Article 14 AP II, clarifies:

It is prohibited to attack or destroy objects with the aim of starving out civilians. However, if the objects are used for military purposes by the adversary, they 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.⁷⁰

The language used by the ICRC suggests that military necessity cannot be derived by the purpose of depriving the civilian population of such objects ‘because of their sustenance value’.⁷¹ It is only legitimate to damage protected objects and installations by effect of military operations ‘if the

⁶⁴ US LOAC Manual, *supra* note 25, at 316, § 5.20.2.

⁶⁵ UK LOAC Manual, *supra* note 76, at 74, § 5.27.2

⁶⁶ L. Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995), § 2.3.10.3 in combination with § 5.1. This latter obligation in and of itself, it might be argued, carries its own challenges related to ‘consenting’ to such humanitarian operations, which are in turn -at least in part- justified by the difficulties of controlling distribution to civilians only (as opposed to diversion to combatants). These issues, and how they do not infringe upon the prohibition against starving civilians, will be discussed more in detail later in this paper.

⁶⁷ *Ibid.*

⁶⁸ Kaufmann, *supra* note 15, at 215; Bothe, Partsch and Solf, *supra* note 14, at 681.

⁶⁹ In its Customary Law Study, the ICRC concluded in fact that ‘149 out of the 161 rules apply equally in international and non-international armed conflicts’, with rules 53 and 54 being two of them. Furthermore, when reviewing practice in connection with rule 54 (Attacks against objects indispensable to the survival of the civilian population), and rule 8 (military objectives) the study did not find contrary practice with respect to either IAC or NIAC. See Henckaerts and Doswald-Beck, *supra* note 21, at 186 and 189.

⁷⁰ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1459, § 4807.

⁷¹ D. Fleck, *Handbook of International Humanitarian Law* (Oxford University Press, 2013), at 209.

impairment is an incidental effect of the attack' and does not result in the starvation of the civilian population:⁷²

An irrigation channel, for example, shall not be destroyed deliberately in order to interrupt agricultural production; the same is true for the destruction of crops or gardens because of their importance to the sustenance of the civilian population. Nevertheless, the destruction of an irrigation channel may be permissible if the channel is used as a defensive position by the military forces in occupation and a field of crops may be burnt down in order to clear the field for artillery.⁷³

If this is correct, other IHL rules also apply: i.e. the attack has to be dictated by imperative military necessity, be carried out against a lawful military objective identified with the requisite degree of certainty,⁷⁴ and proportionality would demand that any foreseeable incidental harm resulting from the attack would not be *excessive* in relation to the anticipated concrete and direct military advantage.⁷⁵ The applicability of this approach to attacks on dual-use objects in the context of the prohibition against starvation is illustrated in many manuals on the law of armed conflict, including those of the UK and Australia.⁷⁶

A far more difficult question to answer is that of what would be considered excessive damage, or how proportionality and the prohibition against starvation could be reconciled. When considering the proportionality of a single attack on a dual-use object or facility, however, one has to consider the context of the 'attack as a whole'.⁷⁷ This is true also for 'knock-on' or 'reverberating' harm, i.e. 'incidental harm that does not arise immediately or in one causal step'.⁷⁸ In the context of foodstuffs and agricultural areas producing them, crops, livestock and supplies of drinking water, it is possible to imagine how the single attack might be justified by imperative military necessity. The destruction of a 'wheat field to deny concealment to enemy forces',⁷⁹ for example, might be considered proportional to the anticipated military advantage in that instance. However, once the destruction of the same field

⁷² *Ibid.*

⁷³ *Ibid.*, 209-10. The same position has been taken recently by G. Gaggioli, 'Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?', *EJIL:Talk!*, 30 January 2019, available at <https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/#more-16877> (visited 1 August 2019).

⁷⁴ Henckaerts and Doswald-Beck, *supra* note 21, Rule 8, at 29-32; 'As far as dual-use facilities are concerned, such as civilian means of transportation and communication which can be used for military purposes, practice considers that the classification of these objects depends, in the final analysis, on the application of the definition of a military objective'.

⁷⁵ *Ibid.*, Rule 14, at 46.

⁷⁶ Australia, Department of Defence, Law of Armed Conflict Manual (2006) ADDP 06.4, §§ 7.11-7.13; United Kingdom, Department of Defence, Joint Service Manual on the Law of Armed Conflict, 2004, § 15.19.1.

⁷⁷ See E.-C. Gillard, 'Chatham House Report on Proportionality in the Conduct of Hostilities — Some Key Elements', *EJIL:Talk!*, 28 January 2019, available at <https://www.ejiltalk.org/joint-symposium-chatham-house-report-on-proportionality-in-the-conduct-of-hostilities-some-key-elements/> (visited 1 August 2019). 'In determining what amounts to an 'attack as a whole' and, therefore, constitutes the frame of reference for conducting a proportionality assessment, consideration must be given to the *context* in which the act is conducted. If the military advantage anticipated from a single attack is not dependent on or affected by other acts, then the act should be considered an 'attack as a whole' for the purpose of proportionality assessments. If, on the other hand, a single attack is an element in a larger operation where other acts contribute to the military advantage, then the operation in its entirety should be considered the 'attack as a whole'.

⁷⁸ *Ibid.*

⁷⁹ Australian LOAC Manual, *supra* note 76, § 7.13.

is considered against the background of the ‘attack as a whole’, the litmus test is whether the civilian population might or not be *foreseeably* left ‘with such inadequate food or water as to cause its starvation or force its movement’.⁸⁰ This means that whereas attacks on dual-use objects that also serve as sustenance for the civilian population may be lawful if justified by military necessity (and other IHL rules are applied), individual attacks have to be carefully weighed against whether the conduct of the campaign ‘as a whole’ risks leaving the population to starve. If the individual attack would almost certainly lead to the starvation of the population, then it may be considered a violation of IHL and possibly ICL, subject to the thorny question of intent, as set out below. Nonetheless, in general, it will be difficult (but not impossible, e.g. if *all* crops for a given community are stored in one warehouse that also stores weapons for combatants) that a single attack on dual-use object would foreseeably lead a certain population to find itself with inadequate food or water. Arguably, if this occurred, the obligation to provide civilians with humanitarian assistance and ‘make up’ for the lost sustenance would immediately be triggered.

B. ‘Scorched Earth’ Techniques

The legality of ‘scorched earth’ tactics, whereby a force retreating across its ‘own’ territory destroys foodstuffs, water supplies, or other resources in order to slow down a pursuing force, arises in relation to the crime of starvation. Whereas some military manuals entirely prohibit scorched earth policies, they are customarily found to be lawful in IAC in defence of territory, or to stop the enemy’s military advance, and only on the State’s own land.⁸¹ One might ask what their status is in NIAC. Scorched earth techniques were in fact discussed during the negotiations of AP II. Already then, the States which adopted AP II were, according to the ICRC, of the opinion that the obligation not to attack objects indispensable to the civilian population equally applies to the territory under the HCP’s control in NIACs.⁸² The 1987 Commentary mentions however that:

During the discussions, this interpretation, which was the object of lengthy discussion in connection with the corresponding article of Protocol I, was neither confirmed nor dismissed with regard to Protocol II. It was argued that in an international armed conflict a State retained freedom of action in the territory under its own control, and that consequently it could not entirely be ruled out that the State would destroy everything on its own side under a ‘scorched earth’ policy in case of imperative military necessity, for example, to halt the advance of enemy troops⁸³.

The ICRC study on customary law nevertheless concluded that ‘[i]t is doubtful, [...] whether the exception of scorched earth policy applies to non-international armed conflicts because Article 14 of AP II does not contain it’.⁸⁴ Similarly, the ICRC commentary considers it is clear that in NIACs ‘it is not admissible that one of the parties could destroy or render useless objects indispensable to the survival of part of the population living in the part of the territory under its control because it suspected that

⁸⁰ Once again, an example of state practice on this is Australia above; also see: Art 54 (3)(b) AP I, and ICRC commentary to Art 14 AP II.

⁸¹ Henckaerts and Doswald-Beck, *supra* note 21, Rule 54, at 192-93.

⁸² Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1459, §§ 4808-9

⁸³ *Ibid.*

⁸⁴ Henckaerts and Doswald-Beck, *supra* note 21, Rule 54, at 192-93.

the latter supported or sympathized with the adversary'.⁸⁵ The study cites the Military Manual of Colombia as an example of practice prohibiting to order a scorched earth policy 'in all armed conflicts'.⁸⁶ A reference to an absolute prohibition of scorched earth tactics can also be found in the UK manual on the law of armed conflict, which states in its section on internal armed conflicts that Article 14 of AP II would 'prevent government forces from adopting a 'scorched earth' policy as a method of pressure against civilians supporting insurgents'.⁸⁷ A similar attitude can be found among scholars.⁸⁸ Some, while accepting them as a defensive measure in IACs, conclude that scorched earth policies are completely prohibited in NIACs.⁸⁹ Consequently, this is arguably a rare instance in which the protection in NIAC is actually greater than in IAC.⁹⁰

This reading emerges not only from the literal terms of Article 14 of AP II; but also, as pointed out by Sivakumaran, that a different interpretation would 'not prove workable in non-international armed conflict as it would allow the state to engage in such tactics but not the non-state armed group, territory under the control of the armed group not 'belonging' to them'.⁹¹ To the extent that scorched earth tactics are considered by some to be lawful in NIACs, they would be subject, *at a minimum*, to the same limitations that apply to IAC, meaning that scorched earth could be implemented only in the defence of one's territory, if safe civilian passage can be granted, and only if the civilian population can be fed / sustained otherwise.⁹²

C. Starvation and Isolation-Related Practices

Any isolation-related practice intended, by design, to impose hardship (such as sieges, blockades, and embargoes) is already considered unlawful *per se* if 'it has the sole purpose of starving the civilian population or denying it other objects essential for its survival'.⁹³ The commentary to the San Remo Manual, recounting the debate over the provision concerning blockades in particular, mentions however that:

[...] the word 'sole' was retained because if a blockade has both the unlawful purpose of starvation together with a lawful military purpose, the provision in (b) is applicable, therefore

⁸⁵ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1459, § 4811.

⁸⁶ Henckaerts and Doswald-Beck, *supra* note 21, Rule 54, at 193.

⁸⁷ UK LOAC Manual, *supra* note 76, at 408, fn 123.

⁸⁸ For a very detailed discussion of why scorched earth tactics cannot be an exception to Art 14 AP II, see: Hutter, *supra* note 11, at 218-222.

⁸⁹ Y. Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press, 2015), at 138-39.

⁹⁰ Sivakumaran reaches the same conclusion with regards to NIAC. Both he and Dinstein cite the ICRC Customary Law study and the fact that Article 14 does not include the derogation clause of Art. 54(5) API. S. Sivakumaran, *The Law of Non-International Armed Conflict* (Cambridge University Press, 2012), at 425.

⁹¹ *Ibid.* Scorched earth tactics are clearly recognized as a defensive tactic only and it is difficult to apply this criterion to NIACs: either all territory concerned 'belongs' to the State, resulting in the fact that scorched earth tactics could only be carried out by the State (which conflicts with the principle of belligerent equality); or one substitutes the criteria of 'belonging' with 'control', but then it becomes difficult to determine if the scorched earth policy is used as an offensive or defensive tactic.

⁹² Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1457, § 4798.

⁹³ Henckaerts and Doswald-Beck, *supra* note 21, Rule 53, at 188-89.

rendering the blockade unlawful if the effect on the civilian population is excessive in relation to the lawful military purpose.⁹⁴

Nonetheless, having a legitimate military objective is not sufficient, and other precautions are necessary to make sure that the affected population does not starve. During sieges, for example, it is an obligation of both parties to allow civilians safe passage out if the siege is to be subjected to any form of violence.⁹⁵

There is some debate as to whether a siege *per se* can be considered an attack;⁹⁶ but whether one considers it an 'attack' on its own, or views the mounting and maintaining of the siege as a series of attacks (by combining several methods of warfare such as land, air or other), given the adverse effect that even non-violent but protracted situations of isolations inevitably have on civilians, the ongoing lawfulness of any such methods has to be monitored at all times.⁹⁷ Whereas the length of the siege (or other isolation practice) might have a material impact on the general availability of goods (the assumption being that the longer the siege lasts, the less goods would be available), ultimately, the same litmus proportionality test as described above (i.e. whether civilians are starving) ought to apply. The same remains true for blockades and similar (i.e. embargoes, for example).⁹⁸ Whereas they may be mounted lawfully for a legitimate military (or, arguably, an economic or other) purpose, their continued lawfulness must be weighed against the situation on the ground, and at all times accompanied by the timely and unimpeded passage of humanitarian and emergency relief in accordance with Rule 55 in the ICRC study on customary law.⁹⁹ Additionally, consistent with Article 17 of AP II, using starvation to forcibly move the population, or moving the population in circumstances where sufficient shelter, hygiene, health, safety and nutrition would not be received, is prohibited.¹⁰⁰

Similarly, 'if it turned out to be impossible to send sufficient aid for that part of the population of a besieged or encircled area that is particularly weak, the principle of the prohibition of starvation should henceforth dictate the evacuation of such persons'.¹⁰¹ At the same time, the evacuation would have to be conducted so as to ensure that 'removals are effected in satisfactory conditions of (...)

⁹⁴ San Remo Manual, *supra* note 66, art 102(a). Similar to blockades, siege warfare is not *per se* prohibited under international law, neither in IACs nor in NIACs, as long as its purpose is to achieve a legitimate military objective, and not 'solely' to starve the civilian population. Henckaerts and Doswald-Beck, *supra* note 21, Rule 53, at 188-89.

⁹⁵ Henckaerts and Doswald-Beck, *supra* note 21, Rule 24.

⁹⁶ Gaggioli, *supra* note 73; Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1456, § 4794; M. Cottier and E. Richard, 'Article 8(2)(b)(xxv)' in K. Ambos and O. Triffterer (eds), *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck/Hart/Nomos 2016), at 509; S. Watts, 'Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations', Research and Policy Paper (Harvard Law School, Counterterrorism and Humanitarian Engagement Project) available online at <http://blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-IHL-and-SC-Practice-concerning-Urban-Siege-Operations.pdf> (visited 1 August 2019) at 10.

⁹⁷ Gaggioli, *supra* note 73.

⁹⁸ See e.g. Report of the Independent and Eminent International and Regional Experts on Yemen (*supra* note 2), Annex II: Access Restrictions by the Government of Yemen/Coalition, §§ 1-31.

⁹⁹ Henckaerts and Doswald-Beck, *supra* note 21, Rule 55, at 193.

¹⁰⁰ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1460, § 4813.

¹⁰¹ *Ibid.* at 654, § 2096.

nutrition'. Failure to do so could result in a violation of the prohibition on forcible displacement of the population under Article 17 of AP II, as well as the prohibition on starvation.¹⁰²

In other words, whereas sieges and blockades might be lawfully mounted for reasons other than to intentionally starve civilians (and if they are mounted for the sole purpose of starving them the conduct would easily amount to a war crime), in order to prevent starvation from occurring *incidentally*, as a consequence of the practice, both besieger and besieged are under an obligation to let civilians take safe passage out, to let humanitarian aid in, and to distribute the consignments without adverse distinction. Given that the starvation of combatants however remains lawful, and the virtual impossibility to control distribution once consignments have entered the siege in particular, some have argued that mounting a siege that is both lawful and effective today is no longer viable.¹⁰³

D. The Conspicuous Absence of a Provision Prohibiting Starvation in NIAC in the Rome Statute

In light of the clear status of the prohibition against starvation in NIAC under customary law, it is remarkable that a provision criminalizing it as a war crime in NIAC was not included in the Rome Statute. Although there was considerable controversy around the inclusion of starvation in Article 8 even for IAC, many delegations in Rome were in favour of including starvation as a war crime also in NIACs.¹⁰⁴ Already in 1997, the Preparatory Committee had produced a draft that included 'starvation of civilians' as a crime in both types of conflict.¹⁰⁵ The crime was equally included for NIACs in a joint proposal by Switzerland and New Zealand based on an earlier ICRC working paper.¹⁰⁶ As pointed out by Bartels, the option to include starvation of the civilian population was also part of the 1998 Zutphen draft.¹⁰⁷ From this point, however, and despite the authors' best efforts, the disappearance of the provision becomes difficult to trace, which has led some commentators to conclude that the non-inclusion was simply an oversight.¹⁰⁸ Yet, Hermann von Hebel (who was Chair of the Working Group on the Definition of War Crimes during the Rome Conference) and Darryl Robinson mention that '[t]he inclusion of this crime in the context of international armed conflicts had already caused considerable controversy, and its inclusion in the context of internal armed conflicts appeared impossible, even though the prohibition of starvation is explicitly included in Article 14 of Additional Protocol II'.¹⁰⁹ Delegates involved in the Rome Conference, who have been contacted by the authors of this article, have also confirmed this interpretation. Indeed, throughout the negotiations, there had been much

¹⁰² Pejic, *supra* note 17, at 1100-1101, citing inter alia Art. 17 AP II.

¹⁰³ Dinstein, *supra* note 89, at 138-39.

¹⁰⁴ Cottier and Richard, *supra* note 96, at 510, fn 1226.

¹⁰⁵ ICC PrepCom, 'Decisions Taken by the Preparatory Committee at its Session Held From 11 to 21 February 1997', 12 March 1997, A/AC.249/1997/L.5.

¹⁰⁶ 'Working Paper Submitted by the Delegations of New Zealand and Switzerland', 14 February 2017, A/AC.249/1997/WG.1/DP.2. See also Bartels, *supra* note 38, at 297.

¹⁰⁷ ICC PrepCom, 'Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands', 4 February 1998, A/AC.249/1998/L.13, at 30. See also Bartels, *supra* note 38, at 297.

¹⁰⁸ Bartels, *supra* note 38, at 298.

¹⁰⁹ H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court' in R. S. K. Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999), at 125, fn 122; see also D. Robinson and H. von Hebel, 'War Crimes In Internal Conflicts: Article 8 of the ICC Statute', 2 *Yearbook of International Humanitarian Law* (1999) 193, at 208, fn 76. Yet, Cottier and Richard argue that the inclusion for IACs was not controversial, see Cottier and Richard, *supra* note 96, at 510.

disagreement on the scope of the ICC's jurisdiction over war crimes in NIAC, ranging from no crimes at all to complete symmetry between IAC and NIAC.

It is therefore not unlikely that the inclusion of starvation as a war crime in NIAC became a 'sacrificial lamb' (along with others) in order to maintain a delicate compromise in the final draft.¹¹⁰ Though Article 8 has already been amended once,¹¹¹ it appears that no systematic analysis of what amendments could be done to Article 8 has ever occurred. The government of Belgium, for example, already proposed several specific amendments to Article 8 but none of them concerned starvation.¹¹² The Review Conference adopted some of them in 2010, the rest later became the amendments of 2017.¹¹³ It should also be noted that in the same timeframe, negotiations first and ratification campaign subsequently were taking place on the crime of aggression. Given how difficult those negotiations turned out to be,¹¹⁴ it appears that insufficient time and energy was left to address the inclusion of starvation as a war crime in NIACs.

E. The Swiss Proposed Amendment

To codify into the Rome Statute the prohibition under customary international law thus far highlighted, the Swiss proposed amendment submits that the following text be inserted as new subparagraph to Article 8(2)(e):

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.

The proposed text largely follows that of the existing crime of starvation in IAC under Article 8(2)(b)(xxv):

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.

For this reason, the terms of the proposed text which match those in Article 8(2)(b)(xxv), should be interpreted consistently with the existing crime to the extent possible. The following analysis will address all the terms of the proposed text.

¹¹⁰ That a delegates' name appears in the acknowledgements of this article does not necessarily mean that the person was consulted or agreed to be consulted for the purposes of this paragraph. The views expressed in this paragraph however are in fact representative of the views expressed by all who were consulted during the authors' research.

¹¹¹ Amendment to article 8 of the Rome Statute of the International Criminal Court (adopted 10 June 2010, entered into force 26 September 2012) 2868 UNTS 195.

¹¹² ICC ASP, Resolution ICC-ASP/8/Res.6, Annex III, 26 November 2009.

¹¹³ See *Amendment to Article 8*, *supra* note 111, and Amendment to article 8 of the Rome Statute of the International Criminal Court (Weapons which use microbial or other biological agents, or toxins) (adopted 14 December 2017) Resolution ICC-ASP/16/Res.4 (not yet in force).

¹¹⁴ See i.e. C. Kreß, 'Introduction: The Crime of Aggression and the International Legal Order' in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), at 1-18.

A. *Elements of the Proposed Crime*

1. *Chapeau Elements*

As with the other crimes set out in Articles 8(c) and (e), the proposed amendment would require that the conduct took place in the context of and was associated with a NIAC, and perpetrator was aware of the factual circumstances that established the existence of a NIAC.¹¹⁵ A key point in this respect is that the perpetrator need not appreciate the legal qualification of the conflict in question. Indeed, the question of whether a particular conflict *legally* qualifies as international or non-international can divide even judicial opinion in the same case.¹¹⁶ On the additional requirement of showing the nexus between the starvation and a NIAC, the analysis will largely overlap with the requirement of showing that the starvation was used as a method of warfare. As long as a NIAC has been established and it is shown that starvation was used as a method of warfare, the nexus will usually be clear unless the starvation somehow concerned a completely separate armed conflict.

2. *Actus Reus*

a. *Starvation*

‘To starve’ someone is generally understood as the act of subjecting them to famine, extreme, and general scarcity of food.¹¹⁷ The nominal form – ‘starvation’, is defined in the Oxford English Dictionary as ‘[s]uffering or death caused by lack of food’.¹¹⁸ For the current analysis, starvation is used in a broad sense, meaning the process of depriving persons of food necessary for their survival, rather than the narrower sense of the resulting death or significantly compromised health among the targeted persons.¹¹⁹

This approach is consistent with the terms of the Rome Statute and relevant provisions of IHL. Neither the proposed text, nor the existing crime under Article 8(2)(b)(xxv), nor Article 54 of AP I,¹²⁰ requires that civilians actually were starved to death or to any other point of suffering.¹²¹ Similarly, the elements of crimes of the Rome Statute indicate that the crime of starvation does not require proof that civilians actually died or suffered. Under the elements, it is simply required to show that ‘the perpetrator deprived civilians of objects indispensable to their survival’ and that ‘the perpetrator

¹¹⁵ See Article 8(2)(c) and (e), Elements of Crimes.

¹¹⁶ Compare Decision on the Confirmation of the Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber, 29 January 2007, § 220 with Judgment pursuant to Article 74 of the Statute, Trial Chamber, 14 March 2012, § 567.

¹¹⁷ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1456, § 4791.

¹¹⁸ ‘Starvation’ (*OED Online*, OUP December 2018) available at www.oed.com/view/Entry/189208 (visited 7 March 2019).

¹¹⁹ See generally B. Conley and A. de Waal, ‘The Intent to Starve: Historical and Contemporary Uses of Starvation’, in this special issue of the *Journal of International Criminal Justice*.

¹²⁰ Although the ICRC commentary on Art. 14 of Additional Protocol II does not explicitly address whether a result is required, it does note that Art. 14 is a ‘simplified version’ of article 54 of Additional Protocol I; Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1456, § 4792. Consistent with the commentary on Article 54, no result requirement should be read into article 14 of Additional Protocol II.

¹²¹ K. Dörmann, *Elements of War Crimes of the Rome Statute of the International Criminal Court* (Cambridge University Press, 2003), at 363-64; Pejic, *supra* note 17, at 1098

intended to starve civilians as a method of warfare’,¹²² but it is not required to show that civilians were actually starved. A result element for the crime of starvation was suggested by the USA (‘That, as a result of the accused’s acts, one or more persons died from starvation’), but was not included in the Elements of Crimes adopted by the Preparatory Commission.¹²³ Although it is not necessary to prove a result element, in almost all circumstances where starvation is used during warfare, suffering will ensue among the targeted population.

A question also arises as to whether any minimum duration of deprivation is required to establish the element of starvation. The question of duration is particularly relevant to instances of temporary cut-offs of electricity or water, which often occur in connection with armed conflict. The elements do not refer to a minimum duration in a specific temporal sense, and, given that it is not required that civilians are actually starved, it seems there is no basis to read into the provision some form of minimum duration requirement for the deprivation.

b. Depriving

The wording of the proposed prohibition mirrors the existing crime in IACs insofar as it provides that starvation consists of *depriving* civilians of objects indispensable to their survival. In this respect, it must be shown that the perpetrator(s) undertook the conduct of depriving civilians of such objects (although if the civilians managed to secure replacement foodstuffs through other sources, this would not negate the original deprivation). Article 14 of AP II, provides guiding language as to the meaning of depriving civilians in this manner. The formulation is however ‘non-exhaustive’,¹²⁴ and would include ‘destroying crops by defoliants or poisoning wells or springs, a particularly egregious form of starving civilians’,¹²⁵ along with rendering irrigation works or installations useless.¹²⁶ Depriving civilians of objects indispensable to their survival implicates various human rights violations, including the right to security and potentially the right to life under the International Covenant on Civil and Political Rights, as well as the right to food under the International Covenant on Economic, Social, and Cultural Rights. In armed conflict, starvation can be the result of material acts, such as the targeting of civilian foodstuffs, agricultural sites, and water infrastructures,¹²⁷ and preventing humanitarian and emergency aid to be promptly delivered to civilians in need by withholding consent to their operations or otherwise wilfully impeding the consignments.¹²⁸ However, omissions could arguably qualify as the crime of starvation, as: ‘(a) failure to fulfil a duty under international humanitarian law may also amount to depriving civilians of objects indispensable to their survival’.¹²⁹

¹²² Article 8(2)(b)(xxv), Elements of Crimes.

¹²³ Proposal by the United States of America, UN Doc. PCNICC/1999/DP.4/ Add.2 (4 Feb. 1999) 18) cited in Cottier and Richard, *supra* note 96, at 517.

¹²⁴ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1458, § 4800.

¹²⁵ Cottier and Richard, *supra* note 96, at 514, citing Sandoz, Swinarski and Zimmermann, *supra* note 15, at 655, § 2101 and 1458, § 4801.

¹²⁶ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 655, § 2100.

¹²⁷ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, at 83, § 315.

¹²⁸ Recent examples have been Syria and Yemen, see i.e. UN Press Release, ‘Essential Aid Deliveries Blocked for Millions of Syrians in Besieged Areas’, 30 January 2018, SC/13190, available at <https://www.un.org/press/en/2018/sc13190.doc.htm> (visited 1 August 2019); Report of the Independent and Eminent International and Regional Experts on Yemen, *supra* note 2, at 46-64.

¹²⁹ Cottier and Richard, *supra* note 96, at 516.

There are multiple scenarios in which omissions of IHL duties could lead to starvation of civilians. For example, ‘an Occupying Power may fail to ensure food and medical supplies to the civilian population within the occupied territories’.¹³⁰ In the context of a NIAC, Article 18 of AP II is somewhat ambiguous in providing that ‘relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned’. As noted in the commentary to Article 18, ‘[t]he whole of this provision is based on the principle that States are primarily responsible for organizing relief’.¹³¹ Arguably, this could provide a basis to hold States responsible where they fail to provide relief to starving populations and fail to permit and/or facilitate the provision of relief by agencies offering to provide such relief in accordance with the requirements of Article 18. Whether such pure omissions would be sufficient to find criminal responsibility is largely untested at the ICC. Nonetheless, at the ICTY and ICTR, various chambers have held that war crimes (and other crimes) may be committed by omission.¹³²

c. Objects indispensable to their survival

The ICRC Commentary on Article 14 of AP II provides that ‘[o]bjects indispensable to the survival of the civilian population’ means objects which are of ‘basic importance for the population from the point of view of providing the means of existence’.¹³³ It includes ‘[items] such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works’.¹³⁴ It then clarifies that ‘foodstuffs’ and ‘agricultural areas for the production of foodstuffs’ should be ‘understood in the broadest sense to cover the infinite variety of needs of the populations of different geographical areas throughout the world’.¹³⁵ In this manner, the definition of ‘indispensable’ refers to a broad range of objects that could compromise the survival of the civilian population, but does not require showing that the objects actually were so indispensable in the specific circumstances that the survival of the civilian population was compromised through deaths and/or extreme suffering (indeed that would be tantamount to including a result element into the definition, which was rejected as discussed above).

Although the range of indispensable objects is broad, the question arises as to whether in addition to food and water and related resources, indispensable objects include ‘clothing, medical supplies’¹³⁶ and ‘under certain circumstances, electricity sources’.¹³⁷ Similarly, the question arises as

¹³⁰ *Ibid.*

¹³¹ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1458, § 4871.

¹³² Judgment, *Oric* (IT-03-68-A), Appeals Chamber, 3 July 2008, § 43; Judgment, *Brdjanin* (IT-99-36-A), Appeals Chamber, 3 April 2007, § 274; Judgment, *Galic* (IT-98-29-A), Appeals Chamber, 30 November 2006, § 175; Judgment, *Mrksic* (IT-95-13/1-A), Appeals Chamber, 5 May 2009, §134; Judgment, *Ntagerura* (ICTR-99-46-A), Appeals Chamber, 7 July 2006 §§ 334, 370; Judgment, *Blaskic* (IT-95-14-A) Appeals Chamber, 29 July 2004, § 663.

¹³³ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 1458, § 4803.

¹³⁴ *Ibid.*, § 4805.

¹³⁵ *Ibid.*

¹³⁶ Cottier and Richard, *supra* note 96, at 512-513; Sandoz, Swinarski and Zimmermann, *supra* note 15, at 655, § 2101. See also Dörmann, *supra* note 121, at 363.

¹³⁷ Cottier and Richard, *supra* note 96, at 513.

to whether other commodities, the sale of which generates income for the purchase of basic sustenance, would also be covered. The term starvation implies a connection with nourishment or sustenance, rather than any connection whatsoever to survival. As set out in the ICRC commentary, the range of indispensable objects typically considered relevant to the crime of starvation are those of basic importance, linked directly to food and water supplies. The commentary suggests that other objects, such as clothing, medical supplies, and electricity, would not qualify as indispensable objects *per se*. However, their deprivation could be relevant if used as an indirect means of depriving civilians of basic objects linked to food and water. For example, if a party to the conflict intentionally cut off the energy to the opposing population's food stores in order to cause the spoliation of those supplies, this could constitute an indirect means of depriving the civilians of those basic objects linked to sustenance.

An additional question arises if the supplies are indispensable to the survival of civilians, but the party preventing those supplies from reaching the civilians offers alternative sources. In the context of IACs, one view is that '[i]f the civilian population of the blockaded territory is however adequately provided with essential commodities, the blockaded objects are not 'indispensable to their survival' and thus could not fall under the prohibition of starvation'.¹³⁸ However, if the objects were indispensable at the time they were blocked and the alternative sources were only subsequently provided, then the prohibition would be violated.

d. Including by wilfully impeding relief supplies

In line with the existing crime, the proposed text provides that one form of depriving civilians of objects indispensable for their survival is wilfully impeding relief supplies. Accordingly, the rules governing the access of relief supplies to civilians are critical for the application of the prohibition of starvation whether in NIACs or IACs. Indeed, the ICRC commentary to Article 54 of AP I highlights that the provision can only be operationalized by taking into account its context and the other provisions surrounding it.¹³⁹ The ICRC commentary to AP II explicitly links Article 14 to a later article on relief societies and relief actions.¹⁴⁰ The wording of article 8(2)(b)(xxv) includes the clause 'as provided for under the Geneva Conventions'. The reference to relief supplies imports the rules set out in the GC IV and AP I.¹⁴¹ The broader framework of IHL would also apply, *mutatis mutandis*, to the prohibition of starvation in the context of NIACs, as Article 8(2)(e) of the Rome Statute states that it concerns 'other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law'.¹⁴² As discussed herein, as a matter of customary international law applicable to IACs and NIACs, 'parties to the conflict must allow and facilitate unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.¹⁴³ This is consistent

¹³⁸ *Ibid.*, at 515.

¹³⁹ Sandoz, Swinarski and Zimmermann (*supra* note 15) at 653, § 2091.

¹⁴⁰ *Ibid.*, at 1456, § 4791.

¹⁴¹ M. Bothe, 'War Crimes' in A. Cassese, P. Gaeta and J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002), at 402; Sandoz, Swinarski and Zimmermann, *supra* note 15, at 653, § 2091.

¹⁴² See Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, *Ntaganda* (ICC-01/04-02/06 OAS), Appeals Chamber, 15 June 2017, § 53.

¹⁴³ Henckaerts and Doswald-Beck, *supra* note 21, Rule 55, at 193.

with Common Article 3, which applies to IACs and NIACs, and provides that ‘an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict’.¹⁴⁴

e. Civilians

The term ‘civilian’ is generally defined in Article 50 of AP I to the Geneva Conventions.¹⁴⁵ As is well known, according to this provision ‘[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.’ Of course ‘the protection civilians enjoy is lifted as soon as they are directly participating in hostilities and for the whole duration of their participation’.¹⁴⁶ To date, the ICC has adhered to the approach whereby the term ‘civilian’ is defined negatively in contradistinction to the term ‘military’.¹⁴⁷

Civilian objects are defined negatively based on the definition of military objects, which are those ‘which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’.¹⁴⁸

It is important to note that, the prohibition on using starvation against civilians is not limited to civilians of the opposing side; Article 8(2)(b)(xxv) ‘not only protects civilians belonging to an adverse party to the conflict finding themselves on that adverse party’s territory or in occupied territory, but also any other civilian population such as civilians belonging to the own party to the conflict or finding themselves on the territory of the own party to the conflict’.¹⁴⁹ Consistent with this broad approach, objects that are indispensable for the survival of the civilian population are protected under IHL, and

¹⁴⁴ Pejic, *supra* note 17, at 1105.

¹⁴⁵ Dörmann, *supra* note 121, at 364. The category of civilians does not include (Article 4 A (1), (2), (3) and (6) of GCIII) POWs (who have fallen into the power of the enemy): (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war; and (Art.43 Additional Protocol I) organised armed forces. See Judgment, *Martić* (IT-95-11), Appeals Chamber, 8 October 2008, §§ 291-302.

¹⁴⁶ Cottier and Richard, *supra* note 96, at 513.

¹⁴⁷ See e.g. Judgment Pursuant to Article 74, *Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March 2016, § 152.

¹⁴⁸ Art. 52(1) AP I; Judgment pursuant to Article 74, *Katanga* (ICC-01/04-01/07), Trial Chamber, 7 March 2014, § 893; Judgment, *Kordić & Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 52.

¹⁴⁹ Cottier and Richard, *supra* note 96, at 513.

therefore potentially by ICL, when they are located in the territory held by that Party to the conflict or that of a co-belligerent, as well as in enemy territory.¹⁵⁰

3. *Mens Rea*

In line with the existing text of Article 8(2)(b)(xxv), the proposed crime requires that the conduct be undertaken ‘intentionally’. The definition of intent is set out in Article 30 of the Rome Statute which provides, in relation to conduct, that intent is established if the person means to engage in the conduct, and that for consequences, intent is established if the person means to cause that consequence or is aware that it will occur in the ordinary course of events.¹⁵¹ Establishing the requisite intent for the crime is critical in ICC proceedings. Intent is one of the constituent factors in demonstrating that a crime has occurred and that individual criminal responsibility can be imposed on one or more persons.¹⁵²

The elements of crimes indicate that the *mens rea* will require that ‘the perpetrator intended to starve civilians as a method of warfare’.¹⁵³ In interpreting and applying the reference to a person ‘intentionally’ using starvation as a method of war, the terms of Article 54 of AP I may prove instructive. They state that ‘in no event shall actions against these objects [used in direct support of military action] 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’.¹⁵⁴ In light of this, the mental element of the crime of starvation may include undertaking actions that can be expected to deprive the civilian population of adequate food or water. On a related note, the ICRC Commentary to Article 54 of AP I recalls that ‘[u]nfortunately it is a *well-known* fact that all too often civilians, and above all children, suffer most as a result [of blockades]’.¹⁵⁵ Again, if the deprivation of objects indispensable to the survival of the civilian population is the expected result of a military action, then that may be sufficient to establish the necessary intent. Under the ICC’s jurisprudence the current test would require showing that such deprivation was a ‘virtual certainty’.¹⁵⁶

Consistently with the existing crime, the proposed text also includes reference to a different mental element, by prohibiting ‘*wilfully* impeding relief supplies’. Although ‘the standard of ‘*wilfully*’ includes recklessness and insofar would differ from the general standard under Article 30 Rome Statute’, it is not clear that the drafters intended to deviate from the general rules regarding the mental element in this respect.¹⁵⁷ In this respect, it is notable that, if no reference to a particular

¹⁵⁰ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 657, § 2113.

¹⁵¹ Art. 30 Rome Statute.

¹⁵² Forms of liability such as accomplice liability under article 25 and superior responsibility under article 28 of the Rome Statute do not strictly require intent on the part of the accused, but at least one perpetrator must have the intent for the crime or else no crime will have occurred and there will be no crime in respect of which the accomplice or superior may be held responsible.

¹⁵³ Art. 8(2)(b)(xxv), Elements of Crimes.

¹⁵⁴ Art. 54(3)(b) AP I.

¹⁵⁵ Sandoz, Swinarski and Zimmermann, *supra* note 15, at 653-54, §§ 2089-2095.

¹⁵⁶ See Appeal Judgment, *Lubanga* (ICC-01/04-01/06-3121), Appeals Chamber, 12 December 2014, § 447 (‘absolute certainty about a future occurrence can never exist; therefore the Appeals Chamber considers that the standard for the foreseeability of events is virtual certainty.’).

¹⁵⁷ Cottier and Richard, *supra* note 96, at 518. ‘The drafting history of the Statute suggests that the notion of *dolus eventualis*, along with the concept of recklessness, was deliberately excluded from the framework of the

mental element is made in the elements of crime, which is the case for Article 8(2)(b)(xxv), Article 30 of the Statute applies.¹⁵⁸ One understanding of the term *wilfully* is as a way of excluding circumstances in which a party to a conflict impeded the relief supplies inadvertently because of their military activities in the path of the relief vehicles delivery route. The mental elements will also require an awareness that the activity occurs during armed conflict.¹⁵⁹

4. As a method of warfare

The elements of crimes clarify that the perpetrator must intend to use the starvation ‘as a method of warfare’. The use of starvation as a tactic of war, whether in IAC or in NIAC, is unfortunately not obsolete. The Commission of Inquiry into events in Darfur recognized how, as a method of warfare, ‘water pumps and wells were destroyed and poisoned by dropping the carcasses of cattle into them’.¹⁶⁰ Similarly, the Office of the Prosecutor of the ICC noted that across Darfur the forces of Al-Bashir allegedly ‘destroy[ed] all the target groups’ means of survival, poison[ed] sources of water including communal wells, destroy[ed] water pumps, [stole] livestock and strip[ped] the towns and villages of household and community assets’.¹⁶¹ In this light, the term “method of warfare”, and the meaning ascribed to it, is significant. There are several ways in which this term could potentially be interpreted.

According to a broad approach, this would simply mean a party intentionally imposes starvation on civilians in a situation of armed conflict, while IHL applies. The crime would focus on the fact that starvation was intentionally imposed on civilians during armed conflict, rather than the specific way in which the starvation of civilians was used or the goal that it sought to achieve.

A more demanding interpretation would require starvation to be used in order to obtain a military advantage. While many instances in which starvation of civilians has been used in war were clearly aimed at achieving a military advantage, such as capturing a city by starving out its population, starvation is also sometimes used purely as a punishment against the civilian population of the opposing side to a conflict.¹⁶² This more demanding interpretation would preclude such starvation from falling within Article 8(2)(b)(xxv) (and the proposed corresponding crime in NIAC), even when conducted intentionally to punish the civilian population. Given that the IHL prohibition of starvation is ontologically linked to the principle of humanity, it would appear incongruous to exclude the intentional starvation of civilians from the ambit of the crime merely because it was not used for a tactical advantage. Additionally, the more demanding interpretation of the phrase ‘as a method of warfare’ would appear to remove starvation as an applicable crime in the context of occupation. During occupation, the belligerent has already established control over the territory in question,

Statute (e.g. see the use of the words “unless otherwise provided” in the first sentence of Article 30.’ See Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, § 1011.

¹⁵⁸ General Introduction, Elements of Crimes, § 2.

¹⁵⁹ Article 8(2)(b)(xxv), Elements of Crimes.

¹⁶⁰ *Ibid.*, at 512, citing the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, §§ 235 and 305.

¹⁶¹ Public Redacted Version of the Prosecutor’s Application under Article 58, *Situation in Darfur, The Sudan* (ICC-02/05), 14 July 2008, § 14.

¹⁶² The Commission of Inquiry on Syria noted, for example, that ‘[b]esieging a civilian population in the manner documented by the Commission is tantamount to collective punishment’. See Commission of Inquiry on the Syrian Arab Republic, *supra* note 2, at 4.

meaning that there is no significant fighting. In such circumstances, it would be difficult to argue that the starvation of civilians, no matter how intentional, was being used as a method of conducting hostilities in order to obtain a military advantage, as there would be no ongoing active hostilities. However, such conduct might amount to violence to life, as well as cruel and inhumane treatment under common Article 3, and, accordingly, could be punishable under Articles 8(2)(a)(i-iii) and (c)(i) as the civilian population is already under the control of the perpetrator.¹⁶³

To date the academic commentary that has addressed this question appears to take a broad approach, encompassing starvation of civilians as long as the objective is somehow linked to the armed conflict: ‘must be conducted to achieve a military advantage or other objective *vis-à-vis* an adversary party’. Therefore ‘...[t]o deliberately decide not to take measures to supply the population with objects indispensable for its survival can become a method of combat by default, and would also be prohibited’.¹⁶⁴ In this respect, the crime would cover ‘using starvation to achieve a speedier subjection of a besieged town or village, as was medieval warfare practice, or to pressure on the adversary to accept some other aim of the attacker...[or] to deprive civilians of indispensable goods in order to force them to move out of a certain area in order to facilitate the control over that area’.¹⁶⁵

The terms of Article 54 of AP I draw a distinction between purpose and motive. Article 54(2) provides that it is prohibited to interfere with objects indispensable to the survival of the population: ‘for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive’.¹⁶⁶ Although this same wording was not reproduced in Article 14 of AP II, applicable in NIACs, or to the criminal prohibitions set out in the ICC Statute, it highlights that the prohibition concerns the use of starvation as a method of war, irrespective of the ultimate motive behind the conduct. Consequently, where the starvation of the civilian population is explicitly contemplated by the attackers, and considered to be a worthwhile means of conducting their operations, it will violate the IHL provisions and potentially the ICL crime.

Whereas motive will not justify the intentional starvation of civilians, the use of starvation as a tactic during armed conflict for unlawful purposes would clearly violate the prohibition: ‘depriving civilians of indispensable objects with the intention, for instance, to ‘ethnically cleanse’ a region or town from a certain group of civilians, or to force targeted civilians to move away or take some other action intended or ordered by the perpetrator, would seem to meet the *mens rea* required under Article 8(2)(b)(xxv)’.¹⁶⁷

B. Amendment Procedure: Article 121(5) of the ICC Statute

¹⁶³ See Bartels, *supra* note 38, at 299-300.

¹⁶⁴ Cottier and Richard, *supra* note 96, at 518.

¹⁶⁵ *Ibid.*

¹⁶⁶ Art. 54(2) AP I. See also Sandoz, Swinarski and Zimmermann, *supra* note 15, at 656, § 2107 (‘the provision under consideration here means that it is prohibited to attack etc. objects indispensable to the survival of the civilian population wherever it is, or to deprive the enemy State of such objects indispensable to the civilian population.’).

¹⁶⁷ Cottier and Richard, *supra* note 96, at 518.

In accordance with Article 121(5) of the ICC Statute, the amendments will enter into force for the State Parties which accept them one year after the deposit of their instruments of ratification or acceptance. This would match the approach followed for the amendments to Article 8 proposed by Belgium and adopted at the Kampala Conference to include three war crimes relating to the use of prohibited weapons in NIACs, which mirrored those already included in the Statute with respect to IACs.¹⁶⁸ Interpretive issues arising in relation to the crime of starvation and its elements could be addressed by amending both the existing crime applicable in IACs and by introducing the crime in the context of NIACs. In this way, the ambiguities could be cleared up, and the elements could be perfected for application. However, an amendment of the provision relating to IACs would potentially open up the crime to re-ratification by States Parties, which would potentially result in a fragmented position whereby different States would be subject to different versions of the prohibition, with some applying the 'old' definition and some the 'new' one. To avoid such fragmentation, the 'simpler' solution would be to adopt a definition of the war crime of starvation in NIACs that essentially mirrors the existing one for IACs.

F. Making the case for the Adoption of the Swiss Amendment

A. Possible Objections to the Amendment

This article has highlighted substantial state practice showing that depriving civilians of humanitarian aid, including by wilfully impeding the delivery of humanitarian aid and relief supplies, would constitute a violation of IHL in NIAC, and would potentially entail individual criminal responsibility for the war crime of starvation in the context of NIACs. One might thus assume that the Swiss proposed amendment would be fairly uncontroversial when negotiated within the Assembly of States Parties (ASP). Introducing amendments to the ASP is however not simply a question of substance. One objection that may be raised is that the piecemeal introduction of new war crimes through the amendment procedure *ex* Article 121(5) will lead to a fragmented regime, whereby certain crimes are only applicable to States that have ratified the particular amendment in question. There is a risk that persistent non-ratification by a substantial number of states could raise doubts as to the existence of a customary basis for the crime. However, the potential for this future outcome is implicit in the amendment procedure, and should not prevent states having the opportunity to ratify and accept the application of the prohibition of starvation in the context of NIACs alongside IACs. It is in fact the responsibility of each State Party to the ICC Statute to be sure this outcome is avoided by living up to their commitments and promptly and speedily ratifying and implementing any amendments to the Statute.

Another objection may be that the inclusion of the war crime of starvation in NIAC under the ICC jurisdiction was already considered, and rejected, during the Rome negotiations. Unlike in the negotiations of the APs in 1977, however, there appears to be little evidence that in 1998 doubts persisted as to the customary existence of the war crime of starvation in NIACs. To the contrary, it appears that the inclusion of the crime in the Statute was somehow 'sacrificed' on political grounds.

¹⁶⁸ R. Geiß, 'Preliminary remarks on subparagraphs (xiii)–(xv): Prohibited weapons in non-international armed conflicts' in Ambos and Triffterer, *supra* note 96, at 569-571.

Thus, in the absence of compelling substantive reasons not to uniform the treatment of starvation in IACs and NIACs in the ICC Statute, little weight can be placed on this objection.

Finally, some might call into question the timing of the amendment, and appeal to what some consider a form of ‘amendment fatigue’ caused by the negotiations surrounding the crime of aggression and the Belgian amendments on war crimes. The trends in NIACs around the world, however, and the suffering of so many civilians who have wilfully and appallingly been starved to achieve a military advantage should make the timeliness of this amendment a self-evident reality.

B. A Gap in Accountability in the Rome Statute

The Swiss proposed amendment is not only timely: but may have real utility in addressing the serious mistreatment of the civilian population in armed conflict. The starvation of civilians and related acts might arguably already be prosecuted in NIAC under the Rome Statute under Article 8(2)(e)(i) (the war crime of directing an attack against a civilian population), under Article 7(1)(a), (b), (f) (h), or (k) (the crimes against humanity of murder, extermination, torture, persecution, and other inhumane acts), or perhaps even under Article 6 (as an act of genocide).¹⁶⁹ However, each one of these potential alternatives has serious limitations.

Insofar as prosecutions under Article 8(2)(e)(i) are concerned, for example, while the provision could arguably cover the wilful starvation of civilians through attacks, it would not cover the wilful impeding of passage of humanitarian and relief goods. Article 6 would only cover groups protected under the genocide definition, and the ‘intent’ required for genocide is a much different threshold than the *mens rea* required for a war crime.¹⁷⁰ Prosecutions for the crime against humanity of murder under Article 7(1)(a) would fall short of including cases of starvation in which civilians do not actually die, thus setting a different, much higher bar in NIAC than in IAC. Similarly, prosecutions for the crime against humanity of extermination under Article 7(1)(b) also present quite a high threshold under which not all cases of starvation will fall.¹⁷¹ Article 7(1)(h) on the crime against humanity of persecution, which could arguably cover the diversion of humanitarian and relief supplies with adverse discriminatory intent, would however also incur in some evidentiary problem, as the intent to discriminate which would be sufficient for the war crime of starvation may not be sufficient to establish intent to persecute on the specific discriminatory grounds listed in Article 7(1)(h).¹⁷²

¹⁶⁹ For a more detailed analysis of how starvation can be alternatively prosecuted and charged in the ICC Statute, see M. J. Ventura, ‘Starvation as an Underlying International Crime: Exploring the Legal Possibilities’, in this special issue.

¹⁷⁰ Which means the victims have to belong to a certain national, ethnical, racial or religious group and the act of starvation must be accompanied by the intent to destroy the group as such in whole or in part. See Art. 6 Rome Statute; see also: Second Decision on the Prosecution’s Application for a Warrant of Arrest, *Al Bashir* (ICC-02/05-01/09) Pre-Trial Chamber, 12 July 2010, § 34.

¹⁷¹ See i.e. S. Power, ‘Siege Warfare in Syria: Prosecuting the Starvation of Civilians’, 8 *Amsterdam Law Forum* (2016) 1, at 18-19; C. K. Hall and C. Stahn ‘Article 7(b)’ in Ambos and Triffterer, *supra* note 96, at 257.

¹⁷² To commit the crime against humanity of persecution, the victim group would have to be targeted due to their political, racial, national, ethnic, cultural or religious status or gender, or any other grounds universally recognised as impermissible under international law. See Article 7(1)(h) and Element 3, Article 7(1)(h), Elements of Crime.

Furthermore, while a single act can amount to a war crime, any prosecutions under Article 7 would have to be part of a ‘widespread or systematic attack directed against any civilian population’.¹⁷³

Consequently, the existing provisions in the Rome Statute are unable to capture the full scope of the ways in which, today, the war crime of starvation is most likely to be inflicted. For this reason, the Swiss amendment is imperative to close a substantive accountability gap.

G. Conclusions

Starvation is an unwelcome but prevalent feature of armed conflict. The Swiss proposal raises an important question concerning the imbalance of the Rome Statute’s disparate treatment of starvation in IACs vs NIACs. The close examination of the elements of starvation under IHL and under ICL, as well as its application to various controversial scenarios, shows that it may involve complex questions surrounding the intent behind the starvation and its link to the armed conflict as well as the obligations on the parties to allow relief supplies to reach the civilian population. In addressing the Swiss proposal, it is important that these issues are fully canvassed and that the understanding of how the crime would apply in practice is roundly accepted and recorded. The preceding analysis shows that there is little justification for the disparate treatment of starvation as a crime during IACs and NIACs. While there are contentious scenarios in which starvation may or may not be established according to the facts of the case and the intentions of the parties to the conflict, these marginal cases do not undermine the compelling basis for the criminalization of the starvation of civilians during armed conflict. Rather the contentious cases reflect an ongoing tension in the application of ICL and IHL — the treatment of foreseeable outcomes from conduct primarily directed to other purposes or motivated by other concerns. . What is uncontentious is the moral and legal basis for prohibiting the intentional starvation of civilians as a method of warfare in both IACs and NIACs.

¹⁷³ See Art. 7(2)(a) Rome Statute.