

**CONCEPTUALIZING FAMINE AS A SUBJECT OF
INTERNATIONAL CRIMINAL JUSTICE: TOWARDS A
MODALITY-BASED APPROACH**

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ABSTRACT

Since the inception of modern international criminal law (ICL), scholars have considered the issue of potential ICL accountability predicated on mass famine situations. Despite this interest, the subject of famine has remained mostly outside the scope of ICL practice to date. This article revisits the question of potential intersections between ICL and modern famines. In doing so, recent real-world famines in Cambodia, North Korea, Somalia and Darfur, along with the current threat of famine amidst the ongoing civil war in Syria are referenced as examples of potential situations warranting the pursuit of ICL accountability. These and other examples of modern famine demonstrate that the creation, enforcement or perpetuation of famine represents a modality of harm causation through which various international crimes may be committed. Depending on the circumstances such crimes may take the form of genocide, war crimes and/or crimes against humanity. After providing an overview of promising ICL entry points for the pursuit of famine accountability, this article suggests that famine harms have been

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largely excluded from the purview of ICL primarily because of persistent outdated understandings of the dynamics of famine causation, and the fact that famine situations fail to conform to preconceived notions of what constitutes an atrocity event. In order to push back against such preconceptions, this article suggests that famine is better conceptualized as a means or modality through which atrocities may be committed, rather than trying to describe the condition of famine itself as amounting to an international crime.

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1. INTRODUCTION

True famines¹ are periods of horror and social rupture, involving mass trauma and death.² For centuries, these tragedies were dominantly conceptualized in Malthusian terms, as products of overpopulation, natural disaster, or some other cause of reduction in per capita food production.³ Today, scholars largely agree that famines are not unforeseeable natural disasters, but are the largely predictable by-products of political and economic causes.⁴ In this new era of understanding famines as primarily attributable to human agency, certain scholars have proposed that international criminal law (ICL) should play some role in responding to especially flagrant famine-inducing behavior.⁵ This question, of the relationship between ICL

¹ For the purposes of this article, the term “famine” is used to denote situations during which there is a significant increase in death rates amongst a population lacking access to sufficient food. For an overview of the various competing definitions of famine, see Paul Howe & Stephen Devereux, *Famine Scales: Towards an Instrumental Definition of “Famine,”* in *THE NEW FAMINES: WHY FAMINES PERSIST IN AN ERA OF GLOBALIZATION* 27, 29–35 (Stephen Devereux ed., 2007).

² CORMAC Ó GRÁDA, *FAMINE: A SHORT HISTORY* 45–63 (2009) (describing the “horrors” of famine).

³ Early famine scholarship was heavily influenced by the work of Thomas Malthus, who viewed famine and the spread of disease as the largely inevitable results of unchecked population growth. For a brief overview of Malthus’ work and its legacy for famine studies, see Stephen Devereux, *Introduction*, in *THE NEW FAMINES: WHY FAMINES PERSIST IN AN ERA OF GLOBALIZATION* 1, *supra* note 1, at 5–6.

⁴ See, e.g., Amartya Sen, *Ingredients of Famine Analysis: Availability and Entitlements*, 96 Q. J. ECON. 433 (1981) (studying how people use legal means to control food); ALEX DE WAAL, *FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA* (1997) (describing how political acts create famine); Ó GRÁDA, *supra* note 2, at 1–13 (stating that major famines in the modern era are more often caused by political factors and human activity than by nature). Indeed, locating responsibility for famine causation is a major theme in recent famine scholarship. In a 2007 book introduction, Stephen Devereux identifies “responsibility for famine causation and accountability for famine prevention” as recurring themes in contemporary famine scholarship. Devereux, *Introduction*, *supra* note 3, at 13. This generalization is not meant to suggest that there is any one universally agreed upon paradigm of famine, but simply that there exists a more general movement within famine studies away from Malthusian or natural disaster paradigms and towards those focused on human action as the driving force behind famine causation.

⁵ See, e.g., David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT’L L. 245 (2003); Grace M. Kang, *A Case for the Prosecution of Kim Jong Il for Crimes Against Humanity, Genocide, and War Crimes*, 38 COLUM. HUM. RTS. L. REV. 51 (2006); Jenny Edkins, *The Criminalization of Mass Starvations: From Natural Disaster to Crime Against Humanity*, in *THE NEW FAMINES: WHY FAMINES PERSIST IN AN ERA OF GLOBALIZATION*, *supra* note 1, at 50; J. Solomon Bashi, *Prosecuting Starvation in the Extraordinary Cham-*

and famine, is fundamentally interdisciplinary in nature, sitting at the intersection of famine studies, demography, international law, and international relations. Partially as a result of this interdisciplinary reality, scholars often talk past one another using unfamiliar technical language and continue to be divided over the degree to which existing provisions of ICL provide adequate coverage over famine-causing behaviour versus the need for the creation of new, famine-specific international crimes.⁶

As this abstract scholarly debate has evolved, activists, journalists, and scholars have proposed that various real-world famines, both contemporary and historical, be conceptualized as international crimes. Prominent examples include the Ukrainian *Holodomor* ("extermination by hunger") famine under Soviet rule from 1932-

bers in the Courts of Cambodia, 29 WIS. INT'L L.J. 34 (2011); Randle C. DeFalco, *Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes Against Humanity of Extermination, Inhumane Acts and Persecution*, 5 INT'L J. TRANSITIONAL JUST. 142 (2011); Rhoda E. Howard-Hassmann, *State-Induced Famine and Penal Starvation in North Korea*, 7 GENOCIDE STUD. & PREVENT. 147 (2012); Jens David Ohlin, *Opinion, Somalia Famine 'Crime against Humanity'?*, CNN (Aug. 12, 2011), <http://www.cnn.com/2011/OPINION/08/12/ohlin.somalia.crimes/index.html> [<https://perma.cc/J6QF-CLR3>]. Alex de Waal has similarly argued for the conceptualization of mass famine in Darfur as crimes, but has recently reconsidered his position, due to practical concerns related to how such treatment may inhibit the delivery of aid. DE WAAL, *FAMINE CRIMES*, *supra* note 4; *cf.* Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis as Genocide*, 20 HARV. HUM. RTS. J. 25 (2007) (finding that labeling the Sudanese crisis as a genocide implies moral condemnation and limits the range of solutions); Alex de Waal, *On Famine Crimes and Tragedies*, 372 THE LANCET 1538 (2008) (finding that criminalizing famine while a crisis is ongoing can interfere with humanitarian relief work).

⁶ For example, in a 2003 article, David Marcus argued that international criminal law provided only "patch-work" coverage, primarily in the form of crimes against humanity, over common famine scenarios and concluded that the preferable way forward would be to amend the Rome Statute to include famine-specific crimes. Marcus, *supra* note 5, at 247. Meanwhile, certain scholars view famine through the rubric of genocide. For example, Helen Fein, Sheri Rosenberg, and Everita Silina include the enforcement of starvation conditions as one method of what they refer to as "genocide by attrition." See Helen Fein, *Genocide by Attrition 1939-1993: The Warsaw Ghetto, Cambodia, and Sudan: Links between Human Rights, Health, and Mass Death*, 2 HEALTH & HUM. RTS. 10 (1997) (describing how the government withheld food from the south Sudanese); Sheri P. Rosenberg & Everita Silina, *Genocide by Attrition: Silent and Efficient*, in GENOCIDE MATTERS: ONGOING ISSUES AND EMERGING PERSPECTIVES 106, 116-18 (Joyce Apsel & Ernesto Verdeja eds., 2013) (describing Stalin's deprivation of food to Ukrainians as a means of gradually committing mass murder).

1933;⁷ the Chinese famine of 1958-1962;⁸ the Khmer Rouge era Cambodian famine of 1975-1979;⁹ the Ethiopian famine of 1983-1985;¹⁰ the Somali famine of 2010-2012;¹¹ and recurrent famine conditions in Darfur¹² and North Korea¹³ in recent decades. Amongst these examples, recent or recurring famine conditions in North Korea, Darfur,

⁷ See, e.g., Marcus, *supra* note 5, at 252–55; Nicolas Werth, Keynote Address for the Holodomor Conference, Harvard Ukrainian Research Institute, 17–18 November 2008, 30 HARV. UKR. STUD. xxix, xxix–xxxviii (2008); Renate Stark, *Holodomor, Famine in Ukraine 1932-1933: A Crime against Humanity or Genocide?*, 10 IR. J. APPL. SOC. STUD. 20 (2010); Rebekah Moore, “A Crime Against Humanity Arguably Without Parallel in European History”: Genocide and the “Politics” of Victimhood in Western Narratives of the Ukrainian Holodomor, 58 AUST. J. POLIT. HIST. 367 (2012). For a factual overview of this famine, see ROBERT CONQUEST, *THE HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR-FAMINE* (1986).

⁸ See, e.g., Eamon Aloyo, *Improving Global Accountability: The ICC and Nonviolent Crimes against Humanity*, 2 GLOBAL CONSTITUTIONALISM 498, 504-05 (2013) (characterizing Mao Zedong’s policies that caused widespread famine as a crime against humanity). For one historical account of this famine, see FRANK DIKÖTTER, *MAO’S GREAT FAMINE: THE HISTORY OF CHINA’S MOST DEVASTATING CATASTROPHE, 1958-1962* (2011).

⁹ DeFalco, *Accounting for Famine*, *supra* note 5; Bashi, *supra* note 5. For a factual overview of this famine, see Randle C. DeFalco, *Justice and Starvation in Cambodia: The Khmer Rouge Famine*, 2 CAMBODIA L. & POL’Y J. 45 (2014).

¹⁰ See, e.g., Marcus, *supra* note 5, at 255–59; DE WAAL, *supra* note 4. For an overview of recent domestic accountability efforts in relation to the period during which this famine occurred, see Firew Kebede Tiba, *The Mengistu Genocide Trial in Ethiopia*, 5 J. INT’L CRIM. JUST. 513 (2007).

¹¹ See, e.g., Matt Bryden, *Somalia’s Famine is Not Just a Catastrophe, It’s a Crime*, THE ENOUGH PROJECT (Oct. 2011), http://www.enoughproject.org/files/Bryden_SomaliaFamine%20Brief_final_0.pdf [<https://perma.cc/D9BC-MLGQ>] (describing Al-Shabaab’s exacerbation of famine conditions in Somalia); Ohlin, *supra* note 5 (reporting on the developing famine in Somalia and Al-Shabaab’s “policy of preventing civilians from leaving their territory”). While Bryden and Ohlin suggest that the militant group Al-Shabaab may be responsible for international crimes in relation to this famine, journalist Alex Perry has argued that the Somali government, at the behest of the United States, committed the war crime of using starvation of civilians as a weapon to weaken Al-Shabaab’s influence in famine-afflicted areas. See Anna Maria Tremonti, *Somalia 2011 Famine Was a U.S.-Created War Crime*, THE CURRENT (Jan. 18, 2016), <http://www.cbc.ca/radio/thecurrent/the-current-for-january-18-2016-1.3408273/somalia-2011-famine-was-a-u-s-created-war-crime-says-journalist-alex-perry-1.3408302> [<https://perma.cc/XL4W-53UJ>] (summarizing Alex Perry’s findings from his 2011 investigation in Somalia). Approximately 260,000 victims died in the 2010-2012 Somali famine. *Somalia Famine ‘killed 260,000 people’*, BBC (May 2, 2013), <http://www.bbc.com/news/world-africa-22380352> [<https://perma.cc/FX2A-HR2V>].

¹² See, e.g., de Waal, *Reflections, supra* note 5; Eric Reeves, *Humanitarian Obstruction as a Crime Against Humanity: The Example of Sudan*, 54 AFR. STUD. REV. 165 (2011); Jennifer Leaning, *Diagnosing Genocide – The Case of Darfur*, 351 N. ENGL. J. MED. 735 (2004).

¹³ See, e.g., Kang, *supra* note 5; Howard-Hassmann, *supra* note 5.

Somalia, and the current threat of famine in parts of war-torn Syria stand out as reminders that famine has not yet been banished to the annals of history.

Despite such arguments, actual ICL accountability predicated on the creation, enforcement or perpetuation of famine conditions has remained elusive. While the subjects of famine and starvation have been intermittently raised in discussions of ICL accountability, they have nonetheless remained at the periphery of ICL practice. Outside the context of prison conditions, famine and starvation have tended to be addressed within ICL practice mostly indirectly, as root causes or collateral consequences of more familiar atrocity crimes.¹⁴

This article considers why the relationship between famine and ICL has been so confused thus far, and suggests how famine might be more usefully conceptualized as a subject of ICL to help dispel some of this confusion. In doing so this article puts forth two main arguments. First, while the prosecution of international crimes stemming from famine events would present certain practical challenges, such challenges are not in any way unique, but are typical of the difficulties inherent in prosecuting atrocity crimes generally. Second, language suggesting that the conditions of famine or starvation are, in and of themselves, international crimes is misleading and conceptually inaccurate. It would be more useful and accurate to conceptualize and present famine as a modality or means through which powerful group actors may bring about mass harm. Acknowledging that famine scenarios do not present any unique challenges to the pursuit of ICL accountability and conceptualizing famine conditions as a modality through which traditional international crimes may be committed, would help to dispel some of the persistent misunderstandings concerning both famine and ICL more generally.

To make out these arguments, this article proceeds in three sections. First, an overview of existing scholarship and practice related to the intersections between famine and ICL is provided. This section demonstrates that famine-based ICL scholarship often utilizes confusing language that misleadingly suggests that famines are, in

¹⁴ In this vein, Diana Sankey has observed that “since mass starvation has traditionally been associated with natural disasters, perpetrators have been able to portray deaths and suffering as simply resulting from natural disasters or from the unforeseen consequences of other forms of violence.” Diana Sankey, *Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice*, 8 INT’L J. TRANSITIONAL JUST. 121, 129 (2014).

and of themselves, criminal events. Meanwhile in practice, the subject of famine tends to be pushed to the margins of ICL accountability efforts and/or treated as a contributing cause or collateral consequence of more familiar forms of atrocity crimes. Second, the question of potential areas of overlap between famine situations and genocide, war crimes, and crimes against humanity is revisited. This section demonstrates that each of these three main categories of international crimes may be implicated by famine and can provide significant coverage over key famine harms and attendant culpabilities, depending on the relevant circumstances. Third, the implications of this disconnect between potential and actual ICL coverage of famines is considered. In particular, perceived roadblocks to ICL famine accountability, such as overdetermined causation, group culpability, concerns of criminalizing poor policy choices or mere negligent governance, and omission versus commission concerns are addressed. Each of these perceived roadblocks are dismissed as being either general challenges presented by virtually all atrocity situations (e.g. causal overdetermination and complex group commission) or grounded in misunderstandings of the dynamics of modern famine (e.g. that famines are products of omissions, rather than positive acts). This article then concludes by considering some of the questions raised by the foregoing analysis for the international criminal justice system more broadly.

2. FAMINE AND ICL: THE STORY SO FAR

The standard narrative regarding the relationship between famine and ICL is one of near-complete neglect.¹⁵ While in a general sense it is true that there has yet to be an ICL prosecution predicated specifically and exclusively on famine there has been some limited engagement with famine issues in ICL jurisprudence. For example,

¹⁵ For example, David Marcus states in a 2003 article that “the international community has never called for international criminal trials for government officials responsible for creating, inflicting, or prolonging famine.” Marcus, *supra* note 5, at 246.

the prosecutions of Adolf Eichmann in Israel¹⁶ and Hans Frank¹⁷ at the International Military Tribunal (IMT) in Nuremberg both resulted in convictions for various international crimes based at least partially on enforcing starvation conditions on civilians. In convicting Frank, who held the positions of Chief Civil Administration Officer and later, Governor General, of occupied Poland during World War II, the IMT found that “[t]he evidence establishes that this occupation policy was based on the complete destruction of Poland as a national entity, and a ruthless exploitation of its human and economic resources for the German war effort. All opposition was crushed with the utmost harshness.”¹⁸ Recent research by Evelyne Schmid demonstrates the significant degree to which the imposition of starvation conditions was integral to this ruthless occupation policy.¹⁹ In Frank’s private journal, translated by Schmid, he wrote that if the Nazis sentenced 1.2 million Jews to “die of hunger” that such deaths would likely be “noted only marginally” by the international community.²⁰

Although Frank’s conviction at the IMT demonstrates that he was not fully accurate in his assessment of the way in which the famine conditions in Jewish ghettos (and for that matter, in occupied Poland) would be treated by the international community, he did accurately identify a broader tendency to mischaracterize famines as non-criminal events. The international community has historically viewed famine and other socio-economic forms of mass harm causation as resulting in unforeseeable harms or involving individual agency-devoid, wholly structural causes. As a result, despite a growing body of research demonstrating that famines and other socio-economic catastrophes can be products of rather direct human causation, there exists a persistent reluctance to conceptualize such

¹⁶ CrimC (Jer) 40/61 Attorney General v. Adolf Eichmann, ¶¶ 195-99 (1961) (Isr.) [hereinafter *Eichmann Judgement*], available at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf [<https://perma.cc/78WF-EVCH>].

¹⁷ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 296-98 (1946) [hereinafter *IMT Judgement*], available at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf [<https://perma.cc/P8TQ-5LW7>] (convicting accused Hans Frank of war crimes and crimes against humanity predicated on the treatment of civilians in occupied Poland).

¹⁸ *Id.* at 296-97.

¹⁹ EVELYNE SCHMID, TAKING ECONOMIC, SOCIAL AND CULTURAL RIGHTS SERIOUSLY IN INTERNATIONAL CRIMINAL LAW 1-2 (2015).

²⁰ Quoted in *id.* at 2.

events as atrocities worthy of an ICL response. Quite often scholars, lawyers and judges tend to dismiss famine and other forms of socio-economic harm causation as being inherently excluded from the purview of ICL as this body of law is currently constituted.²¹ A growing cohort of scholars however, has identified opportunities within ICL, *de lege lata*, to address certain real-world socio-economic harms,²² including famine.²³

Despite the important contributions of much of this scholarship, in certain ways it has added to, rather than reduced the general state of confusion surrounding the question of intersections between ICL and famine. Scholars analyzing famine as a potential subject of ICL often employ terminology that suggests that the conditions of famine or starvation themselves are, or at least should be, directly labeled international crimes. This language of “famine crimes”²⁴ suggests that famine/starvation are either already criminalized

²¹ The assumption that violence, in a narrow sense of the word, is the primary subject matter of ICL pervades ICL scholarship. One example of such an assumption is an article written by current ICC Trial Chamber Judge Chile Eboe-Osuji concerning potential ICL accountability for gross corruption, which he refers to as “kleptocracy.” In the article, Judge Eboe-Osuji advocates for an ICL-based approach to combatting kleptocracy. In doing so, however, he argues that kleptocratic rulers tend to commit violent human rights abuses to maintain their power and that kleptocratic acts amount to direct human rights violations. Nonetheless, Judge Eboe-Osuji presents his argument primarily as one advocating the extension of ICL, rather than broader application of existing ICL, stating that although “the international community appears now to have found the courage to visit with criminal sanctions individuals who grossly violate the fundamental rights of others . . . this resolve appears thus far to focus exclusively on gross violations of human rights—the violent type.” Chile Eboe-Osuji, *Kleptocracy: A Desired Subject of International Criminal Law that is in Dire Need of Prosecution by Universal Jurisdiction*, in *AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE*, 121, 129 (Evelyn A. Ankumah & Edward K. Kwakwa eds., 2005).

²² See generally, e.g., Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 *NORTHWEST. UNIV. L. REV.* 1257 (2007) (arguing that international criminal tribunals should expand their scope outside of conflicts and crises to long-term systemic abuses committed during peacetime); SCHMID, *supra* note 19 (applying international criminal law to violations of economic, social and cultural rights).

²³ See generally, e.g., Marcus, *supra* note 5 (advocating for the criminalization of the knowing or intentional use of policies that cause famine to decimate targeted populations).

²⁴ This language is regularly employed by both scholars advocating for the creation of famine/starvation-specific international crimes and those advocating for the application of existing ICL provisions to famine/starvation. See, e.g., *id.*; Edkins, *supra* note 5; Bashi, *supra* note 5; DE WAAL, *supra* note 5. Each of these authors, to varying degrees, focuses on current opportunities to address famine/starvation via ICL.

directly, or need to be for accountability to be successfully pursued. Such language has the potential to confuse key issues and to mischaracterize the relationship between ICL and famine as one that is inherently discordant.

The question of ICL accountability for famine was most directly and fulsomely addressed by David Marcus in a widely cited 2003 article in which he argues that certain forms of what he terms “faminogenic” behavior could be prosecuted as crimes against humanity.²⁵ Marcus argues more specifically that “existing international law criminalizes first- and second-degree faminogenic behavior.”²⁶ First-degree faminogenic behavior occurs when “governments deliberately use hunger as a tool of extermination to annihilate troublesome populations.”²⁷ Second-degree behavior occurs when a government “recklessly” continues famine-causing policies “despite learning that they are causing mass starvation.”²⁸ Meanwhile, Marcus contends that ICL could not be deployed successfully as an accountability mechanism for third and fourth-degree faminogenic behavior.²⁹ Third-degree refers to situations where authoritarian governments indifferently “turn blind eyes to mass hunger.”³⁰ Finally, fourth-degree faminogenic behavior is described by Marcus in terms of negligence, involving “incompetent or hopelessly corrupt government” who are unable to respond effectively to halt famine.³¹ Ultimately, Marcus is pessimistic regarding the likelihood that ICL’s “patch-work” coverage over famine scenarios will result in much actual ICL practice and calls for the codification of new, famine-specific international crimes.³²

Since the publication of Marcus’ influential article, numerous scholars and commentators have addressed the question of famine accountability under ICL. Much like Marcus, Jenny Edkins argues that there is a need to replace the causally-neutral language of fam-

²⁵ Marcus, *supra* note 5.

²⁶ *Id.* at 246.

²⁷ *Id.* at 247.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 246–47.

³¹ *Id.* at 246.

³² *Id.* at 280.

ine, suggesting the phrase “mass starvation” to highlight the causality involved.³³ Also a proponent of codification, Edkins further argues that explicit codification of famine-related international crimes could remove “immunity” from those who “commit famine crimes or the crime of mass starvation.”³⁴ This tendency to refer to famine or starvation as “crimes” is also prevalent in other scholarship on the issue.³⁵

Other scholars, including the author, have considered potential ICL accountability for particular real-world famine scenarios. This scholarship also presents a mixed bag of conclusions. For example, in a 2011 article, the author suggested that a combination of the crimes against humanity of extermination, persecution and/or other inhumane acts, would present a useful framework for pursuing criminal accountability of former senior Khmer Rouge leaders for enforcing famine conditions on the civilian population while in power, concluding that convictions appear possible.³⁶ This conclusion can be contrasted with those of Solomon Bashi and Howard de Nike, who both concluded that accountability for the Khmer Rouge famine via ICL would likely be unattainable, raising issues of causation, the risk of retroactive criminalization, and *mens rea* defenses as potential roadblocks.³⁷

In a 2007 article, Grace Kang argued that North Korean dictator Kim Jong-Il and his subordinates could likely be held individually accountable for the crime against humanity of extermination predicated on the enforcement of famine conditions throughout the country.³⁸ In contrast, Rhoda Howard-Hassmann, writing after the 2011 death of Kim Jong-Il, concluded that the famine causing behavior of the North Korean dictatorship qualified “merely” as the crime against humanity of other inhumane acts.³⁹

Meanwhile, other commentators have focused on the relationship between severe violations of certain economic and social hu-

³³ Edkins, *supra* note 5, at 61.

³⁴ *Id.*

³⁵ For example, in discussing the Khmer Rouge era famine in Cambodia, Solomon Bashi repeatedly characterizes “starvation” as a “crime.” Bashi, *supra* note 5.

³⁶ DeFalco, *supra* note 5.

³⁷ Howard J. De Nike, *Prosecuting Avoidable Famine as a Crime against Humanity* (Dec. 20, 2011), Law and Global Justice Forum (on file with author); Bashi, *supra* note 5.

³⁸ Kang, *supra* note 5, at 85.

³⁹ Howard-Hassmann, *supra* note 5, at 158.

man rights, most notably the right to adequate food, and ICL. Commentators such as Evelyne Schmid, Diana Kearney and Larissa van den Herik have all, to varying degrees, argued that economic, social and cultural rights form a blind spot in the current international criminal justice regime and that such blindness is not necessitated by the strict boundaries of ICL, *de lege lata*.⁴⁰ Other scholars have touched on famine conditions as aspects of “genocide by attrition” or “slow-burning” genocidal processes, or as a part of a broader blindness to economic questions in the pursuit of transitional justice.⁴¹

As this scholarly debate has continued, in recent years small steps have been taken towards addressing famine and starvation via ICL in actual practice. Yet such steps have been hesitant at best, focusing mostly on starvation conditions in prisons⁴² or referring to famine more generally as it relates to well-established forms of atrocity crimes. At the International Criminal Court (ICC), Omar Al Bashir, President of the Republic of the Sudan, and several of his associates have been charged with genocide and crimes against humanity, predicated in part on their alleged roles in attacks on villages in the Darfur region that resulted in large numbers of deaths attributable to both direct violence and the related spread of starvation and disease.⁴³ The ICC Office of the Prosecutor has alleged that

⁴⁰ SCHMID, *supra* note 19; Diana Kearney, *Food Deprivations as Crimes against Humanity*, 46 NYU J. INT’L L. & POL. 253 (2013); Larissa van den Herik, *Economic, Social, and Cultural Rights-International Criminal Law’s Blind Spot?*, in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES 343, 365–66 (Eibe H. Riedel, Gilles Giacca, & Christophe Golay eds., 2014).

⁴¹ See, e.g., Fein, *supra* note 6 (mentioning starvation as one weapon used in several cases of genocide by attrition); Rosenberg & Silina, *supra* note 6 (discussing genocide by attrition); Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar’s Rohingya*, 23 PAC. RIM POL’Y J. 683 (2014) (studying the long-term human rights abuses in Myanmar); Zinaida Miller, *Effects of Invisibility: In Search of the “Economic” in Transitional Justice*, 2 INT’L J. TRANSITIONAL JUST. 266 (2008) (discussing the omission of issues of economic justice and structural violence from the field of transitional justice); JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION (Dustin N. Sharp, ed., 2014) (examining and arguing for a greater role for transitional justice in economic violence).

⁴² See Kearney, *supra* note 40, at 256 (summarizing ICL case law related to starvation conditions in prison settings).

⁴³ The general factual allegations are laid out in Prosecutor v. Al Bashir, ICC-02/05-157-AnxA, Public Redacted Version of the Prosecutor’s Application under Article 58 (July 14, 2008) [hereinafter Al Bashir, Article 58 Application]. ICC Pre-Trial Chamber I amended the charges following this application. Prosecutor v. Al Bashir, ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al

the creation of famine formed part of a criminal plan to take control over certain areas in Darfur through the commission of genocidal acts and various crimes against humanity.⁴⁴ Thus far, however, Al Bashir and his key associates have successfully evaded arrest and referral to the ICC.

North Korea has been another famine site that has engendered significant interest in a potential ICL response. Former North Korean dictator Kim Jong-Il died however, without facing accountability for enforcing disastrous famine conditions on the civilian population,⁴⁵ and his son and successor Kim Jong-Un has similarly managed to evade legal accountability thus far. The latter has continued to enjoy impunity despite the fact that a United Nations (UN) commission of inquiry concluded in 2014 that by “knowingly causing prolonged starvation” Kim Jong-Un and other high-level North Korean officials appear to have committed the crime against humanity of other inhumane acts against the North Korean civilian population.⁴⁶ Recently, Marzuki Darusman, UN Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea, called for Kim Jong-Un to be officially warned that he could be held accountable for various international crimes based on treatment of civilians under his rule.⁴⁷ Yet the prospect of actually prosecuting Kim Jong-Un or his underlings remains unlikely at the present time.

Although it is tempting to attribute the lack of accountability for famine in Darfur and North Korea to more generalized enforcement

Bashir (July 12, 2010) [hereinafter Al Bashir, Second Arrest Warrant]; *see also* Edkins, *supra* note 5, at 62-63 (discussing the prosecution of starvation crimes in Darfur under “more general provisions against violence against civilians”).

⁴⁴ Al Bashir, Article 58 Application, *supra* note 43.

⁴⁵ For an overview of Jong-Il’s potential ICL responsibility for enforcing such famine conditions, see Kang, *supra* note 5; Howard-Hassmann, *supra* note 5.

⁴⁶ Comm’n of Inquiry on Human Rights in the Democratic People’s Republic of Korea, *Rep. of the Comm’n of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, U.N. Doc. A/HRC/25/63, ¶¶ 49-55, 74-79, 82 (Feb. 7, 2014) [hereinafter 2014 UN North Korea Report]. For a detailed overview of the factual findings of the Commission, see Comm’n of Inquiry on Human Rights in the Democratic People’s Republic of Korea, *Rep. of the Detailed Findings of the Comm’n of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014).

⁴⁷ Nick Cumming-Bruce, *North Korea Leader Should Be Told He Could Face Trial, U.N. Official Says*, N.Y. TIMES (Feb. 15, 2016), http://www.nytimes.com/2016/02/16/world/asia/north-korea-leader-should-be-told-he-could-face-trial-un-official-says.html?_r=0 [https://perma.cc/68AE-FZ3T].

problems and jurisdictional gaps that plague the current international criminal justice regime, famine accountability has also been lacking even when general personal and subject matter jurisdiction is obtained. Famine and starvation were major components of the atrocities committed in both East Timor and Cambodia. The East Timorese Reception, Truth and Reconciliation Commission estimated that “84,200 people died from displacement-related hunger and illness” during the repressive Indonesian occupation of 1975-1999.⁴⁸ Demographers commissioned by judges at the Extraordinary Chambers in the Courts of Cambodia (ECCC) estimated that approximately fifty percent, or between 800,000 and 1.2 million Cambodians died from causes other than direct interpersonal violence during the reign of the Khmer Rouge from 1975-1979.⁴⁹ Yet at both the East Timorese Special Panels for Serious Crimes (SPSC) and the ECCC, famine issues have taken a backseat to more traditional atrocity crimes.

Although the East Timor Commission for Reception, Truth and Reconciliation dedicated an entire chapter of its final report to forced displacement and famine,⁵⁰ the mandate of the SPSC was limited to directly addressing acts of terrorism and direct violence committed solely between January 1 and October 25 of 1999.⁵¹

Meanwhile, the degree to which issues related to the Khmer Rouge era famine in Cambodia will be addressed by the ECCC remains unclear. To date, the ECCC has disproportionately focused on familiar, physically violent crimes. The Court’s first judgement was limited to crimes related to the operation of a specific prison,

⁴⁸ Comm’n for Reception, Truth, and Reconciliation Timor-Leste, *Chega! The Rep. of the Comm’n for Reception, Truth, and Reconciliation Timor-Leste*, 72 (2005), available at <http://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf> [<https://perma.cc/HQH4-MPEP>] [hereinafter *Chega!*].

⁴⁹ Ewa Tabeau & Kheam They, *Khmer Rouge Victims in Cambodia, April 1975 - January 1979: A Critical Assessment of Major Estimates* (Sept. 30, 2009), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D140_1_1_Public_Redacted_EN.PDF [<https://perma.cc/6AHL-7WWK>].

⁵⁰ *Chega!*, *supra* note 48, at 72-85. For a helpful discussion of these findings, see Sankey, *supra* note 14, at 138-39.

⁵¹ The Special Panels also suffered from serious fair trial shortcomings. For an overview of the work of the Special Panels and an analysis of their shortcomings, see DAVID COHEN, *INDIFFERENCE AND ACCOUNTABILITY: THE UNITED NATIONS AND THE POLITICS OF INTERNATIONAL JUSTICE IN EAST TIMOR* (2006), <https://scholarship.manoa.hawaii.edu/bitstream/10125/3528/1/sr009.pdf> [<https://perma.cc/MZ66-BS8A>].

torture and execution center.⁵² Meanwhile, the Court's second case against Nuon Chea and Khieu Samphan, the two most senior former Khmer Rouge leaders still alive, has been bifurcated into a series of trials, with the first, now-completed trial (referred to as Case 002/01) focusing exclusively on allegations related to the events immediately following the Khmer Rouge's seizure of power in 1975.⁵³ While the second Case 002 trial (referred to as Case 002/02) is currently underway and this trial does touch on living and working conditions, it does so only in relation to a handful of specific locations, rather than addressing such issues from a nationwide perspective. It remains to be seen whether and the degree to which the ECCC Trial Chamber will address famine, either locally or as a nationwide phenomenon.

3. REVISITING FAMINE ACCOUNTABILITY OPPORTUNITIES WITHIN ICL

Given that famine has thus far occupied a rather awkward position at the periphery of international criminal justice efforts, one might conclude that this is because ICL simply lacks the necessary legal provisions to address famine causation successfully. The harms associated with famine—slow deterioration and the spread of disease—are not immediately familiar as products of criminal behavior in a visceral sense. That is, famines, though branded as international disasters, crises or emergencies, do not involve the kinds of spectacular violence that are commonly associated with the commission of atrocity crimes. Famines kill slowly and lack any physical linkages connecting those responsible for causing famine with those who ultimately suffer and die. As a result, unlike more traditional atrocity crimes, such as violent massacres, bombings or sexual violence, famine situations present no singular, identifiable moment of self-evidently criminal action. Such singular, manifestly criminal acts provide a useful fulcrum, around which an entire ICL trial can be centered. Such dramatic moments of criminality rarely exist during famines. Instead, famines tend to be caused cumulatively and to worsen over time. This begs the question of feasibility. Can famine events actually engender ICL responsibility? Various scholars

⁵² Prosecutor v. Duch, Case No. 01/18-07-2007/ECCC/TC, Judgement (Extraordinary Chambers in the Courts of Cambodia July 26, 2010).

⁵³ Prosecutor v. Chea, Case No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgement (Extraordinary Chambers in the Courts of Cambodia Aug. 7, 2014).

have answered this question affirmatively, though subject to important qualifiers and often disagreeing as to what crimes might be involved.⁵⁴ The following section revisits this question of feasibility by providing an analysis of promising entry points for famine accountability within genocide, war crimes and crimes against humanity. This analysis demonstrates that, depending on the circumstances, famine may form a means or modality through which genocide, war crimes and/or crimes against humanity may be committed.

3.1. Genocide

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") defines genocide as one or more of an enumerated list of "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group."⁵⁵ In *Prosecutor v. Musema*, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) held that the crime of genocide consists of three elements: (1) commission of one of the enumerated acts; (2) against a recognized protected class, "specifically targeted as such"; and (3) committed with the intent to destroy the protected group in whole or in part (*dolus specialis*).⁵⁶ Enumerated genocidal acts include, *inter alia*, killing members of the group; causing "serious bodily or mental harm" to members of the group; and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."⁵⁷ Recent jurisprudence has held that the portion of a protected group targeted for destruction must form a "substantial portion" of the overall group population.⁵⁸ This requirement may be numerically or

⁵⁴ See, e.g., Marcus, *supra* note 5; Edkins, *supra* note 5; Kang, *supra* note 5; Howard-Hassmann, *supra* note 5.

⁵⁵ Convention on the Prevention and Punishment of the Crime of Genocide, concluded Dec. 9 1948, 78 U.N.T.S. 277, art. 2 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

⁵⁶ *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 154 (Jan. 27, 2000).

⁵⁷ Genocide Convention, *supra* note 55, at art 2.

⁵⁸ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶ 8 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgement, ¶ 82 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

qualitatively satisfied;⁵⁹ however, “the part targeted must be significant enough to have an impact on the group as a whole.”⁶⁰

In *Prosecutor v. Akayesu*, the ICTR Trial Chamber held that “killing members of the [protected] group” must be interpreted as “murder,” according to the definition in the Rwandan penal code to predicate liability for genocide.⁶¹ Thus, for an instance of famine to amount to genocide under article 2(a) of the Genocide Convention, those responsible for the famine must have intentionally sought to kill members of a protected group. This interpretation means that for this particular *actus reus* requirement to be satisfied within a famine scenario, the perpetrators must have acted with the specific intent to kill members of a protected group, while also having the special intent for these killings to form part of an effort to destroy the group in whole or in part. The Chamber further held that “[c]ausing serious bodily or mental harm to members of the group does not necessarily mean that the harm [required] is permanent and irremediable” for genocide liability to attach.⁶² The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) further elaborated on this point in *Prosecutor v. Krstić*, stating:

serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.⁶³

Presumably, enforcement of famine conditions on a protected group would rise to the requisite level of “serious bodily or mental harm,” as the suffering associated with famine often causes the type

⁵⁹ *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 634 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (holding that genocide requires “an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively”).

⁶⁰ *Krstić*, Appeal Judgement, *supra* note 58, at ¶ 8.

⁶¹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 500 (Sept. 2, 1998) (holding that under the Rwandan Penal Code murder “is homicide committed with the intent to cause death”).

⁶² *Id.* at ¶ 502.

⁶³ *Krstić*, Trial Judgement, *supra* note 59, at ¶ 513. *Krstić* was convicted of genocide by the Trial Chamber. *Id.* at ¶ 688. On Appeal, this conviction was downgraded to “aiding and abetting” genocide. *Krstić*, Appeal Judgement, *supra* note 58, at ¶ 138. Nonetheless, the Appeals Chamber did not find any error in the Trial Chamber’s finding that genocide occurred in Srebrenica during the relevant time. *Id.* at ¶¶ 2-32.

of “grave and long-term disadvantage” to the ability of victims to live a normal and constructive life required according to current ICL jurisprudence.⁶⁴

3.1.1. *Inflicting Genocidal “Conditions of Life”*

Starvation may also be implicated under article 2(c) of the Genocide Convention as a method of “inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”⁶⁵ The Preparatory Commission for the International Criminal Court subdivided the requirements of article 2(c) into five distinct elements:

- (1) The perpetrator inflicted certain conditions of life upon one or more persons.
- (2) Such person or persons belonged to a particular national, ethnical, racial or religious group.
- (3) The perpetrator intended to destroy, in whole or in part, the national, ethnical, racial or religious group, as such.
- (4) The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
- (5) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.⁶⁶

⁶⁴ Krstić, Trial Judgement, *supra* note 59, at ¶ 513. Famine survivors face serious long term physical and mental health challenges. For an overview of the “horrors” of famine and the demographic implications of famine, see generally Ó GRÁDA, *supra* note 2, at 45–68, 90–128. There is extensive literature examining the long-term health ramifications of famine on both survivors and children born to undernourished mothers. While this scholarship continues to evolve, the fact that famines result in long-term negative health outcomes for survivors, with likely intergenerational consequences as well, is relatively settled. For an example of such scholarship, see, e.g., Tessa Roseboom, Susanne de Rooij & Rebecca Painter, *The Dutch Famine and its Long-Term Consequences for Adult Health*, 82 EARLY HUM. DEV. 485 (2006).

⁶⁵ Krstić, Trial Judgement, *supra* note 59, at ¶ 540.

⁶⁶ Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court, Addendum Part II, Finalized draft text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000), at 7, art 6(c).

According to the Preparatory Commission, intentionally inducing starvation amongst a protected class of individuals appears to qualify as genocidal infliction of “conditions of life” that destroy a targeted group in whole or in part.⁶⁷

The ICTR has followed a similar tract in discussing what acts may satisfy article 2(c) of the Genocide Convention. In *Akayesu*, the ICTR Trial Chamber held that article 2(c) includes “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”⁶⁸ In *Prosecutor v. Kayishema*, the Trial Chamber similarly stated that the Genocide Convention “allows for the punishment of the perpetrator for the infliction of substandard conditions of life which, if left to run their course, could bring about the physical destruction of the group . . . [including, *inter alia*,] the starving of a group of people.”⁶⁹

3.1.2. Genocidal Dolus Specialis

While subsections (b) and (c) of article 2 of the Genocide Convention establish that the *actus reus* of genocide could encompass the targeted creation of famine conditions affecting a particular national, ethnic, racial or religious group, the success or failure of any genocide prosecution predicated on famine would likely hinge on whether the crime’s stringent *mens rea* could be established. A perpetrator of genocide must commit one of the acts enumerated under article 2 of the Genocide Convention while possessing the specific intent to destroy a protected group in whole or in part.⁷⁰ This special *mens rea* of *dolus specialis* requires that the victims be targeted specifically *because* of their status as a member of a protected class, as “the victim of the crime of genocide is not only the individual, but also

⁶⁷ *Id.* at 7 n. 4 (The Preparatory Commission includes “deprivation of resources indispensable for survival, such as food or medical services” as an example of a genocidal infliction of conditions of life calculated to cause physical destruction of part or all of a group.).

⁶⁸ *Akayesu*, Trial Judgement, *supra* note 61, at ¶ 505.

⁶⁹ *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement, ¶ 116 (May 21, 1999).

⁷⁰ *See, e.g.*, *Krstić*, Trial Judgement, *supra* note 59, at ¶ 542 (stating that “the *mens rea* of [genocide] is described as the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”).

the group to which he or she belongs.”⁷¹ Thus, for genocide to apply to a famine scenario, there must be evidence demonstrating that not only were those individuals responsible for causing the famine aware of the suffering and death that resulted from their actions, but also that such individuals specifically caused the famine with the goal of destroying at least a substantial portion of a group of people protected by the Genocide Convention.

3.1.3. Intersections between Famine and Genocide

Even though in most famine scenarios, it would be quite difficult to prove that any accused was aware that they were causing famine, let alone that such accused acted with the *mens rea* of *dolus specialis*, there does exist some support for the treatment of the imposition of famine conditions as a key aspect of a larger genocidal project. In a letter written sometime around 1953 but only recently published, genocide pioneer Rafael Lemkin discussed the “Soviet Genocide in Ukraine.”⁷² Lemkin argued that the Soviet government used the “weapon” of starvation against Ukrainian farmers, resulting in 5,000,000 famine deaths between 1932 and 1933.⁷³ According to Lemkin’s view, the Ukrainian peasantry was “sacrificed” by the Soviet Kremlin by enforcing famine conditions through forced collectivization and state grain expropriation.⁷⁴ According to Lemkin, enforcement of these conditions was one aspect of a four-pronged genocidal plan aimed at the “systematic destruction of the Ukrainian nation, in its progressive absorption within the new Soviet nation.”⁷⁵ Other commentators have also argued that this famine was a product of genocide, as well as other international crimes.⁷⁶

⁷¹ Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgement, ¶ 61 (June 7, 2001) (citing Akayesu, Trial Judgement, *supra* note 61, at ¶¶ 521-22); accord ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 137 (2d ed., 2008).

⁷² Text of original letter reprinted in Roman Serbyn, *Lemkin on Genocide of Nations*, 7 J. INT’L CRIM. JUST. 123, 125-30 (2009).

⁷³ *Id.* at 128.

⁷⁴ *Id.*

⁷⁵ *Id.* at 129.

⁷⁶ See, e.g., Marcus, *supra* note 5; Aloyo, *supra* note 8, at 500. Both authors generally refer to the Ukrainian *Holodomor* famine as an example of a historical example of a situation involving a proposed understanding of international criminality.

The 1961 prosecution of Adolf Eichmann in Israel provides further support for this formulation of genocide via starvation,⁷⁷ albeit in the form of a single, highly contentious domestic trial.⁷⁸ The District Court of Jerusalem convicted Eichmann of multiple counts of “crimes against the Jewish People,” a domestic formulation of genocide, predicated on his role in the Nazi Party’s “Final Solution” plan to exterminate all Jews in Europe, launched in the summer of 1941.⁷⁹

The District Court held that victims of the second count of crimes against the Jewish People were Jews who were “put to hard labour, with the intention of killing them, too, in time, in some way; but who were saved because of the advance of the Soviet army.”⁸⁰ Similarly, the third count of crimes against the Jewish people was predicated on “causing serious bodily or mental harm to Jews” after the summer of 1941 pursuant to the Final Solution:

by means of enslavement, *starvation*, deportation and persecution, confinement to ghettos, to transit camps and to concentration camps - all this under conditions intended to humiliate the Jews, to deny their rights as human beings, to suppress and torment them by inhuman suffering and torture . . . with the [ultimate] intention of exterminating the Jewish People.⁸¹

Thus, according to the Israeli District Court in *Eichmann*, holocaust survivors who had suffered at the hands of the Nazis, yet ultimately survived, were also victims of “crimes against the Jewish people,” along with the millions who were killed as part of the Final Solution plan.

Eichmann also provides an example of the critical importance of *mens rea* proofs in any genocide prosecution and how such proofs could interact with famine issues. In *Eichmann*, the District Court held that the forced deportation of Jews prior to the implementation of the Final Solution plan did not amount to a crime against the Jew-

⁷⁷ For an excellent account of this trial, see HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Viking Press 1963).

⁷⁸ For a renowned critique of the legal processes through which Eichmann was prosecuted, see *id.*

⁷⁹ *Eichmann* Judgement, *supra* note 16, at ¶¶ 195-99.

⁸⁰ *Id.* at ¶ 196.

⁸¹ *Id.* at ¶ 199 (emphasis added).

ish people, due to insufficient proof Eichmann possessed the necessary *mens rea* at the time.⁸² This finding was despite the fact that the Court also found that the deportations were “organized by the Accused in complete disregard for the health and lives of the deported Jews” and also that “many Jews died as a result of the expulsions.”⁸³ Although Eichmann himself was found to have both “foresaw” and “wished” the “murderous consequences of these deportations,” the Court found insufficient evidence to conclude that Eichmann possessed the “intentional aim to exterminate” and therefore, “deal[t] with these inhuman acts as being crimes against humanity” rather than crimes against the Jewish People.⁸⁴

Meanwhile, although both the ICTR and ICTY have dealt extensively with genocide allegations, both tribunals have focused mainly on the perpetration of direct violence as methods of committing genocide. The Rwandan genocide was short and brutally violent, without time for killing by starvation to become a serious possibility. Meanwhile, in the case of the former Yugoslavia, genocide charges were focused on mass executions of Muslim men and boys at Srebrenica. As such, these courts, while generally acknowledging that genocide could be committed by means other than mass executions and targeted physical violence, have dealt with issues of famine and starvation exclusively under the rubrics of war crimes and/or crimes against humanity.

At the ICC, meanwhile, it appears the issues of potential intersections between famine conditions and genocide may eventually be borne out within the context of cases arising out of the Darfur region of Sudan. Most notably, following a successful appeal by the prosecution, ICC Pre-Trial Chamber I added genocide charges to the arrest warrant against Omar Al Bashir.⁸⁵ The prosecution had alleged that genocidal acts were committed against members of the Fur, Masalit and Zaghawa ethnic groups in the Darfur region, including “causing serious bodily or mental harm and . . . deliberately inflicting conditions of life calculated to bring about physical destruction” of the ethnic groups as part of the Sudanese government’s anti-insurgency campaign.⁸⁶ Indeed, specific reference is made in the se-

⁸² *Id.* at ¶ 186.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Al Bashir, Second Arrest Warrant, *supra* note 43.

⁸⁶ *Id.* at 7.

cond arrest warrant to acts of poisoning potable water sources, forcible transfer and encouraging members of other ethnic groups to settle the land of forcibly evicted victims.⁸⁷ The ICC Office of the Prosecutor, in its original application to the Pre-Trial Chamber concerning the situation in Darfur, referenced various starvation-causing acts in Darfur as aspects of an alleged genocidal criminal enterprise led by Al Bashir and his inner circle.⁸⁸ In particular, the OTP alleged that in the Darfur region approximately “83,000 [victims] died as a consequence of injury, *starvation*, lack of water, or conditions in [refugee] camps” between September 2003 and January 2005.⁸⁹ In 2012 ICC Prosecutor Fatou Bensouda has also stated that further charges may be pursued in relation to the situation in Darfur, including those predicated on “the blocking of distribution of humanitarian aid.”⁹⁰ Whether Al Bashir or his alleged criminal compatriots will ever be successfully arrested and brought to the Hague for trial however, remains uncertain, as the ICC’s investigation in Darfur has been suspended since December 2014.⁹¹

Despite this limited jurisprudence and the fact that the Darfur cases at the ICC remain in their preliminary stages, there is ample support already for the general proposition that enforcing famine conditions on a national, racial, ethnic or religious group, with the intent to destroy the group in whole or in part, could qualify as an act of genocide. The *Eichmann* Judgement provides some precedent, if only in the form of a single domestic conviction, while such an approach is also indirectly supported in ICTR and ICTY jurisprudence concerning the potential methods of establishing genocidal *actus reus*.⁹² Finally, if and when Darfur situation cases make their

⁸⁷ *Id.*

⁸⁸ Al Bashir, Article 58 Application, *supra* note 43, at ¶¶ 30, 111, 172-73, 177, 202, 388 (repeatedly referencing the causation of death by starvation as a main aspect of the alleged genocide in Darfur).

⁸⁹ *Id.* at ¶ 111 (emphasis added).

⁹⁰ Peter James Spielmann, ICC Prosecutor: Sudan may face more Darfur charges, ASSOCIATED PRESS (Dec. 13, 2012), <http://www.sandiegouniontribune.com/sdut-icc-prosecutor-sudan-may-face-more-darfur-charges-2012dec13-story.html> [<https://perma.cc/X7P6-U23P>].

⁹¹ See David Smith, ICC Chief Prosecutor Shelves Darfur War Crimes Probe, THE GUARDIAN (Dec. 14, 2014), <https://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan> [<https://perma.cc/4GGN-29SL>].

⁹² See, e.g., Akayesu, Trial Judgement, *supra* note 61 at ¶ 506 (referencing *Eichmann* and holding that “the means of deliberate inflicting on the group conditions

way to trial at the ICC, it is likely that further jurisprudence will be developed discussing the circumstances under which enforcing famine conditions can be legally labelled as a method through which genocide may be committed.

3.2. War Crimes

The term “war crimes” refers to serious violations of international humanitarian law entailing individual criminal responsibility.⁹³ War crimes were charged extensively in post-World War II prosecutions⁹⁴ and are predicated on humanitarian law requirements dating back to the Hague Conventions of 1899⁹⁵ and 1907⁹⁶ and expanded upon in the four Geneva Conventions of 1949,⁹⁷ and

of life calculated to bring about its physical destruction, in whole or part [for purposes of the Genocide Convention], include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement”).

⁹³ See CASSESE, *supra* note 71, at 81.

⁹⁴ See, e.g., Charter of the Nuremberg International Military Tribunal, art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter IMT Charter].

⁹⁵ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, available at <https://ihl-databases.icrc.org/ihl/INTRO/150?OpenDocument> [https://perma.cc/53LZ-TNA9] [hereinafter 1899 Hague Convention].

⁹⁶ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, <https://ihl-databases.icrc.org/appl/ihl/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6> [https://perma.cc/6G6V-RGND] [hereinafter 1907 Hague Convention].

⁹⁷ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Aug. 12, 1949, 75 U.N.T.S. 31, available at <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> [https://perma.cc/2CT6-T7SF] [hereinafter Geneva I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/appl/ihl/ihl.nsf/2F5AA9B07AB61934C12563CD002D6B25/FULLTEXT/GC-II-EN.pdf> [https://perma.cc/3CKV-EDGG] [hereinafter Geneva II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, available at <https://ihl-databases.icrc.org/ihl/INTRO/375?OpenDocument> [https://perma.cc/U3FG-JR4Q] [hereinafter Geneva III]; Geneva Convention (IV) Relative to the Protection of Civilians in Times of War, Aug. 12, 1949, 75 U.N.T.S.

their two additional protocols of 1977.⁹⁸ The current body of war crimes is largely drawn from actions constituting so-called “grave breaches” of the Geneva Conventions, although other flagrant violations of customary humanitarian law can also rise to the level of war crimes.

3.2.1. *The Armed Conflict “Nexus” Requirement*

Once it is established that an armed conflict existed at the relevant time, the prosecution must demonstrate in each case that every charged war crime shared some link or “nexus” with the predicate armed conflict at issue.⁹⁹ The ICTY Trial Chamber has stated that what is required is an “obvious link” between an alleged criminal act and the predicate armed conflict in order for it to qualify as a war crime.¹⁰⁰ This requirement, however, does not mean that war crimes can only be committed within areas where armed hostilities physically take place, as it is sufficient that alleged war crimes be “closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”¹⁰¹

287 *available at* <https://ihl-databases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5> [https://perma.cc/FT95-Q5BS] [hereinafter Geneva IV].

⁹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979) [hereinafter “Protocol I”]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

⁹⁹ See *CASSESE*, *supra* note 71, at 82–86.

¹⁰⁰ *E.g.* Prosecutor v. Delalić (Čelebići Camp), Case No. IT-96-21-T, Judgement, ¶ 193 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (“It is axiomatic that not every serious crime committed during the armed conflict in Bosnia and Herzegovina can be regarded as a violation of international humanitarian law. There must be an obvious link between the criminal act and the armed conflict.”).

¹⁰¹ Prosecutor v. Blaškić (“Lašva Valley”), Case No. IT-95-14-T, Judgement, ¶ 69 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); *accord* Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgement, ¶ 32 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

3.2.2. *International versus Non-International Armed Conflicts*

Until relatively recently, the predicate armed conflict for war crimes applicability was strictly required to be international in character, thereby excluding the types of civil wars and insurgencies that now form the vast majority of armed conflicts.¹⁰² This antiquated focus on classical warfare between two distinct nation-states has significant repercussions for the potential coverage of war crimes over modern famine scenarios, as famine is often the by-product of localized, sectarian armed conflict or armed insurgencies. In 1995, the ICTY Appeals Chamber in the Tribunal's first case, *Prosecutor v. Tadić*, signaled a move towards relaxing this strict requirement by holding that serious violations of fundamental provisions of international humanitarian law may be regarded as true war crimes regardless of whether the underlying conflict is international in character.¹⁰³ The Chamber held that for a violation of humanitarian law to rise to the level of war crime, three conditions must be met: (1) the acts by the accused amount to a "serious infringement" of a humanitarian law provision protecting important values, the breach of which necessarily involves grave consequences for the victim; (2) the rule being violated must be part of customary international law or provided for in an applicable treaty; and (3) applicable law must provide for individual criminal responsibility for violations of the rule in question.¹⁰⁴ Although *Tadić* marked an emerging ICL trend towards relaxation of the strict requirement of an international armed conflict, the scope and applicability of war crimes remains narrower during non-international armed conflicts.¹⁰⁵

¹⁰² See, e.g., CASSESE, *supra* note 71, at 81 ("Traditionally, war crimes were held to embrace only violations of international rules regulating war proper; that is international armed conflicts and not civil wars.").

¹⁰³ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96-137 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (providing an overview of the evolution of customary international law in relation to internal armed conflicts and concluding that "customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife" at ¶ 134).

¹⁰⁴ *Id.* at ¶ 94.

¹⁰⁵ See, e.g., Knut Dörmann, "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes" 7 Max Planck U.N.Y.B. 341, 344-48 (2003) ("[A]pproximately half of the

Generally, an armed conflict exists “whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹⁰⁶ For the conflict to be deemed international in character, it must either involve the breakout of hostilities between two States¹⁰⁷ or, as held by the ICTY Trial Chamber in *Prosecutor v. Kordić*, an internal conflict may become international if: “(i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal conflict act on behalf of that State.”¹⁰⁸ In situations where it is unclear whether certain belligerent forces are affiliated with a foreign State or not, the ICTY has utilized a test of “overall control” to determine the relevant chain of command.¹⁰⁹

3.2.3. Victim Identity and Protected Classes

The identity of victims of putative war crimes also affects what crimes may be implicated in any given scenario. For crimes that originated as grave breaches of the Geneva Conventions, the victims must fall into one of the classes of individuals protected by the Conventions themselves, including: civilians under an occupying power, health workers and aid workers, and soldiers rendered *hors de combat*, such as wounded or shipwrecked soldiers, and prisoners of war.¹¹⁰ Importantly, under the Geneva Conventions, civilians are not protected from abuses committed by their own government, as

provisions of article 8 applicable to international armed conflicts were not included in the sections on non-international armed conflicts.”).

¹⁰⁶ Tadić, Decision on Interlocutory Appeal, *supra* note 103, at ¶ 70; *accord* Prosecutor v. Kunarac, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, ¶ 56 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

¹⁰⁷ *E.g.* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“It is indisputable that an armed conflict is international if it takes place between two or more States.”).

¹⁰⁸ *Id.*; *accord* Kordić, Trial Judgement, *supra* note 101, at ¶ 66.

¹⁰⁹ *E.g.*, Tadić, Appeal Judgement, *supra* note 107, at ¶ 120 (“Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.”).

¹¹⁰ *See* Geneva I, *supra* note 97; Geneva II *supra* note 97; Geneva III *supra* note 97; Geneva IV, *supra* note 97.

according to the fourth Geneva Convention relating to the protection of civilians, protected persons include civilians “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹¹¹ This limitation does not apply, however, to a limited set of war crimes consisting of violations of Common Article 3 shared by all four Geneva Conventions and applicable to all armed conflicts, including those non-international in character. For Common Article 3 to apply, the victims must simply be non-combatants.¹¹² Finally war crimes that have developed within general customary international law outside of the Geneva Conventions have individual requirements concerning victim status for some crimes, although typically reference is made to civilian victims more generally in the language of such crimes.

3.2.4. *Intersections between War Crimes and Famine*

War crimes have evolved into a long list of offences drawn from a mix of customary and codified ICL. While it is not a codification of custom, the ICC's Rome Statute provides an illustrative set of modern war crimes in Article 8, including numerous crimes that could be implicated during periods of famine and starvation. Which crime(s) might be relevant to any particular scenarios would depend largely on both whether the relevant famine took place during a period of international versus domestic armed conflict and the identity of the victims. For example, it is a war crime under Article 8(2)(a) of the Rome Statute to subject members of a class of persons protected by one of the four Geneva Conventions to “inhuman treatment,” to “[w]ilfully cause great suffering, or serious injury to body or health” of such individuals, or to extensively destroy or appropriate their property.¹¹³ Presumably, enforcing famine conditions on a pro-

¹¹¹ Geneva IV, *supra* note 97, at art. 4.

¹¹² See Geneva I, *supra* note 97; Geneva II, *supra* note 97; Geneva III, *supra* note 97; Geneva IV, *supra* note 97, at art. 3 (uniformly prohibiting “violence to life and person, in particular murder of all kinds” against persons placed *hors de combat*).

¹¹³ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 8(2)(a)(ii)-(iv), July 17, 1998 (entered into force July 1, 2002) [hereinafter *Rome Statute*].

tected civilian population could rise to the level of inhuman treatment, great suffering and/or serious injury. Moreover, wartime famines are often caused by military destruction of agricultural property or expropriation of foodstuffs and these actions could be prosecuted under the war crime of destroying or appropriating protected property.

The Rome Statute also provides for jurisdiction over various war crimes during periods of international armed conflict, including “directing attacks against civilian objects,” destroying or seizing enemy property, pillaging, committing “outrages upon personal dignity,” and most notably “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.”¹¹⁴

Meanwhile, the list of war crimes potentially relevant to famine and starvation that can be committed during periods of non-international armed conflict are much more cursory, including violations of Common Article 3 of the Geneva Conventions and limited customary law crimes. Article 8(2)(c)(i)-(ii) of the Rome Statute contains the war crime of “violence to life and person” which encompasses “cruel treatment” and also the crime of “outrages upon person dignity.”¹¹⁵ Meanwhile, Article 8(2)(e) subsections (v) and (xii) render pillage and destruction of property outside the “necessities of the conflict” war crimes during periods of non-international armed conflict.¹¹⁶

When considered as a whole, certain principles relevant to famine scenarios can be drawn out from amongst these war crimes. First, famine conditions could indirectly be treated as forming key aspects of war crimes in specialized situations, as the harms associated with periods of famine clearly can rise to the level of inhuman, cruel or degrading treatment, or an outrage against personal dignity, making the creation of famine conditions a potential *actus reus* mechanism for numerous war crimes. Second, the criminalization of “intentionally using starvation of civilians as a method of warfare” under Article 8(2)(b)(xxv) of the Rome Statute stands out as an uncharacteristically direct ICL mechanism for addressing famine attendant to periods of armed conflict. This crime is drawn directly

¹¹⁴ *Id.* at art 8(2)(b)(ii)-(iii), (vi), (xxi), (xxv).

¹¹⁵ *Id.* at art (2)(c)(i)-(ii).

¹¹⁶ *Id.* at art (2)(e)(v)(xii).

from Article 54(1) of Protocol I Additional to the Geneva Conventions, which also prohibits starvation of civilians as a method of warfare and goes on to state:

It is prohibited to [*inter alia*] remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them their sustenance value to the civilian population . . . whatever the motive, whether in order to starve out civilians, cause them to move away or any other motive.¹¹⁷

The language of Article 8(2)(b)(xxv) also specifically provides for the criminalization of acts which impede relief supplies as provided for under the Geneva Conventions.¹¹⁸ Specific references to civilian food rights are found in articles 23, 55, 59, 60 and 89 of the fourth Geneva Convention.¹¹⁹ Article 55 specifically references food rights of civilians in occupied territory, stating that “[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population.”¹²⁰ Article 55 thus places an affirmative duty on an occupying military authority to import necessary foodstuffs when civilian needs are not adequately met and forbids the requisition of food from civilian populations, especially if such requisition would lead to civilian shortages of food. Additionally, Article 23 requires the “free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases,”¹²¹ although subject to limitation if there are “serious reasons for fearing” such supplies will be “diverted from their destination” or “a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material,

¹¹⁷ Geneva I, *supra* note 97, at art. 54(1).

¹¹⁸ Rome Statute, *supra* note 113, at art. 8(2)(b)(xxv) (listing as a war crime “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”).

¹¹⁹ Geneva IV, *supra* note 97, at arts. 23, 55, 59, 60, 89.

¹²⁰ *Id.* at art. 55.

¹²¹ *Id.* at art. 23.

services or facilities as would otherwise be required for the production of such goods.”¹²² Article 59 requires the power occupying an inadequately supplied area to agree to relief schemes,¹²³ although Article 60 states that accepting such “[r]elief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55 . . . and 59.”¹²⁴ Reference to these provisions demonstrates that the drafters of the Rome Statute clearly sought to criminalize both positive acts intended to cause starvation of civilians and passive acts, such as refusing to permit or cooperate with outside humanitarian food relief efforts.

Charges based on Article 8(2)(b)(xxv), however, have yet to be pursued at the ICC, although it appears that the pursuit of war crimes charges for intentionally starving civilians was at least contemplated at the ICTY. The experience of the ICTY is illustrative of how narrow the war crime of intentionally using starvation of civilians as a method of warfare is. First, the crime solely applies to international armed conflicts, excluding internal conflicts, which are currently much more prevalent than true international wars. Second, the crime includes a rather stringent *mens rea* of intent, which appears to limit the crime’s scope to only apply to instances where famine is induced as part of a specific strategy to starve civilians. As such, other than in highly specialized circumstances, despite the rare inclusion of the word “starvation” within ICL, Article 8(2)(b)(xxv) of the Rome Statute appears to provide only narrow coverage over instances of famine and starvation attendant to armed conflicts.

In the former Yugoslavia, a commission of legal experts appointed by the UN Security Council considered whether this crime was committed during the siege of Sarajevo but concluded, based on the “tendency of both sides [of the conflict] to control food, water and electricity for publicity purposes, the intermingling of military forces and the civilian population and the fact that no one appears to have died during the siege from starvation, dehydration or freezing,” that the crime was inapplicable.¹²⁵ Similarly, no attempts were made to prosecute the war crime of intentional starvation of civilians predicated on conditions in other affected areas where severe food

¹²² *Id.* at art. 23, subsections (a), (c).

¹²³ *Id.* at art. 59.

¹²⁴ *Id.* at art. 60.

¹²⁵ *Final report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, ¶ 205, U.N. Doc. S/1994/674/Add.2 (Vol. I) (May 31, 1995), [hereinafter ICTY UN Experts Report].

shortages occurred during the Balkan conflict, such as in Srebrenica from 1992-1993, where famine conditions did reach the point of actual instances of civilian starvation.¹²⁶ Quite understandably, the prosecution at the ICTY appears to have focused its resources concerning Srebrenica on prosecuting crimes related to the notorious 1995 genocidal massacre of thousands of Muslim men and boys. More recently, journalist Alex Perry has invoked the war crime of intentionally using starvation of civilians as a method of warfare to accuse the Somali government, at the behest of its United States military advisors, of committing war crimes by impeding humanitarian food relief efforts destined for areas controlled by the Al-Shabaab militant group in 2011.¹²⁷ Perry's invocation of this particular war crime can be contrasted with the opinions of scholars such as Jens Ohlin and Andrew Jillions, who have argued that members of Al-Shabaab should be prosecuted for crimes against humanity based on their role in the deadly 2011 famine.¹²⁸ Famine has also become

¹²⁶ For example, humanitarian conditions in and around Srebrenica deteriorated from 1992-1993 amidst conflict between Bosnian Serb and Bosnian Muslim forces. Serb forces destroyed the town's water supply and in March of 1993, General Philippe Morillon of France, the Commander of the UN Protection Force ("UNPROFOR") reported that "siege" conditions prevailed in Srebrenica. Prosecutor v. Tolimir, Case No. IT-05-88/2-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), ¶¶ 22-23 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2009). Genocide charges related to Srebrenica, however, have been predicated on the mass execution of Muslim men and boys from the area in 1995. Indeed, the famine conditions in Srebrenica were dire enough that the ICTY Trial Chamber dropped charges of plunder as a war crime against accused Naser Orić for having participated in the alleged theft of several hundred cattle specifically because "any criminal responsibility" on the part of Orić was "offset by the real and present necessity to acquire food for the survival of the population of Srebrenica." Press Release, International Criminal Tribunal for the Former Yugoslavia, Oral Decision Rendered Pursuant to Rule 98bis in the Orić Case, U.N. Press Release CVO/MOW/974e (June 8, 2005), <http://www.icty.org/en/press/oral-decision-rendered-pursuant-rule-98bis-oric-case> [<https://perma.cc/66SV-VSA9>].

¹²⁷ Tremonti, *supra* note 11.

¹²⁸ Ohlin, *supra* note 5; see Andrew Jillions, *The (in)Justice of Famine: Is al-Shabaab Guilty of a Crime Against Humanity?*, JUSTICE IN CONFLICT, Aug. 15, 2011, <http://justiceinconflict.org/2011/08/15/the-injustice-of-famine-is-al-shabaab-guilty-of-a-crime-against-humanity/> [<https://perma.cc/X5WH-78ZB>] (arguing that famine meets the threshold for a crime against humanity, and that members of Al-Shabaab should be prosecuted for such based on their role in the 2011 Somali famine). It should be noted that the conclusions of Ohlin and Jillions do not necessarily conflict with that of Perry, as it remains entirely possible that opposing factions can both commit international crimes in relation to a single famine event. In the Somali situation, the Somali government and its allies could theoretically have committed the war crime of intentionally using starvation of civilians to weaken Al-Shabaab,

a major issue in the Syrian civil war, particularly in the besieged town of Madaya, to the point that UN Secretary-General Ban Ki-moon has accused all factions – the Assad government, rebel groups and Islamic State militants – of the war crime of using starvation as a weapon of war.¹²⁹

Ultimately, war crimes present various opportunities to address famines occurring during periods of armed conflict in ICL prosecutions. Generally speaking, in light of the narrow language of using starvation of civilians as a method of warfare, the more general language of other war crimes may actually provide more useful approaches to prosecuting certain other famine-inducing acts under the aegis of war crimes. For example, the UN commission of experts for the former Yugoslavia did conclude the war crime of inhumane acts was likely being committed against certain non-Serb detainees based on findings of “patterns of abuse” including evidence that:

prisoners [were] nearly starved to death and, at best, are given one meal a day consisting of meagre portions of thin soup and bread. In instances where food is delivered to a camp by the [International Committee of the Red Cross], the food is not distributed to prisoners as intended [but] is retained for the Bosnian-Serb fighting forces or . . . the camp guards.¹³⁰

which itself may have committed crimes against humanity by not allowing starving civilians to leave the areas it controlled, misappropriating foodstuffs and food aid, and by kidnapping and murdering numerous foreign aid workers.

¹²⁹ U.N. Security-General, Full transcript of Secretary-General’s press encounter following briefing to the General Assembly on his Priorities for 2016 (Jan. 14, 2016), <http://www.un.org/sg/offthecuff/index.asp?nid=4316> [<https://perma.cc/Z6UP-TEKB>] [hereinafter Full transcript of Secretary-General’s press encounter] (“Let me be clear: the use of starvation as a weapon of war is a war crime. All sides – including the Syrian government which has the primary responsibility to protect Syrians – are committing this and other atrocious acts prohibited under international humanitarian law.”); see also Diana Semaan, *Madaya shocked the world but this story isn’t over*, AMNESTY INTERNATIONAL, Jan. 15, 2016, <https://www.amnesty.org/en/latest/news/2016/01/madaya-shocked-the-world-but-this-story-isnt-over/> [<https://perma.cc/XDR4-NGUP>] (describing conditions of hunger faced by civilians in Madaya); SYRIA: ‘LEFT TO DIE UNDER SIEGE’: WAR CRIMES AND HUMAN RIGHTS ABUSES IN EASTERN GHOUTA, SYRIA, AMNESTY INTERNATIONAL (Aug. 12, 2015), <https://www.amnesty.org/en/documents/document/?indexNumber=mde24%2f2079%2f2015&language=en> [<https://perma.cc/A5AZ-QSML>] (describing the humanitarian crisis in Eastern Ghouta).

¹³⁰ ICTY UN Experts Report, *supra* note 125, at ¶ 230(p).

These and other acts of starving and otherwise mistreating detainees were prosecuted extensively at the ICTY as both crimes against humanity and war crimes. For example, Milorad Krnojelac was found convicted under the doctrine of superior responsibility of the war crime of cruel treatment as a breach of Common Article 3 of the Geneva Conventions for the living conditions enforced on non-Serb detainees at the Kazneno-Popravni Dom (KP Dom) prison where he served as warden.¹³¹ A major aspect of the living conditions that contributed to their rising to the level of cruel treatment as a war crime was the provision of "starvation rations" to non-Serb prisoners.¹³² In *Prosecutor v. Krnojelac*, the Trial Chamber noted that "[p]erhaps the most marked contrast between the treatment of Serbs and non-Serbs was with regard to food, both in quantity and in quality."¹³³

Additional war crimes provisions may also criminalize certain famine-inducing behavior in certain circumstances. Two especially relevant crimes are those of pillage and destruction or seizure of the property of an adversary not imperatively demanded by the necessities of the conflict under customary law and codified in Rome Statute Articles 8(2)(e)(v) and (xii). These two property crimes can be committed during any armed conflict and, being grounded in customary law and not the Geneva Conventions, need not be directed only against civilians in occupied territory. The strength of these crimes and other similar war crimes provisions protecting property during armed conflicts, is that they criminalize acts of property theft and destruction, which are often key factors contributing to famine during a period of armed conflict. The weakness of the crimes is that if used to prosecute individuals for stealing or destroying foodstuffs or food-production equipment, such prosecutions would be for those specific acts themselves and would not therefore, reflect any direct culpability for resulting famine conditions. Nonetheless, protecting civilian property rights during periods of armed conflict is an important aspect of famine deterrence. Moving forward, should the Darfur cases ever go to trial at the ICC, issues of famine

¹³¹ *Prosecutor v. Krnojelac* (Foča), Case No. IT-97-25-T, Judgement, ¶ 499 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) (finding Milorad Krnojelac responsible for two counts of aiding and abetting).

¹³² *Id.* at ¶¶ 439-43 (discussing the Prosecution's argument of inhumane conditions of Muslim and other non-Serb civilian detainees as persecution).

¹³³ *Id.* at ¶ 442 (discussing the quantity and quality of food as part of the inhumane conditions).

resulting from acts of pillage and destruction in the Darfur region will likely be discussed and considered at trial, as such acts are alleged to have formed part of a plan to destroy civilian food and water sources within targeted areas.¹³⁴ Thus, moving forward, these and other specialized war crimes may provide a beachhead for the discussion of famine issues within ICL. If ICL accountability is ever pursued in relation to the situation in Somalia during the past decade, or in relation to the ongoing conflict in Syria, additional progress may be made towards the prosecution of famine-related war crimes.

3.3. *Crimes against Humanity*

The term “crimes against humanity” refers to a group of offences that are elevated to the level of international crimes when committed as part of a widespread or systematic attack against a civilian population. The term was first used in reference to possible criminal sanctions on 28 May 1915, when the French, British and Russian Governments issued a declaration condemning the mass killing of Armenians in the Turkish Ottoman Empire, calling the killings “new crimes of Turkey against humanity and civilization” and denouncing the acts of “all members of the Ottoman Empire . . . who are implicated in such massacres.”¹³⁵ This declaration did not result in any prosecutions, nor were any realistically contemplated at the time, but the language of the declaration sowed the seeds for a new category of international crimes that were eventually prosecuted extensively in the aftermath of World War II.¹³⁶

¹³⁴ For example, under count 38 listed in the warrant for his arrest, Ali Kushayb is charged with “burning of dwellings and the destruction of crops and farms.” Prosecutor v. Harun, ICC-02/05-01/07, Warrant for the Arrest of Ali Kushayb, ¶ 13 (Apr. 27, 2007) (raising the issue of jurisdiction for warrants to arrest).

¹³⁵ Original language available in the dispatch of the US Ambassador in France (Sharp) to the Secretary of State [telegram] (May 29, 1915), *image of telegram available at* http://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=160 [<https://perma.cc/256Q-ZRMD>]; *see also* CASSESE, *supra* note 71, at 101.

¹³⁶ *See* International Military Tribunal for the Far East Charter, art 5(c), Jan. 19, 1946, T.I.A.S. No. 1589, *available at* <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml> [hereinafter *IMTFE Charter*] (stating the jurisdiction requirement for crimes against humanity); *see also* Control Council Law No. 10: *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, art II(1)(a), Dec. 20, 1945, Official Gazette of the Control Council for Germany, no. 3, *available at* <http://avalon.law.yale.edu/imt/imt10.asp>

As a body of law criminalizing the widespread or systematic abuse of civilians, crimes against humanity presents a framework that appears highly conducive to effectively scrutinizing and accounting for modern famine scenarios. Indeed, some of the earliest prosecutions of crimes against humanity, for example, those of Eichmann in Israel and Hans Frank at the IMT, resulted in convictions based at least partially on enforcing starvation conditions on civilians.¹³⁷

These early applications however, failed to elucidate precisely how the enforcement of famine conditions on a civilian population interacted with the elements of specific crimes against humanity. For example, the IMT simply found Frank guilty of various crimes against humanity based on his contribution to a variety of methods of abuse and killing utilized by the Nazi Party against civilian Jews and Poles, without connecting specific actions by Frank and resultant harms to specific crimes against humanity.¹³⁸ The issue of famine and starvation as subjects of crimes against humanity has since largely languished. For example, prosecutions at the ICTY and ICTR have involved factual scenarios mostly involving classical international crimes of direct, interpersonal violence, rather than involving large-scale and severe civilian famines involving mass death. The Khmer Rouge period, in contrast to the situations in the former Yugoslavia and Rwanda, presents an instance of a particularly virulent and directly caused famine affecting millions of victims, rendering this famine an ideal entry point for an ICL response generally and the invocation of crimes against humanity specifically. The remainder of this section provides an overview of the prerequisite *chapeau* elements universal to all crimes against humanity and examines how these requirements, along with the elements of three specific crimes against humanity – extermination, persecution and other inhumane acts – interact with famine.

[hereinafter Control Council Law No. 10] (stating the acts considered to be crimes against peace); see also CASSESE, *supra* note 71 at 101-06.

¹³⁷ *Eichmann Judgement*, *supra* note 16; *IMT Judgement*, *supra* note 17, at 296-98 (convicting accused Hans Frank of war crimes and crimes against humanity predicated on the treatment of civilians in occupied Poland).

¹³⁸ See *IMT Judgement*, *supra* note 17, at 298 (convicting Frank based on his “willing and knowing” participation in acts of terrorism and exploitation).

3.3.1. *Chapeau Elements: The Widespread or Systematic Attack against a Civilian Population*

Historically, in order to differentiate crimes against humanity from ordinary domestic crimes, crimes against humanity were linked with war crimes and it was necessary to demonstrate a nexus between any alleged crime against humanity and an armed conflict. At the IMT and the International Military Tribunal for the Far East (“IMTFE”) in Tokyo, crimes against humanity could only be “committed in connection with either war crimes or an aggressive war.”¹³⁹ The various special courts established under Control Council Law 10 in each of the allied-controlled sections of Germany dropped this requirement, apparently removing the requirement that crimes against humanity be committed in connection with war crimes or crimes against peace.¹⁴⁰ Since these early prosecutions, the requirement that crimes against humanity form part of an attack against a civilian population has replaced the abandoned requirement of some connection with an armed conflict or the crime of aggression.¹⁴¹ This requirement of a widespread or systematic attack against civilians is typically referred to as a contextual or “*chapeau*” element, as it is common to all crimes against humanity.¹⁴² This *chapeau* requirement can be subdivided into five distinct elements: (1) an attack; that is (2) either widespread or systematic; (3) directed against a civilian population; (4) the *actus reus* of the accused must

¹³⁹ Stuart K. Ford, *Crimes against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA Pac. Basin L.J. 125, 144 (2007); see also IMT Charter, *supra* note 94, at art 5(c); IMTFE Charter, *supra* note 6, at art 5(c).

¹⁴⁰ *Id.* at 147-48 (discussing war crimes, crimes against peace and crimes against humanity contained in the Control Council Law No. 10).

¹⁴¹ See generally Tadić, Decision on Interlocutory Appeal, *supra* note 103, at ¶¶ 96-137.

¹⁴² *Id.* at 99, 109 (“At present, [international criminal law] always requires for [crimes against humanity] a general context of criminal conduct, consisting of a widespread or systematic practice of unlawful attacks against the population.”); see also Statute of the International Criminal Tribunal for the former Yugoslavia art. 5, May 25, 1993, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [<https://perma.cc/T94U-WL7Y>]; Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994, available at http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf [<https://perma.cc/V8JV-EWGD>]; Rome Statute, *supra* note 113, at art. 7(1); Statute of the Special Court for Sierra Leone, art. 2, Aug. 14, 2000, available at <http://www.rscsl.org/Documents/scsl-statute.pdf> [<https://perma.cc/3Y7K-24KW>].

form part of the attack; and (5) the accused must be aware of his participation therein (*mens rea*).¹⁴³

3.3.1.1. *The Attack*

The Rome Statute is the only codified international legal instrument that defines “attack,” describing it as a “course of conduct involving the multiple commission of [enumerated specific crimes against humanity] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”¹⁴⁴ This definition adds an additional “policy” requirement, unique to the ICC,¹⁴⁵ but otherwise reflects the expansive view of the term “attack” under customary law.¹⁴⁶ In the ICTY case of *Prosecutor v. Kunarac*, the Appeals Chamber upheld the Trial Chamber’s defi-

¹⁴³ See, e.g., *Tadić*, Appeal Judgement, *supra* note 107, at ¶ 248; *Kunarac*, Appeal Judgement, *supra* note 106, at ¶ 85; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, ¶ 28 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002) (distilling the customary *chapeau* elements of crimes against humanity into five distinct requirements, albeit in a different order).

¹⁴⁴ Rome Statute, *supra* note 113, at art 7(2)(a); see also *Akayesu*, Trial Judgement, *supra* note 61, at ¶ 581 (“An attack may also be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”).

¹⁴⁵ See, e.g., CASSESE, *supra* note 71, at 125 (observing that “[i]t would seem that the [Rome] Statute requires that the offender, in committing a crime against humanity, pursue or promote [a State organizational policy to commit the alleged attack]” and concluding that “[c]learly, this requirement [of a State or organizational policy] goes beyond what is required under international customary law”); see also *Kunarac*, Appeal Judgement, *supra* note 106, at ¶ 98 (holding that “neither the attack nor the acts of the accused needs to be supported by any form of ‘policy’ or ‘plan.’ There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.”) (internal citations omitted). For an overview of customary international law sources supporting the position that there is no policy requirement for crimes against humanity, see *id.* at ¶ 98 n. 114. It remains unclear what the precise requirements of the policy element are at the ICC. See DARRYL ROBINSON, *Crimes Against Humanity: A Better Policy on ‘Policy,’ in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 705 (Carsten Stahn ed. 2014).

¹⁴⁶ See generally CASSESE, *supra* note 71, at 124–26 (outlining the elements of article 7 of the Rome Statute and noting that some aspects of the article are both narrower and broader than customary international law).

inition of an “attack” as “a course of conduct involving the commission of acts of violence.”¹⁴⁷ The Appeals Chamber attack further opined that the requisite attack is “not limited to the use of armed force [but] encompasses any mistreatment of the civilian population.”¹⁴⁸

Under this expansive definition, it appears clear that enacting harsh policies that lead directly to famine can form part of the requisite attack necessary for crimes against humanity liability. For example, the ICTR Trial Chamber held that one example of such an attack is “exerting pressure on the population to act in a particular manner . . . if orchestrated on a massive scale or a systematic manner.”¹⁴⁹ Furthermore, there is ample support in ICL jurisprudence for the proposition that general mistreatment may qualify as the requisite “attack” so long as such mistreatment is either widespread or systematic.¹⁵⁰

¹⁴⁷ Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 415 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); *aff’d* Kunarac, Appeal Judgement, *supra* note 106, at ¶ 89.

¹⁴⁸ Kunarac, Appeal Judgement, *supra* note 106, at ¶ 86. For example, in *Kunarac*, the requisite “attack” chapeau requirement of crimes against humanity was held to be satisfied. The Trial Chamber found that during the relevant period there was “an extensive attack by the Serb forces targeting the Muslim civilian population” in the municipalities of Foča, Gacko and Kalinovik. Kunarac, Trial Judgement, *supra* note 147, at ¶ 570. The Trial Chamber found that the attack consisted of the creation of an “atmosphere of intimidation” imposed on the local Muslim population, marked by, *inter alia*, ostracism, violent outbursts (including numerous beatings and killings), house-burning, gender segregation, arbitrary detainment with insufficient food in “intolerably unhygienic conditions” and the systematic rape and sexual assault of women and young girls (*id.* at ¶¶ 570-578). The findings of the Trial Chamber in *Kunarac* illustrate the fact that various forms of mistreatment, both clearly violent (*e.g.* beatings and killings) and non-violent (*e.g.* gender segregation and insufficient provision of food) can form part of the requisite attack. Furthermore, the prosecution may prove the existence of the attack by offering evidence that other, unindicted crimes were committed as part of the overall attack. *See, e.g.*, Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgement, ¶ 890 (Int’l Crim. Trib. for the Former Yugoslavia July 20, 2009). That the requisite attack need not involve the commission of acts of violence is not universally agreed upon. However, given the wide degree of definitional variation and contestation concerning what constitutes “violence” such differences may simply reflect differing underlying viewpoints concerning the definition of violence. In this regard, see SCHMID, *supra* note 19, at 76-80.

¹⁴⁹ Akayesu, Trial Judgement, *supra* note 61, at ¶ 581; *accord* Musema, Trial Judgement, *supra* note 56, at ¶ 205.

¹⁵⁰ *See, e.g.*, Prosecutor v. Renzaho, Case No. ICTR-97-31-T, Judgement and Sentence, ¶ 782 (July 14, 2009) (“An attack against a civilian population means the perpetration against that population of a series of acts of violence, or of the kind of mistreatment [that rises to the level of an enumerated crime against humanity].”)

3.3.1.2. *Widespread or Systematic*

One key feature of all crimes against humanity differentiating them from domestic crimes is their massive scale or highly organized nature.¹⁵¹ In order to reach this threshold, an alleged crime against humanity must form part of an attack that is either “widespread” or “systematic,” rather than being a mere isolated instance of criminal behavior.¹⁵² The ICTR Trial Chamber commented that “[a] widespread attack is an attack on a large scale directed against a multiplicity of victims, whereas a systematic attack is one carried out pursuant to a preconceived policy or plan.”¹⁵³ It is well-settled law that these requirements are alternative and not cumulative.¹⁵⁴

Within crimes against humanity jurisprudence, the term “widespread” refers to the scale and number of victims. The ICTR Trial Chamber has defined “widespread” as “massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”¹⁵⁵ The alternative requirement of a “systematic” attack refers to whether the attack

(citing *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Judgement and Sentence, ¶ 2165 (Dec. 18, 2008)) (citing *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgement, ¶¶ 915-918 (Nov. 28, 2007)); *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Appeal Judgement, ¶ 666 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); *Kunarac*, Appeal Judgement, *supra* note 106, at ¶ 89; *Kunarac*, Trial Judgement, *supra* note 147, at ¶ 415.

¹⁵¹ See CASSESE, *supra* note 71, at 99 (“Let us now return to the large-scale or massive nature of crimes against humanity. That this feature is a necessary ingredient may be inferred from the first provisions setting out a list of such offences. They clearly, if implicitly, required that the offence, to constitute an attack on humanity, be of extreme gravity and not be a sporadic event but part of a pattern of misconduct.”); see also *Akayesu*, Trial Judgement, *supra* note 61, at ¶ 579.

¹⁵² See, e.g., Rome Statute, *supra* note 113, at art. 7 (“For the purpose of this Statute ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population.”); see also *Akayesu*, Trial Judgement, *supra* note 61, at ¶ 579.

¹⁵³ *Bagilishema*, Trial Judgement, *supra* note 71, at ¶ 77 (internal citation omitted).

¹⁵⁴ See, e.g., *Tadić*, Appeal Judgement, *supra* note 107, at ¶ 248; *Kunarac*, Appeal Judgement, *supra* note 106, at ¶¶ 93, 97; *Musema*, Trial Judgement, *supra* note 56, at ¶ 203.

¹⁵⁵ *Akayesu*, Trial Judgement, *supra* note 61, at ¶ 580; see also International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, art. 18, comment 4, in 2 Y.B. Int'l L. Comm'n. 47, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) [hereinafter 1996 ILC Draft Code] (noting that

forms part of an organized effort to abuse civilians. The commentary to the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind defines "systematic" as "pursuant to a preconceived plan or policy . . . [t]he implementation of [which] could result in the repeated or continuous commission of inhuman acts."¹⁵⁶ The ICTY Trial Chamber provided a more detailed definition in its judgement in *Prosecutor v. Blaškić*, distilling four factors to consider in assessing the systemic nature of an alleged attack:

- (1) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy persecute or weaken a community
- (2) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another
- (3) the preparation and use of significant public or private resources, whether military or other
- (4) the implication of high level political and/or military authorities in the definition and establishment of the methodical plan.¹⁵⁷

The Chamber in *Blaškić* also held that the plan itself need not be declared expressly but "may be surmised from the occurrence of a series of events."¹⁵⁸ The ICTY Appeals Chamber elaborated on how a systematic attack can be inferred in *Prosecutor v. Kunarac et al.*, finding that the "[p]atterns of crimes" necessary to satisfy the systematic requirement can be inferred based on an analysis of the "improbability of their random occurrence."¹⁵⁹ As a result, even a single criminal act may constitute a crime against humanity when committed

the "[widespread] alternative requires that the inhumane acts be committed 'on a large scale' meaning that the acts are directed against a multiplicity of victims").

¹⁵⁶ *Id.* at art. 18, comment 3.

¹⁵⁷ *Blaškić*, Trial Judgement, *supra* note 101, at ¶ 203 (internal citations omitted).

¹⁵⁸ *Id.* at ¶ 204.

¹⁵⁹ *Kunarac*, Trial Judgement, *supra* note 147, at ¶ 429; *aff'd* *Kunarac*, Appeal Judgement, *supra* note 106, at ¶ 94. In practice, there is often significant evidentiary overlap in analyzing whether an attack is widespread and/or systematic. For example, in *Kunarac*, the Appeals Chamber considered "[t]he consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the

pursuant to a larger, organized assault on a civilian population.¹⁶⁰ Famines, which by their very nature are widespread and affect numerous victims, would seemingly always qualify as “widespread,”¹⁶¹ and if famine conditions resulted pursuant to an organized plan or set of policies, it is also likely that this scenario would also satisfy the alternative “systematic” requirement. For example, the Khmer Rouge period famine was clearly widespread, as it affected virtually the entire Cambodian population and killed civilians throughout large swaths of the country.¹⁶² Moreover, the main policies causing this famine were part of official national policy and as such, systematically enforced starvation conditions throughout the country.¹⁶³

3.3.1.3. *Against a Civilian Population*

Crimes against humanity are limited to instances where a civilian—as opposed to military—population is the target of widespread or systematic abuses. According to current jurisprudence, “the use of the word ‘population’ does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack.”¹⁶⁴ Instead, the prosecution must demonstrate that “enough individuals were targeted in the course

possible participation of officials or authorities or any identifiable patterns of crimes,” in determining “whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack vis-à-vis [the specific] civilian population.” *Id.* at ¶ 95. This is to be expected and in most cases both requirements are satisfied or fail, based on the same evidence.

¹⁶⁰ See, e.g., Kunarac, Trial Judgement, *supra* note 147, at ¶ 431 (“A single act could therefore be regarded as a crime against humanity if it takes place in the relevant context.”) (citing Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 550 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000)); Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgement (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) at ¶ 649; accord Kunarac, Appeal Judgement, *supra* note 106, at ¶ 96 (“[T]he acts of the accused need only be a part of this attack and, all other conditions being met, a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.”).

¹⁶¹ This limitation would likely exclude periods of food scarcity or chronic undernourishment that fail to rise to the level of famine.

¹⁶² See generally DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9.

¹⁶³ For an overview of these policies and how they created and maintained famine conditions, see *id.*

¹⁶⁴ Kunarac, Appeal Judgement, *supra* note 106, at ¶ 90.

of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population’, rather than against a limited and randomly selected number of individuals.”¹⁶⁵ Furthermore, the expression “directed against” has been interpreted by the ICTY Appeals Chamber as specifying that the civilian population must be “the primary rather than incidental target of the attack.”¹⁶⁶ To determine whether the civilian population was the subject of the attack the same Chamber has directed Trial Chambers to:

consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.¹⁶⁷

Accordingly, the civilian population in question may vary based on the size and scope of the alleged attack.¹⁶⁸ Additionally, the attack itself need not be directed against the entire civilian population in a given area, but may target a specific group from amongst the larger civilian community.¹⁶⁹

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at ¶ 91.

¹⁶⁷ *Id.*

¹⁶⁸ For example, in *Lukić*, the ICTY Trial Chamber found that there existed a widespread or systematic attack against the Muslim civilian population of Višegrad. *Lukić*, Trial Judgement, *supra* note 148 at ¶¶ 889-95.

¹⁶⁹ See *id.* at ¶ 891 (finding that the requisite “attacks were directed in a discriminatory manner against the civilian population; the victims were civilians from Višegrad, many were elderly and women and children, and all were Muslims”). Indeed, a population retains its civilian character even if it contains some non-civilian members, so long as the attack itself primarily targets civilians. See, e.g., *Blaškić*, Trial Judgement, *supra* note 101, at ¶ 214 (holding that “it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population”); see also *Tadić*, Trial Judgement, *supra* note 160, at ¶ 639; *Akayesu*, Trial Judgement, *supra* note 61, at ¶ 582; *Kayishema*, Trial Judgement, *supra* note 69, at ¶ 128.

3.3.1.4. Chapeau Actus Reus

Simply committing a crime during an unrelated widespread or systematic attack against a civilian population is insufficient to turn a simple domestic crime into a crime against humanity. The criminal acts of the specific accused must form part of the overall attack against a civilian population.¹⁷⁰ The contribution of the accused, however, need not be a *sine qua non* for the overall attack, as the commission of crimes against humanity often involves numerous perpetrators spread widely across time and space.¹⁷¹ In fact, liability is still possible in instances where the accused commits a single unlawful act before or after the overall attack, provided the act is not found to be “isolated” from the attack.¹⁷² The ICTY Appeals Chamber has defined an “isolated act” as one “so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.”¹⁷³

3.3.1.5. Chapeau Mens Rea

Crimes against humanity can only be committed by a perpetrator who is aware of the larger criminal context of his actions. According to ICTY jurisprudence, the accused must simply “know that

¹⁷⁰ See, e.g., Tadić, Appeal Judgement, *supra* note 107, at ¶ 248 (“The Appeals Chamber agrees that it may be inferred from the words “directed against any civilian population” in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population.”) (citing Prosecutor v. Mrkšić (“Vukovar Hospital”), Case No. IT-95-13-R61-T, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 30 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 1996)); accord Kunarac, Appeal Judgement, *supra* note 106, at ¶ 96 (observing that “the acts of the accused need only be a part of this attack” in order to satisfy the *chapeau* element of crimes against humanity).

¹⁷¹ See, e.g., Kunarac, Appeal Judgement, *supra* note 106, at ¶ 96 (noting that “all other conditions being met, a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.”); see also Tadić, Appeal Judgement, *supra* note 107, at ¶ 271 (holding that “to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population”) (emphasis in original).

¹⁷² *Id.* at ¶ 100.

¹⁷³ *Id.*

his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and [must also] know that his acts fit into such a pattern.”¹⁷⁴ As for knowledge of the specifics of the attack and the nature of his participation therein, the ICTY Trial Chamber has held that it is “sufficient that [the accused] merely understood the overall context in which his acts took place” and with such understanding, “took the risk that his acts were part of the attack.”¹⁷⁵ As is the norm under ICL, the accused’s subjective motivation for participating in the commission of a crime against humanity is irrelevant.¹⁷⁶ Additionally, according to the ICTY Appeals Chamber, it is inconsequential whether the accused’s acts targeted a specific individual, rather than the civilian population in general, as “it is the attack, not the acts of the accused, which must be directed against the civilian population.”¹⁷⁷

3.3.2. *Specific Crimes against Humanity: Extermination, Persecution and Other Inhumane Acts*

Establishing that an accused’s alleged criminal actions formed part of the requisite widespread or systematic attack on a civilian population is only the first step towards a conviction for crimes against humanity, as the prosecution must further prove the elements of each specific charged crime against humanity beyond a reasonable doubt. Three specific crimes against humanity stand out as potential candidates for addressing many famine scenarios: extermination, persecution and other inhumane acts.¹⁷⁸ Meanwhile, in

¹⁷⁴ Lukić, Trial Judgement, *supra* note 148, at ¶ 877 (citing Kunarac, Appeal Judgement, *supra* note 106, at ¶ 85).

¹⁷⁵ Lukić, Trial Judgement, *supra* note 148, at ¶ 877.

¹⁷⁶ For a thorough discussion of why the subjective motivation of an individual accused with crimes against humanity is irrelevant, see Tadić, Appeal Judgement, *supra* note 107, at ¶¶ 247-272; accord Lukić, Trial Judgement, *supra* note 148, at ¶ 877 (“The accused’s motives for participating in the attack are irrelevant as well as whether the accused intended his acts to be directed against the targeted population or merely against his victim.”) (citing Kunarac, Appeal Judgement, *supra* note 106, at ¶¶ 103, 105).

¹⁷⁷ Lukić, Trial Judgement, *supra* note 148, at ¶ 877 (citing Kunarac, Appeal Judgement, *supra* note 106, at ¶¶ 103, 105).

¹⁷⁸ The author has previously proposed the use of these three crimes against humanity as a framework for addressing the Khmer Rouge era famine at the ECCC. DeFalco, *Accounting for Famine*, *supra* note 5. Diana Kearney has also emphasized

certain circumstances additional crimes against humanity, such as those of apartheid or slavery, could be implicated. The remainder of this section explores the elements of extermination, persecution and other inhumane acts in relation to the enforcement of famine conditions on a civilian population.

3.3.2.1. Extermination

The crime against humanity of extermination is a crime of mass killing.¹⁷⁹ Such killing can be achieved by any means, including “subjecting a number of people to conditions of living that would inevitably lead to death.”¹⁸⁰ Both the ICTR and ICTY have stated that the *actus reus* of extermination covers “any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.”¹⁸¹ One example of the *actus reus* of extermination provided by the ICTR Trial Chamber is “[i]mprisoning a large number of people and withholding the necessities of life which results in mass death.”¹⁸² Similarly, the Rome

the suitability of these three specific crimes against humanity for the pursuit of ICL famine accountability. See Kearney, *supra* note 40.

¹⁷⁹ See Lukić, Trial Judgement, *supra* note 148, at ¶ 937 (citing Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgement, ¶ 189 (Mar. 12, 2008)); Prosecutor v. Stakić (“Prijeedor”), Case No. IT-97-24-A, Judgement, ¶ 259 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, ¶ 516 (Dec. 13, 2004); Bagosora, Trial Judgement, *supra* note 150 at ¶ 2191; Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶ 62 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007).

¹⁸⁰ See Ntakirutimana, Appeal Judgement, *supra* note 179, at ¶ 522; *accord* Stakić, Appeal Judgement, *supra* note 179, at ¶ 259.

¹⁸¹ Seromba, Appeals Judgement, *supra* note 179, at ¶ 189 (citing Prosecutor v. Brđanin (“Krajina”), Case No. IT-99-36-T, Judgement, ¶ 389 (Sept. 1, 2004)); *see also* Bagosora, Trial Judgement, *supra* note 150, at ¶ 2191; Lukić, Trial Judgement, *supra* note 148, at ¶ 937.

¹⁸² Kayishema, Trial Judgement, *supra* note 69, at ¶ 146 (The accused were not convicted of extermination because the Trial Chamber found that under the specific circumstances, the conviction of the accused for genocide subsumed the charges of murder and extermination as crimes against humanity.); *see also* Brđanin, Trial Judgement, *supra* note 181, at ¶ 389 (“An act amounting to extermination may include the killing of a victim as such as well as conduct which creates conditions provoking the victim’s death and ultimately mass killings, such as the deprivation of food and medicine, calculated to cause the destruction of part of the population.”).

Statute explicitly includes the “deprivation of access to food and medicine” as acts that may satisfy the *actus reus* of extermination.¹⁸³

3.3.2.1.1. The Massiveness Threshold

The crime against humanity of extermination is—along with genocide—perhaps the most heinous crime in existence, as its commission necessarily involves mass killing.¹⁸⁴ It is this critical element of massiveness that sets extermination apart from simple murder.¹⁸⁵ There is no numerical threshold of victims that automatically establishes massiveness as a matter of law.¹⁸⁶ Instead, each case requires

¹⁸³ Rome Statute, *supra* note 113, at art 7(2)(b). Moreover, extermination charges are well suited to address the culpability of leaders of repressive regimes, as they are appropriately brought against individuals who “did in fact exercise authority or power over many other individuals or did otherwise have the capacity to be instrumental in the killing of a large number of individuals.” Vasiljević, Trial Judgement, *supra* note 143, at ¶ 222 (“It is worth noting that in none of the reviewed [post-World War II] cases were minor figures charged with ‘extermination’ as a crime against humanity. Those who were charged with that criminal offence did in fact exercise authority or power over many other individuals or did otherwise have the capacity to be instrumental in the killing of a large number of individuals.”); *accord* Brđanin, Trial Judgement, *supra* note 181, at ¶ 390.

¹⁸⁴ Although there is no formal hierarchy of international crimes, which are all considered especially grave in nature, extermination is often described as “similar to genocide” and of equal gravity thereto. *See, e.g.*, Krstić, Trial Judgement, *supra* note 59, at ¶ 497.

¹⁸⁵ *See, e.g.*, Lukić, Trial Judgement, *supra* note 148, at ¶ 938 (“The crime of extermination differs from murder in that it requires an element of mass destruction.”) (citing Stakić, Appeal Judgement, *supra* note 179, at ¶¶ 259, 260 (“The *mens rea* of extermination clearly requires the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths. This intent is a clear reflection of the *actus reus* of the crime.”)); Ntakirutimana, Appeal Judgement, *supra* note 179, at ¶ 522; Bagosora, Trial Judgement, *supra* note 150, at ¶ 2191 (“The *mens rea* of extermination requires that the accused intended to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their deaths in a widespread or systematic manner.”); Brđanin, Trial Judgement, *supra* note 181, at ¶ 395 (“The Prosecution is . . . required [in order to obtain an extermination conviction] to prove beyond reasonable doubt that that accused had the intention to kill persons on a massive scale or create the conditions of life that led to the deaths of a large number of people.”); *aff’d* Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgement, ¶ 476 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).

¹⁸⁶ *See, e.g.*, Lukić, Trial Judgement, *supra* note 148, at ¶ 938, (citing Stakić, Appeal Judgement, *supra* note 179, at ¶ 260); Ntakirutimana, Appeal Judgement, *supra* note 179, at ¶ 516; Krstić, Appeal Judgement, *supra* note 58, at ¶ 501; Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgement, ¶ 573 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Brđanin, Appeal Judgement, *supra* note 185, at ¶¶ 471-72;

a careful analysis of relevant factors, including: “the time and place of the killings, the selection of the victims, and the manner in which they were targeted.”¹⁸⁷ Judges at the ICTR and ICTY have held that individual victims however, need not be named or described,¹⁸⁸ or share “any common national, ethnical, racial or religious characteristics” beyond comprising a civilian population.¹⁸⁹ The accused also need not have specific victims in mind during the commission of the crime.¹⁹⁰ Moreover, deaths from geographically and/or temporally separated sites have been aggregated to reach the required massive-ness threshold, so long as each event falls within the overall extermination episode charged.¹⁹¹

3.3.2.1.2. *Mens Rea*: Knowledge of Mass Death and the Question of “Calculation”

The ICTY and ICTR have both generally held that the *mens rea* of extermination requires that “the accused intended, by his acts or

Prosecutor v. Krajišnik (“Bosnia and Herzegovina”), Case No. IT-00-39-T, Judgement, ¶ 716 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27. 2006).

¹⁸⁷ Krajišnik, Trial Judgement, *supra* note 186; *accord*, Martić, Trial Judgement, *supra* note 179, at ¶ 63; Lukić, Trial Judgement, *supra* note 148, at ¶ 938. For example, extermination convictions have resulted from incidents involving the killing of 66 and 59 persons in cases at the ICTY. Krajišnik, *id.* at ¶¶ 699, 720; Lukić, Trial Judgement, *supra* note 148, at ¶¶ 941, 945 (majority decision, Judge Van den Wyngaert dissenting).

¹⁸⁸ *E.g.*, Ntakirutimana, Appeal Judgement, *supra* note 179, at ¶ 521 (“It is not an element of the crime of extermination that a precise identification of ‘certain named or described persons’ be established.”).

¹⁸⁹ *See* Krstić, Trial Judgement, *supra* note 59, at ¶ 500.

¹⁹⁰ Kayishema, Trial Judgement, *supra* note 69, at ¶ 145; *see also* M CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW (1992) at 291 (cited by Kayishema, Trial Judgement, *supra* note 69, at ¶ 143 (“Extermination implies intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not perform the *actus reus* that produced the deaths, nor have specific intent toward a particular victim.”)); *see also* 1996 ILC Draft Code, *supra* note 155, at 48, note 8 (noting that the crime against humanity of extermination “applies in situations in which some members of a group are killed while others are spared”).

¹⁹¹ *See* Lukić, Trial Judgement, *supra* note 148, at ¶ 938 (citing Brđanin, Trial Judgement, *supra* note 181, at ¶ 391; *aff’d* Brđanin, Appeal Judgement, *supra* note 185, at ¶¶ 471-72); *see also* Ntakirutimana, Appeal Judgement, *supra* note 179, at ¶ 521.

omissions, either killing on a large scale, or the subjection of a widespread number of people, or the systematic subjection of a number of people, to conditions of living that would lead to their deaths.”¹⁹² There has been some disagreement between reviewing courts as to whether this standard includes gross criminal negligence, though it appears unlikely that a negligence standard would suffice.¹⁹³ The ICTR Trial Chamber included gross negligence in its summary of the requisite *mens rea* for extermination in its *Kayishema* Judgment;¹⁹⁴ however, more recent ICTY jurisprudence suggests that recklessness, or *dolus eventualis*,¹⁹⁵ is the threshold *mens rea* for extermination¹⁹⁶ as is the standard for crimes against humanity generally.¹⁹⁷ As such, from a general standpoint, the consensus at the ICTY and ICTR seems to be that an accused must intentionally contribute to the creation of mass death, and be at least subjectively aware that he was participating in group action that was objectively likely to result in mass death.¹⁹⁸

The Rome Statute adds another layer to the debate concerning the *mens rea* of extermination, defining the crime as including “the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, *calculated* to bring about the destruction of part of a population.”¹⁹⁹ As noted by Evelyne Schmid, the term “calculated” implies that the deprivation of access to basic socio-economic rights must have been intended as a mechanism to bring

¹⁹² Stakić, Appeal Judgement, *supra* note 179, at ¶ 259, (citing Ntakirutimana, Appeal Judgement, *supra* note 179, at ¶ 522); *accord* Lukić, Trial Judgement, *supra* note 148, at ¶ 939.

¹⁹³ For an overview of the legal debate on the issue, see Brđanin, Trial Judgement, *supra* note 181, at ¶¶ 392-95.

¹⁹⁴ *Kayishema*, Trial Judgement, *supra* note 69, at ¶ 144.

¹⁹⁵ This term was first adopted within ICL by the ICTY Appeal Chamber in its first judgement, where the term was defined as requiring “a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.” Tadić, Appeal Judgement, *supra* note 107, at ¶ 220.

¹⁹⁶ *See, e.g.*, Lukić, Trial Judgement, *supra* note 148, at ¶ 939 (“The *mens rea* of extermination is that the accused committed the act or omission with the intent to kill persons on a large scale or in knowledge that the deaths of a large number of people were a probable consequence of the act or omission.”).

¹⁹⁷ *See, e.g.*, CASSESE, *supra* note 71, at 114-15.

¹⁹⁸ For a more detailed discussion of the *mens rea* of *dolus eventualis*, see Jared L. Watkins & Randle C. DeFalco, *Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, 63 RUTGERS L. REV. 193, 249-51 (2010).

¹⁹⁹ Rome Statute, *supra* note 113, at art. 7(2)(b) (emphasis added).

about the destruction of part of a population.”²⁰⁰ This would seem to present a negative regression of the scope of extermination by unnecessarily connecting it to similarly stringent *mens rea* language in the Genocide Convention. This *mens rea* question has not been addressed in detail as of yet at the ICC and it is important to bear in mind that the Rome Statute is not a codification of customary ICL. For their part, the authors of the 2014 UN report on conditions in North Korea were of the opinion that for extermination:

[t]he death of large numbers of people does not have to be the goal pursued by the perpetrators for the criminal intent requirement to be satisfied. In the opinion of the Commission, it is sufficient that the perpetrators impose living conditions in calculated awareness that such conditions will cause mass deaths in the ordinary course of events.²⁰¹

This interpretation seems to conform with the Rome Statute’s general definition of “intent” as being established in situations where “[i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”²⁰² Such an approach would also avoid inconsistency between the *mens rea* requirement for one particular enumerated form of *actus reus* for extermination and the crime’s general status as a crime of indiscriminate mass killing.

3.3.2.1.3. Extermination and Famine Mortality

As a crime of indiscriminate mass killing, the crime against humanity of extermination is perhaps the most appropriate international crime to apply to typical modern famine scenarios. This is because there is significant conceptual overlap between modern understandings of how famines kill and how causation issues are

²⁰⁰ SCHMID, *supra* note 19, at 155.

²⁰¹ 2014 UN North Korea Report, *supra* note 46, at 1042. The report cites the *Lukić* Trial Judgement, *supra* note 148, at ¶ 939 as authority, along with various scholars including, *inter alia* M. Cherif Bassiouni, Antonio Cassese and Evelyne Schmid. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 369 (2011); Antonio Cassese, *Crimes against Humanity*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 365 (Antonio Cassese, ed., 2002). The report cites Schmid’s PhD work, which represents an earlier version of her book. See SCHMID, *supra* note 19.

²⁰² Rome Statute, *supra* note 113, at art. 30(2)(b) (emphasis added).

treated within extermination jurisprudence. The judgement of the IMT convicting Hans Frank of, *inter alia*, extermination as a crime against humanity is illustrative of how this crime can properly reflect the culpability of individuals who place a group of victims in circumstances leading to mass death. In convicting Frank, the Tribunal judges noted that the arduous working conditions and German expropriation of foodstuffs resulted in mass death through disease and starvation, finding that:

The economic demands made on the General Government were far in excess of the needs of the army of occupation, and were out of all proportion to the resources of the country. The food raised in Poland was shipped to Germany on such a wide scale that the rations of the population of the occupied territories were reduced to the starvation level, and epidemics were widespread. Some steps were taken to provide for the feeding of the agricultural workers who were used to raise the crops, but the requirements of the rest of the population were disregarded. It is undoubtedly true, as argued by counsel for the defence, that some suffering in the General Government was inevitable as a result of the ravages of war and the economic confusion resulting there from. But the suffering was increased by a planned policy of economic exploitation.²⁰³

This use of the civilian population of Poland as a source of indentured labor is also similar to how the Khmer Rouge leadership used the civilian population of Cambodia in the service of the perceived needs of the revolution. In both Poland and Cambodia, this economic and social exploitation of the civilian population resulted in terrible living conditions marked by famine, disease, and starvation and resulting in mass death. Ultimately, the IMT found that Frank was “a willing and knowing participant in the use of terrorism in Poland; in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people; in the deportation to Germany as slave labourers of over a million Poles; and in a programme involving the murder of at least three million Jews.” As a result of this participation, the Tribunal found

²⁰³ IMT Judgement, *supra* note 17, at 297.

Frank guilty of the crimes against humanity²⁰⁴ of “murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations.”²⁰⁵

The IMT Judgement against Frank demonstrates how extermination can be successfully prosecuted against individuals who participate in enforcing famine conditions on a civilian population. The conviction of Frank also demonstrates how, as a crime of large-scale, yet impersonal killing, extermination accurately reflects how famines can kill amongst a civilian population indiscriminately.

3.3.2.2. Persecution

Persecution is defined in the Rome Statute as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”²⁰⁶ The ICTY Appeals Chamber in *Krnojelac* provided a similar definition, finding that:

the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).²⁰⁷

3.3.2.2.1. Actus Reus: Severe Infringement of a Fundamental Human Right

The *actus reus* of persecution requires acts or omissions that severely infringe a “fundamental right” guaranteed by international law.²⁰⁸ “Only gross or blatant denials of fundamental rights” qualify

²⁰⁴ *Id.* at 298.

²⁰⁵ *Id.* at 29.

²⁰⁶ Rome Statute, *supra* note 113, at art. 7(1)(g).

²⁰⁷ Prosecutor v. Krnojelac (Foča), Case No. IT-97-25-A, Judgement, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003) (quoting Krnojelac, Trial Judgement, *supra* note 131, at ¶ 43).

²⁰⁸ See, e.g., Vasiljević, Trial Judgement, *supra* note 143, at ¶ 244.

as persecution.²⁰⁹ The suffering occasioned through the violation of the predicate fundamental right must be of “similar gravity” to other crimes against humanity.²¹⁰ Additionally, specific persecutory acts must be alleged rather than general mistreatment of a targeted group,²¹¹ although various discriminatory acts not individually rising to the requisite gravity may cumulatively qualify as persecution.²¹²

Although international human rights law is predicated on the notion that all human beings are entitled to basic rights, not all such rights are considered “fundamental” and as such, not every targeted human rights violation amounts to persecution. This general fact is especially true within the context of economic and social rights, such as the right to adequate food, which encompasses both fundamental core rights, as well as penumbral aspirational targets assigned to individual states and the global community at large.²¹³

The genesis of the modern right to adequate food is found in article 25(1) of the 1948 Universal Declaration of Human Rights (Universal Declaration), which acknowledged a universal “right to a standard of living adequate for the health and well-being of himself

²⁰⁹ *Id.* The requirement that the right be “fundamental” replaced the former requirement under the Nuremberg Charter that persecution be committed in association with other crimes against humanity. See, e.g., *Prosecutor v. Blaškić* (“Lašva Valley”), Case No. IT-95-14-A, Judgement, ¶ 135 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004). It is unclear however, whether the *actus reus* of persecution must independently constitute a criminal act. See Separate Opinion of Judge Shahabuddeen, in *Krnjelac*, Appeal Judgement, *supra* note 207, at ¶¶ 5-7; cf. *Prosecutor v. Kvočka* (“Omarksa, Keraterm & Trnopolje Camps”), Case No. IT-98-30/1-T, Judgement, ¶ 186 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (“[J]urisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution. Thus, acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.”).

²¹⁰ See *Lukić*, Trial Judgement, *supra* note 148, at ¶ 993; see also *Kordić*, Appeal Judgement, *supra* note 150, at ¶ 102 (citing *Blaškić*, Appeal Judgement, *supra* note 209, at ¶ 135); *Krnjelac*, Appeal Judgement, *supra* note 207, at ¶¶ 199, 221.

²¹¹ See, e.g., *id.* at ¶ 246 (citing *Kupreškić*, Trial Judgement, *supra* note 160, at ¶ 626); *Krnjelac*, Trial Judgement, *supra* note 131, at ¶ 433.

²¹² *Prosecutor v. Kvočka* (“Omarksa, Keraterm & Trnopolje Camps”), Case No. IT-98-30/1-A, Judgement, ¶ 186 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgement, ¶ 179 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009); *Kupreškić*, Trial Judgement, *supra* note 160, at ¶ 615(e); *Krnjelac*, Trial Judgement, *supra* note 131, at ¶ 434.

²¹³ For an overview of the human right to food, see Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT’L L. 131 (2006).

and of his family, including food.”²¹⁴ This nascent right to adequate food was solidified and elaborated on in Article 11 of the International Covenant for Economic, Social and Cultural Rights (ICESCR) in 1966.²¹⁵ Article 11 of the ICESCR divides the general human right to adequate food into two rights: (1) the largely aspirational right to an “adequate standard of living” including “adequate food” and the “continuous improvement” of living conditions; and (2) “the fundamental right of everyone to be free from hunger.”²¹⁶ The core values of the right to adequate food, recognized in the ICESCR and Universal Declaration, are also considered “fundamental” in nature.²¹⁷ Thus, the core requirements of the right to adequate food cannot be dismissed as “mere” economic rights, but must be viewed as a critical ingredient necessary to protect the most basic human right of all: the right to life.²¹⁸

General support for the right to adequate food can also be found in numerous other human rights documents, including the International Covenant on Civil and Political Rights,²¹⁹ Universal Declaration on the Eradication of Hunger and Malnutrition,²²⁰ Conventional

²¹⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(1) (Dec. 10, 1948).

²¹⁵ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 11 (Dec. 16, 1966).

²¹⁶ *Id.*

²¹⁷ The right to food is considered a “foundational” right, inherent in the right to life. See UN Economic and Social Council, *General Comment 12: Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights*, U.N. Doc. E/C.12/1999/5, ¶ 4 (May 12, 1999) [hereinafter *General Comment 12*] (“The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Rights.”); see also Niada, *supra* note 213.

²¹⁸ See *General Comment 12*, *supra* note 217.

²¹⁹ International Covenant on Civil and Political Rights, art. 1(2), Dec. 19, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) (“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”).

²²⁰ *Universal Declaration on the Eradication of Hunger and Malnutrition*, U.N.G.A. res. 3180 (XXVIII) (Dec. 17, 1973); endorsed by U/N.G.A. Res. 3348 (XXIX), art. 1 (Dec. 17, 1974) (“Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties.”).

on the Elimination of Discrimination Against Women,²²¹ and Convention on the Rights of the Child.²²² Both scholars and the UN Special Rapporteur on the Right to Food have asserted that these instruments and concordant state practice are sufficient to establish the human right to adequate food as customary international law.²²³

As with most human rights, the right to adequate food refers to a broad spectrum of rights, ranging from well-established basic prohibitions on state action to aspirational soft-law norms calling for affirmative state action to improve food security both domestically and abroad.²²⁴ There are three main responsibilities placed on states, those to: *respect*, *ensure* and *fulfil*.²²⁵ According to Laura Niada, when it comes to state implementation of the right to adequate food, “States have a duty to immediately realize the right to be free from hunger” but “[r]esponding to minimum needs, however, is only the baseline action necessary to comply with the right to food [because] States have an explicit duty to progressively implement the comprehensive right to food.”²²⁶ Thus, while it can be generally concluded that there exists a general human right to adequate food and a fundamental right to be free from hunger, it remains unclear where the demarcation line between “fundamental” and other types of food rights precisely sits. Nonetheless, it appears clear that if a group is intentionally subjected to famine conditions as part of a targeted campaign against them, such acts would amount to a severe infringement of the basic, fundamental human right to be free from

²²¹ Convention on the Elimination of Discrimination Against Women, art. 12(2), Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (requiring the provision of “adequate nutrition during pregnancy and lactation” for women).

²²² Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 24(2)(c) (entered into force Sept. 2, 1990) (obligating State parties to “take appropriated measures” to *inter alia* “combat disease and malnutrition, including within the framework of primary health care through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water”).

²²³ See Niada, *supra* note 213, at 173-76 (discussing the arguments for and against recognizing the right to adequate food as customary law and concluding that “there is a strong case for identifying a ‘modern’ international customary norm on the right to food, comprehensive and constantly updating” at 176); see also Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on the Right to Food*, ¶ 10, U.N. Doc. A/63/278 (Oct. 21, 2008) (asserting that the right to adequate food is customary international law).

²²⁴ See generally, Niada, *supra* note 213 (discussing the right to food).

²²⁵ See generally, *id.*

²²⁶ *Id.* at 151-52.

hunger and would also implicate the most basic of all rights: the right to life.

3.3.2.2.2. *Mens Rea: Dolus Specialis*

The key to most persecution convictions is establishing the required *mens rea* of *dolus specialis*, or the “intent to commit the underlying act and to discriminate on political, racial or religious grounds.”²²⁷ This special discriminatory intent is the element that sets persecution apart from other crimes against humanity.²²⁸ For this stringent requirement to be satisfied, the perpetrator of persecution must violate the fundamental rights of members of an intentionally targeted political, racial or religious group.²²⁹ Thus, unlike the crime of genocide, political groups form a protected class for purposes of persecution, although it is often difficult to define the vital aspects of a political group. The ICTR Trial Chamber has commented that “[p]olitical grounds include party political beliefs and political ideology.”²³⁰ The practical difficulties inherent in such ambiguity however, are largely avoided through the adoption of a subjective approach to defining political groups, meaning that if the perpetrators targeted a group of victims based on their perceived group political identity, this suffices for purposes of persecution applicability.²³¹ As such, it follows that liability is proper, even if an

²²⁷ Lukić, Trial Judgement, *supra* note 148, at ¶ 994 (citing Stakić, Appeal Judgement, *supra* note 179, at ¶ 328).

²²⁸ See, e.g., Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73, 137 (2004) (noting that it is the requirement of “discriminatory intent which sets the crime of persecution apart from other crimes against humanity”).

²²⁹ See, e.g., Tadić, Trial Judgement, *supra* note 160, at ¶ 697 (stating that for persecution liability to attach, “it is evident that what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual’s fundamental rights”).

²³⁰ See, e.g., Kayishema, Trial Judgement, *supra* note 69, at ¶ 130.

²³¹ For example, the ICTY Trial Chamber found that persecutory acts committed by Serb paramilitary groups against local Muslim populations were committed on both religious and political grounds. Krnojelac, Trial Judgement, *supra* note 131, at ¶ 22, note 56 (“The Trial Chamber understands that the term ‘non-Serb’ connotes both religious and political distinctions.”); *accord* Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgement and Sentence, ¶ 1072 (Dec. 3, 2003) (finding the accused guilty of persecution for broadcasting hate-speech targeting both “the Tutsi ethnic group and the so-called ‘moderate’ Hutu political opponents who supported the Tutsi ethnic group.” The Trial Chamber found that these attacks “essentially

alleged perpetrator of persecution acted with the intent to discriminate based on a false assumption regarding the political beliefs of associations of victims.²³²

3.3.2.2.3. Persecution and Famine

In the context of famine, persecution could serve as a useful mechanism to reflect the culpability of those who forcibly subject disfavored political or other protected groups to famine conditions. Furthermore, the inclusion of political groups renders persecution potentially applicable to more modern famine scenarios than genocide, representing a critically important distinction in many cases. This distinction is important because famines are often manipulated by powerful groups to shift the brunt of suffering onto less powerful ones, typically along political lines.²³³ As such, persecution provides a potentially useful legal acknowledgment of this dynamic and could signal instances where famine conditions, even if not completely caused by the perpetrator group, are manipulated to much more severely affect a particular group. Prosecutions of persecution charges attendant to famine scenarios could also serve the purpose of further clarifying and advancing human rights law related to food access. Even if the relevant adjudicators decline to enter a conviction for persecution predicated exclusively on the denial of the human right to be free from hunger, convictions could still be feasible, as

merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity.”); *cf.* Nahimana, Appeal Judgement, *supra* note 150, at ¶¶ 986-88 (finding that “hate speech alone can amount to a violation of the rights to life, freedom and physical integrity of the human being. Thus, other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.” The Chamber further found however, that “all [relevant hate] speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence” and thus such hate speech rose to the level of the crime against humanity of persecution).

²³² Krnojelac, Appeal Judgement, *supra* note 207, at ¶ 187 (finding that “a Serb mistaken for a Muslim may still be the victim of the crime of persecution”).

²³³ For example, Zimbabwean President Robert Mugabe has been accused of manipulating the distribution of aid, especially food aid, to reward political allies and punish political opponents. *See, e.g.,* Rhoda E. Howard-Hassmann, *Mugabe’s Zimbabwe, 2000-2009: Massive Human Rights Violations and the Failure to Protect*, 32 HUM. RIGHTS Q. 898 (2010).

famine conditions also very directly compromise other less controversial rights, such as the basic human rights to life and bodily integrity.

The case of Hans Frank again proves demonstrative within the context of the interaction between the enforcement of famine conditions and international criminal culpability. Along with finding Frank guilty of other crimes against humanity for his role in brutalizing the civilian population of Poland generally, Frank was also convicted for his role in the persecution and extermination of European Jews.²³⁴ The Tribunal specifically found that Frank participated in the Final Solution plan of the German Nazi party, pursuant to which Jews “were forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated.”²³⁵ This targeted persecution of Jews by the German Nazis is in many respects similar to the manner in which the Khmer Rouge leadership expressed disdain for so-called “new” people, who were singled out amongst the civilian population and branded as less deserving of access to basic necessities such as food, water, shelter, healthcare and rest.²³⁶ Just as Jews in German-controlled portions of Europe were segregated and subjected to especially harsh conditions marked by lack of food and basic sanitation and the ever-present threat of extreme violence, Cambodians labelled as new people by the Khmer Rouge were subject to repeated forced relocation, especially harsh living and working conditions, and often provided with food rations that paled in comparison to even the meagre rations provided to other civilian workers.²³⁷

²³⁴ IMT Judgement, *supra* note 17, at 296-98.

²³⁵ *Id.* at 116 (498 in original).

²³⁶ The term “new” people denoted Cambodians who had lived in cities or other areas not controlled by the Khmer Rouge during the 1970-1975 civil war. Unlike the Nazi Party’s persecution of European Jews, the Khmer Rouge leadership did not seek the outright destruction of new people. For a basic overview of the Khmer Rouge history, including a discussion of the concept “new” people, see KHAMBOLY DY, *A HISTORY OF DEMOCRATIC KAMPUCHEA 1975-1979* (2007). For an analysis of the treatment of new people within the context of famine specifically, see DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9.

²³⁷ See DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9.

3.3.2.3. *Other Inhumane Acts*

The crime against humanity of other inhumane acts is designed as a catch-all residual crime that can be used to prosecute acts that, while not satisfying all of the elements of a specific other crime against humanity, nevertheless rise to the same level of seriousness. To maintain this flexibility, the *actus reus* of other inhumane acts has been left intentionally amorphous to prevent creative technical evasions of the law through the use of novel forms of harm causation.²³⁸ An alleged inhumane act must be of “similar gravity” to that of other crimes against humanity in order to rise to the requisite level of seriousness.²³⁹ Moreover, specific inhumane acts must be demonstrated at trial, rather than generally demonstrating mistreatment of a civilian population.²⁴⁰ The perpetrator of an inhumane act must possess a *mens rea* of at least *dolus eventualis*²⁴¹ according to prevailing jurisprudence at the ad hoc Tribunals, although the Rome Statute requires that the perpetrator “intentionally” cause the suffering of the victims.²⁴²

²³⁸ See, e.g., Kupreškić, Trial Judgement, *supra* note 160, at ¶ 563 (“The phrase [other inhumane acts] was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”).

²³⁹ E.g., Lukić, Trial Judgement, *supra* note 148, at ¶ 960 (“The act or omission [forming the *actus reus* of [inhumane acts] must have been of a seriousness similar to that of [other crimes against humanity].”); Kayishema, Trial Judgement, *supra* note 69, at ¶ 149 (“Since the Nuremberg Charter, the category [of other inhumane acts] has been maintained as a useful category for acts not specifically stated but which are of comparable gravity.”).

²⁴⁰ *Id.* at ¶¶ 580-89 (observing that “[a]s far as counts for other inhumane acts are concerned the accused could be found guilty of crimes against humanity based on other inhumane acts” but ultimately finding that “the fundamental rights of both the accused, namely to be informed of the charges against him and to be in a position to prepare his defence in due time with complete knowledge of the matter, has been disregarded in relation to all the counts of crimes against humanity for other inhumane acts” thereby requiring their acquittal for inhumane acts).

²⁴¹ For a discussion of *dolus eventualis*, see *supra* at 39; *supra* note 195.

²⁴² E.g., Krnojelac, Trial Judgement, *supra* note 131, at ¶ 132 (“The required *mens rea* is met where the principal offender at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.”) (citing Kayishema, Trial Judgement, *supra* note 69, at ¶ 153); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, ¶ 56 (Int’l Crim.

3.3.2.3.1. Acts of "Similar Gravity"

In order to rise to a level of similar gravity to other crimes against humanity, alleged inhumane acts must cause injury to the "physical or mental integrity, health or human dignity" of affected victims.²⁴³ Within international practice, accused have been found guilty of inhumane acts as a crime against humanity for various acts of cruelty and abuse. Examples pertinent to famine and hunger include: forcible transfer;²⁴⁴ confinement "on exposed ground without water, food or sanitary facilities" for five days;²⁴⁵ mistreatment and injuring of detainees;²⁴⁶ "psychological abuses, and confinement in inhumane conditions";²⁴⁷ injuries sustained during forced labor;²⁴⁸ and general physical assaults causing injury.²⁴⁹

Trib. for the Former Yugoslavia June 25, 1999); *cf.* Rome Statute, *supra* note 113, at art. 7(1)(k).

²⁴³ See Lukić, Trial Judgement, *supra* note 148, at ¶ 960 (the "act or omission must have caused serious mental or physical suffering or injury or constituted a serious attack on human dignity") (citing Kordić, Appeal Judgement, *supra* note 150, at ¶ 117) (subsequent citations omitted); *see also* Rome Statute, *supra* note 113, at art. 7(1)(k) (defining the crime as that of "[o]ther inhumane acts of a similar character [to other crimes against humanity,] intentionally causing great suffering, or serious injury to body or to mental or physical health").

²⁴⁴ See, e.g., Blagojević, Trial Judgement, *supra* note 186, at ¶ 810 (stating that forcible transfer is principally allowed).

²⁴⁵ Bagilishema, Trial Judgement, *supra* note 71, at ¶¶ 490-94 ("The confinement of a large number of people on exposed ground without water, food or sanitary facilities will amount to an inhumane act if the act is deliberate and its consequences are serious mental or physical suffering or a serious attack on human dignity." The Chamber found "no evidence that any refugee actually died for lack of water or food. . . . Nevertheless, the evidence suggests that by the fifth day the physical suffering of most refugees must have been extreme." Furthermore, the Chamber found that placing the refugees in such horrible conditions "necessarily constitutes a serious attack on human dignity."). The accused was acquitted of inhumane acts charges on evidentiary grounds. *Id.* at ¶ 555.

²⁴⁶ Kordić, Trial Judgement, *supra* note 101, at ¶¶ 256, 266-72.

²⁴⁷ Kvočka, Trial Judgement, *supra* note 209, at ¶ 209.

²⁴⁸ Prosecutor v. Naletilić ("Tuta & Štela"), Case No. IT-98-34-T, Judgement, ¶ 271 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

²⁴⁹ E.g., Tadić, Trial Judgement, *supra* note 160, at ¶ 697 (beatings of six prisoners).

3.3.2.3.2. Other Inhumane Acts and Famine

The conditions of life associated with periods of famine involve a degree of suffering clearly comparable to that of other enumerated crimes against humanity. Starving famine victims suffer severe, prolonged physical pain as their bodies break down and weaken. The longer term health implications for victims are similarly serious, as the physical stress of enduring periods of starvation is associated with lifelong and intergenerational negative health implications.²⁵⁰ Famine conditions also routinely cause severe mental traumas and often involve breakdowns in most basic societal norms and mores, leading to wider negative implications for affected societies.²⁵¹ For example, survivors of the Khmer Rouge period famine often suffered physically from lack of food while also being forced to watch loved ones weaken, suffer and die from starvation.²⁵² Importantly, the crime of other inhumane acts could also be used to recognize the suffering of victims of famine who ultimately survive, as the suffering of survivors is oft-ignored in discussions of famine in Cambodia and elsewhere.

4. CONCEPTUALIZING FAMINE AS A MODALITY OF HARM CAUSATION

As demonstrated above, certain famine situations may involve the commission of a wide variety of international crimes. Famine conditions may form part of a genocidal plan to destroy a national, religious, racial or ethnic group, as has been alleged by the ICC Office of the Prosecutor in regards to the situation in Darfur.²⁵³ Famine conditions enforced on a civilian population by an occupying power

²⁵⁰ See generally Roseboom, de Rooij, & Painter, *supra* note 64; Ó GRÁDA, *supra* note 2 at 45–68, 90–128. For connections between the Khmer Rouge period, trauma and enduring mental health challenges for survivors and their families, see CAMBODIA'S HIDDEN SCARS: TRAUMA PSYCHOLOGY IN THE WAKE OF THE KHMER ROUGE (Beth Van Schaack et al. eds., 2011). In particular, see Nigel P. Field, *Intergenerational Transmission of Trauma Stemming from the Khmer Rouge Regime: An Attachment Perspective*, in CAMBODIA'S HIDDEN SCARS: TRAUMA PSYCHOLOGY IN THE WAKE OF THE KHMER ROUGE, *id.* at 70, 71.

²⁵¹ See generally Ó GRÁDA, *supra* note 2.

²⁵² For an account of such an experience from a survivor of the Khmer Rouge period, see DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9, at 46–48.

²⁵³ See Al Bashir, Article 58 Application, *supra* note 43 (discussing how food deprivation was used as a weapon).

or starving prisoners of war could be characterized as the war crime of inhumane acts or wilfully causing great suffering. Property-based war crimes could also be implicated when military campaigns involve acts of pillaging or engage in scorched earth tactics. Using starvation as a method of warfare is also itself a discrete war crime, one which UN Secretary-General Ban Ki-moon recently accused the Syrian government, rebel forces, and Islamic State militants of in relation to the current food crisis in Madaya and other parts of Syria.²⁵⁴ Finally, the creation or enforcement of famine conditions can often be accurately characterized as a widespread or systematic attack on a civilian population, making crimes against humanity a promising entry point for addressing general famine conditions outside the context of a targeted genocidal attack or armed conflict. In particular, the crimes against humanity of extermination and other inhumane acts could be combined to address the two main harms associated with famine: mass death and the immense suffering of all victims, including survivors. When disfavored political groups are denied fundamental human rights leading to disproportionate suffering during a general famine, or creating a famine affecting only members of such group, the crime against humanity of persecution may be applicable.

Thus, a wide variety of well-established international crimes may be implicated by particular famine scenarios. Furthermore, despite some disagreement concerning which particular aspects of ICL might be applicable, there appears to be relatively broad agreement amongst scholars and key international legal actors, such as the UN Commission of Inquiry for North Korea, and the ICC Office of the Prosecutor and Pre-Trial Chamber in relation to the situation in Darfur, that there are significant opportunities within ICL, *de lege lata*, to pursue accountability for causing harm through the creation of famine conditions.²⁵⁵ Nonetheless, actual prosecutions directly address-

²⁵⁴ See Full transcript of Secretary-General's press encounter, *supra* note 129 (addressing the situation in Madaya).

²⁵⁵ See, e.g., Marcus, *supra* note 5 (demonstrating the role of international criminal law in the context of famine); Kang, *supra* note 5 (describing food deprivation as a prosecutable crime against humanity); Edkins, *supra* note 5; DeFalco, *Accounting for Famine*, *supra* note 5 (discussing the international criminal dimensions of famine); Howard-Hassmann, *supra* note 5 (concluding that famine could be categorized as a crime against humanity). See also 2014 UN North Korea Report, *supra* note 46 (finding state led food deprivation to be among the violations of human rights in North Korea).

ing famine remain elusive and the tendency to frame hunger, starvation and the spread of famine-related diseases as unfortunate by-products or collateral damage of more familiar forms of atrocity and mass violence persists.

This disconnect begs the question of why famine has continued to be relegated to the periphery of ICL when it has been the source of such massive suffering and death. It is tempting to simply attribute the lack of famine-related ICL practice to the more general selectivity and under-enforcement that plagues the entirety of the current international criminal justice regime.²⁵⁶ Yet the realities of ICL's selectivity and under-enforcement only go so far to explain this lack of engagement, as even in situations where ICL accountability has been pursued, such as in the former Yugoslavia, East Timor and Cambodia, questions of famine and civilian starvation have continued to be dealt with indirectly, if at all. The ICTY Prosecutor decided that famine conditions were not serious enough to warrant prosecutions. The jurisdiction of the East Timorese SPSC was limited to a ten-month period when physical violence escalated at the tail end of a brutal multi-decade occupation. The ECCC has thus far, focused primarily on torture and killing in prisons, the forced evacuation of Phnom Penh, and other more familiar atrocity crimes.

There are various reasons beyond the general under-enforcement of ICL that likely contribute the prevailing lack of direct engagement with famine as a subject of ICL. When viewed at a surface level, potential ICL accountability for famine can raise concerns of retroactive criminalization through the creation of new international crimes; watering down the stringency of ICL *actus reus* and *mens rea* requirements; imposing criminal liability for omissions or the imposition of guilt by association; and the imposition of ICL accountability for structurally caused socio-economic rights violations. While such immediate reactions are not manifestly unreasonable, upon closer inspection, these challenges begin to appear less problematic. In fact, when scrutinized more closely, each of these concerns either merely reflects general challenges—such as causal overdetermination and group perpetration—inherent in virtually all atrocity crime prosecutions, or is predicated on outdated underlying understandings

²⁵⁶ Under-enforcement and resultant selectivity represent major challenges to the efficacy and legitimacy of ICL. There exists a large body of scholarship discussing these issues, which are outside the scope of this article. For a thoughtful analysis of how selectivity affects the legitimacy of ICL, see ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME (2005).

of famine itself. Each of these categories of concern are addressed in turn, followed by broader observations concerning the aesthetic expectations of atrocity events.

4.1. *The Specter of "New" International Crimes*

While many scholars have identified promising entry points within ICL for the pursuit of famine accountability, often such liability is discussed using terminology strongly suggestive of direct criminalization.²⁵⁷ This language, when taken out of context, suggests that prosecutions of international crimes related to famine causation would necessarily require or amount to the creation of "new" international crimes. Clearly if this were true, any such prosecution prior to the clear creation of new famine crimes would violate the principle of *nullum crimen sine lege* ("no crime without law"), a foundational maxim of ICL.²⁵⁸ Such language thus confuses the issue, as scholars, including those utilizing such terminology, have identified significant opportunities to address modern famine scenarios utilizing extant ICL provisions. It would not violate the principle of *nullum crimen sine lege* to address novel factual scenarios utilizing well-established international crimes and associated modes of liability.

4.2. *Obscuring Causation and Mens Rea through the Passage of Time*

Causal chains connecting famine conditions to those ultimately responsible for causing them can remain difficult to identify even when rather direct, because the harms associated with famine typically occur attritively over time. The slow and insidious nature of famine is a paradigmatic example of the phenomenon Helen Fein has referred to as "genocide by attrition."²⁵⁹ Everita Silina and the late Sheri Rosenberg have argued that such attritive processes form a major, oft-overlooked aspect of genocides and other mass killing

²⁵⁷ See, e.g., DE WAAL, *supra* note 5; Marcus, *supra* note 5; Edkins, *supra* note 5; Bashi, *supra* note 5; Howard-Hassmann, *supra* note 5.

²⁵⁸ For example, this is the position taken by Howard De Nike. See De Nike, *supra* note 37.

²⁵⁹ Fein, *supra* note 6.

events.²⁶⁰ In order to resist the temptation to resort to inaccurate, static understandings of genocide and mass killing, Rosenberg argues that genocide is better understood as dynamic, evolving “processes” rather than static events.²⁶¹ While Fein, Silina and Rosenberg present their work within the rubric of genocide, they do so using a non-legal definition of the term that roughly correlates with the terms atrocity and mass violence as they are used within ICL scholarship, focusing on the production of mass suffering and death.²⁶² Diana Sankey has similarly identified a broader failure within transitional justice practices to recognize and address what she refers to as “subsistence harms.”²⁶³ Sankey defines subsistence harms as “deprivations of the physical, mental and social needs of human subsistence, perpetrated against individuals or populations in situations of armed conflict or as an act of political repression, where the perpetrator acts with intent or with knowledge of the inevitable consequences of such deprivations.”²⁶⁴

The observations of Sankey, Fein, Rosenberg and Silina, concerning the reality that more insidious, often socio-economic means of mass killing are integral to atrocity and genocide events, raise broader questions related to the relationship between ICL and economic, social and cultural rights. Famine situations are often viewed as products of economic, social and cultural rights violations, especially the right to adequate food.²⁶⁵ While such an association is not necessarily problematic, linking famine with economic, social and cultural rights can lead to the importation of a broader tendency to view the violation of such rights as being inherently

²⁶⁰ See Rosenberg & Silina, *supra* note 6.

²⁶¹ Sheri P. Rosenberg, *Genocide Is a Process, Not an Event*, 7 GENOCIDE STUD. & PREV. 16 (2012).

²⁶² Fein’s article begins with the statement that “[g]enocide by attrition occurs when a group is stripped of its human rights, political, civil and economic. This leads to deprivation of conditions essential for maintaining health, thereby producing mass death.” Fein, *supra* note 6, at 10. Rosenberg meanwhile, states that “genocide is a process, a collective cataclysm, that relies more heavily – than currently appreciated – on indirect methods of destruction for its success. It is the excessive focus on violent deaths and a preoccupation with the numbers of victims that have obscured alternative means of annihilation and have thereby missed the signals of unfolding tragedies.” Rosenberg, *supra* note 261, at 18.

²⁶³ Sankey, *supra* note 14.

²⁶⁴ *Id.* at 122.

²⁶⁵ See, e.g., Kearney, *supra* note 40.

structural in nature and hence, excluded from the purview of ICL.²⁶⁶ This assumption has been increasingly called into question by scholars.²⁶⁷

Misunderstandings of the dynamics of famine causation represent a prime example of this tendency towards broad generalizations concerning the divide between direct and structural causation. Certain famines, such as the Khmer Rouge era famine in Cambodia, can be very directly caused.²⁶⁸ Famines, by definition, kill through attrition, as victims slowly weaken and die. In fact, even during the most virulent famine episodes, relatively few victims die from actual starvation, but more often from the spread of famine-related diseases as society breaks down, the medical sector becomes overwhelmed and desperation sets in.²⁶⁹ As such, famines represent clear examples of mass killing as a dynamic process of attrition, rather than a discrete event, and fit within Sankey's definition of subsistence harms. These facts, that famine events kill attritively through insidious means and over periods of time, have likely tended to obscure relevant chains of causation, contributing to the widely-held assumption that famine harms are necessarily excluded from the reach of ICL. Such an assumption however, represents a generalization that does not always hold true. Certain famines, such as the Khmer Rouge famine in Cambodia and recent North Korean

²⁶⁶ For a discussion of this tendency to view economic, social and cultural rights as being structurally excluded from the purview of ICL, see SCHMID, *supra* note 19, at 22–40. For a widely cited argument that there is pressing need to address economic and social justice issues in transitional justice efforts more generally, see Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 NYU J. INT'L L. & POL. 1 (2007).

²⁶⁷ See, e.g., Evelyne Schmid & Aoife Nolan, "Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice, 8 INT'L J. TRANSITIONAL JUST. 362 (2014). Schmid and Nolan observe that in "the use of ESR [economic and social rights] terminology in transitional justice literature and practice, we observed a tendency to view ESR violations as necessarily structural while considering civil and political rights violations to be discrete abuses." They further contend that the "risk of this approach is that it ignores that many ESR violations occur during conflict and that such violations can be discrete rather than structural." *Id.* at 10–11.

²⁶⁸ Various scholars, including the author, have made this specific argument elsewhere. See generally DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9; James A. Tyner & Stian Rice, *To Live and Let Die: Food, Famine, and Administrative Violence in Democratic Kampuchea, 1975–1979*, 48 POLIT. GEOGR. 1 (2015). For more general accounts of the Khmer Rouge periods that discuss famine issues, see, e.g., ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION*, rev'd ed. (1998); BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–79*, (3d ed. 2008).

²⁶⁹ See Ó GRÁDA, *supra* note 2, at 90–128.

famines, can be products of quite direct causal forces attributable to a discrete and identifiable set of individuals. Indeed, in certain circumstances, the causal links between famine conditions and those responsible for creating them could be stronger and more direct than for more traditional atrocity crimes of direct violence.²⁷⁰

Along with rendering causal links less immediately visible, the fact that famines cause slow deterioration, rather than sudden, violent harm, may also help to obscure the *mens rea* of those responsible for causing famine. Concern over the degree to which famine conditions were foreseeable to those who caused them and concomitant *mens rea* issues have been raised regularly by scholars.²⁷¹ When one views famines as processes of slow killing and traumatization, it becomes less difficult to also view the *mens rea* of individuals implicated in the creation of famine as evolving over time. When viewed in this way, a single famine event that starts as the product of non-criminal negligent action, may evolve into one that is enforced recklessly, knowingly, intentionally, or even purposefully over time as those responsible are made aware of famine conditions and react accordingly. Thus, famines are best understood as delivery systems of mass trauma and death that evolve dynamically and as such, may or may not begin by implicating ICL, but over time may evolve into atrocities entailing individual ICL accountability.

4.3. Group Perpetration and Causal Overdetermination

Famines are overwhelmingly brought about through the coordinated actions of highly organized groups, rather than individuals. Such groups, which often include state actors, transform general food shortages or production shortfalls into mass famines. This was the case in Cambodia, where the Khmer Rouge leadership inherited

²⁷⁰ For example, in the context of the Khmer Rouge, violence carried out at the behest of local Khmer Rouge officials could be unsanctioned by the central leadership, or even against party policy, while famine conditions were primarily a result of the leadership's socio-economic policies. See generally DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9.

²⁷¹ For example, Solomon Bashi, analyzing potential ICL famine accountability of former Khmer Rouge leaders, concludes that holding such leaders criminally responsible "for starvation will certainly be a challenge. The accused will likely claim that they were unaware of the conditions at the local level. This defense can be especially effective against a charge like starvation, in which the resulting deaths are slow and indirect." Bashi, *supra* note 5, at 69.

a nation ravaged by five years of civil war and whose food production had been significantly decreased. Indeed, the Khmer Rouge portrayed their brand of agrarian socialism as a source of abundant food in propaganda materials while they fought a bitter civil war with the US-backed Lon Nol government.²⁷² Once in power, the Khmer Rouge regime enacted a series of social and economic policies that combined to trigger and continually worsen a nationwide famine.²⁷³ These policies operated interactively to cause and continually worsen famine conditions. All of these policies emanated from the top Khmer Rouge leadership and were enforced throughout the countryside by local commanders, cadres and party militias through extreme violence.

As a result of the reality of these overlapping, interactive causal dynamics and group causation, it is tempting to dismiss famine situations as too causally overdetermined for a criminal law paradigm, grounded in individual agency, to be applicable. Yet, in this regard, famines do not present any new challenges to the pursuit of ICL accountability following atrocity events. Atrocities are virtually always heavily overdetermined products of concerted group behavior, and individual perpetrators considered most responsible for atrocity crimes are routinely far removed from the physical perpetration of such atrocities.²⁷⁴ This fact, and the reality that atrocities are committed almost exclusively by groups rather than individuals, have not been viewed as impediments to the pursuit of international criminal justice since the IMT famously pronounced that international crimes are “committed by men, not by abstract entities.”²⁷⁵ Despite the fact that this pronouncement elides the fact that such “men” rarely, if ever, commit such crimes alone, problems of causal overdetermination and group commission have not generally stood

²⁷² See DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9, at 50–54.

²⁷³ See *id.* Examples of key policies include bans on private cooking and eating, bans on private ownership of food or the creation of private subsistence gardens, arduous forced labor conditions, bans on foraging for wild food sources, state expropriation of “surplus” rice to fund revolutionary projects, the complete denial of competent medical care, the expulsion of all foreigners, including food aid workers and organizations, and a complete ban on freedom of movement for civilians to move to areas with more food or flee the country altogether.

²⁷⁴ For a discussion of some of the challenges overdetermination presents to ICL, see James G. Stewart, *Overdetermined Atrocities*, 10 J. INT'L CRIM. JUST. 1189 (2012).

²⁷⁵ See IMT Judgement, *supra* note 17, at 223.

in the way of ICL prosecutions to date.²⁷⁶ Thus, although famine scenarios do present practical challenges to the imputation of individual criminal responsibility, such challenges are not in any way unique to the subject of famine, but rather are near-universal in the pursuit of criminal accountability for atrocities.²⁷⁷

4.4. *The Commission/Omission Distinction and Concerns of Criminalizing Bad Policy Decisions*

If famines are understood according to outdated, causally neutral models grounded in the language of natural disaster, or at least the failure to respond thereto, ICL accountability for famine can raise concerns of the imposition of criminal liability predicated on some mix of omission liability and the criminalization of mere bad policy decisions.²⁷⁸

The concern that the imposition of ICL accountability predicated wholly on the failure of an accused to act to prevent famine is largely grounded in outdated underlying notions of the causal dynamics involved in famine creation. In the vast majority of modern famine scenarios, famine conditions are caused by affirmative actions and policymaking, rather than merely allowed to happen. Furthermore, even in instances where unforeseen or naturally occurring fluctuations in food production have some role in contributing to the onset of famine, typically it is only when relevant actors take affirmative

²⁷⁶ This is not to suggest that problems of overdetermination and group commission have not been major recurring obstacles to the development of ICL. For discussions of some of the issues generally raised in this regard, see, e.g., Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NORTHWEST. U. L. REV. 539 (2004); André Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 ST. CLARA J. INT'L L. 313 (2010); Mark A. Drumbl, *Accountability for System Criminality*, 8 ST. CLARA J. INT'L L. 373 (2010); Darryl Robinson, *International Criminal Law as Justice*, 11 J. INT'L CRIM. JUST. 699 (2013); Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628 (2015).

²⁷⁷ Indeed, this disconnect between municipal and international criminality has led certain scholars, such as Mark Drumbl, to question the suitability of a liberal criminal law framework grounded in municipal conceptions of crime and criminality, to atrocity situations. See, e.g., MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* (2007). Drumbl has described the uncritical adoption of a liberal criminal law model of justice as amounting to the construction of law on "borrowed stilts." *Id.* at 44.

²⁷⁸ These concerns were raised by Alejandro Chehtman and Stephen Toope in discussions with the author, who is grateful for their insightful feedback.

steps that such famines begin to kill on a large scale. Most often, such affirmative acts include some combination of acts affecting food production or distribution, along with restrictions on the ability of victims to engage in coping behavior, such as migration or resorting to alternative food sources.

In Cambodia, the Khmer Rouge regime both triggered famine by expropriating rice from the population and enforcing hard labor, and maintained starvation conditions by expelling all foreign aid workers, refusing to accept international assistance and preventing starving victims from fleeing or foraging for alternative food sources.²⁷⁹ In Darfur, famine conditions appear to have been manufactured by the Khartoum government.²⁸⁰ In Somalia, famine only killed victims in large numbers in areas controlled by Al Shabaab militants, who routinely murdered foreign aid workers and actively prevented civilians from fleeing to areas with greater food availability.²⁸¹ In a more general sense, famines tend to occur only within certain parts of areas affected by naturally-caused reductions in aggregate food production, such as droughts or floods.²⁸² It is this basic fact, that occurrences of famine cannot be directly correlated with decreases in aggregate food production, that has led to a shift in how famines are conceptualized.²⁸³

Yet, even when famines are understood as products of positive acts, rather than omissions, such acts risk being dismissed as mere bad policy, rather than framed as potentially criminal methods of harm causation. Again, such a concern can be both viewed as universal to all atrocity crimes and predicated on an assessment of knowledge and culpability at a particular moment in time, rather than as constantly evolving in relation to events as they unfold. First, one can characterize much of ICL as being dedicated to the prosecution of individuals for their contributions to bad policies.

²⁷⁹ See generally DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9.

²⁸⁰ See, e.g., de Waal, *Reflections*, *supra* note 6; Reeves, *supra* note 12.

²⁸¹ See, e.g., BRYDEN, *supra* note 11; Jillions, *supra* note 128; Ohlin, *supra* note 5. It should be noted that the Somali government and its US backers may have also contributed to the worsening of famine in areas controlled by Al Shabaab. See *Somalia 2011 famine Was a U.S.-Created War Crime*, *supra* note 11.

²⁸² For example, bad weather affected food production throughout Southeast Asia during the reign of the Khmer Rouge in Cambodia, yet true famine occurred solely within Cambodia and did not affect similarly situated countries, such as Thailand, Vietnam or Laos. See DeFalco, *Justice and Starvation in Cambodia*, *supra* note 9.

²⁸³ See, e.g., Sen, *supra* note 4; DE WAAL, *FAMINE CRIMES*, *supra* note 4; Devereux, *Introduction*, *supra* note 3; Ó GRÁDA, *supra* note 2.

The Final Solution plan was official, if secret, Nazi policy. A policy decision was also made to exterminate Muslim men and boys in Srebrenica. While these examples are admittedly extreme, they put into stark relief the fact that characterizing actions causing mass harm as “policy” decisions does not move the needle in terms of an assessment of whether such actions were criminal in nature. Indeed, one of the unique aspects of ICL generally is that it routinely criminalizes actions and policies set by state actors.

Second, the characterization of ICL-based famine accountability as amounting to the criminalization of policy decisions, even poor ones, risks oversimplifying *mens rea* assessments by focusing on a particular, pre-famine moment in time when policy decisions are first made as the sole moment when *mens rea* should be assessed. Famines may be triggered by negligent or hopelessly incompetent governance and policymaking. In such scenarios, those responsible for such bad policy clearly do not commit any international crime by simply being awful at their vocation. Such policies may violate human rights, but may remain non-criminal from the perspective of ICL for some time. When however, famine conditions begin to set in and victims begin to starve and die, the *mens rea* of those responsible for bringing about such conditions very nearly always evolves in relation to events as they unfold. The Khmer Rouge leaders may have been simply grossly incompetent and overly optimistic when they declared that Cambodia would triple rice production in a single year. When famine resulted from this and other disastrous policies however, and continually decimated the civilian population, the regime’s leadership at some point moved from mere negligence to wilful blindness, reckless disregard or sheer uncaring knowledge vis-à-vis the reality that their actions were quite directly resulting in the brutalization of the entire civilian population and the deaths of hundreds of thousands of Cambodians. Thus, the label of “policy” does not preclude the imposition of ICL accountability for famine, but merely reflects the fact that policy choices can *become criminal* over time if they wreak sufficient havoc and yet continue to be enforced nonetheless.

5. CONCLUSION

Famine events are not inherently atrocities. They are periods of mass suffering and death. However, powerful individuals and groups can, and regularly do, commit international atrocity crimes by enforcing famine conditions on victim populations. Nonetheless, famines fail to exhibit the forms of spectacular violence and resultant suffering that have come to be associated with the commission of atrocities, from the Holocaust to more recent atrocities, such as those in Rwanda, the former Yugoslavia, Darfur and Syria.

All of the various potential roadblocks to ICL famine accountability, ranging from fears of retroactive criminalization to the imposition of criminal liability for structural socio-economic rights violations, can be viewed as by-products of this larger, aesthetic issue. Traditional forms of mass atrocity, committed through widespread acts of horrific interpersonal violence, do not suffer from such aesthetic challenges, as they are easily and viscerally understandable as “criminal” in nature. Thus, when a mass grave filled with bodies riddled with bullets or exhibiting other marks of physical assault is discovered, such bodies are intuitively categorized as victims of international crimes. When bodies are decimated by hunger and famine-related diseases, the immediate causal dynamics involved to produce such suffering are not so arrestingly, viscerally criminal. As such, the main barrier standing in the way of ICL-based famine accountability appears to be one grounded in perception, aesthetics, and visibility politics, rather than technical questions of legality and feasibility.²⁸⁴

This broader question, of just what is meant by the term “atrocity” and how aesthetic expectations and other visibility politics shape ICL practice and discourse, goes beyond the question of famine accountability and merits greater investigation. Absent a much broader reimagining of the hallmarks of atrocities and the nature of international criminality, more modest steps could be undertaken in relation to famine itself as a potential subject of ICL. One such step

²⁸⁴ This argument is made, albeit indirectly and in related, but different contexts by Sonja Starr (in relation to potential ICL accountability for grand corruption) and Evelyne Schmid (in relation to potential overlaps between ICL and violations of economic, social and cultural rights generally). See Starr, *supra* note 22, at 1260–67; SCHMID, *supra* note 19, at 22–40. This invisibility of famine can also be understood as part of a broader blindness to economic and social issues within the entire field of transitional justice. See Miller, *supra* note 41.

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could be to re-conceptualize famines as potentially criminal *means*, rather than crimes in and of themselves. Presenting famines in this way, as *modalities of harm production*, could help better situate the subject matter of famine within the architecture of modern international criminal justice and resist aesthetic biases predicated on visibility politics and assumptions concerning the forms that atrocity events may take.