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The underlying rules of international
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Conflict-induced food insecurity and the war crime of starvation of civilians as a method of warfare – the underlying rules of international humanitarian law

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Abstract

This article examines the rules of international humanitarian law (IHL) relevant to avoiding or minimising conflict-induced food insecurity. It is important to consider these rules in order to appreciate the range of protections to which civilians are entitled. Understanding these rules is also essential for interpreting the relevant provisions of international criminal law, including, most notably, the war crime of starvation of the civilian population. After providing a brief outline of the general rules of IHL respect of which can reduce the risk of food insecurity, the article focuses on two sets of rules of direct relevance to food insecurity: the prohibition of starvation of civilians as a method of warfare and the rules regulating humanitarian relief operation. With regard to the former, the article considers whether, under IHL, the prohibition requires that the party that has engaged in the conduct must act with the purpose of causing starvation. It is argued that while the general prohibition of starvation in IHL requires such purpose, there are other, more specific, rules of IHL directed at reducing food insecurity which do not require such purpose. Consideration is also given to the application of the principle of proportionality to measures which have the effect of causing starvation. While most of this article focuses on IHL, it also provides some reflections on the interplay between the rules of IHL relating to humanitarian relief operations and the war crime of starvation in the International Criminal Court's Statute. Moving briefly away from IHL, the article also highlights a normative tension that can impede humanitarian action and therefore exacerbate food insecurity.

1. Introduction

The UN Secretary-General's warning in February 2017 that 22 million people were at risk of famine in Nigeria, Somalia, South Sudan and Yemen was a stark reminder of the vicious cycle between conflict and hunger.¹ In recent years, conflict has become the predominant factor

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¹ Security Council Reporter, *March 2018 Monthly Forecast: Conflict and Hunger*, 28 February 2018, available at https://www.securitycouncilreport.org/monthly-forecast/2018-03/conflict_and_hunger.php (visited 12 November 2019). See *Full transcript of Secretary-General's Joint Press Conference on Humanitarian Crises in Nigeria, Somalia, South Sudan and Yemen*, 22 February 2017, available at <https://www.un.org/sg/en/content/sg/press-encounter/2017-02-22/full-transcript-secretary-generals-joint-press-conference> (visited 12 November 2019). See also *Statement by the President of the Security Council*, 9 August 2017, UN Doc. S/PRST/2017/14.

causing food insecurity.² Conflict can drive food insecurity in a number of ways: it can cause economic recession, drive up inflation, increase unemployment and disrupt the functioning of essential services, all of which negatively impact on the availability of and access to food. More directly, food stocks may be looted or destroyed, basic infrastructure necessary for the production and distribution damaged, and access to fields disrupted.³ Humanitarian action can provide a lifeline for people in need but also faces numerous challenges: insecurity from ongoing hostilities or a breakdown in law and order, and bureaucratic and other impediments imposed by belligerents. While not every factor that contributes to food insecurity in situations of armed conflict is a violation of international humanitarian law (IHL), compliance by belligerents with their obligations can play a key role in avoiding or at least reducing food insecurity.

Since 2017, the international community has taken a number of important steps to advance the normative framework relevant to food insecurity in armed conflict. In April 2018 Switzerland presented a proposal to the Assembly of States Parties to the International Criminal Court (ICC) to amend the Statute of the ICC to include the starvation of civilians as a war crime in non-international armed conflicts'.⁴ The next month the Security Council adopted a landmark thematic resolution on conflict-induced food insecurity.⁵ Among other things, Security Council resolution 2417 repeatedly referred to the importance of compliance by belligerents with relevant international law, and noted that unlawful denial of humanitarian access could constitute a threat to international peace and security.⁶

The collection of essays in this special issue of the Journal of International Criminal Justice discusses the international legal framework relating to the starvation of the civilian population. The present article contributes to this discussion by examining the rules of international humanitarian law (IHL) relevant to avoiding or, at least, minimising conflict-induced food insecurity.⁷ It is important to consider these rules in order to appreciate the range of protections

² Over 80% of funding requested by the United Nations for humanitarian needs goes toward meeting life-saving needs in conflict settings. See *One Humanity: Shared responsibility — Report of the Secretary General for the World Humanitarian Summit*, 2 February 2016, UN Doc. A/70/709, para. 25.

³ Humanitarian Policy Group at the Overseas Development Institute, *Conflict and Hunger: Breaking a Vicious Cycle*, December 2017, available at <https://www.permanentrepresentations.nl/documents/reports/2017/12/14/report-conflict-and-hunger-breaking-a-vicious-cycle> (visited 12 November 2019).

⁴ ICC Assembly of States Parties, *Report of the Working Group on Amendments*, ICC-ASP/17/35, 29 November 2018, §§ 9-11; *Switzerland: Proposal of Amendment*, UN Doc C.N.399.2019.TREATIES-XVIII.10, 30 August 2019. For an analysis of the proposed amendment, see F. D'Alessandra, M. Gillett, 'The War Crime of Starvation in Non-International Armed Conflict', in this special issue.

⁵ SC Res. 2417 (2018). The resolution is examined by S. Zappalà, 'Conflict-Related Hunger, 'Starvation Crimes' and UN Security Council Resolution 2417 (2018)', in this special issue of the Journal of International Criminal Justice.

⁶ SC Res. 2417 (2018), § 4.

⁷ In addition to IHL, international human rights law also affords important protections. These protections are of particular, but not exclusive, relevance where severe food insecurity occurs in situations that do not constitute armed conflicts, and are discussed in S. Hutter, 'Starvation in Armed Conflicts — An Analysis Based on the Right to Food', in the present special issue.

to which civilians are entitled. Understanding these rules is also essential for interpreting the relevant provisions of international criminal law, including, most notably, the war crime of starvation of the civilian population. While a war crime may be framed more narrowly than the underlying rule of IHL,⁸ it cannot be broader in scope. Since war crimes are ‘serious violations of laws and customs of war’, acts which do not even amount to violations of IHL cannot *a fortiori* be interpreted as coming within the scope of a war crime.⁹

Following this Introduction, Section 2 of this article provides a brief outline of general rules of IHL respect of which can reduce the risk of food insecurity. Sections 3 and 4 then focus on two sets of rules of direct relevance to food insecurity: the prohibition of starvation of civilians as a method of warfare and the rules regulating humanitarian relief operation. While most of this article focuses on IHL, Section 5 provides some reflections on the interplay between the rules of IHL relating to humanitarian relief operations and the war crime of starvation in the Statute of the ICC. Moving briefly away from IHL, Section 6 notes a normative tension that can impede humanitarian action and therefore exacerbate food insecurity. Some concluding reflections are provided in Section 7.

2. Compliance with IHL as a Line of Defence against Conflict-Induced Food Insecurity

The prohibition on the starvation of civilians as a method of warfare is far from the only rule of IHL of relevance to preventing or minimising conflict-induced food insecurity. In the words of the UN Emergency Relief Coordinator Mark Lowcock, compliance with other rules constitutes a ‘line of defence’ against hunger in armed conflict.¹⁰ These include a number of rules regulating

⁸ This is the case for example for the rule of proportionality. Art. 51(5) AP I prohibits attacks ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’. The corresponding war crime in the Statute of the International Criminal Court (ICC Statute) is limited to attacks where the expected incidental harm is *clearly* excessive to the *overall* anticipated military advantage. Art. 8(2)(b)(iv) ICCSt.

⁹ See M. Bothe, ‘War Crimes’, in A. Cassese, P. Gaeta and J. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 379-426, at 387. It is arguable that the Appeals Chamber of the ICC went beyond IHL in finding a war crime in *Ntaganda* (Judgment on the appeal of Mr Ntaganda against the ‘Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, *Ntaganda* (ICC-01/04-02/06 OA5), Appeals Chamber, 15 June 2017). See K.J. Heller, ‘ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL’, *Opinio Juris*, 15 June 2017, available at <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/> (visited 12 November 2019). However, the Appeals Chamber appears in that case to have based its interpretation of the war crime on its (somewhat controversial) view of the underlying IHL rule (para. 63) and seems to have taken the view that the war crimes provisions of the ICC Statute should be interpreted in line with IHL (paras. 53-55).

¹⁰ Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Mark Lowcock, *Wars have laws: How do we get more people to comply with them to reduce humanitarian suffering?*, Speech at the Hertie School of Government, Berlin, 3 September 2018, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/Wars%20have%20Laws%20-%20as%20prepared%20for%20delivery%20Berlin%203%20Sept%202018.pdf> (visited 12 November 2019).

the conduct of hostilities that are considered customary and applicable in both international and non-international armed conflicts such as:

- the prohibition on directing attacks against civilian objects,¹¹ which include objects necessary for food production and distribution such as agricultural lands, crops, livestock, farms, mills, water installations and markets;
- the prohibition on indiscriminate attacks, i.e. attacks of a nature to strike military objectives and civilian objects, such as those just listed, without distinction;¹²
- the rule of proportionality, which prohibits attacks against military objectives expected to cause incidental harm (i.e. death or injury of civilians and damage to civilian objects) that would be excessive in relation to the concrete and direct military advantage anticipated.¹³ In assessing the 'weight' to be assigned in proportionality assessments to damage or destruction of objects necessary for the production and distribution of food, consideration must be given to the impact this would have on the well-being of civilian populations.¹⁴
- prohibitions on the use of particular weapons, such as antipersonnel mines and cluster munitions, that contaminate areas of land which can thus not be used for farming or grazing,¹⁵
- the prohibition on the use of means and methods of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment, inasmuch as they would impair food production and availability of safe water supplies.¹⁶

Also of particular relevance is the prohibition on forcibly displacing civilian populations.¹⁷ Displacement causes people to lose access to their sources of livelihood and more generally increases vulnerabilities, including to food insecurity.

¹¹ Art. 52 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (AP I), and J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law Vol 1: Rules ('ICRC CLS')* (ICRC, 2005), Rule 7.

¹² Art. 51(4) AP I and Rule 11 ICRC CLS.

¹³ Art. 51(5)(b) AP I and Rule 14 ICRC CLS.

¹⁴ For a recent discussion of key steps in identifying incidental harm for the purposes of the rule of proportionality see E.-C. Gillard, *Proportionality in the Conduct of Hostilities — The Incidental Harm Side of the Assessment*, Chatham House Briefing Paper, December 2018, available at <https://www.chathamhouse.org/publication/proportionality-conduct-hostilities-incident-harm-side-assessment> (visited 12 November 2019).

¹⁵ 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, and 2008 Convention on Cluster Munitions. It is unsettled whether at present these treaty prohibitions reflect customary rules applicable in both international and non-international conflicts. However, the prohibition on the use of weapons that are by nature indiscriminate, on which they are based, is customary and applicable in both international and non-international armed conflict. Art. 51(4) AP I and Rule 71 ICRC CLS.

¹⁶ Art. 35(3) AP I. The customary law status of this treaty rule is unsettled. Compare Rule 45 ICRC CLS with K. Hulme, 'Natural Environment', in E. Wilmshurst, S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 204-237.

¹⁷ Art. 49, 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV), Art. 17, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (AP II), and Rule 129 ICRC CLS.

In addition to these rules of general application, two sets of provisions of IHL specifically address food insecurity in situations of armed conflict: the prohibition of starvation of civilians as a method of warfare, and the rules regulating humanitarian relief operations. They are discussed in the next two Sections.

3. The Prohibition of Starvation of Civilians as a Method of Warfare

Article 54 of Additional Protocol I to the Geneva Conventions ('AP I') contains related but distinct rules directed at preventing starvation of civilians and food insecurity in conflict. First, Article 54(1) AP I sets out a general prohibition of starvation of civilians as a method of warfare, general in the sense that this prohibition is not restricted to any particular type of conduct. Every method of warfare that has the purpose of causing the starvation of civilians is prohibited. Second, paragraphs 2 to 4 of Article 54 AP I focus on certain acts that can cause food insecurity or eventually the starvation of civilians: attacking, destroying, removing or rendering 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'. Article 14 of Additional Protocol II ('AP II') contains similar prohibitions applicable in non-international armed conflicts.¹⁸ The present article focuses on Article 54 AP I but, unless otherwise noted, its analysis is also applicable to the prohibition in Article 14 AP II. The focus in the Additional Protocols on the destruction of certain objects indispensable to the survival of the civilian population may have been warranted at the time of the negotiations of the 1977 Additional Protocols as such acts might have been considered the most common way in which civilians may be starved. However, it is clear that the prohibition of starvation is broader and not limited to situations in which it is brought about in such a manner.¹⁹ In recent conflicts, concerns about the starvation of civilians have been prompted by different actions by

¹⁸ The prohibition in Art. 14 AP II is phrased in slightly different and briefer terms: '[s]tarvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.' According to the ICRC Commentary, '[t]he text [of Art. 14 AP II] refers to methods of combat, while Protocol I, Part III, is entitled "Methods and Means of Warfare". The ICRC draft proposed to use the same expression "Methods and Means of Combat" in both instruments. In Protocol I the Conference, however, preferred the term "Methods and Means of Warfare" because the term "combat" can be given a narrower interpretation than the word "warfare".' On the other hand, it was considered inappropriate to refer to warfare in an instrument concerning non-international armed conflicts. See Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* ('ICRC Commentary to the APs') (International Committee of the Red Cross and Martinus Nijhoff, 1987), § 4799.

¹⁹ See, for example, ICRC Commentary to the Aps, § 4800: '[t]his sentence [i.e. the second sentence of Article 14 AP II] develops the principle prohibiting starvation from being used against civilians by pointing out the most usual ways in which starvation is brought about. By using the word "therefore" certain acts are emphasized, but the list is not exhaustive.' A similar comment was made in relation Art. 54 AP I. *Ibid.*, § 2098.

belligerents: severe limitations on the passage of essential commodities. The present article focuses on this dimension of the prohibition.

A number of aspects of the prohibition of starvation warrant closer consideration, not least because they are also relevant to the interpretation of the corresponding war crime.

A. What Constitutes 'Starvation'?

A first question is what amounts to 'starvation' for the purpose of the general rule: denial of what commodities and causing what degree of deprivation?

1. What commodities?

In terms of what commodities should be considered, the term 'starvation' has been given a wider interpretation than the literal meaning of depriving of food and water, to encompass also deprivation of other goods essential to survival in a particular context such as, for example, heating oil and blankets. This is clear in the formulation of the war crime in the ICC Statute, that expressly refers to 'starvation of civilians as a method of warfare by depriving them of *objects indispensable to their survival*'.²⁰ This is significant because, as noted in the Introduction, for conduct to amount to a war crime, it must be a violation of IHL in the first place. Although this aspect of the war crime was not ultimately elaborated in the Elements of Crime, during their negotiation there was agreement that the crime did not only cover deprivation of nourishment but also of other essential commodities necessary to live.²¹ This is implicit recognition that the underlying rule of IHL also covers the same range of commodities.

The formulation of the rules relating to starvation in AP I themselves suggest that they extend beyond deprivation of food and nourishment. The title of Article 54 AP I — 'Protection of objects indispensable to the survival of the civilian population' — indicates this breadth of coverage. It should also be noted that the expression 'objects indispensable to the survival of the civilian population', as used in this provision, is strikingly similar to the expression used in Article 69 AP I, dealing with humanitarian relief operations. That latter provision, after referring to food and medicines refers explicitly to 'clothing, bedding, means of shelter, and *other supplies essential to the survival of the civilian population*.' The word 'other' in that provision is a clear indication that clothing, bedding, means of shelter are considered to be supplies (or objects) 'essential' (or

²⁰ Art. 8(2)(b)(xxv) ICCSt. (emphasis added). See also M. Cottier and E. Richard, 'Chapter 25 – Paragraph 2(b)(xxv): Starvation of Civilians as a Method of Warfare', in O. Triffterer, K. Ambos (eds), *Rome Statute of the International Criminal Court*, (3rd edn., Beck/Hart/Nomos, 2015) at §§ 768-772.

²¹ See K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary* (Cambridge University Press, 2003) at 363-364; and D. Frank, 'Article 8(2)(b)(xxv) – Starvation as a Method of Warfare', in R. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 203. Both note that a footnote to the elements of this crime inserted to point out that the intention to starve would also include the deprivation or insufficient supply of anything necessary to live was not included in the final version as it was considered 'redundant'.

‘indispensable’) to the survival of the civilian population. Indeed, the ICRC Commentary to Article 54 AP I notes that in the French text of these two articles there is a slight difference in terminology, but goes to state that ‘[i]n their contexts the two terms [*“biens indispensables”* and *“biens essentiels”*], must be considered to have the same meaning’.²²

Furthermore, the text of Article 54(2) AP I, which relates to attacks on food and water and objects connected thereto, also indicates that these objects are merely examples of objects indispensable to the survival of the civilian population covered by the rule. That provision specifically prohibits parties from attacking, destroying, removing or rendering 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 for their sustenance value to the civilian population or to the adverse Party ...’ (emphasis added). The use of the words ‘such as’ in this provision makes clear that the objects set out are not exhaustive and that what is more important is the general category as opposed to the specific examples listed.²³

Thus, ‘starvation’ may also include deprivation of medicines and medical equipment. Denying civilians these supplies can have the same severe consequences on their well-being as denial of essential other commodities. However, the rules of IHL on medical care afford greater protection by imposing more onerous obligations, requiring belligerents to provide such items as soon as they are *necessary*, rather than only once they become *essential for survival*. Moreover, while the prohibition of starvation only protects civilians, the rules on medical care apply to all the wounded and sick — civilians and fighters. This said, including medical items among the commodities covered by the prohibition of starvation brings the rules on individual criminal responsibility into play more clearly: violation of the prohibition of starvation is a war crime, but violation of the rules on the provision of medical care may not be. In view of this, while there are good reasons for including medicines and medical equipment among the commodities covered by the prohibition of starvation, it should not be forgotten that other rules also apply.

It is a fundamental principle of IHL that wounded and sick civilians and fighters are entitled to receive to the fullest extent practicable and with the least possible delay the medical care and attention required by their condition.²⁴ In view of this entitlement, if there are people in need of such care who are not receiving it, withholding consent to offers to provide the necessary assistance in a principled manner would be arbitrary. Once consent has been granted, parties to an armed conflict and states in whose territory medical relief operations are initiated or through

²² ICRC Commentary to APs, § 2086.

²³ ICRC Commentary to APs, § 2103. Indeed, during the negotiations, the addition of the words ‘such as’ was supported by many delegations in order ‘to give the most extensive application possible’. See Statement by Egypt, Meeting of Committee III, 10 February 1975 (CDDH/III/SR. 16; XIV, 127), § 54.

²⁴ Art. 12, 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); Art. 12, 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); Art. 10 AP I; and Art. 7 AP II.

whose territory they must transit must allow and facilitate rapid and unimpeded passage of medical relief supplies and equipment.²⁵

2. *Threshold of need*

In terms of threshold of need, 'starvation' implies a high degree of deprivation, where survival is threatened. It is more extreme than the 'not adequately supplied' standard that brings into play the rules of IHL regulating humanitarian relief operations.²⁶ However, it is not necessary for death to occur.²⁷

B. The Scope of the Prohibition: Must the Conduct Undertaken be for the Purpose of Starving Civilians?

A second, central but more complex question is whether the prohibition in Article 54 AP I is limited to situations where the party resorting to this method of warfare has the purpose of starving the civilian population, or whether it also covers situations where, although not the purpose of that party, the starvation of the civilian population is the *foreseeable consequence* of a particular course of action. For example, if civilians and fighters are present in a besieged city, would a besieging party that does not allow the entry of commodities because it wants to starve the fighters, knowing that this is also going to cause starvation of civilians be violating the prohibition? Would an attack on a bridge used by military forces whose destruction would prevent humanitarian relief from reaching civilians in severe need and lead to starvation violate the prohibition? Is what matters the purpose of a course of action or its *effects*?

The text of Article 54 AP I appears, on initial reading, to support a narrow interpretation that only prohibits conduct the purpose of which is to starve civilians. First, paragraph (1) does not prohibit starvation as such, but only starvation 'as a method of warfare', suggesting that what is prohibited are not the results but rather the use of a particular technique or way of fighting. Second, Article 54(2) AP I provides an example of how the prohibition of starvation could be violated and refers to the destruction of objects indispensable to the survival of the civilian

²⁵ D. Akande and E.-C. Gillard (eds), *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (2016) ('Oxford Guidance'), available at <https://reliefweb.int/report/world/oxford-guidance-law-relating-humanitarian-relief-operations-situations-armed-conflict> (visited 12 November 2019), Section G.2.

²⁶ Art. 70(1) AP I provides that: '[i]f the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions.' Art. 14 AP II uses the expression 'suffering undue hardship'.

²⁷ Indeed, deprivation of *food* unto death is very rare even during famines, where the proximate cause of death is usually infectious disease. See, for example, A. De Waal, *Famine that Kills: Darfur, Sudan, 1984-1985* (Clarendon Press, 1989), at 188-193.

population ‘for the *specific purpose* of denying them for their sustenance value to the civilian population’ (emphasis added).

Furthermore, there is some evidence from the *travaux* to what became Article 54 AP I, as well as in leading commentaries to the text, that only ‘deliberate starvation’ of civilians is prohibited.²⁸ Relevant state practice essentially takes the form of military manuals. The majority of manuals simply reiterate the wording of Articles 54 AP I and 14 AP I. However, the few that do enter into a substantive discussion largely support²⁹ the narrower interpretation.³⁰

²⁸ See, for example, the ICRC Commentary to Art. 54 AP I: ‘[t]he term “starvation” is generally understood by everyone. To use it as a method of warfare would be to provoke it *deliberately*, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.’ Emphasis added. ICRC Commentary to APs, § 2089. This approach is repeated with regard to the prohibition in Art. 14 AP I: ‘[t]he object of this provision is to prohibit the deliberate provocation of such a situation [i.e. starvation of the civilian population]’, ICRC Commentary to APs, § 4791. See also Bothe, Partsch and Solf: ‘[t]his paragraph [Art. 54(2) AP I] does not prohibit the incidental distress of civilians resulting from otherwise lawful military operations. It would not, for example, be unlawful to attack or destroy a railroad line simply because the railroad was used to transport food needed to supply the population of a city, if the railroad was otherwise a military objective under Art. 52. Such incidental effects are regulated to some degree by Arts. 57 and by Arts. 68–71 dealing with relief actions.’ M. Bothe, K.J. Partsch and W.A. Solf (eds.), *New Rules for Victims of Armed Conflicts* (2nd edn., Martinus Nijhoff, 2013), at 381. With regard to the war crime in the ICC Statute see Cottier and Richard, *supra* note 20, § 791: ‘[t]he crime must be committed with the intent to use the starvation as a *method of warfare*, that is, to deliberately provoke, increase or prolong the starvation by deprivation of objects indispensable for the survival with an aim to gain a military advantage, including for instance forcing civilians to transfer to another area or State.’ Emphasis in the original.

²⁹ Australia’s *Commanders’ Guide* notes that AP I prohibits starvation of civilians as a method of warfare and explains that ‘[m]ilitary operations involving collateral deprivation are not unlawful as long as the object is not to starve the civilian population’ (*Commanders’ Guide* (1994), para. 907). The UK *Military Manual* states that: ‘[t]he law is not violated if military operations are not intended to cause starvation but have that incidental effect, for example, by cutting off enemy supply lines which are also used for the transportation of food ...’ (UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, Section 5.27.1). This position is reflected in the ‘reservation’ to Article 54(2) AP I made by the UK upon ratification of AP I in 1998: ‘[t]he United Kingdom understands that paragraph 2 has no application to attacks that are carried out for a specific purpose other than denying sustenance to the civilian population or the adverse party’. The US *Department of Defence Manual* specifies that ‘[s]tarvation specifically directed against the enemy civilian population ... is prohibited’ (US Department of Defense, *US Department of Defense Law of War Manual*, 2016, para. 5.20.1.). The manual adds that ‘[m]ilitary action intended to starve enemy forces however must not be taken where it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage anticipated to be gained’ (*Ibid.*, para. 5.20.2.). In addition to states’ manuals, the *Harvard Manual on Air and Missile Warfare* also adopts this narrow interpretation: ‘the prohibition of starvation of civilians as a method of warfare means annihilating or weakening the civilian population by deliberately depriving it of its sources of food, drinking water or of other essential supplies, thereby causing it to suffer hunger or otherwise affecting its subsistence’. See Program on Humanitarian Policy and Conflict Research at Harvard University, *Manual on International Law Applicable to Air and Missile Warfare* (Cambridge University Press, 2013), Commentary to Rule 97, para. 2.

³⁰ However, the position adopted in the UK Manual in relation to non-international armed conflicts does suggest a broader understanding of the prohibition: [in relation to NIACs] ‘[t]he right to life is a non-derogable human right. Violence to the life and person civilians is prohibited whatever method is adopted to achieve it. It follows that the destruction of crops, foodstuffs and water sources to such an extent that starvation is likely to follow, is also prohibited. The same applies to sieges, blockades, embargoes, or the

Although there is support for a narrow interpretation of the general prohibition of starvation as set out in paragraph (1) of Article 54 AP I, the text of Article 54 as whole, and in particular the provisions of paragraphs (2) and (3) of Article 54, suggest that there are some situations where conduct that may lead to starvation or cause food insecurity is prohibited even where such conduct is not carried out with the purpose of starving the civilian population.

Art. 54(2) provides that:

It is prohibited to attack, destroy, 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 for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

That provision does not only prohibit attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the civilian population. That paragraph also extends to such acts when carried out for the specific purpose of denying those objects for their sustenance value 'to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive'. Restricting the prohibition on attacks and (related acts) contained in this paragraph to attacks that have the specific purpose of starving civilians would render the words just quoted redundant.

Furthermore, Article 54(3) seems to suggest, explicitly, that there are some cases where attacks/destruction/removal/rendering useless of objects indispensable for the survival of the civilian population is prohibited, even when the attacking party does not have the purpose of depriving the civilian population of those objects, but where starvation is *foreseeable*. Paragraph (3) provides that:

[t]he prohibitions in paragraph 2 [relating to attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population] shall not apply to such of the objects covered by it as are used by an adverse Party:

- a) as sustenance solely for the members of its armed forces; or
- b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken *which may be expected* to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement. (emphasis added)

blocking of relief supplies with the intention of causing starvation.' (UK *Military Manual*, *supra* note 29, para. 15.19.1.).

This provision, which can only be interpreted by reading it in conjunction with paragraph (2), is not as clear as can be.³¹ In particular, it is not clear if paragraph (3) is intended to (i) set out exceptions to paragraph (2) (i.e. to set out conduct which, in principle, falls within the ambit or scope of the prohibition in paragraph (2) but is taken out of that prohibition by paragraph (3); or (ii) to make clear that the conduct described in paragraph (3) does not in fact fall within the scope of paragraph (2); or perhaps even (iii) set out a prohibition which goes beyond that which is contained in paragraph (2).

In fact paragraph (3) appears to do all three things. Paragraph (3)(a) creates a genuine exception to paragraph (2). The former excludes from the prohibition of attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population for the specific purpose of the denying those objects to the adverse party, situations where those objects are used solely as sustenance for the armed forces. Thus it is permissible/not prohibited to attack objects indispensable to the survival of the civilian population, such as crops for example, if in fact they are used exclusively by enemy armed forces. In this case, though the act would violate paragraph (2) in principle, it is not a violation of the Protocol by virtue of paragraph (3). The first part of paragraph (3)(b) sets out that it is not prohibited in general terms to take action against objects indispensable to the survival of the civilian population where such objects are used by the adverse party 'in direct support of military action'. If the reason for attacking, destroying, removing or rendering such an object useless is because they are used in direct support of military action then it would seem to be the case that the act falls outside the prohibition in paragraph (2), even in principle, because the action taken is not for the specific purpose of denying them for their sustenance value.

However, the proviso to paragraph (3)(b) which provides that 'that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement' sets out a prohibition which goes beyond that which is contained in paragraph (2). This proviso suggests that even if the specific *purpose* of the conduct is *not* to deny the objects for their sustenance value to the civilian population or to the adverse party, it is nonetheless prohibited to attack, destroy, remove or render these objects useless, if the *effect* of such acts would be to cause starvation or forced movement of the civilian population *and* if such an effect should have been expected. It suggests that in this case the prohibition would apply if the starvation was simply a foreseeable consequence of the course of action, and even if causing such starvation was not the purpose of the attacking party. Thus, attacks against objects constituting military objectives, e.g. crops used

³¹ During the negotiations, when the draft of the text of what became Article 54 was transmitted to the relevant Committee, the Rapporteur of the Working Group that produced that draft stated that 'this text, which was accepted only after prolonged discussion and considerable amendment, could profit more than most of the articles sent to the Committee by refinement and polishing by a drafting *committee*'. *Report of the Third Committee on the work of the Working Group*, Committee III, 13 March 1975 (CDDH/III/2764; XV, 347), Art. 48. Unfortunately, though very minor changes were made to that draft, the text of the article as a whole remains somewhat confusing.

exclusively for the sustenance of armed forces, may not be conducted *whatever* the anticipated military advantage if it is expected that they would cause the starvation of civilians or (and this is something not normally covered by the rule on proportionality) cause its displacement.

A combined reading of the various paragraphs of Article 54 suggests that while it is possible to interpret the general prohibition of starvation in Article 54(1) as requiring the purpose of starving the civilian population, the prohibitions in paragraphs (2) and (3) which relate to specified conduct that may lead to food insecurity and eventually to starvation (attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population) do not necessarily require this purpose. Significantly, where the specified action is taken against such objects because they are used in direct support of military action, what is prohibited is conduct that may be expected to cause starvation or forced movement. However, in cases where starvation or food insecurity arises not because of attacks on objects indispensable for the survival of the civilian population but because of other acts (e.g. denial of humanitarian access) it is the general prohibition in Article 54(1) that applies, and the conduct in question must have the purpose of causing the starvation of the civilian population.

It is not clear why starvation that is not the purpose of the belligerent but is nonetheless foreseeable should be prohibited in the case of attacking objects indispensable for the survival of the civilian population which are used in direct support of military action, but not in case of starvation that results from other acts (e.g. denial of humanitarian access), or from attacks against military objectives that do not fall within the category of objects indispensable for the civilian population. In respect of this last category, however, reasonably foreseeable starvation will be considered in the course of proportionality assessments.

C. Starvation of Civilians as a 'Method of Warfare'

One of the arguments sometimes given for interpreting the prohibition in Article 54(1) AP I and Article 14 AP II as limited to the deliberate infliction of starvation is the specification in those provisions that it is the starvation of civilians as a *method of warfare* that is prohibited. However, the requirement that starvation of civilians be pursued as method of warfare simply means that it is used by the belligerent as a method of fighting. Gaggioli and Melzer state that '[t]he notion of methods of warfare should be understood ... as referring to any particular manner of using weapons or of otherwise conducting hostilities, irrespective of permissibility or appropriateness'.³² There is no requirement that the belligerent must be seeking to attain a military advantage or advantage on the battlefield therefrom.³³ Using starvation in order to achieve other objectives, such as 'ethnic cleansing' of an area or simply to annihilate or weaken

³² G. Gaggioli and N. Melzer, 'Methods of Warfare' in B. Saul and D. Akande, *Oxford Guide to International Humanitarian Law* (forthcoming 2020).

³³ See, for example, in relation to the ICC war crime, Cottier and Richard, *supra* note 20, § 794 — who state that starvation 'must be conducted to achieve a military advantage or other objective vis-a-vis an adversary party to the international armed conflict'. Emphasis added.

the population would fall within the prohibition.³⁴ Moreover, the specific prohibition in Article 54 (2) applies ‘whatever the motive’ of the attacking party.

The reference to methods of warfare in the prohibition of starvation has also been relied upon by some commentators as a basis for indirectly prohibiting practices that cause the starvation of civilians. This line of argument relies upon the statement of the International Court of Justice in the *Nuclear Weapons* advisory opinion that:

as the Court has already indicated, the principles and rules of law applicable in armed conflict — at the heart of which is the overriding consideration of humanity — make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited.³⁵

According to the proponents of this view, this statement indicates that, in addition to any specific prohibitions or restrictions,³⁶ *all* methods of warfare must be discriminate and not cause unnecessary suffering.³⁷ Consequently, while the starvation of combatants as a method of warfare is not prohibited, it must nonetheless comply with the principle of distinction — and so it must not be applied in an indiscriminate manner that also causes the starvation of civilians.

A similar argument relies on the provision of Article 48 AP I to the effect that ‘[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly *shall direct their operations only against military objectives*’ (emphasis added). According to this argument, there is an obligation on belligerents to ensure that any military operations (which are broader than ‘attacks’ as defined in Article 49 AP I) to starve combatants must be *directed* against them. Thus, if a situation were to arise where it was impossible to direct such an operation only against combatants (such as a siege of an area holding both combatants and civilians), carrying out that operation would be a breach of the principle of distinction. It would be akin to an attack that is indiscriminate because

³⁴ ICRC Commentary to Art. 54(1) AP I, § 2090.

³⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, § 95. The words ‘as already indicated’ refer to the Court’s discussion at paragraph 78 of the Advisory Opinion: ‘[t]he cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.’ This, however, appears to be a discussion of the rules regulating the use of particular weapons and *attacks* rather than methods of warfare.

³⁶ For example, the prohibition of starvation of civilians as a method of warfare in Art. 54 AP I, or of methods of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment in Arts 35(3) and 55 AP I.

³⁷ Gaggioli and Melzer, *supra* note 32.

it 'employs a method or means of combat which cannot be directed at a specific military objective'. This reasoning leads to the same conclusion as the argument considered in the previous paragraph: while it may be argued that the prohibition of starvation itself mainly covers conduct carried out for the purpose of starving civilians, operations to starve combatants must not be indiscriminate.

D. The Prohibition of Starvation and Proportionality

The position has also been expressed that, even though the express general prohibition on starvation in Article 54(1) AP I and Article 14 AP II only covers conduct carried out for the purpose of causing the starvation of civilians, measures that may have the effect of causing the starvation of civilians must not be disproportionate — i.e. the concrete and direct military advantage anticipated from such measures must not be excessive compared to the civilian deaths or injuries they may be expected to cause. Any expected starvation or, indeed, less severe forms of 'injury' to civilians must be taken into account.

³⁸

The precise scope of this requirement is unclear. There is no doubt that measures that amount to attacks as defined in IHL must comply with the rule on proportionality as laid down in Additional Protocol I.³⁹ Attacks on military objectives that may cause the starvation of civilians must comply with the rule. So, for example, an attack on a bridge that constitutes a military objective, but that is also the sole route for the entry of relief consignments for civilians, must comply with the rule of proportionality.

Article 54(3) AP I appears to modify or 'displace' the rule of proportionality with regard to measures that fall within the list of prohibited activities referred to in Article 54(2) AP I — attacking, destroying, removing or rendering useless — when they amount to 'attacks'. Measures that are permissible under Article 54(3)(a) AP I as directed against objects used exclusively as sustenance for the armed forces, must nonetheless meet the requirement of Article 54(3)(b). An attack against what are military objectives (such as crops used exclusively for the sustenance of armed forces) may not be conducted *whatever* the anticipated military advantage if it is expected that it would cause the starvation of civilians or (and this is something not normally covered by the rule on proportionality) cause its displacement.⁴⁰

What is less clear is whether other measures taken to starve combatants, that do not amount to an attack, must be analysed in the same manner. This approach would have to be

³⁸ See, for example, the US Department of Defense Manual, para. 5.20.2., quoted *supra* in note 29.

³⁹ The rule of proportionality as formulated in Art. 51(5)(b) AP I only applies to 'attacks'. These are defined in Art. 49 AP I as 'acts of violence against the adversary, whether in offence or in defence'. It should be noted that not every use of force or military operation in an armed conflict constitutes 'an attack'.

⁴⁰ Art. 55 AP I similarly 'displaces' the rule of proportionality with regard to attacks expected to have widespread, long-term and severe damage to the environment. See Gillard, *supra* note 14, at § 141.

based on a broader *principle* of proportionality that is applicable to all military operations and methods of warfare.⁴¹

The instruments on naval and aerial blockades adopt this approach. For example, the San Remo Manual provides that:

102 The declaration or establishment of a blockade is prohibited if:

- (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.⁴²

E. Conclusions on the Prohibition of Starvation of Civilians in Article 54 AP I

As outlined in the preceding subsections it seems safe to conclude that:

- the general prohibition on starvation of civilians as a method of warfare in Art. 54(1) focuses on conduct carried out for the purpose of starving civilians.
- there is a more specific and stricter prohibition, under Art. 54(2), of attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the civilian population.
- Unlike the prohibitions listed above, which both require that the belligerent party act with a particular purpose, Article 54(3) AP I suggests that attacks and related actions, taken against objects indispensable to the survival of the civilian population used in direct support of military action, may not be taken if they may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
- Starvation of combatants as a method of warfare is not prohibited, but it must not be conducted in an indiscriminate manner.
- Any starvation of civilians that may be expected to occur as a result of an attack directed against combatants or other military objectives must be taken into account under the rule of proportionality as articulated in Article 51 AP I. Any starvation of civilians that may be expected to occur as a result of military operations other than an attack would have to be taken into account under a general principle of proportionality that applies to all military operations.

⁴¹ See, for example, J. Kleffner, 'Military Collaterals and Jus In Bello Proportionality', 48 *Israel Yearbook on Human Rights* (2018) 43-61. See also International Law Association Study Group, *The Conduct of Hostilities and International Humanitarian Law - Challenges of 21st Century Warfare, Final Report*, 25 June 2017, 'Part II: The Principle of Proportionality', available at <http://www.ila-hq.org/index.php/study-groups?study-groupsID=58>, at 27 (visited 12 November 2019).

⁴² L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995), Rule 102 and commentary thereto. Rule 157 of the *Harvard Manual on Air and Missile Warfare* (*supra*, note 29) on aerial blockade adopts the same approach.

It is important to bear in mind that the prohibition of starvation is not the only rule that must be considered. In particular, the rules on humanitarian relief operations discussed in the next section dictate that, if the civilian population is facing starvation, relief operations should be agreed to, allowed and facilitated by belligerents. The effect of this is that measures that can be expected to lead to the starvation of civilians should not be imposed.

3. The Rules Regulating Humanitarian Relief Operations

The next set of rules of direct relevance to preventing or mitigating conflict-induced food insecurity are those regulating humanitarian relief operations. They warrant highlighting because of the immediate and very practical role they play in preventing or minimising conflict-induced food insecurity, but also because the war crime in the ICC Statute specifically mentions ‘wilfully impeding relief supplies as provided for under the Geneva Conventions’ as one of the ways in which the war crime of starvation may be committed.

A. Key Elements of the Rules Regulating Humanitarian Relief Operations

The rules of IHL that regulate humanitarian relief operations are, for the most part, the same in international and non-international conflicts.⁴³ Primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose effective control they find themselves. If this party is unable or unwilling to meet these needs, offers may be made to carry out relief actions that are humanitarian and impartial in character and conducted without any adverse distinction. The consent of affected states is required. States have no latitude to withhold consent to offers to conduct humanitarian relief operations in two situations. The first situation is during occupation: if an occupying power is not in a position to ensure the adequate provision of supplies essential for the survival of the civilian population of the occupied territory, it must accept offers to conduct relief operations that are humanitarian and impartial in character.⁴⁴ Second, the United Nations Security Council may adopt binding measures requiring parties to consent to humanitarian relief operations⁴⁵ or, more radically, imposing relief operations.⁴⁶ Such measures will alter the otherwise applicable rules of IHL. In all other situations consent is required, but it may not be withheld arbitrarily. Once consent has been obtained, parties to an armed conflict must allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in the humanitarian relief operations. They may prescribe technical arrangements under which such passage is permitted.

⁴³ For an overview of the rules described in this paragraph, see generally *Oxford Guidance*, *supra* note 25.

⁴⁴ Art. 59 GC IV.

⁴⁵ To date this has occurred only once, in relation to Syria: see SC Res. 2139 (2014), § 6. While, as a matter of law, it is only the consent of states that is required, in these resolutions the Security Council demanded that all parties to the conflict consent.

⁴⁶ See SC Res. 2165 (2014), § 2.

B. Elements of the Rules Regulating Humanitarian Relief Operations of Particular Relevance to the Crime of Starvation

A number of aspects of the rules regulating humanitarian relief operations warrant highlighting as they are of particular relevance to the prohibition of starvation and the corresponding war crime.

1. Extent of Need

The rules regulating humanitarian relief operations offer protection when civilians are experiencing a lower level of need than the prohibition of starvation. They come into play when the civilian population 'is not adequately provided' with certain essential items.⁴⁷ They therefore play an extremely important role in preventing and alleviating conflict-induced food insecurity.

2. Obligations to Agree to and Allow and Facilitate Relief Operations

As outlined above, the rules on relief operations foresee two successive steps: first, an obligation not to arbitrarily withhold consent to offers to conduct humanitarian relief operations. This step is the initial authorization to conduct relief operations in a particular state. Second, once consent has been obtained, belligerents — and other relevant states — must allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in such operations. This step is the actual implementation of the relief operations.

(a) Consent to offers to conduct relief operations

Consent is withheld arbitrarily in three circumstances:⁴⁸ first, if it is withheld in circumstances that result in the violation by a state of its obligations under international law with respect to the civilian population in question. Second, if the withholding of consent violates the principles of necessity and proportionality. Where consent to relief operations is withheld for a legitimate reason, it will nonetheless be arbitrary if it exceeds what is necessary in the circumstances, and thus is disproportionate. Limitations in terms of time, duration, location, and affected goods and services must not go beyond what is absolutely necessary to achieve the legitimate aim. Finally, consent is withheld arbitrarily when withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate.⁴⁹

The first basis of arbitrariness is of particular relevance to situations of conflict-induced food insecurity. One situation where consent would be withheld arbitrarily is when doing so would

⁴⁷ Art. 70(1) AP I. In non-international armed conflicts the corresponding provisions in Art. 18(2) AP II become applicable when 'the civilian population is suffering undue hardship'.

⁴⁸ *Oxford Guidance*, *supra* note 25, Section E.

⁴⁹ For an elaboration of these rules, see, D. Akande and E-C. Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict', 92 *International Law Studies* (2016) 483-511.

violate the prohibition of starvation. The discussion in Section 3 above on the scope of the prohibition is also relevant here: does the prohibition only cover conduct the purpose of which is starving civilians, in which case consent is only withheld arbitrarily if it is withheld in order to cause, contribute to or perpetuate such non-incidental starvation? Or does the prohibition apply more broadly, in which case consent would be withheld arbitrarily if the *effect* of withholding it is to cause or contribute to starvation?

Even if the general prohibition of starvation is interpreted narrowly, other obligations are also of relevance and limit states' entitlement to withhold consent. For example, wounded and sick civilians and fighters are entitled to receive — to the fullest extent practicable and with the least possible delay — the medical care and attention required by their condition. This is an absolute entitlement and measures that would have this effect would violate belligerents' obligations. Depriving the wounded and sick of medical supplies is prohibited even if it is not the purpose of the measures. Thus, if people in need of medical supplies are not receiving them, withholding consent to offers to provide the necessary assistance in a principled manner would be arbitrary.⁵⁰ Moreover, consent is also withheld arbitrarily if doing so violates fundamental human rights as applicable in situations of armed conflict. This includes circumstances where withholding consent to offers to conduct relief operations would violate the right to bodily integrity, or prevent the satisfaction of the minimum core of relevant economic, cultural, and social rights, such as the rights to an adequate standard of living, and to essential health and medical services.⁵¹

(b) Obligation to allow and facilitate rapid and unimpeded passage

Once consent to conduct relief operations has been obtained, belligerents' obligations are broader in scope than those that can be derived from the prohibition of starvation, and they must allow and facilitate the rapid passage of humanitarian relief consignments for persons in need. These obligations arise as soon as people are 'insufficiently supplied' with essential commodities.

⁵⁰ This view is adopted by the *Harvard Manual on Air and Missile Warfare* (*supra*, note 29) in the discussion on blockades which concludes — albeit without using this expression — that there is no possibility of withholding consent to offers to provide medical supplies: '159. The Blockading Party must allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including inspection, under which such passage is permitted.' Three remarks are warranted in this respect. First, this Rule is based on Rule 104 of the San Remo Manual (*supra*, note 42; see also Art. 23 of GC IV). Second, Rule 159 is complementary to Rule 158, except that the element of consent implied in the subjection of Rule 158 to Rule 100 (see paragraph 4 of the Commentary on the chapeau to Rule 158) is not included in Rule 159. Allowing the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces (as well as prisoners of war who may be held in custody in the blockaded area) is, therefore, *an absolute requirement*. Third, although the agreement of the Blockading Party is not required for the operation of Rule 159, the Blockading Party remains entitled to prescribe technical arrangements — including inspection — to ensure that there is no abuse.

⁵¹ See Hutter, *supra* note 7.

5. Some Reflections on the Interplay between the Rules of IHL on Humanitarian Relief Operations and the War Crime of Starvation in the Statute of the ICC

The war crime of starvation in the ICC Statute is formulated as:

[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.⁵²

‘Wilfully impeding relief supplies as provided for under the Geneva Conventions’ is mentioned as one of the ways in which the war crime in question may be committed. This raises some questions on its interplay with the underlying rules of IHL on relief operations.⁵³

A. What Amounts to ‘Wilful Impeding’ of Humanitarian Relief Operations?

The expression ‘wilfully impeding relief supplies’ does not appear in IHL treaties. While the expression might have a certain appeal in relation to international criminal law in as much as it highlights the mental element required, it is important to bear in mind that not every impeding of humanitarian relief operations will be a violation of IHL, even if wilful. Since war crimes are serious violations of IHL, impeding humanitarian relief operations may amount to war crimes only in cases where they constitute such violations of IHL. Thus, in order to establish the war crime provided for in the ICC Statute, it is necessary to determine what amounts to a violation of the rules regulating humanitarian relief operations outlined in the previous section. Quite apart from establishing whether the mental element required by the word ‘wilful’ is present, it will also need to be established that there has been an *unlawful* impeding.

Humanitarian relief operations will be unlawfully impeded in two circumstances. First, when consent to offers to carry out humanitarian relief operations is withheld in violation of international law. Second, once consent has been obtained, parties to an armed conflict will unlawfully impede humanitarian relief operations where they fail to comply with the obligation to allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in such operations.

⁵² Art. 8(2)(b)(xxv) ICC Statute.

⁵³ For a possible explanation for the rather surprising reference to the Geneva Conventions in the definition of the war crime, see D. Akande and E.-C. Gillard, ‘Promoting Compliance with the Rules Regulating Humanitarian Relief Operations in Armed Conflict: Some Challenges’, 50(2) *Israel Law Review* (2017) 119-137, at 128-130. The reference to the Geneva Conventions is surprising, as it is Additional Protocol I rather than the Geneva Conventions that provide detailed rules for humanitarian relief operations. GC IV lays down some rules regulating collective humanitarian relief operations for the civilian population, in some detail for situations of occupation in Arts 59 to 61 and, more fleetingly, in relation to other situations in Art. 23. However, it is Additional Protocol I that contains the prohibition on starvation and the more comprehensive rules on humanitarian relief operations in Arts 69 to 71; provisions that are generally accepted as having superseded the framework of Art. 23 GC IV.

1. Unlawful Withholding of Consent to Offers to Conduct Relief Operations

Withholding of consent to offers to conduct humanitarian relief operations would violate international law in two situations. The first arises when belligerents are *obliged* to consent to offers to conduct humanitarian relief operations, but fail to do so. As outlined above, an obligation to consent can arise in situations of occupation, or when the Security Council has either adopted binding measures requiring parties to consent to humanitarian relief operations or has imposed such operations. The second situation in which consent is withheld unlawfully is when those whose consent is required withhold it arbitrarily. A possible framework of analysis for determining what would constitute an arbitrary withholding of consent is set out in Section 4(B)(2) above.

2. Violation of the Obligation to Allow and Facilitate Rapid and Unimpeded Passage of Humanitarian Relief Operations

Humanitarian relief operations are also unlawfully impeded if, once consent has been obtained, belligerents do not comply with the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief operations.

Determining when humanitarian relief operations have been ‘impeded’ to a degree amounting to a violation of this obligation is complex as a matter of law and of fact. IHL treaties do not provide guidance on this point. Apart from the small number of instances in which specific conduct is required discussed below, the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief operations may be discharged in a variety of ways, and parties have considerable discretion in its implementation.

IHL treaties only set out a small number of specific measures with regard to the obligation to allow and facilitate passage. Parties may not divert relief consignments from their intended purpose or delay their forwarding, except in cases of urgent necessity in the interests of the civilian population concerned.⁵⁴ Restrictions may be imposed on the activities and the freedom of movement of humanitarian relief personnel only in the event of imperative military necessity, such as in the case of military operations in a particular location. Even in such circumstances, restrictions may be imposed only temporarily.⁵⁵ In situations of occupation, humanitarian relief consignments must be exempt from all charges, taxes or customs unless these are necessary in the interests of the economy of the occupied territory.⁵⁶

Beyond these measures specifically mentioned in IHL treaties, belligerents may discharge the obligation to allow and facilitate rapid and unimpeded passage in a variety of ways. While it

⁵⁴ Art. 70(3)(c) AP I.

⁵⁵ Art. 71(3) AP I.

⁵⁶ Art. 61 GC IV.

is possible to identify practical measures that states could take to facilitate passage,⁵⁷ the fact that they are not mentioned in IHL treaties makes it difficult to assert that just because a party has not taken a particular measure (such as simplifying visa procedures or waiving customs inspections) it has not complied with the obligation to allow and facilitate rapid and unimpeded passage.

While belligerents must allow and facilitate rapid and unimpeded passage of humanitarian relief operations, they are entitled to prescribe technical arrangements for such passage.⁵⁸ These arrangements can serve a number of purposes. They may include the search of consignments to check that they do not contain weapons, other military equipment or items that may be used for military purposes; or the requirement that relief convoys use prescribed routes at specific times to ensure that they do not hamper, and are not endangered by military operations. Belligerents may make passage of humanitarian relief consignments conditional on their distribution under the local supervision of an impartial organization or on other measures to guarantee that the supplies will reach their intended beneficiaries.⁵⁹

As with measures to allow and facilitate rapid and unimpeded passage of relief operations, belligerents also have a degree of discretion with regard to technical arrangements. However, those arrangements must be applied in good faith and their imposition or effect must not be arbitrary within the meaning set out in above. In addition, the nature, extent and impact of such arrangements must not prevent the rapid delivery of humanitarian assistance in a manner that is impartial in character, and conducted without any adverse distinction.

Against this background, it is not straightforward to determine the point at which the effect of constraints, impediments or delays to humanitarian relief operations is of such a nature and extent as to amount to a violation of the obligation to allow and facilitate rapid and unimpeded passage of relief operations and, therefore, to amount to 'unlawful impeding' of relief operations.

IHL instruments do not provide guidance on this issue and to date it has not been addressed by any national or international tribunal. The issue should not be analysed in terms of the bilateral relationship between each actor authorized to carry out humanitarian relief operations and the party to the armed conflict required to allow and facilitate their rapid and unimpeded passage. Instead, since the rules of IHL regulating humanitarian relief operations only come into play when civilians are inadequately provided with essential supplies, the key consideration should be the outstanding needs of the civilian population. It is not sufficient that the activities of a particular actor have been impeded, even if severely. Instead, the impact on the civilian population of the impediments on all those authorized to operate must be considered. If

⁵⁷ For examples see *Oxford Guidance*, *supra* note 25, Section F.

⁵⁸ Art. 59 GC IV and Art. 70(3) AP I. According to Rule 55 ICRC CLS and the commentary thereto, the same entitlement also exists in situations of non-international armed conflict.

⁵⁹ Art. 70(3)(b) AP I.

they are such as to leave the civilian population as a whole, or segments thereof — either in specific locations or particular groups — without essential relief items or specific services for prolonged periods of time, then the party can be considered to have violated the obligation to allow and facilitate rapid and unimpeded passage of relief operations and, therefore, to have ‘unlawfully impeded’ relief operations.

4. *Consequences for the War Crime of Starvation in the ICC Statute*

There have been some recent efforts to clarify the situations in which withholding consent would be arbitrary,⁶⁰ but to date this question has not been addressed by any judicial or quasi-judicial body. More fundamentally, as just discussed, the rules of IHL regulating humanitarian relief operations grant parties some latitude in implementing the obligation to allow rapid and unimpeded passage of humanitarian relief operations. Consequently, in the majority of cases, it is a challenge as a matter of fact and law to determine whether this obligation has been violated. Such lack of clarity in the underlying obligations makes the related war crime equally unclear and, consequently, difficult to prosecute.

B. Severity of the Effect of Impediments

A second question arises from the interplay between the references in the ICC crime to ‘starvation’ and ‘impeding relief supplies’. The crime, it will be recalled, is ‘[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.’

As noted above, the rules on humanitarian relief operations come into play once civilians are ‘inadequately supplied’ with goods essential to their survival — a lower threshold of deprivation than ‘starvation’. Death by starvation does not actually have to occur for the crime to have been committed — as made clear in the ICC Elements of Crime.⁶¹ However, the framing of the crime as relating to ‘starvation’ suggests that the war crime does not cover all instances of ‘unlawful impeding’ but only those cases where the impediments give rise to needs of the same severity as starvation.

6. The Adverse Impact of Sanctions on Humanitarian Action

This final section considers conflict-induced food insecurity from a different angle: the interplay between sanctions and counter-terrorism measures and humanitarian action, and how

⁶⁰ See, for example *Oxford Guidance*, *supra* note 25, Section E.

⁶¹ Dörmann, *supra* note 21, at 364. As remarked above, a proposal to add a requirement in the elements of crime that one or more persons must have died from starvation was rejected.

an overly broad definition of prohibited ‘material support’ to designated groups is impeding humanitarian actors’ capacity to respond in situations where civilians are in extreme need.

It was recognition of the severe adverse impact that comprehensive sanctions could have on civilian populations, including in terms of access to food and other basic commodities, that led the shift from comprehensive to ‘targeted’ sanctions. However, it has now become apparent that such measures, in particular financial sanctions, are affecting humanitarian actors’ capacity to operate in certain contexts — so sanctions are once again, albeit now in an indirect manner, causing or contributing to conflict-related food insecurity.

Financial sanctions⁶² require states to ensure that funds and other assets do not directly or indirectly benefit groups designated under such instruments. Frequently, however, these same groups are the organized armed groups parties to armed conflict that exercise control over civilian populations. The prohibitions on providing support to designated groups are framed extremely broadly, and can potentially include cover incidental payments that humanitarian actors may have to make in order to operate; relief supplies that may be diverted to such groups or that otherwise benefit them; and even the provision of medical assistance to wounded and sick members of the groups. Violations of these prohibitions are criminalized.

Private actors, including banks, must comply with the same sanctions and counterterrorism restrictions. To minimize the risk of liability, they have imposed restrictions on the services they offer to humanitarian actors operating in ‘high-risk’ countries. Overlooked until fairly recently, these restrictions, as well as increased costs for financial services, are having a significant impact on the capacity of humanitarian actors to operate in in certain contexts.⁶³ The impact of banking-sector restrictions is so significant that some humanitarian actors have noted that banks are effectively dictating where they can operate.

The problem first came to the fore in 2010, when famine was looming in parts of southern Somalia, including in areas under al-Shabaab control. Despite the severity of the civilian population’s needs, some humanitarian organizations were concerned that — while providing life-saving assistance — they might violate the prohibition on providing funds and other assets imposed against al-Shabaab in UN Security Council sanctions. Eventually, the Security Council adopted an exemption clarifying that the prohibition did not extend to support that may be

⁶² Counter-terrorism measures to choke funding to groups designated as terrorist impose similar restrictions and have similar adverse impact on humanitarian action. See, for example, E.-C. Gillard, *Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action*, Chatham House Research Paper, August 2017, available at <https://www.chathamhouse.org/publication/recommendations-reducing-tensions-interplay-between-sanctions-counterterrorism-measures> (visited 12 November 2019).

⁶³ See, for example, T. Keatinge and F. Keen, *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, Chatham House Research Paper, April 2017, available at <https://www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-impact-banking-restrictions-uk-ngos> (visited 12 November 2019).

provided in the course of humanitarian assistance operations.⁶⁴ At present, civilians in need find themselves under the control of designated organized armed groups in numerous situations, including ISIL in Syria, Hamas in Gaza, Al-Qaeda in the Arabian Peninsula in Yemen, and Boko Haram in Nigeria — these last two countries also being identified as at risk of famine in 2017.⁶⁵ Despite the same challenges arising in these and other contexts, the Somalia sanctions regime remains the sole one to include an exemption for humanitarian action. There have been numerous calls for the Security Council to systematically include such exemptions, but they remain unheeded. It is regrettable that Security Council resolution 2417 (2018) did not address this dimension of conflict-induced food insecurity, all the more so as the solution lies in the hands of the Council.⁶⁶

At a time when the Security Council is imposing sanctions on parties that obstruct humanitarian access with increasing frequency, it is paradoxical that it does not also take the steps necessary to ensure that humanitarian actors can provide that assistance without exposing themselves to the risk of liability.

7. Concluding Remarks

Recently, considerable attention has been directed to the war crime of starvation, not least because of Switzerland's proposal to amend the ICC Statute. It should not be forgotten that individual criminal accountability is one way of promoting compliance with IHL. Other measures have been also taken to promote compliance with key rules of IHL that aim to mitigate food insecurity. Most notably, the UN Security Council has determined that the obstruction of humanitarian activities or of access to humanitarian assistance may constitute a basis for imposing targeted sanctions in relation to a number of recent conflicts. By early 2019, six Security

⁶⁴ SC Res. 1916 (2010), § 5.

⁶⁵ See *supra*, note 1.

⁶⁶ For an analysis of this resolution, see S. Zappalà, *supra* note 5.

Council sanction regimes explicitly included this ground,⁶⁷ formulated in slightly different ways.⁶⁸ To date, sanctions have been imposed for obstructing the delivery of humanitarian assistance (inter alia) on Al Shabaab in Somalia;⁶⁹ on the anti-Balaka commander in the Central African Republic;⁷⁰ and on the President of the Humanitarian Commission of the *Bureau Regional d'Administration et Gestion de Kidal* in Mali.⁷¹

⁶⁷ These are the sanctions regimes relating to Somalia, the Democratic Republic of the Congo, the Central African Republic (CAR), South Sudan, Yemen and Mali. With respect to Somalia, SC Res. 1844 (2008), § 8(c) gives the possibility of imposing sanctions for 'obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia'. SC Res. 1857 (2008), § 4(f) refers to 'obstructing the access to or the distribution of humanitarian assistance in the eastern part of the Democratic Republic of the Congo.' SC Res. 2196 (2015), § 12(e) refers to 'obstructing the delivery of humanitarian assistance to the CAR, or access to, or distribution of, humanitarian assistance in the CAR.' In relation to South Sudan, the Security Council adopted, as a basis for designation, direct or indirect responsibility for, or engagement or complicity in, actions or policies that threaten the peace, security or stability of South Sudan, and included within this '[t]he obstruction of the activities of international peacekeeping, diplomatic, or humanitarian missions in South Sudan, including IGAD's Monitoring and Verification Mechanism or of the delivery or distribution of, or access to, humanitarian assistance' (SC Res. 2206 (2015), § 7(f)). A similar approach was adopted in relation to Yemen, where the Security Council emphasized that 'acts that threaten the peace, security, or stability of Yemen' and that therefore constitute a basis for designation 'may also include ... obstructing the delivery of humanitarian assistance to Yemen or access to, or distribution of, humanitarian assistance in Yemen' (SC Res. 2216 (2015), § 19). Most recently, SC Res. 2374 (2017), § 8(e) includes 'obstructing the delivery of humanitarian assistance to Mali, or access to, or distribution of, humanitarian assistance in Mali', as a basis for the imposition of sanctions.

⁶⁸ In addition, where the Security Council provides for targeted sanctions on the grounds of violations of IHL or human rights abuses, the resolution would potentially allow for sanctions to be imposed on those individuals or groups who act in violation of the IHL rules on humanitarian relief operations. See, in relation to Libya, SC Res. 2213 (2015) § 11(a); and in relation to Sudan, SC Res. 1591 (2005) § 3(c). See also R. Gunaratne, 'Humanitarian Assistance and Security Council Sanctions: Different Approaches to International Humanitarian Law', *EJIL:Talk!*, 11 April 2019, at <https://www.ejiltalk.org/humanitarian-assistance-and-security-council-sanctions-different-approaches-to-international-humanitarian-law/> (visited 12 November 2019).

⁶⁹ Security Council Committee pursuant to resolution 751 (1992) concerning Somalia, *Summary of Listing Criteria*, at <https://www.un.org/securitycouncil/sanctions/751> (visited 12 November 2019). The reasons for listing on this ground appear related principally to food aid diversion and kidnapping of aid workers: *Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008)*, 10 March 2010, UN Doc. S/2010/91, at §§ 59–67.

⁷⁰ Security Council Committee established pursuant to resolution 2127 (2013) concerning the Central African Republic, *Habib Soussou*, at <https://www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/habib-soussou> (visited 12 November 2019). The reasons for listing on this ground appear related principally to attacks against humanitarian workers and looting of supplies and equipment: *Final Report of the Panel of Experts on the Central African Republic established pursuant to Security Council Resolution 2127 (2013)*, 29 October 2014, UN Doc. S/2014/762, Annexes 59–61. Two individuals are also listed under the relevant provision of the South Sudan sanctions, but for acts unrelated to the obstruction of humanitarian assistance.

⁷¹ Security Council Committee established pursuant to resolution 2374 (2017) concerning Mali, *Ahmed Ag Albachar*, at <https://www.un.org/securitycouncil/content/ahmed-ag-albachar> (visited 12 November 2019). Albachar is a prominent businessman and was listed because he is in a position to manipulate humanitarian aid to fulfil his personal interests and the political interests of the HCUA by exercising terror, threatening NGOs and controlling their operations, all of which result in obstruction and hindrance of aid affecting beneficiaries in need in the region of Kidal.

Moreover, while it is important to consider the prohibition of starvation of civilians as a method of warfare, in many situations belligerents are not pursuing policies whose purpose is starving civilians. It is therefore essential to be aware of and promote compliance with *all* the rules that play a role on preventing and alleviating conflict-induced food insecurity.

In considering the prohibition of starvation, the responsibilities of *parties* to armed conflicts — states, and organised armed groups — must not be overlooked. Their obligations are broader than those whose violation can give rise to individual criminal responsibility. By way of example, while there may be divergences of views as to whether the starvation of civilians as a method of warfare is a war crime in non-international armed conflicts, it is unquestionable that such behaviour is prohibited. Even with regard to those rules whose violation amount to a war crime, establishing criminal responsibility requires showing that the accused had the requisite intent to commit the crime and proving guilt beyond reasonable doubt. While these requirements are proper in criminal proceedings, they may give rise to circumstances where the perpetration of a war crime cannot be judicially established, despite a clear violation of the underlying rule of IHL for which the parties to the armed conflict nonetheless remain responsible.

More practically, there may be circumstances in which it is clear that a violation of IHL has been committed, but where it is impossible to identify the perpetrator and thus criminal proceedings are not an option. Provided that the conduct in question can be attributed to them, the parties to the conflict — states or organised armed groups — are nonetheless responsible under international law for the violation.

While there may have been few instances in which belligerents have been found responsible for violations of prohibition of starvation of the civilian population, they nonetheless play a central role in implementing and ensuring compliance with the relevant rules of IHL. Accountability is relevant once violations have been committed. Focusing on the obligations of belligerents is important to promote compliance so as to prevent the commission of violations in the first place.