

DENYING HUMANITARIAN ACCESS AS AN INTERNATIONAL CRIME IN TIMES OF NON-INTERNATIONAL ARMED CONFLICT: THE CHALLENGES TO PROSECUTE AND SOME PROPOSALS FOR THE FUTURE

*Rogier Bartels**

Impeding humanitarian access and the starving of civilians is prohibited under international humanitarian law in times of both international and non-international armed conflicts. Such conduct is criminalised under the Rome Statute of the International Criminal Court (ICC Statute) when committed during an international armed conflict. However, without good reason, it is not a war crime when committed during a non-international armed conflict. Contemporary conflicts, such as that in Syria, show that this is a problematic omission. This article addresses the challenges in prosecuting the denial of humanitarian access during international armed conflicts and examines the options to prosecute before the International Criminal Court such denial in times of non-international armed conflict as other war crimes, crimes against humanity, and genocide. The author concludes that these options would not suffice and proposes to add to the ICC Statute the starvation of the civilian population, including through impeding humanitarian access, as a war crime for non-international armed conflicts.

Keywords: humanitarian assistance, armed conflict, international humanitarian law, international criminal law, International Criminal Court

1. INTRODUCTION

In 2014, the United Nations Secretary-General reported that in Syria, during a time span of one month, ‘medical supplies that would have assisted 216,015 people in hard-to-reach and besieged areas were either removed from convoys, or the convoys were not allowed to proceed’.¹ The problematic humanitarian access during the non-international armed conflict in Syria does not stand on its own. The majority of today’s armed conflicts are non-international in character. In addition to Syria, the situations in South Sudan and the Central African Republic also illustrate that humanitarian aid and relief operations are often impeded in such conflicts.² The problems that humanitarian actors face are partly the result of the often chaotic and unorganised nature

* Rogier Bartels is a Legal Officer in Chambers (Trial Division) at the International Criminal Court and a Research Fellow (Military Law Section) at the Netherlands Defence Academy. This contribution is an updated and extended version of a paper presented at the 9th Minerva/ICRC Conference on International Humanitarian Law on ‘Access for Humanitarian Action: Legal and Operational Challenges in Assisting and Protecting People Affected by Armed Conflict’ (Jerusalem, November 2014). The views expressed are the author’s alone and do not necessarily represent those of the aforementioned institutions. rogierbartels@hotmail.com.

¹ Report of the Secretary-General, Implementation of Security Council Resolution 2139, 23 April 2014, UN Doc S/2014/295 (2014), para 37.

² See, eg, UNSC Res 2139(2014), 22 February 2014, UN Doc S/RES/2139 (2014), addressing the situation in Syria; UNSC Press Release, ‘South Sudan Leaders Must Allow Humanitarian Access, Work Together to Heal Wounds, Secretary-General Tells Security Council’, 12 May 2014, UN Doc SC/11391, on South Sudan; and UNSC Res 2149(2014), 10 April 2014, UN Doc S/RES/2149 (2014), on the Central African Republic.

of the violence in these types of conflict.³ However, access to populations in need is also frequently withheld by one or more of the warring parties, seemingly on purpose.⁴ During conflicts that are fought along ethnic and/or religious lines, one side may wish to deny access to humanitarian aid to the civilians who are seen as belonging to the opposing side, yet share the same nationality.⁵

The main international humanitarian law (IHL) instruments pertaining to international armed conflicts prohibit the starvation of civilians⁶ and include obligations to allow humanitarian relief operations to access those in need of assistance.⁷ Additional Protocol II, applicable to non-international armed conflicts, includes a weaker provision that requires the consent of the state on the territory of which the relief operations are to be carried out.⁸ However, according to the International Committee of the Red Cross (ICRC), the obligation of parties to the conflict to ‘allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need’ applies equally to both types of conflict.⁹ Indeed, as famously held by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*, ‘[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’.¹⁰

Before this ruling and the inclusion of serious violations of IHL in the Statute of the International Criminal Tribunal for Rwanda (ICTR),¹¹ which applies to a situation that the

³ See, eg, Médecins Sans Frontières, ‘Central African Republic: Escalating Violence Endangering Civilians and Delivery of Humanitarian Aid’, 7 March 2014, <http://www.msf.org/article/central-african-republic-escalating-violence-endangering-civilians-and-delivery-humanitarian>.

⁴ As is concluded with respect to the parties to the Syrian conflict in UN Doc S/2014/295 (n 1) paras 19, 22, 26–28, 33–37.

⁵ See, eg, Human Rights Watch, ‘“All You Can Do is Pray”: Crimes against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State’, April 2013; and Eric Reeves, ‘On the Obstruction of Humanitarian Aid’ (2011) 54 *African Studies Review* 165.

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), art 54(1); and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II), art 14.

⁷ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949), 75 UNTS 287 (1950) (GC IV), art 23; Additional Protocol I (n 6) art 70(2).

⁸ Additional Protocol II (n 6) art 18(2). However, as to the consent, see the recent UN Security Council Resolution which authorised humanitarian operations into Syria, even without the consent of the Syrian government: UNSC Res 2165(2014), 14 July 2014, UN Doc S/RES/2165 (2014), para 6 (renewed by the Security Council in UNSC Res 2191(2014), 17 December 2014, UN Doc S/RES/2191 (2014)).

⁹ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 1: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) (ICRC Study), r 55 of which states: ‘The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’. The updated version of the ICRC Study is available at <https://www.icrc.org/customary-ihl/eng/docs/home>.

¹⁰ ICTY, *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, Appeals Chamber, 2 October 1995 (*Tadić* Jurisdiction Decision), [119].

¹¹ Statute of the International Criminal Court for Rwanda, annexed to UNSC Res 955(1994), 8 November 1994, UN Doc S/RES/955 (1994) (ICTR Statute).

drafters of the statute considered to be a non-international armed conflict,¹² it was long considered that war crimes could be committed only during an international armed conflict.¹³ There existed no equivalent to the grave breaches provisions, which compelled states to prosecute persons who had committed atrocities during conflicts of an internal nature. As no international criminal enforcement mechanism was envisioned for such crimes committed in non-international armed conflicts, despite constituting prohibited acts under IHL, they were not war crimes strictly speaking, but merely crimes under national law. Nevertheless, according to the aforementioned *Tadić* decision, Common Article 3 and (parts of) Additional Protocol II constituted customary international law and gave rise to individual criminal responsibility.¹⁴ The ruling was positively received.¹⁵ It paved the way for the inclusion into the material jurisdiction of the International Criminal Court (ICC) of the majority of the serious violations of IHL that were recognised as war crimes when committed in times of international armed conflict, now also for non-international armed conflicts.¹⁶

Indeed, the Rome Statute of the ICC (ICC Statute)¹⁷ gave a ‘final seal of approval’ to the advancement of individual criminal responsibility for serious violations of IHL applicable to the latter types of conflict.¹⁸ It may therefore come as a surprise that the delegates at the Rome Conference for the establishment of the ICC *did* agree to include the serious matter of impeding humanitarian access as a war crime when committed in times of international armed conflict,¹⁹ but *did not* include the same conduct as a crime for non-international armed conflicts.

¹² The UN Security Council had expressly stated its view that ‘the nature of the conflict [was] non-international in character’: Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955 (1994), 13 February 1995, UN Doc S/1995/134, para 11.

¹³ Until shortly before the rendering of the *Tadić* Jurisdiction Decision (n 10) ‘it was widely accepted that the law of war crimes did not apply in internal armed conflict’: Robert Cryer and others (eds), *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010), referring to an ICRC document of 25 March 1993 entitled ‘Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia’, which was cited in Judge Li’s Separate Opinion in the *Tadić* Jurisdiction Decision. The ICRC was quoted as stating that ‘according to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict’: *Tadić* Jurisdiction Decision (n 10) Separate Opinion of Judge Li, para 9. See also Theodor Meron, ‘The International Criminalization of Internal Atrocities’ (1995) 89 *American Journal of International Law* 554, 559; and René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002) 95, both of which refer to the same ICRC document.

¹⁴ *Tadić* Jurisdiction Decision (n 10) [117]–[127].

¹⁵ Marko Milanovic and Vidan Hadzi-Vidanovic, ‘A Taxonomy of Armed Conflict’ in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 256–57.

¹⁶ See, eg, Gerhard Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009) 361; Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press 2008) 139; Darryl Robinson and Herman von Hebel, ‘War Crimes in Internal Armed Conflicts: Article 8 of the ICC Statute’ (1999) 2 *Yearbook of International Humanitarian Law* 196.

¹⁷ Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

¹⁸ Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 177.

¹⁹ ICC Statute (n 17) art 8(2)(b)(xxv), which reads: ‘Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions’.

Although most of the ‘other serious violations of the laws and customs applicable in times of international armed conflict’, listed in Article 8(2)(b) of the ICC Statute, were reproduced in Article 8(2)(e), which covers non-international armed conflicts,²⁰ the crime of ‘[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’²¹ was not.²² The failure to include this war crime for non-international armed conflicts has been criticised for good reason.²³ However, while the state parties used the ICC Statute Review Conference of 2010 to rectify one of the other shortcomings of Article 8(2)(e)²⁴ – namely by agreeing to include the ‘missing’ non-international armed conflict war crime of using prohibited weapons²⁵ – the issue of humanitarian access received no attention in Kampala.²⁶

Equally troubling is that while the ICTY – which has jurisdiction over a non-exhaustive list of serious violations of IHL²⁷ – was able to address the intentional blocking of humanitarian aid as a war crime, irrespective of the nature of the armed conflict in the cases concerned,²⁸ it is nearly

²⁰ In addition to the use of prohibited weapons (addressed below), the only other violations not included are art 8(2)(b)(iv), the crime of causing excessive collateral damage, and art 8(2)(viii), (xiv) and (xv). Given that the last three provisions deal with occupation and ‘the nationals of the hostile party’, it is obviously not possible to have the same crime for non-international armed conflicts.

²¹ ICC Statute (n 17) art 8(2)(b)(xxv), applicable during international armed conflict.

²² Michael Cottier, who was present at the Rome Conference, observes that ‘[u]ntil the very end of the Rome Conference, many delegations in fact also favored to include starvation as a war crime in non-international armed conflicts, but the “final package” did not include it in the list of war crimes in internal conflict situations’: Michael Cottier, ‘Article 8’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, CH Beck/Hart/Nomos 2008) 275, 459.

²³ See, eg, Werle (n 16) 453; Claus Kress, ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice’ (2000) 30 *Israel Yearbook on Human Rights* 134; Robinson and Von Hebel (n 16) 208.

²⁴ The non-inclusion of the crime of causing excessive incidental damage (included for international armed conflicts as art 8(2)(b)(iv)) also continues to weaken the war crimes provisions applicable to non-international armed conflicts. On this issue, see Rogier Bartels, ‘Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials’ (2013) 46 *Israel Law Review* 271.

²⁵ Now included as art 8(2)(e)(xiii)–(xv). See Review Conference, Resolution RC/Res.5 Amendments to Article 8 of the ICC Statute, adopted at the 12th plenary meeting, 10 June 2010.

²⁶ As becomes clear from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, RC/11, in which starvation and humanitarian relief is at no point addressed.

²⁷ ICTY Statute (Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704, adopted by the Security Council in Resolution 827(1993), 25 May 1993), art 3 (entitled ‘Violations of the laws or customs of war’), which explicitly states that the Tribunal’s jurisdiction is not limited to the examples listed under (a) to (e).

²⁸ ICTY Chambers have held that for crimes falling within art 3 of its Statute only the (jurisdictional) requirement of ‘existence of an armed conflict’ needed to be satisfied. The *Halilović* Trial Chamber, for example, held that ‘[w]hen an accused is charged with violation of Article 3 of the Statute, based on a violation of Common Article 3, it is immaterial whether the armed conflict was international or non-international in nature’: ICTY, *Prosecutor v Halilović*, Judgment, IT-01-48-T, Trial Chamber I, 16 November 2005, [25]. See also ICTY, *Prosecutor v Popović and Others*, Judgment, IT-05-88-T, Trial Chamber II, 10 June 2010, [744]–[748]; ICTY, *Prosecutor v Mrksić and Others*, Judgment, IT-95-13/1-T, Trial Chamber II, 27 September 2007, [457]; ICTY, *Prosecutor v Galić*, Judgment, IT-98-29-T, Trial Chamber I, 5 December 2003, [22]; ICTY, *Prosecutor v Simić and Others*, Judgment, IT-95-9-T, Trial Chamber II, 17 October 2003, [38]; and ICTY, *Prosecutor v Furundžija*, Judgment, IT-95-17/1-T, Trial Chamber, 10 December 1998, [59]–[60]. According to Alexander Zahar and Goran Sluiter, the *Tadić* Appeals Judgment (ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1, Appeals

impossible, under the existing framework, to prosecute before the ICC the blocking of humanitarian operations as a war crime when carried out in times of non-international armed conflict. The present contribution addresses this dilemma and proposes a solution.

To that extent, and in order to understand the requirements that the proposed war crime for non-international armed conflict should fulfil, this contribution first highlights some of the challenges in prosecuting (before the ICC) the denial of humanitarian access as a war crime when committed in times of international armed conflict.²⁹ It then discusses the drafting history of the ICC Statute and sets out the reasons why no non-international armed conflict equivalent exists in the ICC Statute, followed by a discussion of whether charges for the same behaviour can (partially) be brought under other war crime provisions included in Article 8(2)(c) or (e) of the ICC Statute. As it is found that those provisions would not properly capture or fully address the criminality of the actual conduct, the article then examines whether the blocking of humanitarian access can be prosecuted as a crime against humanity and genocide. It concludes with a proposal for the next ICC Review Conference to modify the text of Article 8(2)(b)(xxv) and to adopt starvation of the civilian population and the denial of humanitarian access as a war crime in non-international armed conflicts.

2. THE DENIAL OF HUMANITARIAN ACCESS AS A WAR CRIME IN INTERNATIONAL ARMED CONFLICT

Historically, siege warfare, during which the entire population of a city was subjected to starvation, was not prohibited and indeed was generally practised during the conduct of wars.³⁰ The Lieber Code went so far as to suggest ‘throw[ing] the burden of war ... on the disloyal citizens’³¹ and permitted the starvation of ‘the hostile belligerent armed *or unarmed*’.³² At the beginning of

Chamber, 15 July 1999) ‘has been misinterpreted as dispensing with the need to decide the internationality of a conflict for war crimes other than grave breaches’: Alexander Zahar and Goran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008) 112.

²⁹ The present contribution focuses on the ICC. The ICTY, the only ad hoc tribunal dealing with a situation of armed conflict that is still in operation, is nearing completion of its work and the three cases currently pending do not deal with the denial of humanitarian access – at least, not as a (separate) crime charged. Two of the three remaining cases concern the sieges of Sarajevo and Srebrenica (*Prosecutor v Karadžić* and *Prosecutor v Mladić*). According to the indictment in each of the cases, Radavon Karadžić and Ratko Mladić directed and/or authorised ‘the restriction of humanitarian aid to Bosnian Muslim and/or Bosnian Croat enclaves located in territory controlled by Bosnian Serb Political and Governmental Organs and/or Bosnian Serb Forces in an effort to create unbearable living conditions for these inhabitants’. However, the allegations against each that ‘humanitarian aid was restricted to the enclave ... in an effort to make life impossible for the inhabitants of the enclave and to remove its population’ only constitute an underlying fact to support the crimes against humanity charges for persecution and deportation: ICTY, *Prosecutor v Karadžić*, Prosecution’s Marked-up Indictment, IT-95-5/18-PT, 19 October 2009, [57], [74]; ICTY, *Prosecutor v Mladić*, Fourth Amended Indictment, IT-09-92-PT, 16 December 2011, [56], [73].

³⁰ Generally, Yoram Dinstein, ‘Siege Warfare and the Starvation of Civilians’ in Astrid JM Delissen and Gerard J Tanja, *Humanitarian Law of Armed Conflict: Challenges Ahead – Essays in Honour of Frits Kalshoven* (Martinus Nijhoff 1991) 145–52.

³¹ General Orders No 100: Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated by President Lincoln, 24 April 1863, art 156.

³² *ibid* art 17 (emphasis added).

the twentieth century, the Hague Regulations prohibited pillage and mandated that certain buildings must not be fired at during a siege,³³ but did not mention anything about persons subject to a siege. Indeed, in the *High Command* case, the United States Military Tribunal confirmed the lawfulness of siege warfare. The judges regretted not being able to find otherwise, but held that the German use of artillery to prevent the civilians from fleeing the siege of Leningrad was not a crime.³⁴ Certain provisions of the 1949 Geneva Conventions, including the provisions that obliged free passage of humanitarian relief action as well as food and medical supplies, limited the ability to lay siege and thereby affect the civilian population.³⁵ In 1977, Additional Protocol I strengthened this protection³⁶ and specifically stated that starvation as a method of warfare was prohibited.³⁷ As a corollary, passage of humanitarian relief convoys must be allowed if denial of such passage would result in the starvation of those affected.³⁸ However, siege warfare itself is still permitted as long as the objective is military in nature.³⁹

2.1. THE CRIME OF STARVATION AS INCLUDED IN THE ICC STATUTE

The phrases ‘humanitarian access’ or ‘humanitarian assistance’ cannot be found in the ICC Statute. Yet, the denial of such access/assistance is precisely what is meant by Article 8(2)(b)(xxv), which lists among ‘serious violations of the laws and customs applicable in international armed conflict’⁴⁰ the act of ‘[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’. The scope of the crime is much broader than starvation in the strict sense.⁴¹ Indeed, the draft text first read ‘starving of the civilian population and pre-

³³ Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land (entered into force 26 January 1910) Martens Nouveau Recueil (ser 3) 461, arts 28 and 27, respectively.

³⁴ Nuremberg Military Tribunal under Control Council Law No 10, *United States of America v Wilhelm von Leeb and Others*, Judgment, 27 October 1948, 563. The judges noted: ‘We might wish the law were otherwise but we must administer it as we find it’.

³⁵ Such as GC IV (n 7) arts 23, 55, 59–62.

³⁶ Additional Protocol I (n 6) arts 69–71.

³⁷ Additional Protocol I (n 6) art 54.

³⁸ Hans-Peter Gasser and Knut Dörmann, ‘Protection of the Civilian Population’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 238.

³⁹ ICRC Study (n 9) 188. Ingrid Deter, however, submits that arts 54 and 70 of Additional Protocol I ‘prohibit siege in the old meaning and function of the term’: Ingrid Deter, *The Law of War* (2nd edn, Cambridge University Press 2000) 298.

⁴⁰ The ICC Elements of Crimes (9 September 2002, ICC-ASP/1/3; UN Doc PCNICC/2000/1/Add.2 (2000)) clarify that the crimes listed in art 8(2)(b) of the ICC Statute can only be committed in the context of an international armed conflict. Art 8(2)(b) itself requires only a violation of IHL applicable to such conflicts, which makes more sense as this body of law can also be applicable outside an international armed conflict (eg the continued application of IHL to persons detained in relation to the armed conflict, and after the conflict ends; or when the parties, by way of special agreement (as referred to in Common Article 3), agree to apply the provisions of the 1949 Geneva Conventions to a non-international armed conflict.

⁴¹ See Ilias Bantekas, *International Criminal Law* (4th edn, Hart 2010) 172.

vention of humanitarian assistance from reaching them'.⁴² Illustrative of the form of relief is the agreement amongst the drafters of the Elements of Crimes⁴³ that, although the second element specifically requires the intent 'to starve', the deprivation of objects indispensable to survival, referred to in the first element, included not only food and drink, but also medications and, in case of very low temperatures in a region, blankets.⁴⁴

Article 8(2)(b)(xxv) of the ICC Statute is a combination of the prohibition of starvation found in Article 54 of Additional Protocol I and general provisions relating to relief in favour of the civilian population, such as Article 23 of Geneva Convention IV of 1949 and Articles 70 and 71 of Additional Protocol I.⁴⁵ Geneva Convention IV and Additional Protocol I also contain positive duties for an occupying power to provide relief to the civilian population in occupied territories, or to allow the free passage of humanitarian aid.⁴⁶ In general, combining underlying prohibitions to create a single crime is not ideal. This is so because when these prohibitions are found in different treaties and serve different purposes, combining them can negatively affect the strength of a criminal prohibition.⁴⁷ Moreover, as will be discussed below, the combination of language derived from the 1949 Geneva Conventions and the 1977 Additional Protocols raises specific questions.⁴⁸

⁴² Draft text of 1996 as prepared by the Preparatory Committee, reprinted in M Cherif Bassiouni, *The Legislative History of the International Criminal Court*, Vol II (Transnational 2005) 89.

⁴³ (n 40).

⁴⁴ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003) 363. It is suggested by the present author that, depending on the circumstances and the length of, eg, a siege or blockade, clothing should also be included. GC IV (n 7) art 59, and Additional Protocol I (n 6) art 69(1), albeit applicable to belligerent occupation, specifically refer to clothing as part of the relief supplies that are to be given free passage. Art 23 GC IV dictates the free passage also of, inter alia, clothing for children and expectant mothers outside a situation of occupation. In support, see Stefan Oeter, 'Methods and Means of Combat' in Fleck (n 38) 115, 209. Further support can be found in the commentary to the 1977 Additional Protocols by Michael Bothe and others, in which the authors note with regard to the 'illustrative list' in art 54(2) of Additional Protocol I that '[a]lthough the list deals primarily with food, drinking water and objects which contribute to their production, the [Drafting] Committee's action in adopting an illustrative listing indicates that other life sustaining objects such as clothing and shelter needed to sustain life under prevailing climatic conditions may also be covered by the prohibition': Michael Bothe, Karl Josef Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Martinus Nijhoff 2013) 382. It is noted that in a footnote, Bothe and his co-authors appear to undercut the foregoing statement by observing that '[t]he eagerness of the Conference to adopt the abstraction of an open ended illustrative list and its reluctance to include within it concrete objects other than those dealing with food and drink indicates that it may be difficult to establish that objects other than the latter category are intended to be protected by the Article': *ibid.*

⁴⁵ See Dörmann (n 44) 364–68.

⁴⁶ GC IV (n 7) arts 55, 59–62; and Additional Protocol I (n 6) art 69.

⁴⁷ The manner in which the ICC Statute combines into one crime violations of the principle of proportionality, as prohibited by Additional Protocol I, with causing excessive environmental damage – tracking the language of, inter alia, the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (ENMOD) (entered into force 5 October 1978) 1108 UNTS 151 – is a case in point here: Bartels (n 24) 307–08. See also Jordan Paust's critique of the combining of different prohibitions under IHL in the draft crime proposed by the Preparatory Committee: Jordan Paust, 'The Preparatory Committee's "Definition of Crimes" – War Crimes' (1997) 8 *Criminal Law Forum* 431, 442–43.

⁴⁸ One can also starve a prisoner of war, or those otherwise deprived of their liberty in times of armed conflict – eg the mass starvation that occurred in the Nazi concentration camps during the Second World War. However, these cases, in which the victims are in the hands or power of the alleged perpetrator and a separate duty of care exists

2.2. CHALLENGES FOR THE PROSECUTION OF STARVATION

The wording of Article 8(2)(b)(xxv) of the ICC Statute, as well as the general legal framework of the ICC, creates challenges for prosecuting denial of humanitarian access as a war crime. Such challenges include, but are not limited to, the relatively high threshold of ‘starvation of civilians’. With respect to the relevant provision of Additional Protocol II, the ICRC Commentary on the 1977 Additional Protocols defines starvation, by reference to a dictionary, as ‘the action of subjecting people to famine, that is extreme and general scarcity of food’.⁴⁹ The commentary to the related provision of Additional Protocol I appears to set a lower bar, as starvation is considered to consist of the suffering of hunger. At the same time, the addition that ‘[s]tarvation is referred to here as a method of warfare, that is, a weapon to annihilate or weaken the population’, indicates a similarly high threshold.⁵⁰

Furthermore, IHL requires consent from the party in control of the territory concerned in the case of international armed conflicts, or of the state in the territory of which relief operations would take place in the case of a non-international armed conflict.⁵¹ In addition, IHL grants the warring parties several lawful options to (temporarily) restrict the provision of humanitarian aid. In a commentary to the Additional Protocols, it has been submitted in this regard that consent may be refused only for ‘valid and compelling reasons’, which ‘may include imperative considerations of military necessity’.⁵² But there is no unfettered discretion to refuse agreement, and it may not be declined for arbitrary or capricious reasons’.⁵³ Indeed, nowadays it is ‘generally accepted that although the consent of the affected state to relief actions is required, it may not be arbitrarily withheld’.⁵⁴ However, it is far from clear what actually constitutes arbitrary

for the detainer, are not those covered by the prohibitions of starvation included in the Additional Protocols. As such, these situations will not be addressed in this contribution.

⁴⁹ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) (ICRC Commentary on the Additional Protocols), para 4791, referring to the definition given by the 1978 edition of *The Shorter Oxford English Dictionary*.

⁵⁰ *ibid* paras 2089–90. See also the view of the Turkel Commission, *The Public Commission to Examine the Maritime Incident of 31 May 2010* (Report 1, Part 1), para 76.

⁵¹ Additional Protocol I (n 6) art 70 states 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*’ (emphasis added). The parties to an international armed conflict are states. The provision adopted for Additional Protocol II similarly aimed to preserve the sovereignty of the state receiving the relief (for a discussion, see Emanuela-Chiara Gillard, ‘The Law Regulating Cross-Border Relief Operations’ (2013) 95 *International Review of the Red Cross* 356). Additional Protocol II (n 6) art 18(2) reads: ‘If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken *subject to the consent of the High Contracting Party concerned*’ (emphasis added).

⁵² Bothe, Partsch and Solf (n 44) 485.

⁵³ *ibid*.

⁵⁴ Gillard (n 51) 356.

withholding of consent.⁵⁵ The level of debate by academics illustrates the likelihood of discussion of this topic in the courtroom, and highlights the challenges that any criminal prosecution would face on the refusal to give such consent.⁵⁶ Furthermore, for as long as consent remains essential, ‘authorities can usually find plausible excuses for delaying humanitarian assistance’.⁵⁷ Such delays may have serious consequences, as a person can survive for some time without food, but without drinking water or medication the time period is significantly less. In addition, (part of) humanitarian goods are often seized by one of the warring parties as a pay-off to let the goods pass. It has been questioned what level of relief supplies have to be diverted to the opposition for a party to legitimately deny the deliverance of relief.⁵⁸ One author considers that it is only when an ‘excessively large portion of aid’ is diverted to the opposition that access could be denied,⁵⁹ but this threshold appears to be far too high – especially in the context of a criminal trial.

It is significant, too, that the prohibition against starving the civilian population as a method of warfare could be considered absolute,⁶⁰ but the prohibition against attacking objects indispensable to the survival of the civilian population in fact allows for derogation. For example, foodstuffs or drinking water installations may be attacked ‘when required by imperative military necessity’ for a party to defend its own national territory.⁶¹ Rather than attacking existing objects indispensable to the

⁵⁵ *ibid* 360. A more in-depth discussion is available in Dapo Akande and Emanuela-Chiara Gillard, ‘Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict’, *OCHA Occasional Policy Papers*, No 8, 2014 (currently not yet publicly available).

⁵⁶ For various views and discussions on consent for humanitarian relief operations see, eg, Cedric Ryngaert, ‘Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective’ (2013) 5 *Amsterdam Law Forum* 5–19; Gillard (n 51) 356–73; Felix Schwendimann, ‘The Legal Framework of Humanitarian Access in Armed Conflict’ (2011) 93 *International Review of the Red Cross* 993, 998–1002; Rebecca Barber, ‘Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law’ (2009) 91 *International Review of the Red Cross* 371, 391; Katja Luopajarvi, ‘Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?’ (2003) 15 *International Journal of Refugee Law* 678, 689.

⁵⁷ Yoram Dinstein, ‘The Right to Humanitarian Assistance’ (2000) 53 *Naval War College Review* 77, 86.

⁵⁸ Cedric Ryngaert asks: ‘[D]oes a diversion [to the opposition] of 10 pct. of the (value of the) goods suffice, or should a 50 pct. or even higher threshold be maintained?’: Ryngaert (n 56) 9.

⁵⁹ Ruth Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflicts: Achievements and Gaps’ (2004) 86 *International Review of the Red Cross* 515, 542. As an example, she mentions the armed conflict in Somalia in the early 1990s ‘when 90 per cent of humanitarian aid was appropriated by the warlords for their own benefit’.

⁶⁰ The derogation provided for in Additional Protocol I (n 6) art 54(3) and (5) refers to para 2, but not to para 1 of art 54. The ICRC commentary on this article does not pronounce on whether the prohibition of starvation is absolute, since the commentary explains that ‘a general principle only of course becomes fully operative when it is accompanied by rules of application: the remainder of the article is concerned with such application, as are several other articles in the Protocol, particularly those relating to relief actions’. It further states that para 2 ‘develops the principle formulated in paragraph 1 of prohibiting starvation of the civilian population; it describes the most usual ways in which this may be applied’: ICRC Commentary on the Additional Protocols (n 49) paras 2091 and 2098. This could be taken to mean that the derogations to para 2 may thus legitimately have an impact on para 1. On the other hand, the commentary on the sister provision in Additional Protocol II is significantly more resolute: ‘The prohibition on using starvation against civilians is a rule from which no derogation may be made. A form of words whereby it would have been possible to make an exception in case of imperative military necessity was not adopted’: *ibid* para 4795.

⁶¹ Additional Protocol I (n 6) art 54(5). See also the exceptions listed in para 3 of the same article. As to these exceptions, however, note the disclaimer provided for in art 54(3)(b).

survival of a civilian population, a party to a conflict can also prevent new objects from reaching the population. The San Remo Manual dealing with naval warfare specifies that a naval blockade would be prohibited ‘if it has the sole purpose of starving the civilian population or denying it other objects essential for its survival’.⁶² Conversely, if a blockade is established for military reasons – for example, to prevent the supply of weapons to the enemy – and starvation occurs as a side effect, it would, according to the Manual, be prohibited only when the expected starvation would be excessive in relation to the military advantage anticipated to be gained by the blockade.⁶³ The required criminal intent (*mens rea*) to cause starvation as a war crime is discussed in more detail below.

The underlying prohibition to starve a civilian population as a method of warfare assumes that the alleged perpetrator commits certain *acts* in order to actively deprive the civilians of objects indispensable to their survival: for example, by actively attacking foodstuffs or by poisoning wells. The addition that the crime can also be committed by the wilful impediment of relief supplies strengthens the idea that active behaviour is required,⁶⁴ this includes, for example, physically preventing humanitarian convoys from reaching the civilian population. One wonders, then, whether the crime can also be committed as a result of an omission, such as the refusal of consent to the humanitarian organisation wishing to provide humanitarian aid, or not entering into an agreement on a ceasefire or a so-called humanitarian corridor, which would allow humanitarian assistance to reach a population in need.⁶⁵ The ICC Statute is silent on omission liability. For its part, the ICTY found that such liability exists under customary law, but the ICC does not necessarily follow the ICTY with regard to liability.⁶⁶ The academic literature is divided on this matter.⁶⁷ Moreover, a draft article that would have criminalised omissions was dropped by the drafters.⁶⁸ During the drafting of Article 22 of the ICC Statute, dealing with the principle of legality, the chairman of the relevant working group proposed the current language of the first paragraph of this article, which contains the word ‘conduct’.⁶⁹ The chairman observed that ‘[t]he term “conduct” was generally accepted to denote a criminal act or omission in order to avoid the

⁶² Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995) art 102(a).

⁶³ *ibid* art 102(b). See, however, the Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, which sets out (in para 80) that in the case of a blockade ‘if necessary, the civilian population ... must be allowed to receive food and other objects essential to its survival’.

⁶⁴ Compare Cottier (n 22) 465–66.

⁶⁵ Compare Christa Rottensteiner, ‘The Denial of Humanitarian Assistance as a Crime under International Law’ (1999) 81 *International Review of the Red Cross* 555, 580–81. With respect to the non-international armed conflict in Somalia, the UN Security Council demanded that ‘all parties ... immediately cease hostilities, maintain a ceasefire throughout the country, ... in order to promote the process of relief distribution’: UNSC Res 794(1992), 3 December 1992, UN Doc S/RES/794 (1992), para 1.

⁶⁶ For example, the idea of joint criminal enterprise is not recognised before the ICC. There is discussion whether recklessness, accepted by the ICTY, fulfils the required intent and knowledge under the ICC Statute.

⁶⁷ For an overview of academic opinion on the different sides of the debate, see Florian Jessberger, ‘Omission’ in Antonio Cassese and others (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 446.

⁶⁸ Per Saland, ‘International Criminal Law Principles’ in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 189, 212.

⁶⁹ ‘A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court’: ICC Statute (n 17) art 22(1).

problem which some delegations had with the idea of omissions being criminal on a par with acts'.⁷⁰ However, on the basis of that information, one could also conclude that 'liability for omissions was not categorically excluded by the drafters'.⁷¹ It has further been suggested that the Elements of Crimes deliberately avoid the term 'acts' in favour of 'conducts', as is also the case with the third element for Article 8(2)(b)(xxv), because 'conduct' would include both acts and omissions.⁷² Moreover, although the Elements of Crimes may merely serve to 'assist' the judges of the Court,⁷³ they thus far have been followed quite diligently.⁷⁴

With regard to the required intent and knowledge, Article 30 of the ICC Statute provides that 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'. Such intent would be relatively clear when it concerns a (prohibited) attack on, for example, a humanitarian convoy⁷⁵ or on the water supply. However, the intent to cause and knowledge of the consequence may be less clear in a case of denial of humanitarian assistance. If heavy fighting is taking place in an area where the civilian population is also in need of humanitarian aid, a party may not consent to humanitarian relief operations being undertaken, or to a request for the fighting to be temporarily ceased to allow for such relief operations. This denial could be for military reasons, such as the possibility of achieving a speedy victory or to prevent the enemy from having a chance to regroup. In addition, humanitarian organisations may be unwilling to enter the area because of the security situation. In these cases, it is difficult to see how the *mens rea* requirement would be met. Moreover, the language of the first part of Article 8(2)(b)(xxv) would allow for criminal responsibility if the perpetrator was aware that starvation would occur 'in the ordinary course of events'.⁷⁶ However, the use of 'wilful' in the second part of the article could suggest that this standard does not apply to impeding relief supplies.⁷⁷

⁷⁰ Saland (n 68) 195.

⁷¹ Cryer and others (n 13) 363.

⁷² Maria Kelt and Herman von Hebel, 'The Making of the Elements of Crimes' in Roy S Lee and others (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational 2001) 14; Cryer and others (n 13) 363.

⁷³ See ICC Statute (n 17) art 9.

⁷⁴ The Pre-Trial Chamber held by majority in *Al Bashir* that the Elements of Crimes (n 40) 'must be applied unless the competent Chamber finds an irreconcilable contradiction with the Statute', following which 'the provisions in the Statute must prevail': ICC, *Prosecutor v Al Bashir*, Case No ICC/02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, [117]–[120], [128], [131]. However, strict application will not always be possible. For example, the first element for the war crime of perfidy (Article 8(2)(e)(ix) of the ICC Statute) refers to 'one or more combatant adversaries'. Since no combatant status exists in times of non-international armed conflict, this element cannot be fulfilled. Indeed, Schabas observes that Pre-Trial Chamber I overstated the role of the elements of crimes: William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 408. Leena Grover correctly observes that the language of art 9(1) means that the elements 'must be considered but may or may not be applied' (emphasis omitted): Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press 2014) 189.

⁷⁵ This would also constitute a crime under art 8(2)(b)(xxiv) of the ICC Statute (n 17).

⁷⁶ ICC Statute (n 17) art 30(2)(b).

⁷⁷ See, however, Cottier ((n 22) 465) who submits that 'delegations at the Diplomatic Conference may not have had the intent to deviate from the general rules regarding the mental element'. He points to the general introduction to the Elements of Crimes (n 40), in which it is mentioned that art 30 of the ICC Statute applies if no reference to

Moreover, it is important to note that only the starvation of civilians *as a method of warfare* is prohibited.⁷⁸ The scarcity of provisions during times of conflict inevitably subjects civilians to some form of deprivation. In addition to the effects of the general warfare impacting on civilians, for example, ‘if civilians through fear of military operations abandon agricultural land or are not prepared to risk bringing food supplies into areas where fighting is going on’,⁷⁹ specific military operations may also result in starvation. It is important to carefully assess actions which lead to starvation, however, ‘for what may seem to be an incidental effect of an armed conflict may prove to be a covert method of combat’.⁸⁰ The incidental starvation of a civilian population caused by military operations, for example, as a result of ‘cutting off enemy supply routes which are also used for the transportation of food’,⁸¹ does not in itself violate IHL.⁸² Rather, the relevant party should allow and facilitate humanitarian assistance for the said population.⁸³ In such situations, it is unlikely that charges would be brought for starvation of the civilian population. Nevertheless, it serves to show the difficulty in bringing any charges related to conduct that did not involve actual attacks on objects indispensable to the survival of the civilian population.

Another aspect of the crime of starving the civilian population which requires a careful assessment of the conduct, as well as evidence showing specific intent to cause starvation,⁸⁴ is the fact that, as one of the few war crimes included in the ICC Statute,⁸⁵ Article 8(2)(b)(xxv) has no result requirement.⁸⁶ The United States had proposed including an element that required that ‘as a result of the accused’s acts, one or more persons died of starvation’, but no such element was adopted.⁸⁷ The

the mental element is made in the respective elements of a crime. No such reference is made in the Elements of Crime for art 8(2)(b)(xxv). Schabas ((n 74) 214) suggests, albeit with regard to the war crime of murder, that the term ‘wilful’ is ‘probably synonymous with “intentional”, and does not serve to make the provision in any way an exception to the general rule on the mental element laid down in Article 30 of the Statute’. For a discussion of whether the recklessness standard applies before the ICC, see Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 48–50.

⁷⁸ See Dörmann (n 44) 364. It has been suggested that therefore only ‘to deliberately provoke, increase or prolong the starvation by deprivation of objects indispensable for the survival with an aim to gain a military advantage’ falls within the war crime as included in the ICC Statute: Cottier (n 22) 465. According to Cottier, ‘forcing civilians to transfer to another area or state’ would be included in such military advantage, as it ‘may present a military gain in that the political and physical control over this territory or area is enhanced or will be easier to establish’: *ibid.* The present author does not agree that forcible transfer or deportation could qualify as military advantage, but Cottier’s description illustrates the high threshold for behaviour to fall within the prohibited conduct. A better understanding of the phrase ‘method of warfare’, in the context of the current crime, is to see it as ‘a weapon to annihilate or weaken the population’: ICRC Commentary on the Additional Protocols (n 49) para 2090.

⁷⁹ United Kingdom Ministry of Defence (UKMoD), *The Manual of the Law of Armed Conflict* (Oxford University Press 2004) para 5.27.2.

⁸⁰ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 424.

⁸¹ UKMoD (n 79) para 5.27.2.

⁸² See *San Remo Manual on the Law of Non-International Armed Conflict* (International Institute of Humanitarian Law 2006) r 2.3.10; see also Sivakumaran (n 80) 424.

⁸³ *eg.*, *San Remo Manual*, *ibid* r 5.1.

⁸⁴ The Elements of Crimes (n 40) require that ‘[t]he perpetrator intended to starve civilians as a method of warfare’. See also Bantekas (n 41) 172; and Cottier (n 22) 465–66.

⁸⁵ *eg.*, ICC Statute (n 17) art 8(2)(b)(iv) also does not require a result.

⁸⁶ See, *eg.*, Cottier (n 22) 465.

⁸⁷ The US had proposed to include the element ‘[t]hat as a result of the accused’s acts, one or more persons died from starvation’: United States of America, Proposal regarding an Annex on Definitional Element for Part 2

death of one or more civilians from starvation thus does not need to have occurred. This is, of course, a positive aspect of the crime, as it means that if the prosecution manages to prove the intent to starve civilians on the part of the accused but, for some reason,⁸⁸ fails to show that civilians in fact starved, a conviction for the crime may still follow. It also allows the prosecution to focus on proving intent and not spend too many resources on proving the result. Moreover, the civilian population need not have starved for the prosecution of those responsible for denial of humanitarian access to take place.⁸⁹ However, without there being a result, a crime is also more difficult to prove. When would something actually qualify as starvation? How many humanitarian convoys have to be blocked before it can be considered an attempt to starve the civilian population? Should convoys carrying medication be differentiated from those carrying food supplies? It would appear that it can be determined only on a case-by-case basis when the threshold is met. The following salient example shows just how fine the dividing line may be. According to a government document, made public upon request by a non-governmental organisation,⁹⁰ Israel assessed the minimum number of calories needed per adult in order 'not to starve' and allowed food convoys into the Gaza Strip on the basis of the calculated figure.⁹¹

In addition to the foregoing, the value of the crime of intentionally causing starvation, as criminalised by Article 8(2)(b)(xxv), may be impaired by the language used. Starvation can be achieved, *inter alia*, by 'wilfully impeding relief supplies *as provided for under the Geneva Conventions*'.⁹² The ICC Statute's reference to the Geneva Conventions is ambiguous, as both the prohibition against starvation and the most robust provision on relief supplies are found in Additional Protocol I. It is not clear whether this phrase includes relief supplies as provided

Crimes, 19 June 1998, UN Doc A/CONF.183/C.1/L.10; and Proposal Submitted by the United States of America: Draft Elements of Crime, 4 February 1999, UN Doc PCNICC/1999/DP.4/Add.2, 18. See also Dörmann (n 44) 364.

⁸⁸ eg, because the witnesses were found not to be credible, or certain materials could not be authenticated.

⁸⁹ It is, of course, likely that an act of denying humanitarian assistance that did not result in the death of civilians would not be considered to be sufficiently grave to warrant prosecution before the ICC. The ICC Statute (n 17) art 17(1)(d) mandates that a case is inadmissible if it 'is not of sufficient gravity to justify ... action by the Court'. The ICC Office of the Prosecutor set out its views on gravity in its report on the registered vessels of Comoros, Greece and Cambodia, in which it determined that although 'a reasonable basis [exists] to believe that war crimes were committed on board the Comorian-registered vessel (the *Mavi Marmara*) during the interception of the flotilla on 31 May 2010', the matter was not sufficiently grave for it to proceed with an investigation: ICC Office of the Prosecutor, 'Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report', 6 November 2014, paras 133–48.

⁹⁰ The document entitled 'Food Consumption in the Gaza Strip – Red Lines', mostly referred to as the 'Red Lines document', was obtained by Gisha through legal action against the Israeli government: Gisha, 'Food Consumption in the Gaza Strip – Red Lines', October 2012, <http://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf>.

⁹¹ Amira Hass, '2,279 Calories per Person: How Israel Made Sure Gaza Didn't Starve', *Ha'aretz*, 17 October 2012, <http://www.haaretz.com/news/diplomacy-defense/2-279-calories-per-person-how-israel-made-sure-gaza-didn-t-starve.premium-1.470419>. A government official had previously said: 'The idea is to put the Palestinians on a diet, but not to make them die of hunger': Conal Urquhart, 'Gaza on Brink of Implosion as Aid Cut-off Starts to Bite', *The Guardian*, 16 April 2006, <http://www.theguardian.com/world/2006/apr/16/israel>. In addition to it being questionable whether this could qualify as a method of warfare, such a statement illustrates that, in light of the required special intent to starve the civilian population, the alleged Israeli policy, although objectionable, without more would not amount to intentionally starving the civilian population.

⁹² Emphasis added.

for under the said Protocol.⁹³ It is submitted here that the mention of the Geneva Conventions should be understood as referring to the Geneva Conventions framework; this includes the two 1977 Protocols, which are additional to the 1949 Conventions.⁹⁴ For a situation of international armed conflict, the relevant provisions of Additional Protocol I would then also be applicable. The author acknowledges, however, that the language of Article 8(2)(b)(xxv) allows for the argument to be made that the enhanced protection of Additional Protocol I is not applicable. Indeed, during a criminal trial the defence is likely to advocate a narrow reading and a chamber may reason that the provision should be interpreted in a restrictive manner, thereby including only the more limited relevant provisions of the 1949 Geneva Conventions. The reference to ‘Geneva Conventions’ is further unfortunate in light of the UN Security Council’s authority to impose the duty on states to allow access for humanitarian relief.⁹⁵ As the Security Council is nowhere mentioned in the Geneva Conventions, they would not ‘provide’ for the aforementioned duty, which raises the question whether in these situations the humanitarian relief may be impeded without falling within Article 8(2)(b)(xxv). In light of these possible limitations resulting from the wording of the ICC Statute, it is worth noting that the German legislation implementing the ICC Statute has rectified this anomaly: the crime, as included in the Code of Crimes against International Law 9 (Völkerstrafgesetzbuch), criminalises the impeding of relief supplies in contravention of the entire body of IHL.⁹⁶

Of further interest to note is that, as with all criminal trials, for an accused to be found guilty, proof beyond reasonable doubt is required.⁹⁷ Such proof has to be based on evidence brought before the relevant trial chamber. The burden of proof lies with the Office of the Prosecutor,⁹⁸

⁹³ Cottier (n 22) 462. The drafting history does not explain why specific reference to the ‘Geneva Conventions’ was made. The drafters consulted by the present author cannot recall a reason for this reference. Although it is possible that it was purposely avoided to make reference to the Additional Protocols, as the customary status of certain provisions contained therein had been subject to fierce debate during the Rome convention, there is no reason why a general reference to IHL could not be made instead. While some other war crimes provisions also refer to the ‘Geneva Conventions’ (eg, ICC Statute (n 17) art 8(2)(b)(vii) and (xxiv)), other parts of art 8 include phrases such as ‘protection ... under the international law of armed conflict’ (eg, ICC Statute (n 17) art 8(2)(b)(iii) and (xx)). When one compares the various war crimes, it becomes clear that the references to the Geneva Conventions are to the protection regime included in the Geneva Conventions framework (ie Geneva law), while the references to ‘international law of armed conflict’ are used to refer to treaties that do not fall within the Geneva Conventions framework, such as the prohibited weapons treaties. It therefore appears most likely that the drafters did not make a conscious choice aimed at excluding the Additional Protocols, but rather considered that the rules relevant to humanitarian relief were only found in Geneva law.

⁹⁴ Knut Dörmann appears to be of the same view. Under the heading ‘Including impeding relief supplies as provided for under the Geneva Conventions’, he includes provisions of the 1949 Geneva Conventions as well as Additional Protocol I in his overview of relevant provisions that ‘specifically address relief supplies’: Dörmann (n 44) 366–73. It should be noted, however, that Dörmann also includes parts of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Doswald-Beck (n 62)) in this overview, whereas this Manual clearly is not part of the Geneva Conventions framework.

⁹⁵ UNSC Res 2165(2014) (n 8).

⁹⁶ Völkerstrafgesetzbuch, 26 June 2002, BGBl I, 2254, s 11(1) subs 5, states (in relevant part): ‘... oder Hilfslieferungen unter Verstoß gegen das humanitäre Völkerrecht behindert’, which can be translated as: ‘... or impedes relief supplies in contravention of international humanitarian law’.

⁹⁷ ICC Statute (n 17) art 66(3).

⁹⁸ ICC Statute (n 17) art 66(2).

which has to show that any alleged reasons for denying humanitarian access were not legitimate. That necessarily means that these reasons must be known. It will normally be difficult to find members of the armed forces, allegedly responsible for blocking access or arbitrarily withholding consent, willing to testify. However, the other side, which would be able to testify as to the reasons provided for withholding consent, consists of employees of humanitarian organisations. It is therefore interesting to note that the employees of one of the key humanitarian organisations, the ICRC, are in principle exempted from testifying pursuant to rule 73(4) of the ICC's Rules of Procedure and Evidence.⁹⁹

On the basis of the foregoing, it can be concluded that prosecuting someone for the war crime of starvation of civilians, committed in times of international armed conflict, inter alia, by denying them humanitarian assistance, is no easy task. However, and as discussed next, as the ICC framework does not include such a war crime for non-international armed conflicts, prosecuting similar conduct in the latter type of conflict is far more problematic.

3. PROSECUTING DENIAL OF HUMANITARIAN ACCESS IN NON-INTERNATIONAL ARMED CONFLICTS

Much of today's armed violence is carried out by armed groups that lack a clear structure and hierarchy.¹⁰⁰ In addition, these non-state actors have become increasingly mobile and frequently move across state borders, compounding the challenge to control them. Moreover, many of the groups are conducting their operations in, or from, states that are either unwilling or unable to prevent them from attacking civilians and/or government structures.¹⁰¹ The porous borders between Syria and its neighbouring countries, combined with the ongoing extreme level of violence, highlight the contemporary problems of armed groups.¹⁰² Also, many conflicts see a multitude of armed groups fight each other and/or the government, in ever changing alliances.¹⁰³ Such (transnational) armed bands and groups pose a security problem that is difficult to counter with existing (often old-fashioned) security forces.¹⁰⁴ Moreover, they also pose difficult legal challenges, as they do not always neatly fit in the classic category of non-state actors for the purposes of IHL or international criminal law.

⁹⁹ Rules of Procedure and Evidence of the International Criminal Court (entry into force 9 September 2002), ICC-ASP/1/3 (Part II-A).

¹⁰⁰ Some armed groups continue to be organised along the lines of classic armed forces, such as the Colombian rebel force, the Fuerzas Armadas Revolucionarias de Colombia (FARC).

¹⁰¹ Current examples include the Islamic State of Iraq and the Levant (ISIS), Boko Haram in Nigeria, and Al-Shabaab in Somalia.

¹⁰² Other examples include the recent situations in northern Mali and Nigeria, as well as the enduring insecurity as a result of armed violence in the Great Lake region and Somalia.

¹⁰³ Examples include the Central African Republic and the eastern provinces of the Democratic Republic of Congo: see, eg, Jason Stearns, Judith Verweijen and Maria Eriksson Baaz, *The National Army and Armed Groups in the Eastern Congo: Untangling the Gordian Knot of Insecurity* (Rift Valley Institute 2013).

¹⁰⁴ eg, David Kilcullen, 'Counter-insurgency Redux' (2006) 48 *Survival: Global Politics and Strategy* 111–30.

3.1. PROSECUTION AS A WAR CRIME

The war crimes within the jurisdiction of the ICC, set out in Article 8 of the ICC Statute, constitute a limitative list.¹⁰⁵ The drafters of the ICC Statute quickly agreed on the inclusion of the grave breaches of the universally ratified 1949 Geneva Conventions and acts listed in Common Article 3 of the same, but the content of the Additional Protocols, to which a significant number of states were not party, was subject to more discussion.¹⁰⁶ One of the drafters observed in this regard that '[u]ntil the very end of the Rome Conference, many delegations in fact also favored to include starvation as a war crime in non-international armed conflicts, but the "final package" did not include it in the list of war crimes in internal conflict situations'.¹⁰⁷ However, it is not clear why it was not included in the final draft. The drafting history, which will be discussed in more detail below, does not provide any insight in this regard. The omission is puzzling indeed because Additional Protocol II prohibits the starvation of the civilian population, a fact highlighted by two of the drafters including the chair of the Rome Conference working group on the definition of war crimes.¹⁰⁸ A parallel with the crime of causing excessive damage to the civilian population or natural environment, which was only included in Article 8(2)(b), cannot then be drawn.¹⁰⁹ Because this crime was based on the articles in Additional Protocol I that codified the principle of proportionality,¹¹⁰ no equivalent for non-international armed conflict was adopted.¹¹¹ The various drafts that preceded the ICC Statute will therefore be scrutinised more closely in the following section.

3.1.1. DRAFTING HISTORY

In 1991, the International Law Commission (ILC) prepared a 'Draft Code of Crimes against Peace and Security of Mankind', which included an article that listed war crimes applicable to both international and non-international armed conflicts.¹¹² However, this article was intended to criminalise 'exceptionally serious war crimes' only, and the selection made by the ILC of the crimes that fulfilled that standard did not include starvation.¹¹³ Building on the Draft

¹⁰⁵ Schabas (n 74) 213.

¹⁰⁶ eg, Djamchid Momtaz, 'War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court' (1999) 2 *Yearbook of International Humanitarian Law* 183.

¹⁰⁷ Cottier (n 22) 459.

¹⁰⁸ Robinson and Von Hebel (n 16) 208. These authors remark that '[t]he inclusion of this crime in the context of internal armed conflicts did not appear to garner sufficient support, notwithstanding that the prohibition is explicitly included in Art. 14 of Additional Protocol II'.

¹⁰⁹ ICC Statute (n 17) art 8(2)(b)(iv).

¹¹⁰ Additional Protocol I (n 6) arts 51(5)(b), 57(2)(a)(iii) and (b).

¹¹¹ Bartels (n 24) 292–93; Schabas (n 74) 197.

¹¹² The ILC's commentary to draft article 22 explains that 'the words "armed conflict" cover ... also non-international armed conflicts covered by article 3 common to the four 1949 Geneva Conventions': Report of the International Law Commission on the Work of its Forty-Third Session, 29 April–19 July 1991, UN Doc A/46/10 (initially distributed as Official Records of the General Assembly, Forty-Sixth Session, Supplement No 10) 105.

¹¹³ *ibid* 97, 105.

Code, the ILC produced in 1994 a ‘Draft Statute for an International Criminal Court’, in which it gave the proposed court jurisdiction over ‘serious violations of the laws and customs applicable in armed conflict’,¹¹⁴ as well as the grave breaches of the 1949 Geneva Conventions and Additional Protocol I.¹¹⁵ Yet, it did not specify what the ‘serious violations’ entailed.

Following the ILC’s proposal, the UN General Assembly first set up the Ad Hoc Committee on the Establishment of an International Criminal Court and, having been recommended to do so by the said committee, it subsequently created the Preparatory Committee on the Establishment of the International Criminal Court. From 1996 to 1998, this Preparatory Committee met several times to work on a draft statute. For the first session, the 1996 Preparatory Committee listed as a war crime for international armed conflicts the ‘starving of the civilian population and prevention of humanitarian assistance from reaching them’.¹¹⁶ The draft also proposed certain war crimes for non-international armed conflicts, but these did not include the aforementioned crime. A year later, the draft had progressed and the proposal now included ‘starvation of civilians’ as a war crime for both international and non-international armed conflicts.¹¹⁷ The said draft was very similar to the version proposed by the ICRC shortly before, which had included ‘starvation of civilians’ for both types of conflict.¹¹⁸ However, the mere mention of ‘starvation of civilians’ was considered ‘too vague and open’.¹¹⁹ Therefore, by the end of that same year, the provisions that were drafted for war crimes included for international armed conflicts a provision with the exact same wording as the current crime under Article 8(2)(b)(xxv).¹²⁰ This draft provided the option to also include this provision in the proposed section dealing with non-international armed conflicts.¹²¹ The so-called ‘Zutphen Draft’ of the ICC Statute, as well as the draft agreed upon by the 1998 Preparatory Committee, retained the same approach: inclusion of the wording of the current crime for international armed conflicts and the option to include the same language as a war crime for non-international armed conflicts.¹²²

However, at the Rome Conference, the discussion focused mainly on the general question of whether war crimes for non-international armed conflicts should be included at all. Specific

¹¹⁴ Draft art 20(c) as included in the Draft Statute for an International Criminal Court (in Report of the International Law Commission on the Work of its Forty-Sixth Session, 1 September 1994, UN Doc A/49/335 11).

¹¹⁵ Included under draft art 20(e) as ‘crimes, established under or pursuant to the treaty provisions listed in the Annex, which having regard to the conduct alleged, constitute exceptionally serious crimes of international concern’: *ibid* 11. The Annex (‘Crimes pursuant to Treaties’) lists in para 1 the grave breaches of the 1949 Geneva Conventions and Additional Protocol I: *ibid* 30.

¹¹⁶ Chairman’s revised informal text, reproduced in Bassiouni (n 42) 91.

¹¹⁷ ‘Decisions taken by the Preparatory Committee at its Session held 11 to 21 February 1997’, reproduced in Bassiouni (n 42) 87, 89.

¹¹⁸ ICRC, ‘War Crimes’, Working Paper prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court, 13 February 1997. The ICRC’s proposal was later submitted as a joint Switzerland–New Zealand proposal (A/AC 249/1997/WG.1/DP.2 (1997)).

¹¹⁹ Cottier (n 22) 459.

¹²⁰ Art 20(c)(s) as included in the ‘Decisions taken by the Preparatory Committee at its Session held 1 to 12 December 1997’, reproduced in Bassiouni (n 42) 80.

¹²¹ *ibid* 83, Option II.

¹²² Zutphen Draft (A/AC.249/1997/L.9/Rev.1) and 1998 Preparatory Committee, reproduced in Bassiouni (n 42) 72 and 75, and 64 and 66, respectively.

attention was also given to the definition and threshold of such conflicts, and the question whether employing certain weapons should be included as a crime for non-international armed conflicts received particular interest.¹²³ Yet, no specific debate took place as to the inclusion of starvation as a war crime for non-international armed conflicts.¹²⁴ As noted above, many delegations had actually supported the inclusion of starvation as a war crime for such conflicts;¹²⁵ but, for some reason, the final version of the ICC Statute, adopted on 17 July 1998, did not include this crime in Article 8(2)(e). As there appears not to have been any actual opposition to the inclusion of this crime for non-international armed conflicts,¹²⁶ the most reasonable explanation for the omission is an oversight, perhaps caused by the unfortunate placing of the proposed crime together with various versions of disproportionate use of force¹²⁷ in ‘Option II’ of the draft text, which resulted in the drafters forgetting to include it as a war crime for non-international armed conflicts.¹²⁸

Importantly, the present ICC Statute does not include this crime in Article 8(2)(e). Article 22 of the ICC Statute prohibits the analogous application of crimes.¹²⁹ Consequently, the crimes listed in Article 8(2)(b), including starvation, cannot be applied to situations of non-international armed conflict,¹³⁰ nor can an Article 8(2)(b)(xxv) charge be re-characterised in the event that a trial chamber were to find that the nature of an armed conflict was non-international rather than international.¹³¹ To address this conduct as a war crime would thus require bringing it under the heading of another war crime for non-international armed conflict. The following

¹²³ Schabas (n 74) 198.

¹²⁴ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, Rome, 15 June–17 July 1998, UN Doc A/CONF.183/13 (Vol.11), 319–48.

¹²⁵ Cottier (n 22) 459.

¹²⁶ Robinson and Von Hebel (n 16) 208.

¹²⁷ However, as noted above, an explanation does exist for the lack of support to adopt a violation of the proportionality principle as a war crime for non-international armed conflicts.

¹²⁸ The drafters consulted by the author (including the chair of the Working Group on the definition of war crimes and the chair of the Committee of the Whole) do not recall any specific reasons for the non-inclusion and agree that the omission is likely to have been unintentional.

¹²⁹ ICC Statute (n 17) art 22(2) states (in relevant part) that ‘the definition of a crime shall be strictly construed and shall not be extended by analogy’.

¹³⁰ See Machted Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 607–08.

¹³¹ In the first two cases before the ICC, the classification of the relevant conflict changed over the course of the trials. In both *Lubanga* and *Katanga and Ngudjolo*, the charges were confirmed for an international armed conflict, but in the trial judgments the conflict was found to be non-international in character: ICC, *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, Trial Chamber I, 14 March 2012, [566]–[567]; and ICC, *Prosecutor v Katanga*, Jugement rendu en application de l’article 74 du Statut, ICC-01/04-01/07, Trial Chamber II, 7 March 2014 (*Katanga* Trial Judgment), [1229]–[1230], respectively). In these cases, the consequence of the Trial Chambers re-characterisation from international to non-international armed conflict, pursuant to reg 55 of the Regulations of the Court, was (arguably) limited as the crimes charged consisted of (more or less) the same form for both types of conflict. Indeed, the *Katanga* Trial Chamber said that it ‘underscores that the new characterisation of the armed conflict does not prompt it to modify the legal elements of the alleged crimes in substance. It further notes that the same facts and circumstances are clearly at issue’ (official translation): *ibid*, para 1230. However, in the case of charges for the war crime of starvation, changing the character of the conflict would obviously have significant consequences.

discussion considers whether conduct that may be prosecuted as starvation of the civilian population in times of international armed conflict could be brought within a different war crime when committed during a non-international armed conflict.

3.1.2. AS ANOTHER WAR CRIME?

When considering the obstruction of humanitarian relief and how it should be charged, the war crime of attacks on persons and material involved in a humanitarian assistance mission comes to mind. The persons taking part in humanitarian missions are, generally, civilians and are protected as such, but these attacks are specifically criminalised under the ICC Statute.¹³² Be that as it may, preventing humanitarian personnel from carrying out their mission while leaving them unharmed, or preventing such materials from reaching the desired destination, does not fall within this particular war crime.

Another crime that comes to mind is that of collective punishments.¹³³ The underlying prohibitions are included in IHL applicable to international as well as non-international armed conflicts,¹³⁴ and are considered to be part of customary law.¹³⁵ However, this conduct is not included as a war crime in the ICC Statute, either for international or for non-international armed conflicts. It has been suggested that the denial of humanitarian assistance could be charged as other non-international armed conflict war crimes that are included in the ICC Statute, such as murder, torture and cruel treatment.¹³⁶ In the view of the present author, starvation of the civilian population by impeding humanitarian relief cannot be prosecuted as any of those war crimes. This follows from the division in IHL between rules that derive from the so-called Hague law, dealing with the conduct of hostilities, and those deriving from Geneva law, setting out a protection framework for protected persons. The war crimes of murder, torture and cruel treatment belong in the second category. In times of international armed conflicts, such crimes are committed against protected persons.¹³⁷ During non-international armed conflicts, the status of ‘protected person’ does not exist and the victims of the said crimes are persons protected by IHL applicable during this type of conflict. Although they cannot be called ‘protected persons’, the de facto situation of

¹³² For non-international armed conflicts: ICC Statute (n 17) art 8(2)(e)(iii).

¹³³ The ‘[i]mposition of collective penalties’ was considered a war crime by the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, set up after the First World War: ‘Commission on Responsibility of the Authors of the War and on Enforcement of Penalties’ (1920) 14 *The American Journal of International Law* 114. It is further listed as a war crime in art 4(b) ICTR Statute (n 11) and art 3(b) of the Statute of the Special Court for Sierra Leone (entered into force 12 April 2002) 2178 UNTS 139.

¹³⁴ Additional Protocol I (n 6) art 75(2)(d); and Additional Protocol II (n 6) art 4(2)(b).

¹³⁵ The ICRC’s customary IHL study includes the prohibition of collective punishments: ICRC Study (n 9) 374–75, r 103.

¹³⁶ Rottensteiner (n 65) 562–67. She also mentions willful killing. These crimes are included in the ICC Statute (n 17) art 8(2)(a)(i) (‘[w]ilful killing’) and (c)(i) (‘murder, cruel treatment and torture’). Willful killing and murder are considered to have the same meaning and address the same conduct, with the former committed in times of international armed conflict, and the latter during conflicts not of an international character: Dörmann (n 44) 394; and *Katanga* Trial Judgment (n 131) [789].

¹³⁷ eg, the Elements of Crimes (n 40) for art 8(2)(a)(i) of the ICC Statute.

the victims would be the same: namely, they would be in the hands, or power, of the alleged perpetrator.¹³⁸ That being said, starvation of civilians is actually a violation of Hague law. Indeed, if a party to a conflict tries to starve a civilian population during a siege, for example, the victims are not in its hands, or power. It is difficult to see, then, how this conduct could be prosecuted as the war crime of murder, torture or cruel treatment.¹³⁹ For that reason, it also cannot fall within the war crime of committing outrages upon personal dignity.¹⁴⁰

Conversely, the crime of attacking the civilian population, in the words of the ICC's Pre-Trial Chamber I, 'is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs'.¹⁴¹ This finding illustrates that violations of the rules related to the protection of the civilian population against conduct of hostilities – inter alia, included in Article 8(2)(e)(i) as the war crime of directing an attack against a civilian population during a non-international armed conflict – do not require the victim to be in the hands of the perpetrator. In addition, it illustrates the requirement that such an attack involves the use of violence.¹⁴² Indeed, attacking objects indispensable for the survival of the civilian population, in the case of an international armed conflict, qualifies as starvation, provided that the perpetrator has the required special intent to cause starvation. Yet, at the same time, it also constitutes the war crime of attacking the civilian population.¹⁴³ In times of non-international armed conflict, attacking foodstuffs and drinking water systems, for example, with the intent to deprive civilians of food and water, would similarly fall under Article 8(2)(e)(i) of the ICC Statute.¹⁴⁴ However, this conduct requires attacks – that is, acts of violence – and

¹³⁸ ICC Statute (n 17) art 8(2)(c) explicitly states that it concerns violations of Common Article 3. As a concise version of the minimum rules contained in the 1949 Geneva Conventions, which do not deal with conduct of hostilities, Common Article 3 similarly does not deal with Hague Law (ie conduct of hostilities). See also ICRC Commentary on the Additional Protocols (n 49) para 4776, and Schabas (n 74) 197.

¹³⁹ Gerhard Werle ((n 16) 453) submits that '[o]verlap is also possible with ... willful infliction of great suffering or serious injury to physical integrity or health under Article 8(2)(a)(iii) of the ICC Statute'. However, prosecution for this international armed conflict war crime is similarly limited to protected persons. Indeed, Cottier, to whom Werle refers, notes that '[a]cts qualifying as the war crime of starvation ... might also amount to other war crimes under the jurisdiction of the ICC ... [such as] article 8 para. 2 (a) (iii) criminalizing the willful causation of great suffering or serious injury to body or health of an adversary *in the power of the party to the conflict to which the perpetrator belongs*': Cottier (n 22) 459–60 (emphasis added). Cottier and Werle presumably refer to situations where persons in the power of the perpetrator, such as detainees or prisoners of war, are starved.

¹⁴⁰ ICC Statute (n 17) art 8(2)(e)(ii).

¹⁴¹ ICC, *Prosecutor v Katanga and Ngudjolo*, Decision on the Confirmation of Charges, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, [267].

¹⁴² Additional Protocol I (n 6) art 49(1) defines attacks as 'acts of violence against the adversary, whether in offence or in defence'. See also Dörmann (n 44) 134. Attacks taking place during non-international armed conflicts similarly constitute 'acts of violence': *Katanga* Trial Judgment (n 131) [798].

¹⁴³ Silja Vöneky observes that although '[t]he catalogue of grave breaches contained in Article 85 [Additional Protocol] I does not expressly mention the violation of Article 54 [Additional Protocol] I ... starvation of a population through destruction of facilities, institutions, and objects necessary for the survival always constitutes an attack on the civilian population': Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Fleck (n 38) 676.

¹⁴⁴ Notably, ICC Statute (n 17) art 8(2)(e)(i), like the war crime of causing starvation, does not have a result requirement: Dörmann (n 44) 131.

thus does not cover starvation achieved through the denial of humanitarian assistance, for which the alleged perpetrator need not resort to violence. It is therefore evident that the prosecution of such behaviour as a war crime, when committed during a non-international armed conflict, is very challenging, if not impossible.

3.1.3. AS A CRIME AGAINST HUMANITY OR GENOCIDE?

In addition to war crimes, the ICC also has jurisdiction over crimes against humanity and genocide.¹⁴⁵ Unlike the ICTY,¹⁴⁶ the existence of an armed conflict is not a jurisdictional requirement for crimes against humanity under the ICC Statute, although these crimes can, of course, still be committed during an international or non-international armed conflict.¹⁴⁷ If certain acts do not qualify as war crimes, the solution may therefore lie in prosecuting the conduct as crimes against humanity. In recent years, crimes against humanity appear, in fact, to be the ‘crime of choice’ for the ICC’s Office of the Prosecutor.¹⁴⁸

In the past, the starvation of civilians has been recognised as a crime against humanity by the Nuremberg Tribunal, and has been mentioned as an example of persecution by the ICTY.¹⁴⁹ Eichmann was convicted for the crime against humanity of, inter alia, ‘starvation ... of the civilian Jewish population’.¹⁵⁰ In those cases, however, the starvation concerned victims who were

¹⁴⁵ ICC Statute (n 17) art 5.

¹⁴⁶ Art 5 of the ICTY Statute (n 27) reads, in relevant part: ‘The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in *armed conflict*, whether international or internal in character, and directed against any civilian population’ (emphasis added). Later tribunals and courts, such as the ICTR and the ICC, do not require crimes against humanity to have a nexus with armed conflict. On this issue see, eg, Cryer and others (n 13) 234–35; and, in more detail, Darryl Robinson, ‘Crimes against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience’ in Flavia Lattanzi and William A Schabas (eds), *Essays on the Rome Statute of the International Criminal Court: Vol I* (Il Sirente 1999) 139–49.

¹⁴⁷ eg, Germain Katanga, who was convicted, inter alia, for crimes against humanity committed during fighting that was classified as a non-international armed conflict: *Katanga* Trial Judgment (n 131).

¹⁴⁸ In the cases of Ivory Coast and Libya, for example, the prosecution only charged crimes against humanity, even though in both countries a non-international armed conflict was (most likely) in existence at the time of the alleged crimes. In *Gbagbo*, both the prosecution and the defence considered a non-international armed conflict between forces loyal to the accused and the opposition to be in existence at the time of the alleged crimes, yet only crimes against humanity were charged: ICC, *Prosecutor v Gbagbo*, Document Amendé de Notification des Charges, ICC-02/11-01/11-357-Conf-Anx1, ICC-02/11-01/11, [14]; and ICC, *Prosecutor v Gbagbo*, Transcript of Hearing, ICC-02/11-01/11, ICC-02/11-01/11-T-18-Red-ENG WT, 25 February 2013, [15]–[18] respectively. In *Blé Goudé*, Pre-Trial Chamber I could have refrained from pronouncing on the existence of an armed conflict, as Charles Blé Goudé was also only charged with crimes against humanity, but it held that ‘[b]y 23 February 2011, ... the situation in western Côte d’Ivoire had degenerated into a non-international armed conflict between pro-Gbagbo and pro-Ouattara forces’: ICC, *Prosecutor v Blé Goudé*, Decision on the Confirmation of Charges against Charles Blé Goudé, ICC-02/11-02/11-186, Pre-Trial Chamber I, 11 December 2014, [105].

¹⁴⁹ International Military Tribunal at Nuremberg, Judgment and Sentences, 1 October 1946, printed in (1947) 41 *American Journal of International Law* 249; and ICTY, *Prosecutor v Blaškić*, Judgment, IT-95-14-T, 3 March 2000, [224].

¹⁵⁰ District Court of Jerusalem, *Attorney General of the Government of Israel v Eichmann*, 29 May 1962, (1968) 36 ILR 5, 277.

detained,¹⁵¹ including in Nazi concentration camps. More recently, a UN Commission of Inquiry found that the North Korean government had committed crimes against humanity, inter alia, by the ‘inhumane act of knowingly causing prolonged starvation’.¹⁵² Although the North Korean situation concerns an internal matter, it is, like starvation in concentration camps during the Second World War, quite different from the denial of humanitarian assistance during an armed conflict, discussed in this article.

Interestingly, in Rome, proposals were made to include the ‘new’ crime against humanity of mass starvation in the ICC Statute; however, they were not sufficiently supported,¹⁵³ most likely, because mass starvation was considered to fall within the crimes against humanity of murder, extermination or other inhumane acts.¹⁵⁴ Indeed, while the ad hoc tribunals considered extermination to consist only of mass killing and not to cover situations where certain ‘conditions of life’ were placed on a civilian population,¹⁵⁵ the drafters of the ICC Statute added for the crime against humanity of extermination the specific example that the crime ‘includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine’.¹⁵⁶ It has therefore been observed that ‘a siege of a village’ falls within the said crime against humanity, and that it covers the same acts as those criminalised in Article 8(2)(b)(xxv) of the ICC Statute.¹⁵⁷ Notwithstanding the correctness of this observation, the threshold for extermination is very high and requires the ‘mass killing of members of a civilian population’.¹⁵⁸ It is therefore more likely that deprivation of humanitarian aid would be prosecuted as a form of persecution,¹⁵⁹ or as part of a broader attack on a civilian population for the purposes of murder as a crime against humanity.¹⁶⁰ Moreover, starvation could be included as an ‘other inhumane act’ for the purposes of Article 7(1)(k) of the ICC Statute.¹⁶¹

¹⁵¹ Similarly, a Trial Chamber of the ICTR considered that an example of the crime against humanity of extermination would be ‘[i]mprisoning a large number of people and withholding the necessities of life which results in mass death’: ICTR, *Prosecutor v Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, 21 May 1999, [146].

¹⁵² Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, 7 February 2014, UN Doc A/HRC/25/63, para 76.

¹⁵³ William Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 115.

¹⁵⁴ Herman von Hebel and Darryl Robinson, ‘Crimes within the Jurisdiction of the Court’ in Lee (n 72) 103.

¹⁵⁵ Schabas (n 74) 160.

¹⁵⁶ ICC Statute (n 17) art 7(1)(b) and (2)(b).

¹⁵⁷ Christopher K Hall, ‘Article 7’ in Triffterer (n 22) 243

¹⁵⁸ Elements of Crimes (n 40) art 7(1)(b), element 2.

¹⁵⁹ ICC Statute (n 17) art 7(1)(h). Persecution consists of the severe deprivation, contrary to international law, of persons of their fundamental rights (see the first element of the Elements of Crimes (n 40) for the aforementioned article).

¹⁶⁰ ICC Statute (n 17) art 7(1)(a). See Hall (n 157) 188–89.

¹⁶¹ ICC Statute (n 17) art 7(1)(k) defines as a crime against humanity, when the contextual elements are met, ‘[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental health’. See also Diana Kearney, ‘Food Deprivations as Crimes against Humanity’ (2013) 46 *New York University Journal of International Law and Politics* 253, 281–85. Approaching the matter from a ‘right to food’ perspective, Kearney identifies extermination, persecution and other inhumane acts as possible crimes against humanity to address ‘widespread right to food violations’: *ibid* 273. Rottensteiner (n 65) refers to the same categories, but also mentions torture (ICC Statute (n 17) art 7(1)(f)). However, as with the war crime of torture (discussed above), the crime against humanity of torture should not be used for situations where the victims were not in the hands of the alleged perpetrator.

Nevertheless, securing a conviction for crimes against humanity is not an easy task. Whereas a single act can amount to a war crime and in principle no gravity threshold exists,¹⁶² the ICC Statute defines crimes against humanity as acts committed as part of a ‘widespread or systematic attack’¹⁶³ directed against a civilian population.¹⁶⁴ The ‘attack’ is different from the acts of violence required for certain war crimes, but it does require the multiple commission of the prohibited acts.¹⁶⁵ Moreover, crimes against humanity, at least before the ICC, also require a certain level of organisation, as the attack against the civilian population must be ‘pursuant to or in furtherance of a state or organizational policy to commit such attack’.¹⁶⁶

The ICC’s pre-trial judges have been divided in their views about the level of organisation necessary for a non-state actor to be able to commit crimes as part of an ‘organizational policy’. The late Judge Kaul, the minority in the Pre-Trial Chamber dealing with the Kenya situation, received strong support in the academic literature¹⁶⁷ for his narrow view that for a non-state actor to commit crimes against humanity, it should have a state-like organisational level.¹⁶⁸ For its part, the majority view was less stringent, finding that in principle ‘the capability to

¹⁶² ICC Statute (n 17) art 8(1) does mention that the ICC has jurisdiction over war crimes ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’, but this appears only to serve as guidance for the prosecutorial policy and is not an absolute requirement, or indeed an element of crime: Bartels (n 24) 308–09; see also Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 268.

¹⁶³ ICC Statute (n 17) art 7(1). Various Pre-Trial Chambers of the ICC have understood ‘widespread’ to mean that the attack against the civilian population ‘should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims’: eg, ICC, *Prosecutor v Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11, Pre-Trial Chamber I, 12 June 2014 (*Gbagbo* Confirmation Decision), [222]. The alternative requirement that the attack be systematic ‘has been consistently understood in the jurisprudence of the Court as pertaining to the organised nature of the acts of violence and the improbability of their random occurrence’: *ibid* [223]; see also *Katanga* Trial Judgment (n 131) [1098].

¹⁶⁴ In *Gbagbo*, for example, Pre-Trial Chamber I held that ‘[w]hen alleging the existence of an “attack against any civilian population” by way of describing a series of incidents, the Prosecutor must establish to the requisite threshold that a sufficient number of incidents relevant to the establishment of the alleged “attack” took place’: ICC, *Prosecutor v Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11, 3 June 2013, [23]. This finding by Pre-Trial Chamber I was upheld on appeal: ICC, *Prosecutor v Gbagbo*, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61(7)(c)(i) of the Rome Statute’, ICC-02/11-01/11, 16 December 2013, [48].

¹⁶⁵ ICC Statute (n 17) art 7(2)(a).

¹⁶⁶ *ibid*.

¹⁶⁷ See, eg, Claus Kress, ‘On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision’ (2010) *Leiden Journal of International Law* 855.

¹⁶⁸ According to Judge Kaul, ‘even though the constitutive elements of statehood need not be established, those “organizations” should partake of some characteristics of a State’: ICC, *Situation in the Republic of Kenya*, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010 (*Kenya* Investigation Decision), Dissenting Opinion of Judge Hans-Peter Kaul, [51]. Prior to Judge Kaul’s dissenting opinion, the view that a state-like organisation is required had also been expressed by several influential international criminal law scholars: Schabas (n 74) 152; M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edn, Kluwer Law International 1999) 244–45; Kai Ambos, *Internationales Strafrecht* (CH Beck 2006) 215.

perform acts which infringe on basic human values' was sufficient.¹⁶⁹ Since then, the Pre-Trial Chambers, confirming the charges in the *Ntaganda*, *Gbagbo* and *Blé Goudé* cases, did not pronounce on the matter,¹⁷⁰ but in the *Katanga* Trial Judgment the aforementioned majority approach was adopted.¹⁷¹ The currently prevailing view may not require a state-like organisation, but it still requires a substantial form of organisation.¹⁷² However, many of the armed groups that recently fought in Syria and the Democratic Republic of Congo, for example, would not fulfil – at least not at every stage of the conflict – the organisational requirement, and members of these groups could thus not be prosecuted for crimes against humanity when they intend to cause starvation by restricting humanitarian access.¹⁷³

Turning next to prosecuting the conduct as genocide, naturally the starvation of a specific 'national, ethnical, racial or religious group', with the intent to destroy this group in whole or in part, qualifies as genocide;¹⁷⁴ this is also the case in times of non-international armed conflict.¹⁷⁵ Indeed, the 'deliberate deprivation of resources indispensable for survival of members of one of the protected groups, such as food'¹⁷⁶ by a party to such an armed conflict constitutes genocide by '[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.¹⁷⁷ However, the crime of genocide, as the 'crime of

¹⁶⁹ *Kenya* Investigation Decision, *ibid* [90].

¹⁷⁰ Pre-Trial Chamber I in *Gbagbo* noted the two opposing views, but considered that since 'the organisation alleged by the Prosecutor and satisfactorily established by the available evidence would meet the threshold under either interpretation and that, accordingly, it is unnecessary for the Chamber to dwell any further on this point': *Gbagbo* Confirmation Decision (n 163) [217].

¹⁷¹ *Katanga* Trial Judgment (n 131) [1119]–[1122]. Trial Chamber II explicitly rejected the argument that an 'organisation' must possess state-like or quasi-state characteristics, and concluded with the following: '[T]he organisation concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary' (official translation): *ibid* [1119].

¹⁷² The majority held that 'whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. In making this determination, the Chamber may take into account a number of considerations, inter alia: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a state; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria': *Kenya* Investigation Decision (n 168) [93] (footnotes omitted).

¹⁷³ It is noted that for non-international armed conflicts in which only one armed group fights the government, or only two armed groups fight each other, the relevant groups necessarily have to meet the organisational requirement for the existence of a non-international armed conflict, which is similar to the 'considerations' set out by the majority in the *Kenya* Investigation Decision (n 168): see, eg, ICTY, *Prosecutor v Bošković and Tarčulovski*, Judgment, IT-04-82-T, Trial Chamber, 10 July 2008, [194]–[203]. The problem that a group may not fulfil the requirement for the purposes of crimes against humanity thus arises only with respect to other armed groups involved in such conflicts. The conflict in Syria shows that certain armed groups can be considered as organised, while others do not meet the organisational threshold.

¹⁷⁴ ICC Statute (n 17) art 6. See ICRC Commentary on the Additional Protocols (n 49) para 2097; and Cottier (n 22) 460.

¹⁷⁵ The crime of genocide can be committed both in and outside a situation of armed conflict.

¹⁷⁶ Footnote to the fourth element of crimes for ICC Statute (n 17) art 6(c).

¹⁷⁷ ICC Statute (n 17) art 6(c).

crimes', has a very high threshold and is hard to prove.¹⁷⁸ In addition to the requirement of a genocidal intent, the relevant conduct has to take place 'in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.¹⁷⁹ As to the scale of the destruction, the ad hoc tribunals have opined that '[i]f a group is targeted in part, the portion targeted must be a substantial part of the group because it must be significant enough to have an impact on the group as a whole'.¹⁸⁰ The challenge to prosecute certain conduct as genocide is further illustrated by the discussion, mainly before the ICTR, on what constitutes a protected group,¹⁸¹ and the fact that one of the foremost scholars on genocide has argued that the ICTY incorrectly qualified the killing of several thousands of Bosnian-Muslim men in Srebrenica as genocide.¹⁸²

Notwithstanding this criticism, the discussion hitherto shows that the denial of humanitarian access with the intention of starving the civilian population during non-international armed conflicts, in certain circumstances, indeed could be prosecuted as a crime against humanity or as genocide. However, although legally possible, the additional elements that have to be proved compared with the elements of war crimes, and the difficulty in proving these elements, would place considerable limitations on the ability to address this conduct as crimes against humanity or genocide before the ICC.

4. CONCLUDING REMARKS: THE NEED TO CREATE A NEW CRIME FOR NON-INTERNATIONAL ARMED CONFLICTS

During contemporary armed conflicts, civilian populations in need are often denied access to humanitarian relief. Whereas such conduct, when committed with the intent to starve the said population, is included in the ICC Statute as a war crime for situations of international armed conflicts, the Court does not have jurisdiction over a similar war crime for non-international armed conflicts. It has been shown above that denying access, when not accompanied by acts of violence against civilians or civilian structures, cannot easily be brought under the heading of other war crimes applicable to non-international armed conflicts. It has further been shown that prosecuting the relevant conduct as crimes against humanity or genocide is subject to limitations and requires proving more elements than are required for war crimes.

¹⁷⁸ See, generally, William Schabas, *Genocide in International Law: The Crimes of Crimes* (2nd edn, Cambridge University Press 2009); and Kai Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' (2009) 91 *International Review of the Red Cross* 833.

¹⁷⁹ Fourth element of crimes for ICC Statute (n 17) art 6(a)–(c).

¹⁸⁰ ICTY, *Prosecutor v Krstić*, Judgment, IT-98-33-A, Appeals Chamber, 19 April 2004, [8]. See also, eg, ICTY, *Prosecutor v Popović and Others*, Judgment, IT-05-88-T, Trial Chamber II, 10 June 2010, [831]; ICTR, *Prosecutor v Bagilishema*, Judgment, ICTR-95-1A-T, Trial Chamber I, 7 June 2001, [64]; ICTR, *Prosecutor v Semanza*, Judgment and Sentence, ICTR-97-20-T, Trial Chamber III, 15 May 2003, [316].

¹⁸¹ For an overview, see Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge University Press 2012) 145–52.

¹⁸² William A Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *Journal of Criminal Law and Criminology* 953, 957–58. As in the case of crimes against humanity, Schabas considers that a state-like policy is required for conduct to qualify as genocide.

Caution is warranted when attempting to bring conduct originally meant to fall within a certain crime under the umbrella of another crime: stretching war crime provisions to address unwanted behaviour in times of armed conflict can have negative consequences for the corresponding prohibition and/or protection under IHL.¹⁸³ It should therefore be avoided as much as possible. Moreover, fair labelling requires charging a prohibited form of conduct in a manner that best matches the alleged criminal behaviour.¹⁸⁴

In light of the foregoing, the present author therefore considers it advisable that the ICC Statute, as well as the Elements of Crimes, be modified so as to make future prosecution of starvation, through denial of humanitarian access, possible as a war crime under Article 8(2)(e) of the ICC Statute. Such an amendment to the ICC Statute may be proposed by any ICC State Party and can be dealt with by the Assembly of State Parties during its yearly meeting or at a Review Conference.¹⁸⁵ It should be noted that an amendment needs to be adopted by consensus or, if no consensus can be reached, by a two-thirds majority vote.¹⁸⁶ However, in Rome, the debates concerning the inclusion of war crimes arose mainly in respect of proposed crimes that were not explicitly prohibited in one of the main IHL treaties, or that were of debatable customary status. Because the prohibition of starvation is included in Additional Protocol II, and the customary status of the prohibition of starvation appears not to be contested,¹⁸⁷ the adoption of an amendment to criminalise starvation of the civilian population in times of non-international armed conflict may actually be relatively easy. The 2010 amendment to Article 8(2)(e) for poisonous weapons, gas and expanding bullets,¹⁸⁸ which was adopted by consensus without much controversy,¹⁸⁹ could serve as an example.¹⁹⁰

¹⁸³ This is shown, inter alia, by the definition given by the majority of the Trial Chamber in *Lubanga* (n 131) to the meaning of using child soldiers to actively participate in hostilities; see, eg, Sylvain Vité, 'Between Consolidation and Innovation: The International Criminal Court's Trial Chamber Judgment in the *Lubanga* Case' (2012) 15 *Yearbook of International Humanitarian Law* 61, 83; and Nina HB Jørgensen, 'Child Soldiers and the Parameters of International Criminal Law' (2012) 11 *Chinese Journal of International Law* 657, 687.

¹⁸⁴ See, generally, Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-based Crimes at the International Criminal Tribunals* (Oxford University Press 2014). It could furthermore be argued that greater stigma attaches to a conviction of a crime against humanity or genocide than for a war crime: Grover (n 74) 165.

¹⁸⁵ ICC Statute (n 17) art 121(1) and (2).

¹⁸⁶ ICC Statute (n 17) art 121(3).

¹⁸⁷ Cryer and others note that starvation of the civilian population would fulfil the so-called *Tadić* conditions: Cryer and others (n 13) 278. According to the Appeals Chamber of the ICTY, these four conditions must be met in order for criminal conduct to fall within the scope of art 3 of the ICTY Statute, ie to be considered as a serious violation of the laws and customs of war. These conditions are as follows: '(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met ...; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim ...; (iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule': *Tadić* Jurisdiction Decision (n 10) [94]. These conditions indeed appear to be met for the crime of starvation for non-international armed conflicts.

¹⁸⁸ See ICC, Resolution RC/Res.5, Amendments to Article 8 of the ICC Statute, adopted at the 12th plenary meeting, 10 June 2010.

¹⁸⁹ See Amal Alamuddin and Philippa Webb, 'Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute' (2010) 8 *Journal of International Criminal Justice* 1225.

¹⁹⁰ Alamuddin and Webb conclude that the following lessons about the process for altering the ICC Statute can be drawn from the smooth adoption of the 2010 weapons amendment: 'Proposed amendments should be specific and narrow, attention should be paid to building consensus bilaterally outside of the ASP sessions and through

At the same time it would be helpful to make some minor modifications to the language of the international armed conflict war crime of starvation – included in the ICC Statute as Article 8(2)(b)(xxv) – to address the problems discussed above¹⁹¹ that result from the wording of this provision. The proposed new war crime, applicable to both international and non-international armed conflicts, would ideally remove the reference to ‘method of warfare’, as this could unnecessarily raise problems. Similarly, to avoid misunderstanding, instead of referring to the Geneva Conventions, the crime should refer to the whole body of IHL. Tracking the language used in the German international crimes legislation may assist in reaching agreement on the wording.¹⁹² Alternatively, reference to IHL could be avoided altogether and the provision would then address the lawfulness of withholding consent. The proposed amended Article 8(2)(b)(xxv), and new addition to Article 8(2)(e), would thus read as follows:

Intentionally using starvation of civilians [as a method of warfare] by depriving them of objects indispensable to their survival, including wilfully impeding relief [in a manner contrary to international humanitarian law/without lawful reasons to withhold consent].

It is hoped that the ICC states parties are willing to adopt a war crime of starvation of the civilian population in non-international armed conflicts, so as to enable the Court – if called upon as a result of inability or unwillingness on the part of the relevant state – to address the intentional denial of humanitarian assistance that occurs all too often during contemporary armed conflicts.

co-sponsorship, and informal consultations should take precedence over discussions in the plenary and Working Group formats. Another amendment proposal that did not heed these lessons, the proposal to delete Article 124, failed to achieve consensus in Kampala and we are left with a provision in the ICC Statute that undermines accountability for war crimes. The Article 8 amendment set an important procedural precedent in addition to making a moderate substantive contribution to the development of IHL’: *ibid* 1243.

¹⁹¹ See Section 2.2 above. The general challenges to prosecute the war crime of starvation of civilians under art 8(2)(b)(xxv), such as the high threshold of starvation, would also apply to any crime adopted for non-international armed conflicts.

¹⁹² The German wording ‘... unter Verstoß gegen das humanitäre Völkerrecht ...’ can be translated as ‘contrary to international humanitarian law’.