

Can we prosecute starvation?

Briefing Paper

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Overview

Famine can be ended; indeed, the world came close to doing so. Between 2000 and 2011, there were no famines. Today, several famines threaten various states and regions, all due to the conduct of armed conflict.

Famine is properly understood as an atrocity: the result of distinct and often criminally intentional policies that target discrete populations in the pursuit of military or political goals. Famines will no longer occur when they are so morally reprehensible that causing them, or allowing them to happen, is unthinkable. In order to achieve this goal, we need a sharper application of international law.

Although starvation has appeared in a handful of prosecutions in international criminal law over the modern era, there have been a dearth of prosecutions resting squarely on the crime of starvation.

A principal challenge is ensuring that the law distinguishes between legitimate military actions such as sieges, the multiple and intersecting causes of famine, and the deliberate starvation of civilians.

The clearest and most progressive law on the books is Article 8(2)(b)(xxv) of the Rome Statute, however it does not apply to non-international armed conflict, the context for all of today's famine situations.

Several other legal options exist for prosecution, ranging from war crimes, to crimes against humanity ('CAH'), to genocide, which might be used to address the deliberate starvation of civilians. Doing so will require careful attention to the elements of the offence and the necessary evidence required to establish those elements and the required intent.

Only when existing or future legal mechanisms develop or create a better understanding of these scenarios, or more generally when starvation enters the legal zeitgeist in the way that sexual violence and gender-based crimes (mercifully) now have, will prosecutions produce a more singular definition of the crime of starvation.

Famine Today

Famine is an age-old scourge that almost disappeared in our lifetime. Between 2000 and 2011 there were no famines and deaths in humanitarian emergencies have been much reduced. This progress is partly due to greater expertise in predicting, preventing, mitigating and responding to crises before they reach the level of famine. International humanitarian law is stronger and humanitarian lesson-learning is more robust. Over a generation, the humanitarian agenda was ascendant.

Yet famines have returned. In 2017, the United Nations identified four situations of acute food insecurity that threatened famine or breached that threshold—in north-eastern Nigeria, Somalia, South Sudan and Yemen. Yemen is the largest impending disaster and possibly the famine that will define this era. Cases of deliberate starvation have occurred in Syria and near-famine conditions have occurred in the Democratic Republic of Congo.

Above all, political choices have driven famine's re-emergence in this century. Some famines derive from intentional political and military decisions, while others are allowed to develop because the most powerful actors have other priorities, such as security, that overrule an effective response.

Every famine today is occurring in the context of armed conflict. Indeed, all result from military actions and exclusionary, authoritarian politics conducted without regard to the wellbeing or even the survival of people. Violations of international humanitarian law including blockading ports, attacks on health facilities, violence against humanitarian workers, and obstruction of relief aid are all carried out with a sense of renewed impunity. As stated by Sigrid Kaag, Minister for Foreign Trade and Development Cooperation of the Kingdom of the Netherlands, during a discussion of famine and extreme hunger in the United Nations Security Council on March 23, 2018: "Flouting the law of war not only turns these norms into hollow phrases; it erodes the rules-based international order itself" (S/PV.8213; 6). Famines strike when accountability fails.

Addressing this demands a new infusion of resources and energy, to ensure that there is sufficient political will to end the political and military practices that cause famine. At a time when more authoritarian, militaristic, xenophobic and cynically self-interested politics are on the rise, we must defend the humanitarian imperative and the right of life and dignity.

Our ultimate goal is to render mass starvation so morally toxic, that it is universally publicly vilified. Because mass starvation demonstratively can be ended, it cannot be tolerated. We aim to make mass starvation unthinkable, such that leaders in a position to inflict it or fail to prevent it will unhesitatingly ensure that it does not occur, and the public will demand this of them.

A fundamental contribution to achieving this goal is sharpening the conceptual and practical applications of international law. This raises several questions: Is the law as it exists sufficient to prosecute individuals for crimes of starvation committed by States? Or are there gaps in the law as it stands today, or such constraints on a successful prosecution (such as obtaining the necessary evidence) that makes it impossible to pursue a case successfully?

International Law and Mass Starvation

The question concerning whether the current law is sufficient to prosecute individuals for crimes of starvation cannot be considered without understanding the way in which law is developed; unless and until there is a culture of focused prosecutions for starvation, this question and its answer, will remain in the abstract. As the last 25 years of law making at the international criminal tribunals have shown, once the relevant conduct for a serious international violation moves beyond the classroom and into the courtroom, the relevant law can be identified, clarified and developed. As with the prosecution of sexual violence and gender-based crimes, this process is what brings clarity to the law and ensures it is a useful instrument for accountability.

Although starvation has appeared in a few prosecutions in international criminal law ('ICL') over the modern era, there has been a dearth of prosecutions resting squarely on the crime of starvation. Of the approximate 20 cases in which starvation has featured, only three have pleaded it as a distinct crime. Generally, it has been included as context in other CAH often as part of misconduct in detention situations.

Despite the lack of prosecutions, there is no reason to believe that the crime of starvation cannot follow a trajectory similar to other international offences, such as sexual violence and gender-based crimes. Before the 2001 judgment in the case of [The Prosecutor v Jean-Paul Akayesu](#) at the International Criminal Tribunal for

Rwanda, rape was not recognised as a form of genocide or a CAH. The Court's finding served as the departure point for several international prosecutions of sexual and gender based crimes and a further elucidation of the law. What was historically observed as a natural consequence of war, an unhealthy belief that 'boys will be boys', became universally viewed as abhorrent behaviour demanding prosecution and lengthy prison sentences. What is now required, are prosecutions for starvation offences leading to robust legal findings of individual criminal responsibility, the recognition and removal of accountability gaps, and the comprehensive labelling of the crime as repugnant to all.

The international community lacks even a taxonomy for the acts that constitute starvation. Notwithstanding this, there is still an array of legal options ranging from war crimes, to CAH, to genocide, available to a prosecutor to hold individuals to account for the deliberate starvation of civilians. However, as an examination of the most relevant law shows, there are a number of problems that, in part, exist because there is little detailed legal consideration of the misconduct that lies at the heart of the crime of starvation. These will be discussed briefly below.

Blockades, Sieges and Starvation under IHL

As recently as World War II, it was still lawful for a belligerent to lay siege and drive fleeing civilians back to areas controlled by the enemy as a tactic to put pressure on available food and other resources in furtherance of military success. Indeed, in the so-called High Command Case, a US post-war military commission [acquitted](#) Field Marshall [Wilhelm von Leeb](#) for his role in the brutal siege of Leningrad (September 1941–January 27, 1944) on this rationale. Even then, the judges expressed discomfort with the state of the law as noted in their opinion:

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

The judges concluded:

“We might wish the law were otherwise, but we must administer it as we find it.”

Fortunately, the law has progressed and these attacks on a civilian population are no longer permitted. However, the distinction between legitimate sieges and starvation of the opposing army on the one hand, and starvation and civilian protection on the other, has not been adequately explored in the practical setting of courtrooms and remains poorly understood and defined. As the law develops, one of the principle challenges will be to ensure that the law is able to distinguish between legitimate (IHL compliant) military offensives such as sieges, the multiple and intersecting causes of famine, and the deliberate starvation of civilians. Herein lies the fundamental challenge; to ensure that the law on these issues is certain, specific and declaratory.

The Rome Statute and the International Criminal Court

The clearest and most progressive law on the books is Article 8(2)(b)(xxv) of the Rome Statute. This Article

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

criminalises:

There are four necessary elements to establish the offence:

Acts

- (i) The conduct took place in the context of and was associated with an international armed conflict;
- (ii) The perpetrator was aware of factual circumstances that established the existence of an armed conflict;

- (iii) The perpetrator deprived civilians of objects indispensable to their survival; and

Mental Element

- (iv) The perpetrator intended to starve the civilians as a method of warfare.

The offence described in 8(2)(b)(xxv) is a straightforward articulation of the most egregious form of starvation, with the relevant intent at the core of a starvation offence. Moreover, it appears to address the essential civilian protection problem: it is expansive enough to encompass a situation where starvation is used to gain a military advantage, such as using starvation to achieve a speedier surrender of a besieged town or village.

The requirement that the deprivation of indispensable items meant as a method of warfare, was incorporated to include the IHL concept of starvation under Article 54 Additional Protocol I of the Geneva Conventions. However, given this requirement and the overall focus on intent in the Article, difficulties may arise in practice concerning how to assess the liability of a warring party that fails to respect the principles of proportionality, or is otherwise reckless. Given the need to focus on intent (and not purpose) this may not prove to be an insuperable problem in terms of adjudication or accountability. Putting these questions aside, what is clear is that that Article 8(2)(b)(xxv) does not allow prosecutions for inadvertent consequences, such as societal mismanagement or otherwise failures to generally live up to internationally promoted standards of good governance.

Notwithstanding the above, Article 8(2)(b)(xxv) is a crime with a broad reach that can address a range of misconduct. However, the crime has no applicability outside a sufficient link to an armed conflict and it is not applicable in a non-international armed conflict ('NIAC'). Given that all of the countries' currently enduring conflict-related food insecurity, starvation, or pockets of famine (South Sudan, Yemen, Nigeria and Somalia), are classified as a NIAC –with the exception of Syria--those perpetrating the deliberate starvation of civilians in these States could not presently be prosecuted at the International Criminal Court ('ICC'). This creates a significant accountability deficit that cannot be explained by reference to international customary or conventional

law, and undermines the ICC's mandate of ending impunity. As for the latter, there is no principled reason for not amending the Rome Statute to include starvation as a distinct war crime prosecutable in NIACs.

Nevertheless, a prosecutor faced with evidence of the relevant misconduct is not disarmed, even if handicapped by the lacunae in the Rome Statute. For a NIAC, a prosecutor will need to pick their way through an array of other war crimes or attempt to consider the conduct as a separate CAH or as genocide. The use of these 'alternative' crimes is not without consequences: the more the conduct is separated from the core elements of the crime of starvation, the more the prosecution may fail to capture the essence of the crime. The declaratory value of criminal prosecutions should not be disregarded. It is important not to lose sight of the singular nature of the crime of starvation that rests on the intentional deprivation of objects indispensable for survival. In other words, whilst these alternative crimes may be useful, especially in the face of problems in the applicability of the most appropriate law, they come with their own thresholds and connotations that risk obscuring the uniqueness of starvation as a distinct crime.

Investigative and Evidential Requirements

As with other specific intent crimes, the investigation and prosecution of the crime of starvation under Article 8(2)(b)(xxv) must confront specific evidential thresholds. Given the multi-causal nature of starvation, it is essential that those investigating and collecting the relevant information understand the elements of the offence and the type of information that may be admissible in any prosecution. The evidence collection stage from cause (e.g. an unlawful blockade) to effect (e.g. malnutrition leading to disease epidemics and death such as cholera in Yemen) must be clearly tracked and understood if the intent of the contributory actors is to be accurately assessed.

At the investigative stage, it would be essential to examine and determine the following non-exhaustive factors; (i) the conflict classification; (ii) the causes of deprivation; (iii) relevant issues concerning the principle of distinction, including whether those affected were civilians [which may be difficult to discern in internal conflicts where civilians are often engaged in the

conflict]; (iv) that the objects indispensable to survival were not objects solely for the use of opponent armed forces i.e. food inside a military base is likely to be deemed exclusively for the use of combatants; and, (iv) whether the State which attacked/destroyed/removed or rendered useless the objects, was doing so in its own controlled territory as a tactic against invaders – i.e. the military objective question and the concentric questions of proportionality.

At a minimum, there are three categories of evidence necessary for a prosecutor to be aware of when mounting a case for starvation. These are briefly discussed below.

First, evidence demonstrating the targeting of indispensable objects. Indispensable objects are interpreted broadly and may include a range of items including: food, farmland, crops, livestock, drinking water installations, supplies or irrigation works, medicaments, basic shelter, electricity power, blankets and clothes. Evidence of attacks or destruction of these items, including photographs or videos may be utilised by the prosecution. The targeting of food-producing areas such as agricultural fields, farms, livestock, foodstuff as well as wells or other water installations must be documented through oral and documentary evidence. Photographs or other evidence that show humanitarian convoys containing supplies for the civilian population being attacked or diverted may also be used to prove essential elements of the offence. For example, the combination of satellite and ground imagery and information provided by States enabled a clear picture to be formed of aerial attacks of a Syrian Arab Red Crescent convoy containing humanitarian supplies near Aleppo city in September 2016.

Second, even though the offence does not require proof of outcome, expert or authoritative opinion evidencing the suffering and the consequences of the deprivation, remains an essential piece of the starvation puzzle. Whilst there is no material element requiring proof of starvation (either in terms of deaths or nature and type of suffering), a prosecutor must investigate and collect this kind of evidence to ensure that the requisite gravity of the conduct may be shown and the relevant intent established (either directly, or indirectly through the various strands of circumstantial evidence).

The requirement that the deprived items are indispensable presupposes that any prosecutor will need to engage in demonstrating the nature of those items and how they were essential to survival or wellbeing. There

will be a variety of expert evidence to consider, much of it from humanitarian organisations working on the ground concerning on-going or previous relief efforts. The evidence will need to demonstrate specifically and in detail the principal consequences of the deprivation. The headlining statistics and observations from the humanitarian world will be relevant and probative. The fact that the [humanitarian community in Yemen by November 2017](#) documented that over 2.2 million children in Yemen were malnourished and of those 385,000 children were suffering from severe malnutrition requiring therapeutic treatment will no doubt prove important for understanding the nature, severity and scope of the starvation in that conflict. However, this type of evidence will require substantiation through more specific evidence that reflects the day to day life in besieged areas, including expert analysis on in-country trends of malnutrition, hospital records detailing the numbers of patients suffering from malnourishment or other forms of deprivation, and other records that show the daily struggle for survival.

Third, and perhaps the most challenging, is the collection of evidence that seeks to explain and detail the links between the offending siege or blockade policy, and the consequential deprivation of items. This evidence will likely need to confront a multiplicity of potential causal relationships that might explain the absence or destruction of the items and the deprivation. As foreshadowed by the challenges of distinguishing between legitimate (IHL compliant) military offensives, the multiple causes of famine, and the deliberate starvation of civilians, this evidence will need to be clear and precise. At the center of this investigation, will be a focus on how warring parties are (or are not) responsible for adverse effects on trade, food production and any impediments to the delivery of supplies to civilians, *and* the intention underlying the adverse effects.

Plainly, facts such as those issued in December 2017 by [the UN Humanitarian Coordinator in Yemen](#) that “the continuing blockade of ports is limiting supplies of fuel, food and medicines; dramatically increasing the number of vulnerable people who need help” will be important but insufficient. Instead, the evidence will require specifics which explore alternative explanations, the nature, scope and aim of the relevant blockade, the military targets and accrued advantages, the attempts to alleviate civilian suffering and a wide range of conduct that goes to the principle of proportionality and

distinction. This range of evidence will be essential to establishing the requisite knowledge and intent, which should lay the foundation for the successful identification of perpetrators and prosecutions.

The three categories of evidence outlined above are not intended to be exhaustive. Much will depend on the circumstances and the relevant context. The fundamental challenge will be to show through a broad swathe of circumstantial evidence, that an irresistible inference may be drawn that the named suspects intended the crime of starvation.

Unfortunately, express statements by perpetrators such as those by the Ethiopian Foreign Minister during the Ethiopian famine of 1983-1985 (that food was a major element in their military strategy) or that by an official of the Nigerian government during the 1967-1970 Biafra war of secession (that starving civilians is a legitimate method of war) will be rare. Instead, intent will need to be pieced together from an array of expert and factual evidence that rises to the challenge of establishing the *mens rea* of starvation as a war crime through direct evidence of intentional deprivation, or indirect evidence of a failure to act to alleviate suffering that moves beyond claims of unintended consequences and allows the requisite inference of intent to be drawn.

Disentangling the permissible from the impermissible in IHL and evidencing the requisite specific intent under Article 8(2)(b)(xxv) will pose considerable and novel investigative challenges. However, to an extent, these challenges in one form or another have been faced and met before in the pursuit of new (and much needed) forms of accountability.

Conclusion: The challenge ahead

In its primary use, the verb 'to starve' is transitive: it is something people do to one another, like torture or murder. Mass starvation on account of natural adversity has become vanishingly rare: today's famines are *all* caused by political decision. Even given food insecurity and other pressures, like climate change and poverty, famine should not exist. The technical means to prevent and mitigate mass starvation are well known and achievable. When famine appears, it is the result of political decisions.

This crime can be prosecuted. What is required in the case of starvation (as with many under-prosecuted or neglected crimes) is the political will to pursue those who are acting criminally by starving civilians; a ready forum empowered to prosecute, skilled investigators and the determination of prosecutors to close the accountability gap.

It is only when existing or future legal mechanisms develop or create a better understanding of these scenarios, or more generally when starvation enters the legal zeitgeist in the way that sexual violence and gender-based crimes (mercifully) now have, will prosecutions produce a more singular definition of the crime of starvation. Only once there is legal precedent on how to apply the law to the facts on the ground, will we have the tools to authoritatively understand the contours of the offence, and in turn be able to ascertain whether the existing law is fit for the purpose of successful prosecutions and accountability for these grave crimes.