

Malum in se

Starvation Crimes in International Law

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Starvation has been used as a method of warfare since time immemorial. Yet, despite developments in the laws of armed conflict (LOAC) over the past 150 years aimed at the prohibition of starvation of civilians during war, the use of starvation as a method of warfare persists. This is because belligerents have two lawful means with which to use starvation: (1) siege warfare and (2) blockades aimed at cutting off supplies to the enemy. In this paper, I will argue that even where belligerents employ starvation warfare under the color of international humanitarian law (IHL), such tactics are never morally justified and should be absolutely prohibited because starvation is *malum in se*—i.e., starvation is an innately immoral act, regardless of whether IHL strictly prohibits it. This is so because when used as a weapon of war, starvation violates *jus in bello* principles.

In Part I, I examine the historical IHL and international criminal law (ICL) developments of prohibitions—or rather permissions—on the use of starvation during armed conflicts beginning with the Lieber Code of 1863 and ending with the 2019 amendment to the Rome Statute prohibiting starvation in non-international armed conflicts and defining it as war crime. In Part II, I present my arguments that starvation is *malum in se* because it violates the *jus in bello* principles of distinction, proportionality, necessity, and superfluous injury. In Part III, I present two case studies—one historical and one contemporary—where starvation has been used as a weapon of war. I first present the Nazi Hunger Plan to highlight the immoral position of using starvation against the enemy. Then, I present the contemporary case of Yemen’s civil war where thirteen million people are at risk of starving or dying from starvation-related disease because of the Saudi-led Coalition’s attacks on agriculture, water, and objects indispensable to survival (OIS). These case studies demonstrate that even under the color of law, using hunger as a weapon of war is *malum in se* and should be absolutely prohibited and punished under international law. Finally, I conclude by advocating for stricter prohibitions on starvation under international law with some strategies for pursuing this aim.

Part I. Historical Developments on Prohibitions of Starvation as a Method of Warfare

The laws of war—*jus in bello* or international humanitarian law—govern the conduct of parties to an armed conflict and what military tactics are permissible in a just war.¹ Among the core humanitarian rules of warfare in the 19th and 20th centuries were the principles of military necessity and proportionality—the idea that parties to an armed conflict may undertake an attack when it is actually necessary to accomplish a legitimate military purpose, but it must be balanced with the principle of proportionality to minimize civilian harm.² Oppenheim’s treatise, *International Law*, describes the first and second principles of the laws of war—necessity and humanity—as a contradiction that must be reconciled.³ International humanitarian law, in the form of regulations and conventions, thus developed to reconcile the necessities of war with the principle of humanity.

Prohibitions on *unnecessary* use of starvation as a method of warfare can be traced back to the 1863 Lieber Code, which acknowledges that starvation of the enemy is permissible to hasten capitulation, but that civilian casualties must meet the IHL principles of necessity and proportionality—i.e. civilian deaths must be necessary and proportionate to a legitimate military objective, such as bringing an end to war.⁴ Developed for the US Union Army during the Civil War, the Lieber Code provides:

War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the

1. International humanitarian law is generally regarded as having developed after Henry Durant witnessed the 1859 Battle of Solferino and established the Red Cross movement. The Lieber Code is considered the first example of a codification of the laws of war. However, the laws of war and international humanitarian law, though often used interchangeably, are actually distinct: Geneva law, deriving from the early Geneva Conventions, represent customs of humanitarian principles, whereas Hague law, deriving from the 1899 and 1907 Hague Peace Conferences, represent the conventional rules of the conduct of war. Most legal scholars no longer treat the Hague and Geneva laws as distinct. See Amanda Alexander, “A Short History of International Humanitarian Law,” *European J. of Int’l L.* 26 (2015): 109, 112–116.

2. See, e.g., Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004 e-book) 28–30 (explaining that necessity and proportionality had been part of just war theory since the Middle Ages); General Order No. 100 (April 24, 1863) Lieber Code, Instructions for the Government of Armies of the United States in the Field, Arts. 14–16, https://avalon.law.yale.edu/19th_century/lieber.asp#sec1 [hereinafter, Lieber Code].

3. See, e.g., L. Oppenheim, *International Law: A Treatise*, edited by R. F. Roxburgh, 3rd ed. (1921), 84–85.

4. Lieber Code, *supra* note 3, at Arts. 17–18.

speedier subjection of the enemy. When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, *it is lawful, though an extreme measure to drive them back, so as to hasten on the surrender.*⁵

Inherent in this code is the military necessity of using starvation in order to hasten capitulation. The use of a siege or blockade must be in pursuit of a legitimate military necessity—in other words, it would not be legitimate to use starvation to punish the enemy, exterminate a population, or pillage the enemy's territory for food and supplies to sustain a prolonged military campaign. Though the Lieber Code does not expressly mention proportionality, Article 18 could be interpreted as providing for proportionality insofar as the purpose of permitting siege warfare is to hasten surrender, therefore limiting the total number of casualties of war. What is lacking in the Lieber Code is the principle of humanity—that suffering of civilians in particular is impermissible and unjust. Thus, it would be too much to proclaim the Lieber Code as the first codification of the prohibition on starvation of civilians, but it could be viewed as the first step towards that end given the conditions of military necessity and proportionality implied in Articles 17–18.

Although no express prohibitions on the use of starvation of civilians existed in the 19th century, the 1899 Hague Convention could be construed to prevent starvation of civilians under the Martens Clause, which prohibits methods of warfare that would shock the public conscience.⁶ The Martens Clause, articulated in the preamble of the 1899 Hague Convention II, provides:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it is right to declare that in cases not

5. Lieber Code, *supra* note 3, at Arts. 17–18 (emphasis added). The Lieber Code's permissions to drive combatants back into a besieged area in order to hasten the defeat of an enemy stands in stark contrast to the modern convention that, whenever possible, civilians and non-combatants must be allowed to leave a besieged area or humanitarian aid must be allowed through the siege for civilians. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Arts. 54, 70.

6. The principle of humanity, sometimes referred to as the Martens clause, protects civilians from violations of IHL not expressly covered by treaties. It was introduced by Fyodor Fyodorovich Martens in the preamble of the 1899 Hague Convention. See ICRC, "Fundamental Principles of IHL," <https://casebook.icrc.org/glossary/fundamental-principles-ihl>.

included in the Regulations adopted by them, *populations and belligerents remain under the protection and empire of the principles of international law*, as they result from the usages established between civilized nations, *from the laws of humanity and the requirements of the public conscience*.⁷

The humanity principle is intended to act as a failsafe to prevent belligerents from engaging in anti-humanitarian warfare. It prohibits methods of warfare that are unnecessary for attaining a definite military advantage,⁸ and is closely tied to the principle prohibiting weapons that cause superfluous injury.⁹ Jean Pictet interpreted the principle of humanity to mean that “[N]on-combatants shall be spared as far as possible.”¹⁰ A broad interpretation is that even if a treaty or convention does not expressly prohibit an act or conduct of belligerents, that does not mean that the act or conduct is *ipso facto* permitted. Rather, such an act or conduct is subject to the principles of customary international law.¹¹ In the context of starvation, it can be argued that although no treaty or convention expressly prohibited starvation of civilians during World War II, the Martens humanity principle suggests that if the use of starvation as a method of warfare did not meet a legitimate military objective or was not proportionate, then it was not lawful under the customs of the time.

Further, the 1907 Hague Convention does not expressly mention starvation as a method of warfare, but does provide that siege warfare, which

7. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, Preamble (emphasis added).

8. E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* (Kluwer Academic, Dordrecht, 1992), 36.

9. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, Preamble.

10. Jean Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff and Henry Dunant Institute (Dordrecht/Geneva, 1985), 62.

11. Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict,” *International Review of the Red Cross* 317 (Apr. 30, 1997), <https://casebook.icrc.org/glossary/fundamental-principles-ihl>; But see, *S. S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. Series A 16 No. 10 (Sept. 7), at 19 (In its dicta, the Court describes what has become known as the second Lotus Principle, which crudely suggests that anything not expressly prohibited by international law is permitted: “It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property, and acts ‘outside their territory’”).

has the effect of starving civilians and combatants alike, is permissible.¹² The 1907 Hague Convention reemphasized the humanity principle of the Martens Clause and the principle of necessity.¹³ Thus, the 1907 Hague Convention could be interpreted as banning a military tactic like the Nazi Hunger Plan, which used starvation as a means of eliminating civilians, rather than bringing an end to war.

To that end, The International Military Tribunal at Nuremberg (IMT-N) declared that the 1907 Hague Convention's rules of war were customary international law in 1939:

The rules of land warfare expressed in the [1907 Hague] Convention undoubtedly represented an advance over existing international law at the time of their adoption ...but by 1939 these rules ...were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.¹⁴

However, despite the fact that the 1907 Hague Convention prohibits belligerents from causing unnecessary suffering and destruction of property,¹⁵ the IMT-N did not charge Nazi perpetrators with the crime of starvation for the Hunger Plan. The IMT-N did, however, charge Field Marshal Wilhelm von Leeb for the Siege of Leningrad in the High Command trial. As the name suggests, the High Command trial was the prosecution of twelve Nazi high commanding officers for their alleged war crimes and crimes against peace during World War II; von Leeb's trial was for his role in the invasion of the Soviet Union during Operation Barbarossa. The IMT-N ultimately determined that although starvation by siege was egregious, it was nevertheless lawful:

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. It is said that if the commander of a besieged place expels the noncombatants, in order to lessen

12. Articles 27 of the Hague Convention IV places prohibitions on belligerents to attack the sick and wounded during siege warfare, but not civilians specifically, and Article 28 prohibits pillaging of a besieged town or village. See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Arts. 27–28 [hereinafter, Hague Convention IV].

13. *Id.* at Preamble.

14. International Military Tribunal at Nuremberg, reprinted in *AJIL* 41, 248–249 (1947).

15. Hague Convention IV, *supra* note 12, at Art. 23.

the number of those who consume his stock of provisions, *it is lawful, though an extreme measure, to drive them back so as to hasten surrender...* Hence the cutting off every source of sustenance from without is deemed legitimate... *We might wish the law were otherwise, but we must administer it as we find it.* Consequently, we hold no criminality attached on this charge.¹⁶

Indeed, state practice would suggest that the major parties to World War II, with the exception of the Soviet Union, all believed that starvation for the purpose of causing the enemy to capitulate was a legitimate and legal method of warfare. For example, the US and UK used blockades of food supplies to Germany, German-Occupied Territory, and Japan; the US even named its blockade of Japanese harbors “Operation Starvation.”¹⁷ Thus, starvation caused by sieges and blockades during World War II was not *ipso facto* prohibited under international law. However, even though starvation was not strictly prohibited during World War II, that does not establish that the use of starvation during the war complied with the principles of military necessity, proportionality, distinction, or humanity.

The horrors of World War II led to two significant developments in international law: the 1948 Genocide Convention and the 1949 Geneva Convention for Treatment of Civilians—both of which expressly prohibit starvation of civilians.¹⁸ The Genocide Convention prohibits “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”¹⁹ Starvation undoubtedly meets this criterion. More recently, the 1977 Additional Protocols to the Geneva Conventions provide detailed explanation of permissions and prohibitions on sieges, blockades, attacks on OIS, and humanitarian aid;²⁰ and the 1998 Rome Statute²¹ and

16. Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, October 1946–April 1949, Vol. XI, 563 (U.S. Government Printing Office, Washington, D.C., 1950) (emphasis added).

17. Alex De Waal, *Mass Starvation: The History and Future of Famine* (2018), 127–28.

18. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, Art. II(c); Geneva Convention relative to the protection of civilian persons in time of war, Geneva 8 December 1949.

19. *Id.*

20. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, at Art. 54(1) [hereinafter, Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 609, at Arts. 14, 69–70 [hereinafter, Protocol II].

21. Rome Statute of the International Criminal Court, Art. 8(2)(b)(xxv), 17 July 1998, UN

2019 Amendments criminalize starvation as a method of warfare during both international and non-international armed conflicts.²² Specifically, Article 54 of Additional Protocol I and Article 14 of Additional Protocol II prohibit attacks on OIS and starvation of civilians, while Article 70 of Additional Protocol I requires uninhibited flow of humanitarian aid.²³ While starvation of civilians is strictly prohibited under Article 54, sieges and blockades are lawful exceptions to the prohibitions on starvation, so long as the attack complies with the principles of military necessity, distinction, and proportionality, and does not deprive civilians of adequate food or water, or force civilians to leave due to inadequate food or water.²⁴ Finally, the Rome Statute of the International Criminal Court (ICC) criminalizes starvation as a war crime when the perpetrator intends to cause starvation of civilians as a method of warfare, deprives civilians of OIS, or willfully impedes relief supplies.²⁵

Although the law has evolved to enforce greater restrictions on methods of war that would lead to starvation, currently IHL, ICL, and customary international law stop short of an absolute ban on the use of starvation as a weapon of war. Hence, any change in the law must come as a result of progressive development. As I will lay out below, starvation should be absolutely banned under international law because it is *malum in se*. I will also apply the Doctrine of Double Effect (DDE) to some of the arguments that follow. DDE is a philosophical exercise that explains the permissibility of a harmful action, such as starvation of civilians, as a consequence of promoting some good intention, such as bringing an end to a protracted war. In order for an action to be morally permissible under DDE, four conditions must be satisfied:

1. The action must be morally good or morally indifferent;
2. The intention of the agent must be to bring about the good effect and not the bad one. If the agent could attain the good effect without the bad effect, then that is what is required;

Doc.A/CON.E.183/9, 2187 U.N.T.S. 9 [hereinafter, Rome Statute].

22. International Criminal Court Assembly of State Parties, Report of the Working Group on Amendments, Eighteenth session, 2–7 December 2019, 7–9, ICC-ASP/18/32 (Dec. 3, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-32-ENG.pdf.

23. Protocol I, *supra* note 20, at arts. 54(1) & 70; Protocol II, *supra* note 20, at art. 14.

24. *Id.* at Additional Protocol I, art. 54(3).

25. Rome Statute, *supra* note 21, at art. 8(2)(b)(xxv) (“Intentionally using starvation as a method of warfare by depriving civilians of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions.”); *See also* Elements of Crimes, International Criminal Court (2001), at art. 8(2)(b)(xxv), <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>.

3. The good effect must be produced directly by the action, not by the bad effect (i.e., it is not permitted to use a bad means to achieve a good end);
4. The good effect must be sufficiently desirable to compensate for allowing the bad effect (i.e. the good that is achieved must be proportional to the bad that is allowed).²⁶

A campaign of starvation clearly fails the first condition because starvation is never morally good or morally indifferent. Even if the tactic of a blockade could be viewed as morally indifferent, if the effect of the blockade is to cause starvation, then the blockade fails the third condition because a bad effect (e.g., starvation) must never be used to achieve a good end (e.g., preventing weapons from entering enemy hands).

Part II: The use of starvation as a weapon of war is *malum in se*

The use of starvation as a method of war is *malum in se* because it violates the *jus in bello* principles of distinction, proportionality, necessity, and superfluous injury.

Starvation as a weapon of war violates the *jus in bello* principle of distinction.

Starvation is an inherently indiscriminate weapon. IHL requires that military attacks distinguish between civilians and combatants. When starvation is used lawfully, either through siege or blockade, it is impossible to distinguish between civilians and combatants. This is why the Additional Protocols require combatants to (1) allow humanitarian aid to be distributed to civilians during blockades and sieges and/or (2) allow civilians to leave besieged cities. Similarly, an otherwise lawful attack on enemy territory may cause starvation if the attack destroys OIS. Since water supplies and agricultural sites are used by both civilians and combatants, destruction of OIS intended to force capitulation of the enemy is also *malum in se* because such attacks are indiscriminate.

Some might argue that when used lawfully, starvation caused by sieges, blockades, or attacks on OIS that target combatants is not *malum in se* so long as civilian suffering is limited. To that end, the problem is not that sieges, blockades, or attacks on OIS cannot distinguish between civilians and combatants, but rather, combatants choose not to distinguish between

26. Stephen Coleman, *Military Ethics: An Introduction with Case Studies* (Oxford University Press 2012), 22.

civilians and combatants. These bad actors are thus violating the LOAC and should be punished in accordance with the Geneva Conventions or the Rome Statute.

The reality though, is that even “good”-intentioned combatants who undertake sieges, blockades, or attacks cannot absolutely guarantee that these tactics will not cause harm to civilians. In this way, methods of warfare that cause starvation fail to satisfy the fourth condition of DDE—namely, that the “good” effect of bringing about the capitulation of the enemy is not sufficiently desirable to compensate for allowing the bad effect of causing indiscriminate starvation of civilians. Moreover, in many, if not most cases, humanitarian aid does not reach civilians either because it is pilfered by belligerents or destroyed en route to civilians. And civilians are not always capable of leaving besieged cities. The elderly, disabled, and small children—to whom special duties of care are owed both legally and ethically—cannot be easily moved, and often there is nowhere else to go. Thus, even under the best of intentions, civilians suffer great harm when sieges, blockades, and attacks on OIS are used as a method of war. This is evidenced by the many instances of starvation during armed conflicts over the past 100 years, but especially in the recent conflicts in Sudan, Syria, and Yemen where hundreds of thousands of civilians have died due to starvation and related diseases because of war.²⁷

Starvation as a weapon of war violates the *jus in bello* principle of proportionality.

Starvation often results in disproportionate casualties. The *jus in bello* principle of proportionality prohibits combatants from launching an attack or using means of warfare that *may* be expected to result in excessive civilian harm. Regardless of whether sieges, blockades, or attacks on OIS are lawful, they very often result in excessive civilian harm. The Nazi Hunger Plan led to the deaths of over four million people,²⁸ and the current civil war in Yemen has placed thirteen million people at risk of death or severe malnutrition and illness from starvation.²⁹ In the context of the Hunger Plan, where the Nazis planned to feed the German army by pillaging food from the Soviet

27. See Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, 278–79 (Cambridge University Press 2020); See also, Laura Graham, “Pathways to Accountability for Starvation Crimes in Yemen,” *Case Western J. of Intl. L.* 53 (2020).

28. De Waal, *supra* note 17, at 104.

29. BBC News, “Yemen could be ‘worst famine in 100 years,’” (Oct. 15, 2018), <https://www.bbc.com/news/av/world-middle-east-45857729>.

Union, the starvation deaths of 4.7 million people is neither proportionate to a legitimate military objective, nor is it justified under DDE's second condition—that the agent must intend to bring about the good effect with the action and not a bad one. The Nazis did not intend a good effect. As I will show in the case study in part three, while one purpose of the Hunger Plan (feeding the German army) could be viewed as legitimate if other conditions were met, the primary purpose was to exterminate the Soviets. Extermination of a national or ethnic group is genocide, which is always *malum in se*. And concerning the thirteen million people at risk of starvation in Yemen due to blockades and attacks on OIS, even if a legitimate military objective is being pursued by these tactics, the sheer number of civilians at risk of death and disease (approximately 45% of the population),³⁰ is excessive and therefore not proportionate to a legitimate military objective.

A counterargument to the view that starvation as a method of war is disproportionate is that when used to hasten enemy capitulation, starvation may ultimately save innocent lives. To that end, many war historians believe that the use of starvation against the Germans during the first and second world wars escalated their capitulation, saving countless lives.³¹ Some might argue that if such tactics bring about the capitulation of the enemy faster than a sustained military campaign, then we should consider the civilian casualties of sieges, blockades, and destruction of OIS as proportionate to what would have been a larger loss of life over a protracted conflict.

However, to better understand the loss of life due to starvation in the first and second world wars, one must broaden the timeframe. The civilian loss of life is not just the immediate days or months of a siege or blockade; rather, the loss of life must be calculated over the course of months and sometimes years of food insecurity and disease caused by the siege or blockade even after the war has ended. The “turnip winter” of 1916–17 in Germany, caused in part by US embargoes, led to the deaths of at least 750,000 Germans due to malnutrition, and the birth rate fell significantly.³² Many of those deaths occurred during the six months *after* the armistice.³³ During World War II, at least twenty million people died from starvation,

30. The World Bank, “Total Population Yemen,” <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=YE>.

31. See generally, Lizzie Collingham, *The Taste of War: World War II and the Battle for Food* (2012).

32. *Id.* at 25.

33. De Waal, *supra* note 17, at 74.

malnutrition, and associated diseases.³⁴ Of those twenty million, one million died during the Siege of Leningrad.³⁵ In that context then, it is clear that the loss of civilian life is far greater than what would be permissible under the proportionality principle.

Starvation as a weapon of war violates the *jus in bello* principle of necessity.

Starvation is never necessary in war. The *jus in bello* principle of necessity permits measures that are *actually* necessary to accomplish a legitimate military purpose. Preventing weapons and other supplies from reaching enemy hands is a legitimate military purpose that may be achieved by a blockade. But, where blockades also prevent humanitarian aid from reaching civilians or allowing civilians access to food or water, those methods of war are morally impermissible because they cause unnecessary suffering and harm to civilians. And because a legitimate military purpose cannot be ethically achieved by means that are morally corrupt, starvation—whether it be a direct or indirect consequence of a legal method of warfare—will not satisfy the principle of necessity.

Opponents of absolute prohibitions on sieges, blockades, and other legal methods of warfare that employ the starvation tactic believe that such prohibitions would remove a vital weapon that militaries *may* need in certain rare cases. For example, where military defeat is inevitable *but for* the use of a siege of an enemy-combatant stronghold or a blockade to prevent flow of munitions to the enemy, then these means of warfare may be an *actual* necessity. Unlike rape or genocide, which are *mala in se* because they are *never* justified,³⁶ these opponents would argue that in certain rare cases, such as a “Supreme Emergency,”³⁷ starvation not only is the lesser evil, but it is also justified in order to prevent a worse tragedy or defeat. And when the legitimate needs of a military objective significantly outweigh civilian deaths by starvation, the use of starvation is justified under the necessity principle.

While there may be rare supreme emergencies that justify extreme measures to prevent human annihilation, in reality there will always be some alternative to sieges, blockades, and attacks on OIS. Under the second condition of DDE, the action is unjustified if the agent could attain the

34. Collingham, *supra* note 31, at 2.

35. *Id.* at 5.

36. See Morten Dige, *Explaining the Principle of Mala in Se*, *J. Mil. Ethics* 11(2012), 318–332, 319.

37. Michael Walzer, *Just and Unjust Wars*, 252 (1977).

good effect (military victory) without the bad effect (starvation). Moreover, in Orend's analysis, Walzer's concept of a supreme emergency corrupts the Just War tradition by dismissing the moral justifications of *jus in bello* requirements.³⁸ Applying this logic, starvation as a method of warfare could never be justified, even in a supreme emergency, because to permit such an evil act would bastardize the moral underpinnings of *jus in bello* principles. Thus, although starvation may be an efficient method of bringing the enemy to capitulation, it is not an actual military necessity even in the direst circumstances. Even if starvation as a method of warfare was *actually* necessary because of an existential threat, the suffering caused by such a method is evil in itself and must be absolutely prohibited. Therefore, the supreme emergency necessity argument is unconvincing because the starving of innocents is inherently evil and can never be justified under *jus in bello* requirements.³⁹

Starvation as a weapon of war violates the *jus in bello* principle of superfluous injury.

Starvation causes superfluous injury or unnecessary harm to civilians and combatants alike. Much like landmines, cluster munitions, biological weapons, and other weapons that are illegal because of their pernicious effects, starvation as a tool of war is insidious. Death by starvation is an agonizing process. It takes the average human two full months to die from starvation.⁴⁰ According to food and war scholar Lizzie Collingham:

Victims of starvation die of nutritional dystrophy, a process whereby, once the body has used up all its fat reserves, the muscles are broken down in order to obtain energy. The small intestine atrophies and it becomes increasingly difficult for the victim to absorb nutrients from what little food he or she is able to obtain. As a defence mechanism the body reduces the activity of the vital organs such as the heart and liver and the victim suffers not only from muscular debility but from a more general and overpowering fatigue.... The water content of the body reduces at a slower rate than the wasting of the muscles and tissues and the flaccidity of the body increases. Some victims of starvation

38. Brian Orend, *The Morality of War*, 147–148 (2006); See also, Martin Cook, "Michael Walzer's Concept of 'Supreme Emergency,'" *J. Mil. Ethics* 6 (2007):138–151, 143.

39. See, e.g., Dige, *supra* note 36, at 319.

40. De Waal, *supra* note 17, at 21.

develop hunger oedema and swell up with excess water. The swelling begins in the abdomen and legs and spreads throughout the body. The skin becomes stretched, shiny and hypersensitive. Blood pressure drops and the victim is plagued by keratitis (redness and soreness of the cornea), sore gums, headaches, pains in the legs, neuralgic pains, tremors and ataxia (a loss of control over the limbs). The symptoms are accompanied by an intensive craving for carbohydrates and salt, and uncontrollable diarrhea. Just before death the victim veers wildly from depression to intense irritation and then a profound torpor. Eventually, the body has no alternative but to sustain itself by taking protein from the vital organs....Most importantly, the heart atrophies....Organ failure is the final cause of death.⁴¹

There is no military gain that can justify use of this pernicious weapon.

Some might argue that humankind has been using starvation as a weapon of war for millennia. If it were so terrible, it would no longer be permissible during war and perpetrators of starvation crimes would be prosecuted. Incidentally, no one has ever been punished for the crime of starvation. The lack of prohibitions and prosecutions may be evidence that the international community finds this tactic acceptable—or at least more acceptable than landmines, cluster munitions, and biological weapons. Additionally, an argument can be made that combatant deaths by starvation are no worse than death by bombing and other legal means of warfare. Indeed, because the purpose of sieges and blockades is not specifically to starve the enemy to death, but rather, to starve them into submission and surrender, the pernicious effects of starvation in the late stages of organ failure is an unlikely occurrence since the enemy will usually capitulate long before it gets to that stage.

This argument fails though because the lack of prosecutions of perpetrators of starvation crimes is a problem of political will and stalemate at the UN Security Council, and not a reflection of a lack of international perception of the horror of starvation. Just because the international community has not taken steps to end the blockades and attacks on OIS in Yemen, for example, does not mean that there have not been efforts to do so. The UN Security Council passed Resolution 2417 in an effort to condemn starvation as a result of the war in Yemen, and a 2019 amendment to Rome

41. Collingham, *supra* note 31, at 5–6.

Statute expands the war crime of starvation to apply to non-international armed conflicts.⁴² The dearth of prosecutions for starvation crimes simply reflects the geopolitics of our current international order. While there may be no inevitable attempts to save Yemen, in the long run, the arc of justice is bending towards stricter and perhaps eventually absolute prohibitions on starvation as a method of war. Additionally, the idea that the enemy will capitulate before the pernicious effects of starvation take hold is not supported by historical evidence. Indeed, what tends to happen during sieges and blockades is that enemy combatants reserve vital food and water rations for themselves, furthering the plight of civilians in war zones. In fact, it is the civilians who suffer most during sieges and blockades because of limited quantities of food or water, lack of access to clean water, and because civilians are more likely to consist of the very young, the old, the infirm, and pregnant women, all of whom are less likely to be able to sustain a prolonged period of food shortage. Regardless of how many or how few die from starvation, the principle of superfluous harm prohibits unnecessary suffering, and death by starvation is an intolerably cruel way to die.

Part III: Starvation Case Studies: The Nazi Hunger Plan and Yemen's Civil War

Nazi Hunger Plan

It is well established that the Germans capitulated in World War I because they were starving and could no longer carry on military objectives without access to adequate food supplies.⁴³ As many as 750,000 Germans died as a result of malnutrition from the war.⁴⁴ In the lead up to World War II, the fact that so many Germans experienced starvation during the first world war was very much at the forefront of Hitler's concerns and plans for world domination.⁴⁵ Due to a combination of not wanting a repeat of Germany's defeat from World War I and the Nazi plan to expand the living space for Germans through the Lebensraum policy, the Nazis relied on the Reich

42. S.C. Res. 2417, ¶¶ 5–7 (May 24, 2018); International Criminal Court Assembly of State Parties, Report of the Working Group on Amendments, Eighteenth session, 2–7 December 2019, 7–9, ICC-ASP/18/32 (Dec. 3, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-32-ENG.pdf.

43. *Id.* See also, Alex De Waal, *supra* note 17, at 74; Gesine Gerhard, "Food and Genocide: Nazi Agrarian Politics in the Occupied Territories of the Soviet Union," *Contemporary European History* 18, 45–65.

44. De Waal, *supra* note 17.

45. *Id.* at 75.

Ministry of Food and Agriculture to develop policies to address food shortages and rationing to help the Nazis achieve victory in the war.⁴⁶ While much of the work of the Ministry in the early part of the war was to increase food production in Germany and Nazi-occupied territories as well as ration food for German civilians and soldiers, the Ministry was also responsible for setting the caloric requirements for Holocaust victims in concentration camps as well as POWs.⁴⁷ Nazi victims were allowed a mere 184 to 845 calories a day—a starvation diet.⁴⁸

By 1941, it was clear that in order for the Nazis to defeat the Red Army and pursue global domination, the Wehrmacht (German Army) would need a steady supply of food, which was not available in Germany.⁴⁹ The Nazis calculated that each of the 9.5 million men in the army would need to eat 3,000 calories a day to carry out military activities.⁵⁰ By 1943, the Wehrmacht was consuming 40% of the total grain and 62% of the total meat available to the Reich, leading to food shortages for civilians in Germany.⁵¹ The most valuable weapon of war, therefore, was food.

Fearing a repeat of Germany's defeat in World War I, the Nazis developed a plan that would help them defeat the Red Army and provide ample food to Germans for the duration of the war.⁵² In March–May 1941, a series of high-level meetings took place between Herbert Backe, the author of the Hunger Plan; Hermann Göring, Plenipotentiary of the Four-Year Plan and Supreme Commander of the Luftwaffe (Air Force); Adolf Hitler; and other high-ranking Nazi leaders regarding the Nazi Party's Four-Year Plan for victory.⁵³ The result of those meetings was a plan to starve thirty million “useless eaters” in the Soviet Union.⁵⁴ The Hunger Plan identified surplus zones of food production and deficit zones in the Soviet Union.⁵⁵ The surplus zones—predominantly Ukraine, known as the granary of the Soviet Union, as well as southern Russia and the Caucasus region, were to be captured by the Wehrmacht and used to send 8.7 million tons of surplus

46. *Id.* at 101.

47. Collingham, *supra* note 31, at 4–5.

48. *Id.*

49. *Id.* at 179–180.

50. *Id.* at 180.

51. *Id.*

52. De Waal, *supra* note 17, at 102; Gerhard, *supra* note 43, at 46–47.

53. Alex J. Kay, *Exploitation, Resettlement, Mass Murder: Political and Economic Planning for German Occupation Policy in the Soviet Union, 1940–1941*, 47–67 (2011 e-book).

54. De Waal, *supra* note 17, at 102; Gerhard, *supra* note 43, at 46.

55. Gerhard, *supra* note 43, at 56–57.

food to Germany, while the deficit zones—large urban centers like Moscow in northern and central Russia that required food be brought in, were to be cut off from all food supplies in order to exterminate the population.⁵⁶ The result of the policy, had it fully succeeded, would have led to the starvation of thirty million Slavic and Jewish people in the Soviet Union.⁵⁷

In May 1941, the Nazis held a conference in Wannsee, a small lake town just outside Berlin. Following the Wannsee Conference, a twenty-page document from the Economic Policy Guidelines for Economic Organization East outlining the Hunger Plan was circulated to top Nazi officials.⁵⁸ It noted:

The population of these territories, in particular the population of the cities will have to face the most terrible famine. . . . Many tens of millions of people in this territory will become superfluous and will die or must emigrate to Siberia. Attempts to reduce the population there from death through starvation by obtaining surpluses from the black earth zone can only be at the expense of the provisioning of Europe. They prevent the possibility of Germany holding out till the end of the war, they prevent Germany and Europe from resisting the blockade.⁵⁹

The Nazis formalized their starvation plan and then instigated the worst starvation crime in history.⁶⁰

The Nazis pursued the Hunger Plan under the guise of Operation Barbarossa—the Axis invasion of the Soviet Union.⁶¹ But the Nazis miscalculated the scale of the offensive, and were ultimately unable to achieve victory against the Red Army due to attrition—i.e., the Red Army had worn down the Wehrmacht through continuous losses of soldiers.⁶² The Nazis severely underestimated the difficulty of defeating the Red Army, which outnumbered the Wehrmacht by 2:1.⁶³ Despite miscalculating the Red Army's strength, the

56. *Id.* See also, Kay, *supra* note 53, at 127.

57. De Waal, *supra* note 17, at 102–3.

58. Gerhard, *supra* note 43, at 58.

59. Kay, *supra* note 53, at 135.

60. De Waal, *supra* note 17, at 15.

61. *Id.* at 102.

62. Holocaust Encyclopedia, “Invasion of the Soviet Union, June 1941, US Holocaust Memorial Museum,” <https://encyclopedia.ushmm.org/content/en/article/invasion-of-the-soviet-union-june-1941>.

63. Reina Pennington, “Was the Russian Military a Steamroller? From World War II to Today,” *War on the Rocks* (Jul. 6, 2016), <https://warontherocks.com/2016/07/was-the-russian-military-a-steamroller-from-world-war-ii-to-today/>.

Nazis did achieve a small fraction of their intended purpose in the Hunger Plan—Operation Barbarossa led to the deaths of one million Soviets due to starvation during the 900-day Siege of Leningrad.⁶⁴ A further 1–2 million Soviet POWs were starved to death in Nazi labor camps.⁶⁵

One of the primary reasons the Hunger Plan failed in its principal objective is because the Nazis underestimated the difficulty and time needed to starve thirty million people. It takes two months of no food for the average human being to starve to death.⁶⁶ For example, the IRA Hunger Striker Bobby Sands died without food after sixty-six days.⁶⁷ But the Nazis were never able to completely cut off the food supply in the Soviet Union, in part, due to the availability of food on the black market.⁶⁸ And so it took much longer to starve the population, all the while trying to defeat the Red Army through combat. It was too much to achieve, and eventually the Nazis retreated.⁶⁹ The Nazi Hunger Plan, which planned to kill thirty million people, ultimately killed around 4.7 million.⁷⁰ Had it succeeded, it would have been the worst atrocity ever committed.

Despite the fact that 4.7 million people were starved to death under the Hunger Plan, neither Herbert Backe, Hermann Göring, nor Walter Darré (Reich Minister of Food and Agriculture during the Hunger Plan) were ever charged with violating the laws of war with respect to starvation of civilians as a method of warfare. The reasons for this relate to the custom of the time, which did not prohibit starvation as a method of warfare. However, as I have argued above, the use of starvation as a weapon of the Nazi Hunger Plan is *malum in se* both because it can never be morally or ethically justified by the principles of IHL, and because it fails all four conditions of the DDE. It fails the first condition because weaponized starvation is neither morally good nor morally indifferent. It fails the second condition because the Nazis' intention was never to bring about a good effect, but rather, to exterminate 30 million Soviets while feeding the German army.

64. Collingham, *supra* note 31, at 5.

65. *Id.* at 193; Gerhard, *supra* note 43, at 60–61.

66. Collingham, *supra* note 31, at 5–6; De Waal, *supra* note 17, at 21.

67. *Id.*

68. Kay, *supra* note 53, at 134–35.

69. Encyclopedia Britannica Online, “Stalingrad and the German retreat, summer 1942–February 1943,” <https://www.britannica.com/event/World-War-II/Stalingrad-and-the-German-retreat-summer-1942-February-1943>.

70. De Waal, *supra* note 17, at 104 (noting that it is impossible to know exactly how high the death toll of the Hunger Plan was, but settling on the figure 4.7 million on the basis of leading historians' calculations).

The third condition fails because starvation of over 4 million people is a bad effect lacking justification. And the fourth condition fails because the arguable “good” effect—diverting food from the Soviet Union to feed the German army—cannot compensate for the bad effect of starving 4.7 million people. Thus, the Hunger Plan is unjustified under the principles of IHL and it fails the DDE.

Yemen’s Civil War

The war in Yemen has created the world’s worst humanitarian crisis.⁷¹ Due to the ongoing civil war that began in 2015 between Houthi rebels and the Yemeni government, widespread hunger and disease have left tens of thousands of civilians dead. More than twenty million people are suffering from food insecurity and preventable diseases such as cholera and severe malnutrition.⁷² Since 2017, an estimated thirteen million Yemenis have been declared at risk of starvation⁷³ and at least 85,000 children have died from starvation and starvation-related diseases.⁷⁴ Yemen has been teetering on the brink of famine since before the war broke out in 2015.

As the poorest nation in the Middle East, approximately 44% of Yemenis were undernourished in 2012, with as many as five million people relying on emergency food aid.⁷⁵ Water scarcity was such a significant problem for this

71. Remarks by the Secretary-General to the Pledging Conference on Yemen, The United Nations Office at Geneva (Apr. 1, 2018), [https://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/27F6CCAD7178F3E9C1258264003311FA?OpenDocument](https://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/27F6CCAD7178F3E9C1258264003311FA?OpenDocument); See also Stephen O’Brien, Statement to the Security Council on Missions to Yemen, South Sudan, Somalia, and Kenya and an Update on the Oslo Conference on Nigeria and the Lake Chad Region, United Nations Security Council (Mar. 10, 2017) https://docs.unocha.org/sites/dms/Documents/ERC_USG_Stephen_OBrien_Statement_to_the_SecCo_on_Missions_to_Yemen_South_Sudan_Somalia_and_Kenya_and_update_on_Oslo.pdf (Head of United Nations Office Stephen O’Brien telling the Security Council “We stand at a critical point in history. Already at the beginning of the year we are facing the largest humanitarian crisis since the creation of the United Nations.”) [hereinafter, O’Brien Statement 2017].

72. Humanitarian Aid, “Humanitarian crisis in Yemen remains the worst in the world, warns UN,” *UN News* (Feb. 14, 2019), <https://news.un.org/en/story/2019/02/1032811>; Doctors Without Borders/Médecins Sans Frontières (MSF) has treated 143,467 cholera and 23,319 malnutrition cases between March 2015 and September 2019. See Médecins Sans Frontières, “Yemen: Crisis Update November 2019,” <https://www.doctorswithoutborders.org/what-we-do/news-stories/story/yemen-crisis-update-november-2019>.

73. BBC News, “Yemen could be ‘worst famine in 100 years,’” (Oct. 15, 2018), <https://www.bbc.com/news/av/world-middle-east-45857729>.

74. Bethan McKernan, “Yemen: up to 85,000 young children dead from starvation,” *The Guardian* (Nov. 21, 2018), <https://www.theguardian.com/world/2018/nov/21/yemen-young-children-dead-starvation-disease-save-the-children>.

75. Joseph Hincks, “What you need to know about the crisis in Yemen,” *Time* (Nov. 3, 2016), <https://time.com/4552712/yemen-war-humanitarian-crisis-famine/>.

arid country that in 2012 experts predicted that the country's water would run out by 2017.⁷⁶ In early 2017, the UN declared Yemen in danger of imminent famine.⁷⁷ A famine is “a crisis of mass hunger that causes elevated mortality over a specific period of time”⁷⁸ and have multiple causes that include “both structural factors that determine vulnerability and the proximate triggers of the crisis.”⁷⁹ Famines can be distinguished by magnitude (the number of casualties) and severity (the level of food insecurity).⁸⁰ The severity of food insecurity consists of five phases: (1) minimal; (2) stressed; (3) crisis; (4) emergency; and (5) famine.⁸¹ Multiple regions in Yemen are presently described as being in phase 3 crisis or phase 4 emergency.⁸² The worst areas of food insecurity are where the conflict is being fought—Hudaydah, Sana'a, Ta'izz, Aden, and the Red Sea Coast villages.

Civilian deaths in Yemen caused by starvation and starvation-related diseases such as cholera are man-made.⁸³ Two categories of events are primarily responsible for starvation deaths and injury: (1) military attacks on agricultural and food production that destroy, deny, or render useless OIS, and (2) blockades of airports and seaports causing obstruction of humanitarian aid.⁸⁴ The groups responsible for these atrocities include all of the major parties to the conflict: Iranian-supported Houthi rebels, Yemeni government and military, as well as the Saudi Arabia-led Coalition (SLC). Documentation of attacks on civilian food supplies shows that perpetrators targeted civilians as part of

76. Frederika Whitehead, Water scarcity in Yemen: the country's forgotten conflict, *The Guardian* (Apr. 2, 2015, 5:18 a.m.), <https://www.theguardian.com/global-development-professionals-network/2015/apr/02/water-scarcity-yemen-conflict>; IRIN in Sana'a, “Time running out for solution to Yemen's water crisis,” *The Guardian* (Aug. 27, 2012, 7:30 a.m.), <https://www.theguardian.com/global-development/2012/aug/27/solution-yemen-water-crisis>.

77. O'Brien Statement 2017, *supra* note 71.

78. Alex De Waal, “The end of famine? Prospects for the elimination of mass starvation by political action,” *Political Geography* 62 (2018): 184, 185

79. *Id.* at 185.

80. Paul Howe and Stephen Deveraux, “Famine Intensity and Magnitude Scales: A proposal for an instrumental definition of famine,” *Disasters* 28 (2004): 353–372; Famine Early Warning Systems Network, Integrated Phase Classification, <https://fews.net/IPC>.

81. Famine Early Warning Systems Network, “Integrated Phase Classification,” <https://fews.net/IPC>.

82. Famine Early Warning Systems Network, “Yemen Food Security Outlook,” October 2019 to May 2020, <https://fews.net/east-africa/yemen/food-security-outlook/october-2019>.

83. *See generally* De Waal, *supra* note 17.

84. Martha Mundy, “The Strategies of the Coalition in the Yemen War: Aerial Bombardment and Food War,” *World Peace Foundation* 11 (2018), <https://sites.tufts.edu/wpff/files/2018/10/Strategies-of-Coalition-in-Yemen-War-Final-20181005-1.pdf> [hereinafter Mundy].

a method of warfare, an unambiguous violation of *jus in bello* and Just War tradition.⁸⁵ Some reports point to Saudi Arabia's Crown Prince Mohammad bin Salman having authorized the use of starvation as a method of warfare to defeat the Houthis.⁸⁶

One of the main contributors to starvation and related diseases in Yemen has been the deliberate and disproportionate destruction of OIS, which includes attacks on critical infrastructure such as electricity sources, water supplies, irrigation dams, agricultural extension facilities, and health facilities. The Human Rights Council reported that SLC airstrikes have caused significant damage to civilian objects, leading to numerous civilian deaths.⁸⁷ Destruction of OIS in Ta'izz, Tihama, and the Red Sea Coast are some of the most egregious incidents of the war in Yemen causing starvation of civilians.

Because it was one of the primary battlegrounds in the conflict between Houthi rebels and the SLC, the Ta'izz governorate suffered some of the worst death tolls of the war. Beginning in 2014, civilian objects were repeatedly targeted, leading to the deaths and displacement of many civilians.⁸⁸ A variety of factors have worsened food insecurity in Ta'izz, leading to starvation of civilians. As a result of ongoing fighting, access to food in markets has been reduced significantly, and the price of food items has increased drastically, making food unaffordable for many.⁸⁹ Additionally, SLC airstrikes targeting farms, markets, agricultural offices, and transportation centers have further increased food shortages.⁹⁰ In December 2017, SLC airstrikes targeted a market in al-Ta'iziyah district, completely destroying the market and leaving fifty-four civilians dead and a further thirty-two injured.⁹¹ Seventy five percent of the civilian population in

85. *Id.* at 24.

86. A senior Saudi Arabia-led Coalition Arabia-led Coalition diplomat stated off-record, "Once we control them, we will feed them." *Id.* at 7; See also "Bin Salman threatens to target women and children in Yemen despite international criticism," *Middle East Monitor* (Aug. 27, 2018, 10:39 a.m.), <https://www.middleeastmonitor.com/20180827-bin-salman-threatens-to-target-women-and-children-in-yemen-despite-international-criticism/>.

87. UN Office of the High Commissioner on Human Rights, Yemen: United Nations Experts point to possible war crimes by parties to the conflict (Aug. 28, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23479>.

88. World Peace Foundation, Accountability for Mass Starvation: Starvation in Yemen Policy Brief, World Peace Foundation, 6–7 (2019), <https://sites.tufts.edu/wpf/files/2019/06/Accountability-for-Starvation-Crimes-Yemen.pdf> [hereinafter WPF Policy Brief].

89. *Id.* at 6–7.

90. *Id.*

91. *Id.*

Ta'izz in August 2018 were ranked as food insecure and at least 85% were dependent on humanitarian aid.⁹²

In addition to the attacks in Ta'izz, other areas of the country, including fishing villages, have been targeted. Many airstrikes on agricultural targets were conducted from March 2015 to August 2016.⁹³ Attacks on agricultural land are particularly egregious because only 5% of Yemen's land is arable, and prior to the war, only 3% of Yemen's total land surface was used for agriculture.⁹⁴ In Tihama, the attacks on OIS were not on fields or flocks, but on irrigation systems powered by oil-driven pumping. Beginning in 2011, and as a consequence of the war, oil shortages and price increases have made it nearly impossible for farmers to irrigate their land.⁹⁵

Since the late 1970s, the World Bank has invested in professionally engineered water diversion structures, overseen by the Tihama Development Authority (TDA), used to strengthen water disbursement to farm lands in the region.⁹⁶ Twice in August 2015 and again in September, the SLC delivered a total of fifteen airstrikes on the TDA's central compound just outside Hudaydah, and a further three airstrikes attacked irrigation structures in Wadi Siham in October 2015.⁹⁷ The Yemen Data Project reports two additional attacks on TDA infrastructure in 2016 and another three in early 2017.⁹⁸ As a consequence of these attacks, agricultural yields decreased by 24% among farmers in Wadi Zabid and 46% in Wadi Siham, due primarily to irrigation water shortages.⁹⁹ The Tihama region, once considered the breadbasket of Yemen, has decreased land cultivation by 51%, crop yields declined by 20–61% per hectare, and there has been a complete annihilation of fruits, vegetables, and livestock population, leading to 43% of the population being food insecure.¹⁰⁰

92. *Id.*

93. Mundy, *supra* note 84, at 11.

94. Food and Agriculture Organization of the United Nations, "Selected Indicators," <http://www.fao.org/faostat/en/?#country/249>.

95. Mundy, *supra* note 84, at 13.

96. *Id.* at 14.

97. *Id.*

98. *Id.*

99. The Water and Environment Center of San'a' University, *Food Production, Irrigation, Marketing, and Agricultural Coping Mechanisms, Tihama* (Wadi Zabid and Wadi Siham), Briefing Note 2–Food Security (FBLN, NICHE–Yem027), Flood-Based Livelihoods Network Foundation, <http://spate-irrigation-org/wp-content/uploads/2018/02/Briefing-Note-2-%E2%80%93Food-Security-pdf>.

100. Flood-based Livelihoods Network Foundation, "Yemen's Burnt Granary," <http://spate-irrigation.org/yemens-burnt-granary/#more-6422>.

Artisanal fishing has long been a primary source of food production in Yemen. The General Authority of Fishing in the Red Sea documented damages to fishing from the beginning of the war through December 2017, reporting 146 fishermen killed and 220 fishing boats destroyed by SLC airstrikes in 2018.¹⁰¹ Prior to the war in 2015, Yemen's fisheries sector ranked second in terms of exports and constituted 2% of Yemen's GDP.¹⁰²

Another major cause of starvation in Yemen is the unlawful obstruction and manipulation of humanitarian relief because of blockades. Evidence of impeding humanitarian supplies and operations shows that blockades have halted delivery of humanitarian assistance and have caused unreasonable delays in transportation of humanitarian aid to areas affected by the famine.

Hudaydah was Yemen's poorest governorate prior to the outbreak of war in 2015.¹⁰³ Sixty percent of Yemen's malnourished population resided in Hudaydah.¹⁰⁴ There are three major ports in the governorate, two of which (Al-Hudaydah and Al-Saleef) receive the majority of Yemen's food imports; the total number of commercial imports has declined significantly since 2014.¹⁰⁵ There are two other ports in Yemen at Aden and Al-Mukalla, but they lack the infrastructure necessary to receive bulk food shipments.¹⁰⁶ In April 2015, the SLC undertook a blockade of the Red Sea ports in order to inspect commercial ships that could be carrying prohibited weapons to the Houthis.¹⁰⁷ The consequence of the blockade, which lasted sixteen months, was to effectively limit the flow of food, fuel, and medicine to civilians.¹⁰⁸ On 6 November 2017, the SLC retaliated against a Houthi missile attack on Riyadh by imposing a sixteen-day total air, sea, and land blockade of Yemen, which blocked all food and fuel coming into the country,¹⁰⁹ leading to increased food insecurity and deaths by starvation and malnutrition.

The war in Yemen presents a very different case study from the Nazi Hunger Plan. While the Nazis used starvation as a weapon of extermina-

101. Taqirir 'an al-qita ' al-samaki fi-'l-bahr al-ahmar ba'd alf yaum min al-'udwan [Report on the fishing sector in the Red Sea after a thousand days of the aggression] al-Hai'ah al-'Amman li'-Masa'id al-Samakiya fi'l-Bahr al-Ahmar, 13–43 (Jan. 2018).

102. Ammar Al-Fareh, "The Impact of the War in Yemen on Artisanal Fishing of the Red Sea," *LSE Middle East Centre Report 7* (2018), http://eprints.lse.ac.uk/91022/1/Al-Fareh_The-impact-of-war_Author.pdf.

103. WPF Policy Brief, *supra* note 88, at 7.

104. *Id.*

105. *Id.*

106. *Id.* at 7–8.

107. *Id.*

108. *Id.* at 8.

109. *Id.*

tion, the SLC are using blockades and attacks on Houthi-strongholds. Even if it could be proven that the SLC's tactics did not intentionally starve civilians or specifically target OIS for destruction, which would be very difficult to prove based on the evidence presented above, these tactics are nevertheless *malum in se* because the result is reckless indifference to the starvation of civilians in violation of the four principles of IHL set forth above. Additionally, although SLC blockades and airstrikes in Yemen may intend a good effect (e.g., to defeat the Houthi rebels and restore peace and security in the region), the bad effect (starvation) fails justification under DDE's third and fourth conditions because it is impermissible to use a bad means to achieve a good end, and the effect of bringing an end to the war, which has not worked anyway, is not proportional to the starvation deaths of civilians. For these reasons, I advocate for stricter prohibitions on legal methods of warfare that lead either directly or indirectly to starvation.

Part IV: Conclusion

This paper has argued that the use of starvation as a method of warfare should be absolutely prohibited under international law because it is *malum in se*. While some might argue that both IHL and ICL prohibit starvation already, I submit that the current legal instruments prohibiting starvation are inadequate, both because they are not enforced and because current instruments permit starvation when it is an indirect consequence of legal methods of warfare, such as sieges and blockades. These problems underscore the need for greater restrictions in the existing legal framework to ensure that starvation is never a permissible outcome of a military objective, whether directly or indirectly.

The problem of enforcement owes largely to the fact that the most recent examples where starvation crimes have been committed—Yemen and Syria—do not come under the jurisdiction of the ICC. Without a referral from the UN Security Council to the ICC, it is highly unlikely that perpetrators of starvation crimes will be held accountable¹¹⁰ because the legal systems of these failed states are either unable or unwilling to prosecute perpetrators. Thus, the best that can be done is to preserve evidence of starvation crimes for future prosecutions and for the international community to put pressure on members of the Security Council, but in particular the P3 (US, China, and Russia), to pass a Chapter VII Resolution

110. Graham, *supra* note 27.

to investigate starvation crimes in Yemen and Syria, and to recommend prosecutions of those individuals.

Another way to bring an end to the use of starvation as a weapon of war is for states to make declarations condemning it and calling for the codification or progressive development of international law to place stricter prohibitions on starvation. Some strategies for pursuing this aim include characterizing the crime of starvation as a non-derogable *jus cogens* peremptory norm under existing treaties and conventions,¹¹¹ and lobbying for the Security Council to adopt a Chapter VII Resolution calling for an end to starvation as a weapon of war and describing it as *malum in se*. These steps would send a clear signal that starvation will no longer be tolerated under international law.

Finally, military ethicists can influence a change in the law by persuading state officials and military leaders that legal methods of warfare that cause starvation, whether directly or indirectly, are not necessary to achieve military objectives. Other means can achieve similar goals without the insidious consequences of civilian suffering caused by starvation. Thus, a shift in attitude among military leaders and state officials can create a new custom that starvation is *malum in se*, making it easier to place more meaningful legal restrictions on the use of starvation during war and ending impunity for perpetrators of starvation crimes.

111. The International Law Commission's work on *jus cogens* peremptory norms of general international law does not list the prohibition on starvation in its recent report, but the prohibition on crimes against humanity and genocide are certainly closely related to starvation. See Int'l Law Com., Peremptory norms of general international law (*jus cogens*), Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, (May 29, 2019), A/CN.4/L.936.