

HUNGER CRIMES AND THE CONFLICT IN UKRAINE

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I. INTRODUCTION

The conflict in Ukraine has starkly brought to the forefront the many ways conflict can contribute to food insecurity—both in the country experiencing armed conflict and also globally because of disruptions of exports.¹

In recent years, conflict-induced hunger has been high on the international community's agenda, and a number of important steps have been taken to advance the normative framework relevant to food insecurity in armed conflict.²

In May 2018, the United Nations Security Council (Security Council) adopted a landmark thematic resolution on conflict-induced food insecurity.³ Among other things, Security Council Resolution 2417 repeatedly referred to the importance of compliance by belligerents with relevant international law and noted that unlawful denial of humanitarian access could constitute a threat to international peace and security.⁴

In parallel, in April 2018, Switzerland presented a proposal to the Assembly of States Parties to the International Criminal Court (ICC) to amend the Statute of the ICC (the Rome Statute) to include the starvation of civilians as a war crime in non-international armed conflicts.⁵ The Assembly adopted this amendment in December 2019, and as of August 2023, it has been ratified by twelve states.⁶

While the amendment sends a strong political message, it is unlikely that the war crime of starvation will be the basis for investigations in view of the complexity of the underlying rules of international humanitarian law (IHL) prohibiting starvation, particularly with regard to international armed conflicts. The relevant treaty provision, article 54 of the 1977 first Protocol Additional to the Geneva Conventions⁷ (AP I) is complex and convoluted, and its interpretation raises numerous questions.

1. According to the UN Food and Agriculture Organization (FAO), “[I]n 2021, either the Russian Federation or Ukraine, or both, ranked among the top three global exporters of wheat, barley, maize, rapeseed and rapeseed oil, sunflower seed and sunflower oil.” *The Importance of Ukraine and the Russian Federation for Global Agricultural Markets and the Risks Associated with the War in Ukraine*, FAO 1, 47 (June 10, 2022), www.fao.org/3/cb9013en/cb9013en.pdf.

2. Emanuela-Chiara Gillard, *Conflict-Induced Hunger and the Security Council, The State of Play Three Years After the Adoption of SCR 2417: Challenges and Opportunities*, OXFORD INST. FOR ETHICS & ARMED CONFLICT 4, 17 (Nov. 2021), <https://www.elac.ox.ac.uk/wp-content/uploads/2022/03/gillard-conflict-inducedhungerandthesecuritycounciloxford2021pdf>.

3. S.C. Res. 2417 (May 24, 2018).

4. *Id.* ¶ 4.

5. Int'l Crim. Ct.-Assembly of States Parties, *Report of the Working Group on Amendments* 10–13, ICC-ASP/17/35 (Sept. 20, 2018), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP17/ICC-ASP-17-35-ENG.pdf.

6. U.N. Treaty Collection, Amendment to Article 8 of the Rome Statute of the International Criminal Court (Intentionally Using Starvation of Civilians), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-g&chapter=18&clang=_en (last visited Sept. 5, 2023).

7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

In view of its complexity, it is warranted to set out the provision in full:

Article 54—Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
 - (a) as sustenance solely for the members of its armed forces; or
 - (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

The *Texas Tech Criminal Law Symposium* focused on *criminal* accountability in war time. As a preliminary point, it is helpful to recall the relationship between war crimes and IHL—also known as the “law of armed conflict,” or the “law of war.” War crimes are serious violations of IHL.⁸ A war crime may be framed more narrowly than the underlying rule of IHL,⁹ but it cannot be broader in scope. Acts that do not constitute violations of IHL cannot be interpreted as amounting to war crimes.¹⁰ This relationship must be borne in mind when interpreting war crimes, including the war crime of starvation of the civilian population in the Rome Statute.¹¹

The present Article contributes to the Symposium’s focus by taking a step back from *criminal* accountability and flagging a number of unsettled

Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol].

8. *What Are “Serious Violations of International Humanitarian Law”?* Explanatory Note, INT’L COMM. RED CROSS, <https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf> (last visited Sept. 5, 2023).

9. This is the case for the rule of proportionality. For example, article 51(5) AP I prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The corresponding war crime in the Rome Statute is limited to attacks where the expected incidental harm is *clearly* excessive to the *overall* anticipated military advantage. Rome Statute of the Int’l Crim. Ct. art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

10. *What Are “Serious Violations of International Humanitarian Law”?* Explanatory Note, *supra* note 8.

11. Rome Statute, *supra* note 9, art. 8(2)(b)(xxv).

questions on the rule of IHL prohibiting starvation of the civilian population that have been raised by the war in Ukraine.

II. WHAT CONSTITUTES “STARVATION?”

A first question is what constitutes “starvation” for the purpose of IHL.

The term “starvation” has been given a wider interpretation than the literal meaning of depriving of food and water to encompass deprivation of other goods essential to survival in a particular context. These could include heating, fuel, and blankets in a cold climate. This is clear in the formulation of the war crime in the Rome Statute, which refers to “starvation of civilians as a method of warfare by depriving them of *objects indispensable to their survival*.”¹²

This is significant because, as just noted, it is not possible for a war crime to be broader in scope than the underlying rule. Consequently, by the time of the negotiation of the Rome Statute, states must have been of the view that the underlying prohibition covered this wider range of commodities, rather than just food and water.¹³ This is implicit recognition that the underlying rule of IHL also covers the same range of commodities.

In terms of threshold of need, “starvation” implies a high degree of deprivation, where survival is threatened.¹⁴ It is more extreme than the “not adequately provided” standard that brings into play the rules of IHL regulating humanitarian relief operations.¹⁵ However, it is not necessary for death to occur.

III. MUST STARVATION OF CIVILIANS BE THE PURPOSE OF THE CONDUCT?

A more complex question is whether the prohibition in article 54 AP I only covers situations where the belligerent resorting to this method of warfare has the *purpose* of starving the civilian population, or whether it also covers situations where, although not the purpose of that party, starvation of the civilian population is the *foreseeable consequence* of a particular course of action.

For example, if civilians and fighters are present in a besieged city, would a besieging party that does not allow the entry of commodities because it wants to starve the fighters—knowing that this is also going to cause starvation of civilians—be violating the prohibition? Would an attack on a

12. See Rome Statute, *supra* note 9, art. 8(2)(b)(xxv) (emphasis added); see also Dapo Akande & Emanuela-Chiara Gillard, *Conflict-Induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law*, 17 J. INT’L CRIM. JUST. 753 (2019); OTTO TRIFFTERER & KAI AMBOS, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* ch. 25 ¶¶ 768–72 (C.H. Beck et al. eds., 3d ed. 2016).

13. See Additional Protocol, *supra* note 7, art. 54(2).

14. See *Starve*, WEBSTER’S NEW COLLEGIATE DICTIONARY (1977).

15. See Additional Protocol, *supra* note 7, art. 70(1).

bridge used by military forces whose destruction would prevent humanitarian relief from reaching civilians in severe need and lead to starvation violate the prohibition? Is what matters the *purpose* of a course of action or its *effects*?

A distinction must be drawn between the general prohibition of starvation of civilians as a method of warfare in article 54(1), and the prohibition in article 54(2) on attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population.

As far as the general prohibition in article 54(1) AP I is concerned, a narrow interpretation is warranted that only prohibits conduct whose *purpose* is starving civilians. This approach is based on a literal interpretation of the provision: paragraph (1) does not prohibit starvation as such, but only starvation “as a method of warfare,” suggesting that what is prohibited are not the results, but rather the use of a particular technique or way of fighting. The *travaux* to what became article 54 AP I, as well as leading commentaries to the text, also indicate that only deliberate starvation of civilians is prohibited.¹⁶

The majority of military manuals simply reiterate the wording of article 54 AP I. The few that do enter into a substantive discussion support this narrow interpretation.¹⁷

The position is different with regard to the prohibition in article 54(2) and (3) AP I. Article 54(2) prohibits “attack[ing], destroy[ing], remov[ing], or render[ing] useless objects indispensable to the survival of the civilian

16. See, e.g., INT’L COMM. OF THE RED CROSS, COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 1977 TO THE GENEVA CONVENTIONS OF 1949 653 ¶ 2089 (Yves Sandoz et al. eds., 1987) (stating that “To use [starvation] as a method of warfare would be to provoke it *deliberately*, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.” (emphasis added)); see also MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 381 (2d ed., Martinus Nijhoff Publishers 2013).

17. For example, Australia’s *Commanders’ Guide* notes that AP I prohibits the starvation of civilians as a method of warfare and explains that “[m]ilitary operations involving collateral deprivation are not unlawful as long as the object is not to starve the civilian population.” AUSTL. DEF. FORCE, COMMANDERS’ GUIDE § 907 (1994). The U.K. *Military Manual* states that “[t]he law is not violated if military operations are not intended to cause starvation but have that incidental effect, for example, by cutting off enemy supply routes which are also used for the transportation of food . . .” MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 74 ¶ 5.27.2 (2004). This position is reflected in the reservation to article 54(2) AP I made by the U.K. upon ratification of AP I in 1998: “The United Kingdom understands that paragraph 2 has no application to attacks that are carried out for a specific purpose other than denying sustenance to the civilian population or the adverse party.” RATIFICATION OF THE ADDITIONAL PROTOCOLS BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, 38 INT’L REV. RED CROSS 186, 189 (1998). The U.S. *Department of Defense Manual* specifies that “[s]tarvation specifically directed against the enemy civilian population . . . is prohibited.” U.S. DEP’T OF DEF., LAW OF WAR MANUALS, at 315 ¶ 5.20.1 (2016), <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf>. The U.S. Manual does add that “[m]ilitary action intended to starve enemy forces however must not be taken where it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage anticipated to be gained,” suggesting that a proportionality assessment should be conducted. *Id.* at 316 ¶ 5.20.2. Recognizing that the U.S. has not ratified AP I, it is unclear whether this last sentence refers to the prohibition in article 54(1) or that in article 54(2) AP I. *Id.*

population . . . for the *specific purpose* of denying them for their sustenance value to the civilian population.” However, article 54(3) AP I indicates that there may be situations when such attacks, destruction, removal, rendering useless are prohibited even when the attacking party does not have the purpose of depriving the civilian population of those objects, but where starvation is *foreseeable*.

Article 54(3)(b) provides “that in no event shall actions against objects [indispensable to the survival of the civilian population] be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.” This is a prohibition that goes beyond the one in article 54(2).¹⁸ It suggests that even if the *specific purpose* of the conduct is *not* to deny the objects for their sustenance value to the civilian population or to the adverse party, it is nonetheless prohibited “to attack, destroy, remove or render [these objects] useless,” if the *effect* of such acts would be to cause starvation or forced movement of the civilian population *and* if such an effect should have been expected. In such cases, the prohibition would apply if the starvation was simply a foreseeable consequence of the course of action, even if causing such starvation was not the purpose of the attacking party.

A combined reading of the various paragraphs of article 54 suggests that while the general prohibition of starvation in article 54(1) requires the *purpose* of starving the civilian population, the prohibitions in article 54(2) and (3), which relate to specific conduct that may lead to food insecurity and eventually to starvation—“attack[ing], destroy[ing], remov[ing] or render[ing] useless objects indispensable to the survival of the civilian population”—do *not* require this purpose.

IV. THE PROHIBITION ON ATTACKING, DESTROYING, REMOVING, OR RENDERING USELESS OBJECTS INDISPENSABLE TO THE SURVIVAL OF THE CIVILIAN POPULATION IN THE UKRAINE CONFLICT

The way hostilities have been conducted in Ukraine raises questions of whether the prohibition in article 54(2) AP I has been violated.

For example, according to Ukraine’s Ministry of Defense, “Russian forces have attacked grain silos across the country and stolen an estimated 400,000–500,000 metric tons of grain from occupied regions.”¹⁹ Unharvested crops have caught fire during hostilities, and there have been reports of soldiers looting supermarkets.²⁰

18. See Additional Protocol, *supra* note 7, art. 54(2)–(3) (emphasis added).

19. Caitlin Welsh et al., *Spotlight on Damage to Ukraine’s Agricultural Infrastructure Since Russia’s Invasion*, CTR. FOR STRATEGIC & INT’L STUD. (June 15, 2022), <https://www.csis.org/analysis/spotlight-damage-ukraines-agricultural-infrastructure-russias-invasion>.

20. See Additional Protocol, *supra* note 7, art. 54(2).

Do these acts, and others that targeted or damaged fields, crops, and other objects necessary for the production or storage of food, violate the prohibition in article 54(2) AP I?

Article 54(2) AP I prohibits “attack[ing], destroy[ing], remov[ing] or render[ing] useless objects indispensable to the survival of the civilian population.” The type of prohibited interference is broader than the protection ordinarily accorded to civilian objects, which are protected from direct or indiscriminate attack.²¹

In particular, the prohibition on removing “objects indispensable to the survival of the civilian population” expands the prohibition of pillage to cover *all* property, not just private property. “Destroy[ing]” and “render[ing] useless” prohibit a broader range of forms of interference or harm than attacks. For example, this could include contaminating water sources.

The prohibition applies even though the objects in question are military objectives, for example, by virtue of their location or use. For example, this could be the case if a water tower is used for observation purposes.

Significantly, however, these acts are prohibited only if they are conducted for the “*specific purpose*” of denying the objects in question for their “*sustenance value*” to the civilian population.²²

The prohibition is thus not absolute. By way of example, these words of limitation mean that it is not prohibited to attack a wheatfield if enemy troops are using it as cover. The wheatfield has become a military objective by virtue of its use. As it is not being destroyed for the purpose of denying the crops for their sustenance value to civilian populations, the attack does not fall within the scope of the prohibition.

There may be circumstances when looting of supermarkets by enemy forces will not fall within the prohibition. This would be the case if the purpose of the looting was to benefit the perpetrators, rather than for the specific purpose of denying local civilian population of the sustenance value of the looted goods.

The existence—or absence—of the requisite purpose may be relatively easy to infer in certain situations, and in other cases less so. Rather than from individual acts, the requisite purpose is more likely to be evinced by a pattern of behavior.

For example, the Commission on Human Rights in South Sudan established by the UN Human Rights Council considered the behavior of armed forces in an agrarian community. Over a period of two years, they:

- systematically looted a town;
- pillaged food and livestock, including goats, chickens, grains, food, and the previous year’s harvest;

21. See generally *id.* (granting wide protections to this category).

22. See *id.*

- burned the local market to the ground;
- erected checkpoints around the area to prevent civilians from selling their wares at the local market, and extorted money from them at checkpoints;
- caused the displacement of civilians to the bush, where they did not have access to adequate food, potable water, and shelter; and
- stole pumps used to pump water from boreholes, depriving the communities of access to water for consumption and sanitation. Bore holes were targeted systematically.²³

This pattern of behavior led the Commission to conclude that the prohibition on starvation of civilians had been violated.²⁴

The same analysis would be necessary for the various acts of the Russian forces in relation to assets necessary for food production, storage, or delivery.

V. IS ENERGY INFRASTRUCTURE AN “OBJECT INDISPENSABLE TO THE SURVIVAL OF THE CIVILIAN POPULATION” FOR THE PURPOSE OF ARTICLE 54(2) AP I?

A further question raised by the conduct of hostilities in Ukraine is whether energy infrastructure can be considered an “object[] indispensable to the survival of the civilian population” for the purpose of the prohibition in article 54(2) AP I.

The rules prohibiting starvation of the civilian population as a method of warfare afford specific protection to “objects indispensable to the survival of the civilian population.” Article 54(2) AP I gives a number of indicative examples of such objects including: foodstuffs, crops, livestock, drinking water installations, supplies, and irrigation works.²⁵

As elaborated above, the term “starvation” has been given a wider interpretation than the literal meaning of depriving of food and water, to encompass also deprivation of other goods essential to survival in a particular context, such as heating, oil, and blankets.²⁶ Should the list of objects indispensable to the survival of the civilian population protected under article 54(2) AP I be given a similarly expanded interpretation, beyond food and water, to include objects necessary for survival because they provide electricity and heating, for example?

This is a live question in the war in Ukraine. Should Russia’s barrage of attacks on Ukraine’s critical energy infrastructure in the autumn and winter

23. U.N. Hum. Rts. Council, Conference Room Paper of the Commission on Human Rights in South Sudan, U.N. Doc. A/HRC/45/CRP.3 (Oct. 5, 2020).

24. *Id.* at 36.

25. *Id.*

26. *See supra* Part II (discussing what constitutes starvation for the purpose of IHL).

of 2022²⁷ be considered a violation of the prohibition in article 54(2) AP I to attack or render useless objects indispensable to the survival of the civilian population?

Power infrastructure may constitute a military objective if the electricity it supplies makes an effective contribution to military action and if its neutralization in the circumstances prevailing at the time offers the attacker a definite military advantage.²⁸ However, even if all the power infrastructure systems and facilities that were attacked in Ukraine actually constituted military objectives, article 54(3) AP I would nonetheless prohibit the attacks if they were expected to leave the civilian population “with such inadequate food or water as to cause its starvation or force its movement.”

Although all three paragraphs of article 54 AP I are related, article 54(3) AP I specifically refers to “inadequate food or water as to cause its starvation.” For the purpose of this provision, a broader definition of starvation to include deprivation of other objects indispensable to the survival of the civilian population appears stretched.

Proportionality appears to be a more helpful framework of analysis. There is no need to establish the purpose of the attacks. It is also a more protective approach for civilians. *All* injuries or death of civilians that were reasonably foreseeable when the attacks were conducted must be taken into account, without having to reach the threshold of deprivation of starvation for the rule to come into play.

VI. CONCLUSION

There is no doubt that hostilities in Ukraine have been conducted in a manner that adversely affects food production and availability in significant ways.²⁹ This is even without considering the impact of the conflict in Ukraine on food security in third countries—which although regrettable, is not in the author’s view addressed by IHL.

It is possible that some of the conduct violated the prohibition in article 54(2) AP I, as it was carried out for the specific purpose of denying the objects in question to the civilian population for their sustenance value. In the majority of cases, however, the conduct in question is also likely to have violated other—clearer—rules of IHL. For example, damage to grain silos could be the result of prohibited direct attacks against them, indiscriminate

27. Joseph Majkut & Allegra Dawes, *Responding to Russian Attacks on Ukraine’s Power Sector*, CTR. FOR STRATEGIC & INT’L STUD. (Nov. 8, 2022), <https://www.csis.org/analysis/responding-russian-attacks-ukraines-power-sector>.

28. See Eirini Giorgou & Abby Zeith, *When the Lights Go Out: The Protection of Energy Infrastructure in Armed Conflict*, INT’L COMM. RED CROSS: HUMANITARIAN L. & POL’Y (Apr. 20, 2023), <https://blogs.icrc.org/law-and-policy/2023/04/20/protection-energy-infrastructure-armed-conflict/>.

29. See Caitlin Welsh, *Russia, Ukraine, and Global Food Security: A One-Year Assessment*, CTR. FOR STRATEGIC & INT’L STUD. (Feb. 24, 2023), <https://www.csis.org/analysis/russia-ukraine-and-global-food-security-one-year-assessment>.

attacks, or violations of the rule of proportionality. Attacks against the energy infrastructure are likely to also violate the rule of proportionality. Looting of supermarkets is likely to constitute pillage.

In view of this, and to return to the focus of the *Symposium*—criminal accountability—it seems unlikely that prosecutors would choose the more complicated and, thus far more unexplored, avenue of investigating the war crime of starvation of civilians when more evident violations are apparent, even if they have the downside of not capturing and condemning a broader pattern of behavior.