



Starvation of Civilians as a Method of Warfare:  
Determining the Required Intent

Olivia Luzzana

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Swedish Defence University Department of Political Science and Law

Supervisor: Nobuo Hayashi

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## Abstract

This study examines the legal framework prohibiting the starvation of civilians as a method of warfare, with a focus on the intent required to constitute a violation. The research seeks to answer the question: What degree of intent is required to constitute a violation of the prohibition against the starvation of civilians as a method of warfare? It is important to consider the intent required to hold a perpetrator liable for the war crime of starving civilians, particularly in light of the continued use of, for example, siege warfare in armed conflicts, where the starvation of civilians is often an inevitable consequence. Following an introduction to the legal framework prohibiting the starvation of civilians and the relevant mental elements, the thesis examines the war crime in detail, including its various elements, the intent required for each, relevant court decisions involving similar mental element requirements, and the drafting history of the provisions. It is demonstrated that, while the intent and knowledge under article 30 of the Rome Statute applies to the elements of the crime lacking an independent *mens rea*, the intent to starve civilians as a method of warfare requires *dolus specialis*, a specific additional intent that ‘otherwise provides’ article 30’s default rule. While the main focus of this study is given to the required intent, it also examines several modes of liability, further illustrating that the liability a perpetrator may incur depends on the presence or absence of *dolus specialis*. The findings contribute to understanding the degree of intent required to the prohibition of starving civilians as a method of warfare, as well as its applicability in practice, particularly in cases of siege warfare.

Keywords: starvation, civilians, method of warfare, war crime, siege warfare, intent, article 30, ICL, IHL, international law

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## 1 Introduction

As a result of encirclement by the Israeli Defense Forces, Palestinians in the Gaza Strip resort to digging for water and grinding animal feed into flour to combat famine, due to the cessation of supplies.<sup>1</sup> The situation in the Gaza Strip is not unique, civilians in cities such as Mariupol in Ukraine, Madaya, Aleppo and Ghouta in the Syrian Arab Republic, and Yemen, have similarly been subject to starvation resulting from sieges.<sup>2</sup> Sieges, absent a definition in international law, have elsewhere been defined as encirclement and bombardment of an area containing military belligerents. By cutting off supplies and access to vital necessities, the besieging force aims to compel the enemy to surrender through starvation.<sup>3</sup> Starvation is often thought of as prolonged deprivation of food and water, but does also include deprivation of other necessities vital for survival, such as medicine and heating supplies.<sup>4</sup> Sieges have existed for decades, and is considered an effective and more secure alternative to direct combat in urban environments by surrounding the enemy instead of engaging in direct fire.<sup>5</sup> Although the ultimate objective is the capitulation of the besieged force, areas under encirclement often contain civilian inhabitants that, as a result, suffer the same deprivations as the intended military targets, which the above examples of the Gaza Strip, amongst others, illustrate.<sup>6</sup>

International humanitarian law (IHL), or *jus in bello*, acknowledges that death, injury, and destruction are inevitable consequences of armed conflict. The purpose with IHL is to humanise warfare to the greatest extent possible, by imposing restrictions and mitigating the effects of hostilities.<sup>7</sup> Therefore, IHL makes no exception to include its fundamental principles, such as distinction and proportionality, to siege warfare, despite its non existing

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<sup>1</sup> Lucy Williamson, 'Gaza Residents Surviving off Animal Feed and Rice as Food Dwindles' *BBC* (Jerusalem, 10 February 2024) <<https://www.bbc.com/news/world-middle-east-68239320>> accessed 29 October 2024.

<sup>2</sup> UNGA Res 79/171 (17 July 2024) UN Doc A/RES/79/171 [34]

<sup>3</sup> Maxime Nijs, 'Humanizing Siege Warfare: Applying the Principle of Proportionality to Sieges' (2020) 102 *International Review of the Red Cross* 683, 686–687.

<sup>4</sup> Knut Dörmann and Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (1st edn, Cambridge University Press 2003) 363

<sup>5</sup> Nils Hägerdal, 'Starvation as Siege Tactics: Urban Warfare in Syria' (2023) 46:7 *Studies in Conflict & Terrorism* 1241, 1247–1248.

<sup>6</sup> Emanuela-Chiara Gillard, 'Sieges, the Law and Protecting Civilians' (2019) *Chatham House* 1, 2.

<sup>7</sup> Antonio Cassese, 'Current Challenges to International Humanitarian Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (1st edn, Oxford University Press 2014) 3, 6–7

prohibition under international law.<sup>8</sup> In connection to encirclement the most commonly referred provision is the prohibition against starving civilians as a method of warfare, first articulated in both Protocols Additional to the Geneva Conventions in 1977,<sup>9</sup> and eventually incorporated into the Rome Statute of the International Criminal Court (ICC).<sup>10</sup>

## 1.1 Research Question and Thesis Statement

Siege warfare continues to be a used method of war, and often civilians suffer from starvation as result, as emphasised in the introduction.<sup>11</sup> Despite the development of the prohibition against starving civilians as a method of warfare in IHL, particularly in the APs and the Rome Statute, there remains a lack of case law on the subject.<sup>12</sup> The absence of case law raises questions about what constitutes a violation of the prohibition, and, more specifically, what mental element is required for the accused to be considered a perpetrator. Accordingly, this thesis seeks to address the following research question: What degree of intent is required to constitute a violation of the prohibition against the starvation of civilians as a method of warfare? The purpose of this analysis is to clarify the degree of intent required to establish a violation of the prohibition under international criminal law (ICL) and, by extension, IHL, through an examination of the relevant legal framework, interpretations of the law, court decisions, and the drafting history. Determining the applicable degree of intent can subsequently shed light on whether the prohibition only applies to cases where civilians are the direct targets, or if a breach also occurs when combatants are the intended targets but civilians inevitably suffer from the methods used. Support has been provided to both interpretations, however, this thesis shares the view that the prohibition should be understood in the line of the former description.<sup>13</sup> By first clarifying the degree of intent necessary for the prohibition against starving civilians as a method of warfare, can the lawfulness of a siege be determined.

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<sup>8</sup> Antonio Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984) 3 UCLA Pacific Basin Law Journal 55, 84–86

<sup>9</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 265 (Additional Protocol I) article 54; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II), article 14

<sup>10</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, article 8(2)(b)(xxv)

<sup>11</sup> UNGA Res 79/171 (n 2) [34]

<sup>12</sup> Wayne Jordash and Catriona Murdoch and Joe Holmes, 'Strategies for Prosecuting Mass Starvation' (2019), 17 JICJ 849, 863

<sup>13</sup> Gillard (n 6) 10

## 1.2 Scope and Limitations

This thesis investigates the prohibition against starving civilians as a method of warfare in connection to sieges, excluding other means and methods, such as attacks and bombardments, that are often used alongside encirclement.<sup>14</sup> Accordingly, the primary focus will be placed on the parts of the provisions, addressed mainly in section 2.2, that refers to violations of the prohibition through situations, such as, siege warfare. Furthermore, the analysis will exclusively examine the issue from an international context, excluding interpretations on the matter from domestic courts, national legislation, and so on.

As mentioned, case law on the specific prohibition against starvation of civilians as a method of warfare is lacking.<sup>15</sup> However, famine-related crimes have been addressed in cases brought before international courts, but under different charges than the specific prohibition discussed in this paper.<sup>16</sup> These cases will not be subjects of discussion, instead, the focus will be exclusively on the crime of starving civilians as a method of warfare.

## 1.3 Structure

Following this introductory chapter, chapter 2 will provide an overview of the background, beginning with the history of starvation and a presentation of the relevant provisions on the prohibition on starving civilians as a method of warfare in IHL and ICL, with a focus on their origins and applicability. In section 2.3 concerning ICL, the material- and mental elements relevant to all crimes under the Rome Statute of the ICC will be introduced, followed by an in-depth discussion of their significance to the war crime of starving civilians as a method of warfare under the Rome Statute.

Chapter 3 includes an analysis of the different degrees of intent and their applicability to the prohibition. The first section will examine the applicability of the knowledge-based approach, or *dolus directus* of the second degree, with reference to the court decisions in the Katanga trials. Section 3.2 provides a critical analysis of the approach taken in the Katanga trials by

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<sup>14</sup> Nijs (n 3) 686-687

<sup>15</sup> Jordash, Murdoch and Holmes (n 12) 863

<sup>16</sup> Angelo Stirone, 'Starvation as a method of warfare and applicable IHL' (2024) CIRSD <<https://www.cirsd.org/en/expert-analysis/starvation-as-a-method-of-warfare-and-applicable-ihl>> accessed 26 November 2024

examining the applicability of article 30 of the Rome Statute to the prohibition, focusing on whether the intent in the prohibition is ‘otherwise provided’ for. The section also includes an examination of the interpretation of intent in genocide case law, the understanding of the phrase ‘method of warfare’, and the drafting history of the relevant provisions. Section 3.3 consists of an analysis of four modes of liability that may be relevant to situations where more than one individual is involved in the commission of the crime, and how the degree of intent is to be assessed in such cases.

Lastly, chapter 4 will provide some final remarks, including a conclusion that addresses the research question presented in section 1.1.

## 2 Background

### 2.1 The History of Starvation of Civilians as a Method of Warfare

Starvation of civilians was long an accepted method of warfare in armed conflict. During the Middle Ages, siege warfare was a frequently used tactic carried out on villages and towns, targeting both the enemies and the civilians within.<sup>17</sup> Article 17 of the Lieber Code, formulated during the American Civil War to codify the laws governing armed conflict, further illustrates the long accepted method. The article states that “It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy”, emphasising the legitimacy of starving both civilians and combatants in order to hasten the surrender of the opponent.<sup>18</sup>

Starvation of civilians as a method of warfare, through siege warfare among others, remained as a method into the 20th century which the Nazi-led siege of Leningrad during the Second World War illustrates. This historical event involved a 900 day siege, with low- to no access of food and heating, during a winter period of -40°C affecting the city's 2.8 million

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<sup>17</sup> Michael Cottier and Emilia Richard, ‘Article 8(2)(b)(xxv)’ in Kai Ambos and Otto Triffterer (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016) 508, 518

<sup>18</sup> Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (General Orders No 100, 24 April 1863) article 17

inhabitants.<sup>19</sup> Sieges have also been conducted in the Bosnian cities of Sarajevo,<sup>20</sup> and Srebrenica during the Yugoslavian War,<sup>21</sup> as well as more recently in Aleppo, Syria.<sup>22</sup> In November 2024, ICC Pre-Trial Chamber I issued an arrest warrant for Israeli Prime Minister Benjamin Netanyahu and former Israeli Minister of Defence Yoav Gallant on the charges of using starvation of civilians as a method of warfare in the Gaza Strip, by depriving civilians of access to vital objects.<sup>23</sup> While international law has evolved since the Middle Ages and the Second World War, what is evident is that siege warfare persists in modern-day conflicts and civilians are still similarly affected by its consequences.<sup>24</sup>

## 2.2 Starvation of Civilians in International Humanitarian Law

The prohibition against starving civilians as a method of warfare began to take shape in the Hague Convention (IV), also referred to as the Hague Regulations,<sup>25</sup> and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, where perspectives that had long characterised warfare gave way to the establishment of the principle of distinction between civilians and combatants.<sup>26</sup> For example, article 23(g) of the Hague Regulations prohibits destruction or seizing of the opponents property unless such actions contribute to the war efforts, which illustrates the principle of distinction and military necessity.<sup>27</sup> Similarly, article 53 of the Geneva Conventions (IV) prohibits destruction of civilian objects, unless “absolutely necessary by military operations”.<sup>28</sup> Moreover, article 23 of the Geneva Convention (IV) states the obligation to permit access to essential supplies for the civilian population in times of armed conflict.<sup>29</sup> As their name suggests, the Protocols Additional to

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<sup>19</sup> Marina Gulina, ‘The Child’s Past in the Adult’s Present’: The Trauma of the Siege of Leningrad (1941–1944)’ (2015) 96 *The International Journal of Psychoanalysis* 1305, 1305–1306.

<sup>20</sup> Sean Watts, ‘Humanitarian Logic and the Law of Siege: A Study of the *Oxford Guidance* on Relief Actions’ (2019) 95 *International Law Studies* 1, 10-11

<sup>21</sup> *Ibid* 13

<sup>22</sup> *Ibid* 16

<sup>23</sup> International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024)

<<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 27 November 2024

<sup>24</sup> UNGA Res 79/171 (n 2) [34]

<sup>25</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (HR IV)

<sup>26</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV)

<sup>27</sup> Hague Convention (IV) (n 25)

<sup>28</sup> Geneva Convention (IV) (n26)

<sup>29</sup> *Ibid*



the Geneva Conventions supplement the existing prohibitions and obligations established in the Geneva Conventions, in which the articles referred to above could be seen as the foundation that subsequently led to the creation of the prohibition of starving civilians as a method of warfare.<sup>30</sup>

### 2.2.1 Protocols Additional to the Geneva Conventions

After discussions in the drafting process of the Protocols Additional to the Geneva Conventions, article 54 of Additional Protocol I (AP I) and article 14 of Additional Protocol II (AP II) were adopted by consensus.<sup>31</sup> The most relevant section in regard to this paper is, with its focus on siege warfare and exclusion of bombardments, that of article 54(1) of AP I, and the first sentence of article 14 of AP II.<sup>32</sup> Ultimately, the adoption of article 54(1) of AP I, stating that “[s]tarvation of civilians as a method of warfare is prohibited”,<sup>33</sup> consequently aimed to increase protection of civilians in international armed conflict while still permitting the use of such methods against combatants and military objectives.<sup>34</sup> Similarly, the prohibition applies to non-international armed conflicts based on the inclusion of the prohibition to AP II, under article 14.<sup>35</sup> Other provisions under IHL often come into effect in conjunction with the prohibition against starving civilians, such as article 70 of AP I regarding relief actions and article 17 of the Fourth Geneva Convention concerning evacuations of civilians, amongst others, with the same purpose of preventing civilian harm and suffering to the extent possible.<sup>36</sup>

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<sup>30</sup> Bruno Zimmermann, ‘Title of the Protocol’ in Claude Pilloud and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross: Martinus Nijhoff Publishers 1987) 19, 20 [4]-[5]

<sup>31</sup> *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: summary of second session's work* (International Committee of the Red Cross, Geneva, 1975) 323, 339

<sup>32</sup> Dapo Akande and Emanuela-Chiara Gillard, ‘Conflict-Induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare’ (2019) 17 *Journal of International Criminal Justice* 753, 765.

<sup>33</sup> Additional Protocol I (n 9)

<sup>34</sup> Claude Pilloud and Jean Pictet, ‘Article 54 - Protection of objects indispensable to the survival of the civilian population’ in Claude Pilloud and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross: Martinus Nijhoff Publishers 1987) 651, 656 [2105]

<sup>35</sup> Additional Protocol II (n9)

<sup>36</sup> Pilloud and Pictet (n 32) 654 [2095]-[2096]

### 2.2.2 Customary International Humanitarian Law

The provisions stated in the APs are considered to be part of customary international humanitarian law (CIHL). The International Committee of the Red Cross' study on CIHL has included the prohibition under rule 53, stating that “[t]he use of starvation of the civilian population as a method of warfare is prohibited”.<sup>37</sup> The study underscores the customary character of the prohibition by providing examples of states' views, as reflected in military manuals, official statements, national legislation, and other sources.<sup>38</sup> In 2019 the UN General Assembly adopted resolution 74/149 prohibiting starvation of civilians as a method of warfare.<sup>39</sup> The resolution was passed by 188 out of 193 votes, further emphasising its broad recognition by the international community.<sup>40</sup> Similarly, the UN Security Council adopted resolution 2417 with full consensus.<sup>41</sup> The resolution addressed the issues of food insecurity in armed conflicts, the need to comply with international law and the prohibition against using starvation of civilians as a method of warfare.<sup>42</sup>

### 2.3 Starvation of Civilians in International Criminal Law

The International Criminal Court was established in 1998 with the aim of holding perpetrators accountable for serious crimes that may impact the international community, as specified in the preamble of the Rome Statute.<sup>43</sup> The war crimes outlined in article 8 reflect serious violations of key provisions under IHL, and each crime under the article contains contextual elements which distinguishes them apart.<sup>44</sup> Specified under article 8(2)(b)(xxv) of the Rome Statute of the ICC is the war crime of “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.<sup>45</sup> Article 8(2)(b)(xxv) represents one of the serious violations of IHL, aligning with the prohibition under article 54 of AP I and CIHL. The war crime is only applicable in international armed

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<sup>37</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. I: Rules*, (1 Cambridge University Press 2005) 186.

<sup>38</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. II: Practice, Part I*, (1 Cambridge University Press 2005) 1123-1135

<sup>39</sup> UNGA Res 74/149 (18 December 2019) UN Doc A/RES/74/149

<sup>40</sup> UNGA ‘50th plenary meeting’ (18 December 2019) UN Doc A/74/PV.50, 21-22

<sup>41</sup> UNSC ‘8267th Meeting’ (24 May 2018) UN Doc S/PV.8267, 2

<sup>42</sup> UNSC Res 2417 (24 May 2018) UN Doc S/RES/2417

<sup>43</sup> Rome Statute (n 10)

<sup>44</sup> Ibid

<sup>45</sup> Ibid

conflicts as the crime has been excluded from the section relevant to non-international armed conflicts under article 8(2)(c) of the Rome Statute.<sup>46</sup>

According to article 9 of the Rome Statute, the Elements of Crimes document serves to clarify the material and mental elements of the crimes under articles 6, 7, 8 and 8bis, provided there is no contradiction between the Rome Statute and the Elements of Crime document.<sup>47</sup> Based on the four paragraphs of article 8(2)(b)(xxv) in the Elements of Crime document, a perpetrator must have (1) deprived civilians of objects indispensable to their survival; (2) intended to starve civilians as a method of warfare; (3) performed the conduct in the context of and in association with an international armed conflict; and (4) been aware of the factual circumstances that established the existence of an armed conflict.<sup>48</sup> If consistent with the Rome Statute, the Elements of Crime document may act as a subsidiary tool relevant in interpreting the degree of intent required in article 8(2)(b)(xxv).<sup>49</sup> Understanding how the ICC examines a crime under its statute is central when determining a breach not only of the war crime under article 8(2)(b)(xxv), but also against the prohibition in IHL. The next section will address and further analyse the material- and mental elements relevant to the prohibition on starving civilians as a method of warfare.

### 2.3.1 Material Element (*Actus Reus*)

A material element (*actus reus*), in Latin ‘a guilty act’, describes the acts, or omission to act, necessary for the specific crime to occur.<sup>50</sup> While the concept of *actus reus* has not been directly addressed in the Rome Statute, it has been referenced together with the mental element (*mens rea*) under article 30. What is clarified in article 30 is the necessity of both *actus reus* and *mens rea* in order to establish a breach of a crime.<sup>51</sup> Accordingly, while not the primary subject of this analysis, determining the *actus reus* of the war crime of starving

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<sup>46</sup> Rome Statute (n 10)

<sup>47</sup> Ibid

<sup>48</sup> International Criminal Court, *Elements of Crime* (2011) ICC-PIDS-LT-03-002/11\_Eng

<sup>49</sup> William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford Commentaries on International Law 2016) 328

<sup>50</sup> Graham Gooch and Michael Williams, *A Dictionary of Law Enforcement* (2nd edn, Oxford University Press 2015) s.v. ‘actus reus’

<<http://www.oxfordreference.com/view/10.1093/acref/9780191758256.001.0001/acref-9780191758256>> accessed 6 December 2024.

<sup>51</sup> Rome Statute (n 10)

civilians as a method of warfare is therefore important in understanding whether a crime has occurred at all.

For the *actus reus* of article 8(2)(b)(xxv) to transpire, the perpetrator must deprive civilians of objects indispensable to their survival, as also specified in the first element in the Elements of Crime document.<sup>52</sup> There are several aspects of the *actus reus* within the prohibition that need to be addressed before the crime can be considered as having been committed. First, emphasis will be made on the meaning of ‘starvation’ and ‘deprivation of objects indispensable to survival’ in the provision. During the drafting process of the Rome Statute the United States of America proposed a fourth paragraph to the Elements of Crime document under article 8(2)(b)(xxv), which read “[t]hat as a result of the accused’s acts, one or more persons died from starvation.”<sup>53</sup> The proposed fourth paragraph would have introduced a result-based requirement to the prohibition, which is not currently included in the Elements of Crime document, nor in the Rome Statute or the APs.<sup>54</sup> Instead, it is the conduct of starving civilians by depriving them of objects indispensable for their survival that is ought to be read as the material element actualising the crime.<sup>55</sup> Important to note is that starvation entails, as described in the introduction, more than mere scarcity of food and water,<sup>56</sup> to which the use of the word ‘objects’ as well as the phrase ‘wilfully impeding relief supplies’ in article 8(2)(b)(xxv) could be said to elevate.<sup>57</sup> The material elements under the prohibition of starving civilians as a method of warfare are therefore solely based on the conduct, excluding the requirement of any resulting consequence. This means that the method used need not result in the death of civilians from starvation for the crime to be considered committed.

In addition, the emphasis on ‘civilians’ in article 8(2)(b)(xxv) of the Rome Statute, as well as the first- and second paragraphs in the Elements of Crime document, serves as an additional crucial element. The inclusion of ‘civilians’ clarifies the individuals entitled to protection by the provision. Conversely, this implies that targeting individuals other than civilians, such as

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<sup>52</sup> ICC, *Elements of Crimes* (n 48)

<sup>53</sup> *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Official Records, Rome, 15 June–17 July 1998* (United Nations, 2002) A/CONF.183/13 (Vol. III) 238

<sup>54</sup> ICC, *Elements of Crimes* (n 48) 8(2)(b)(xxv)

<sup>55</sup> Cottier, Richard (n 17) 517

<sup>56</sup> Dörmann, Doswald-Beck, Kolb (n4)

<sup>57</sup> Cottier, Richard (n 17) 513

combatants, is not covered by the prohibition and is therefore lawful.<sup>58</sup> Moreover, article 8(2)(b)(xxv)(3) of the Elements of Crime document, like all war crimes in the Rome Statute, contains two contextual elements that must be fulfilled.<sup>59</sup> The third paragraph starts by clarifying the requirement that “the conduct took place in the context of [...] an armed conflict” emphasising the necessary existence of an armed conflict. The second part of the paragraph illustrates the required nexus between the conduct and the armed conflict, by clarifying that the conduct “was associated with an armed conflict”.<sup>60</sup> In summary, aside from the specific *actus reus* required for the war crime of starving civilians as a method of warfare, namely the deprivation of objects, it must also be established that the targeted individuals were civilians, and that the conduct occurred during and in connection with an armed conflict.

### 2.3.2 Mental element (*Mens Rea*)

In contrast to *actus reus*, *mens rea* concerns the perpetrator’s mental state at the time the crime was committed.<sup>61</sup> Article 30 of the Rome Statute is the provision that primarily addresses the mental elements, and was adopted as a default rule to the crimes lacking *mens rea*. The article reads as follows:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

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<sup>58</sup> Cottier, Richard (n 17) 513

<sup>59</sup> ICC, *Elements of Crimes* (n 48)

<sup>60</sup> Ibid

<sup>61</sup> Gooch, Williams (n 50) s.v. ‘mens rea’

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.<sup>62</sup>

The first paragraph of the article clarifies the minimum *mens rea* applicable to all crimes under the Statute, intent and knowledge.<sup>63</sup> However, the same paragraph provides an exception to the rule with the phrase ‘unless otherwise provided’, which refers to the non-applicability of the article when a mental element similar to those outlined in article 30, or one that exceeds intent and knowledge, specifically *dolus specialis*, is already included.<sup>64</sup> *Dolus specialis* entails that the conduct must have a special purpose beyond the direct intent to perform the conduct itself, genocide is often cited as the crime containing such intent, specifically the intent “to destroy, in whole or in part, a national, ethnic, racial, or religious group”.<sup>65</sup>

In the subsequent paragraph 30(2) the article addresses two degrees of intent, in subparagraph (a) *dolus directus* of the first degree; and (b) *dolus directus* of the second degree. *Dolus directus* of the first degree describes the volitional element of intent, that is, the intent to perform an act with the purpose of bringing about a desired material outcome as a result of the actions.<sup>66</sup> While the former part of article 30(2)(b) repeats the volitional intent, the latter part describes the mental element of *dolus directus* of the second degree. The sequence “is aware that it will occur in the ordinary course of events” suggests a cognitive element of intent, based on knowledge and awareness that the conduct, in the ordinary course of events and with high certainty, will lead to the consequential outcome.<sup>67</sup> The last paragraph, article 30(3), clarifies the *dolus directus* of the second degree by also linking knowledge to circumstance. This section underlines that *dolus directus* of the second degree needs a higher

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<sup>62</sup> Rome Statute (n 10)

<sup>63</sup> Gerhard Werle and Florian Jessberger, ‘“Unless Otherwise Provided”: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law’ (2005) 3 Journal of International Criminal Justice 35, 36.

<sup>64</sup> Ibid 38

<sup>65</sup> Kirsten J Fisher, ‘Purpose-Based or Knowledge-Based Intention for Collective Wrongdoing in International Criminal Law?’ (2014) 10 International Journal of Law in Context 163, 166–167.

<sup>66</sup> *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) [357]

<sup>67</sup> Ibid [359]

level of knowledge or awareness, by emphasising that the perpetrator needs awareness of the circumstance.<sup>68</sup>

Excluded in article 30 and elsewhere in the statute is the mental element of recklessness, or *dolus eventualis*. During the drafting process of the Rome Statute, recklessness was included in a now non-existent fourth paragraph of article 30. In the considered paragraph four, recklessness was explained as having awareness of the circumstances of an existing risk and the possibility of such consequences to occur, yet the perpetrator disregarded such risk.<sup>69</sup> The decision to exclude *dolus eventualis* reflects the debate that took place when drafting the Rome Statute and underlines the consensus reached that a higher *mens rea* threshold is required for the ICC to establish criminal responsibility.<sup>70</sup> In the case of *Prosecutor v. Lubanga Dyilo* the defendant was accused of “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”, a breach of article 8(2)(b)(xxvi) of the Rome Statute.<sup>71</sup> The prosecutor argued to the Pre-Trial Chamber I for the inclusion of *dolus eventualis* by referring to ‘risk’ as a mental element, as the article lacks a subjective element. The argument was based on article 8(2)(b)(xxvi)(3) of the Elements of Crime document, which specifies that the perpetrator “should have known” the children’s age, stating that the mental element precedes the requirements of intent and knowledge under article 30.<sup>72</sup> The Appeals Chamber, alongside the Trial Chamber, subsequently overruled that argument, emphasising that the minimum mental element applicable under the ICC is *dolus directus* of the first or second degree.<sup>73</sup> The Trial- and Appeals Chamber underlined that the exclusion of *dolus eventualis* can be seen by the use of “will occur” under paragraphs (2)(b) and (3) of article 30, asserting the need for a high degree of certainty regarding the possible outcome,<sup>74</sup> an interpretation also shared by the Pre-Trial Chamber in the case *The Prosecutor v. Bemba*.<sup>75</sup> The decision to overrule the prosecutor’s argument for applying the lower degree of *mens rea*, namely *dolus eventualis*,

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<sup>68</sup> Rome Statute (n 10)

<sup>69</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (United Nations, 1996) A/51/22 (Vol. II) 92

<sup>70</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (United Nations, 1996) A/51/22 (Vol. I) 45

<sup>71</sup> Rome Statute (n 10)

<sup>72</sup> *Prosecutor v. Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06-803-tEN (29 January 2007) [358]-[359]

<sup>73</sup> *Prosecutor v. Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2014) [441]

<sup>74</sup> *Ibid* [447]

<sup>75</sup> *Prosecutor v Bemba* (n 66) [360]

indicates that the minimum level of intent and knowledge relevant for crimes under the Rome Statute are *dolus directus* of the first- and second degree.

Accordingly, the mental elements under article 30 should be applied to the war crime of starvation of civilians as a method of warfare, insofar as article 8(2)(b)(xxv) does not itself possess a *mens rea* exceeding those given by default.<sup>76</sup> The following section will analyse whether a subjective element exists in the war crime under article 8(2)(b)(xxv), and, if so, whether this mental element supersedes the applicability of article 30.

### 3 Intent to Starve Civilians as a Method of Warfare

As pointed out in the introduction to this thesis, case law on the use of starvation of civilians as a method of warfare remains absent.<sup>77</sup> Therefore, to clarify the degree of intent encompassed by the prohibition, other similar and relevant cases, court rulings, provisions and drafting history will be examined to provide insight into the interpretation and application of *mens rea*.

#### 3.1 Katanga Trials

In 2014 the ICC Trial Chamber II gave a verdict on the case of *Prosecutor v. Katanga*, finding the accused guilty for the war crime of “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”, stipulated under article 8(2)(e)(i).<sup>78</sup> Relevant to this analysis is the connection between the subjective elements in the war crime of attacking civilians and that of starving civilians as a method of warfare. While the crimes differ in their *actus reus*, the formulation of the *mens rea* “[t]he perpetrator intended to [...]”, is identical in paragraph 2 of the war crime of starving civilians,<sup>79</sup> and paragraph 3 of the war crime of directing attacks against civilians, as outlined in the Elements of Crime document.<sup>80</sup> Therefore, the Court’s interpretation and

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<sup>76</sup> Rome statute (n 10)

<sup>77</sup> Jordash, Murdoch, Holmes (n 12) 863

<sup>78</sup> *Prosecutor v. Katanga* (Judgement pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) 658-659

<sup>79</sup> ICC, *Elements of Crime* (n 48) article 8(2)(b)(xxv)(2)

<sup>80</sup> Ibid article 8(2)(e)(i)(3)



ruling on the required *mens rea* could provide a deeper understanding of how intent could be interpreted in the war crime of starving civilians as a method of warfare.

The Trial Chamber II begins their assessment of the subjective element by referring to article 30 of the Rome Statute and its default rule, clarifying that if a mental element is missing the article's *dolus directus* of the first and second degree shall apply.<sup>81</sup> In the following paragraphs, the Court notes that the intent required to establish the criminal conduct, namely, directing an attack, is *dolus directus* of the first degree, as per article 30(2)(a) of the Rome Statute.<sup>82</sup> Furthermore, the Court takes the view that article 8(2)(e)(i)(3) of the Elements of Crime document, namely '[t]he perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack', is a repetition of article 30(2)(a).<sup>83</sup> Through this reasoning, the Court introduces the possibility of applying article 30(2)(b)'s concept of *dolus directus* of the second degree as clarified in the second part of the article with the reference to having awareness that the consequences "will occur in the ordinary course of events".<sup>84</sup> As explained in section 2.3.2, paragraph (2)(b) of article 30 begins by restating the *dolus directus* of the first degree present in paragraph 2(a), before presenting the mental element of *dolus directus* of the second degree. Therefore, the Court's reference to the intent as a repetition of article 30(2)(a) suggests that paragraph (2)(b) may equally apply to the offense, as the *mens rea* considered a repetition is also present in that paragraph. This assertion implies that the *dolus* to direct an attack against civilians, thereby also relevant to starving civilians as a method of warfare, could mean that the intent required is less than the volitional element of *dolus directus* of the first degree. The decision to apply article 30 to the whole of the article also suggests that the crime lacks an additional intent that would 'otherwise provide' its applicability.<sup>85</sup> Subsequently, the Katanga trials introduced an approach where knowledge could be enough to fulfil the *mens rea* required, extending the spectrum of responsibility.

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<sup>81</sup> Prosecutor v. Katanga (n 78) [804]

<sup>82</sup> Ibid [805]

<sup>83</sup> Ibid [806]

<sup>84</sup> Rome Statute (n 10)

<sup>85</sup> Ibid

### 3.1.1 *Dolus directus* of the second degree

Basing the degree of intent on *dolus directus* of the second degree would mean that the war crime of starving civilians as a method of warfare could be violated if the perpetrator is merely aware that, in the ordinary course of events, the conduct will lead to starvation of civilians.<sup>86</sup> Consequently, the scope of accountability would extend to include situations where combatants were the lawful targets of the operation, yet civilians became victims of starvation as a foreseeable consequence.

As highlighted in the introduction, siege warfare is used by combatants to avoid direct confrontation with the opponent in urban areas.<sup>87</sup> If the prohibition against starving civilians as a method of warfare is based on *dolus directus* of the second degree, siege warfare would generally be regarded as unlawful, provided that the encircled area contains civilians and combatants both affected by the method used. However, a lawful siege could be effectuated if civilians are provided with adequate supplies to prevent starvation, given the opportunity to exit the encircled area,<sup>88</sup> or if the operation targeted an area which is predominantly occupied by combatants.<sup>89</sup> These conditions emphasise the fundamental principle of distinction which, as author Melzer stated, “reflects the idea that belligerent hostilities constitute limited confrontations between organised armed forces, and not between entire populations”.<sup>90</sup> On the other hand, sieging an area aims to weaken the enemies efforts by limiting access to essential supplies, which is achieved by controlling the inflow of resources to, and the outflow of people from, the encircled area. Thus, careful control over the passage of goods and people is essential for a siege to be effective, and such control is likely to take a considerable amount of time.<sup>91</sup> It is therefore necessary to consider whether it would be possible to conduct a siege lawfully and military successfully while still providing civilians with sufficient supplies and exit routes, ensuring the conduct does not amount to starvation, or if a knowledge-based approach to the prohibition would ultimately outlaw siege warfare.

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<sup>86</sup> Rome Statute (n 10)

<sup>87</sup> Hägerdal (n 5) 1247–1248

<sup>88</sup> Pillod, Pictet (n 34) 654 [2096]

<sup>89</sup> Tom Dannenbaum, ‘Siege Starvation: A War Crime of Societal Torture’ (2022) 22:2 Chicago Journal of International Law 368, 385

<sup>90</sup> Nils Melzer, ‘The Principle of Distinction Between Civilians and Combatants’ in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (1st edn, Oxford University Press 2014) 296, 297

<sup>91</sup> Gillard (n 6) 11-13

In conclusion, the decision in the Katanga trial illustrates the possibility of interpreting the required degree of intent for the prohibition against starving civilians as a method of warfare as at least *dolus directus* of the second degree. The following sections will challenge this approach by examining the default rule established in article 30, analysing the interpretation of *mens rea* in genocide case law, assessing whether the included phrasing “method of warfare” in the article indicates a particular mental element, and explore the historical background and drafting that may inform this issue.

### 3.2 ‘Unless Otherwise Provided’

As touched upon in section 2.3.2, the phrase ‘unless otherwise provided’ in article 30 of the Rome Statute demonstrates its non-applicability where a mental element is already provided for.<sup>92</sup> Paragraph 2 of the general introduction to the Elements of Crime clarifies this approach by stating that article 30 should only apply in the case where no reference has been made to a mental element in connection to the conduct, consequence or circumstance.<sup>93</sup> Excluding article 30 completely from a crime under the Statute would therefore be contradictory considering the purpose behind its adoption, instead the article should be applied solely to those material elements that lack a specified mental element of their own.<sup>94</sup> This raises the question of whether any elements of the war crime of starving civilians as a method of warfare ‘otherwise provides’ a mental element.

In the four paragraphs of article 8(2)(b)(xxv) in the Elements of Crime document only two elements contain a reference to a mental element, namely paragraph 2 and 4.<sup>95</sup> Firstly, element 4 describes the contextual element present in all war crimes, that is, the perpetrator’s awareness of the “factual circumstances that established the existence of an armed conflict”.<sup>96</sup> Since the element is included in all war crimes under the Rome Statute it does not refer to a specific *actus reus* unique for the war crime of starving civilians as a method of warfare. In the introduction to article 8 in the Elements of Crime document, paragraph (c) specifies that the *mens rea* required for the perpetrator concerning the circumstances in element 4 is limited

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<sup>92</sup> Donald K. Piragoff and Darryl Robinson, ‘Article 30 Mental element’ in Kai Ambos and Otto Triffterer (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016) 1111, 1118

<sup>93</sup> ICC, *Elements of Crime* (n 48)

<sup>94</sup> Werle, Jessberger (n 63) 55

<sup>95</sup> Rome Statute (n 10)

<sup>96</sup> ICC, *Elements of Crime* (n 48) article 8(2)(b)(xxv)(4)

to awareness.<sup>97</sup> Thus, while it is important to establish that the perpetrator had awareness of the circumstances under which the crime occurs, it does not ultimately determine the degree of intent required to constitute the specific offence under article 8(2)(b)(xxv).<sup>98</sup>

Moreover, the *actus reus* of the crime is stipulated in article 8(2)(b)(xxv)(1) of the Elements of Crime document, by stating that the perpetrator must have “deprived civilians of objects indispensable to their survival”, leaving out any reference to a mental element.<sup>99</sup> In the following paragraph of the same article, the word ‘intended’, amongst others, is used to refer to the mental element required for the conduct of starving civilians as a method of warfare.<sup>100</sup> While the first paragraph lacks any reference to a mental element, the second paragraph of the article specifies the requirement for an additional intent. The absence of *mens rea* in the first element triggers the default rule of article 30.<sup>101</sup> Consequently, this entails that the perpetrator’s conduct was meant to deprive civilians of vital objects,<sup>102</sup> and with regards to the consequence, the perpetrator meant to cause the deprivation of objects, or was aware that it would “occur in the ordinary course of events”.<sup>103</sup> In contrast, the inclusion of the terms ‘intended’ and ‘as a method of warfare’ in paragraph 2, and as discussed further in section 3.2.2, illustrates the presence of an additional *mens rea* required to establish a breach of the war crime of starving civilians.<sup>104</sup> This interpretation contradicts the stance taken by the courts in the Katanga trial, which, as mentioned previously, considered that the mental element governing the conduct of the crime to repeat that of article 30(2)(a), thereby making article 30 applicable to the entire crime.<sup>105</sup> Conversely, the presence of the mental element ‘intended’ arguably excludes the applicability of article 30 to that element as it otherwise provides. This interpretation of the Rome Statute is commonly shared by the ICC in connection to cases regarding genocide.

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<sup>97</sup> ICC, *Elements of Crime* (n 48)

<sup>98</sup> Piragoff, Robinson (n 92) 1119

<sup>99</sup> ICC, *Elements of Crime* (n 48)

<sup>100</sup> Ibid article 8(2)(b)(xxv)(2)

<sup>101</sup> Ibid ‘General introduction’ [2]

<sup>102</sup> Rome Statute (n 10) article 30(2)(a)

<sup>103</sup> Ibid article 30(2)(b)

<sup>104</sup> Cottier, Richard (n 17) 518

<sup>105</sup> *Prosecutor v. Katanga* (n 78) [806]

### 3.2.1 Genocide Case Law

As previously mentioned in section 2.3.2, genocide is often the crime referred to when describing *dolus specialis*.<sup>106</sup> The *dolus specialis* in genocide means that the perpetrator must have had the clear “intent to destroy” the specific group in question, excluding cases where the intent is of a lesser degree, as well as situations where the consequence occurs as an unintended result.<sup>107</sup> The consequence-related *mens rea* of intending to starve civilians as a method of warfare illustrates that the perpetrator must possess a specific intent that exceeds beyond, and is additional to, the intent and knowledge required for the *actus reus* of depriving civilians of objects indispensable to their survival. Similarly, the ICC Pre-Trial Chamber II in the case of *Prosecutor v. Bemba* recognised the existence of a *dolus specialis* in the war crimes of torture and pillaging, referring to the requirement of the perpetrator to have purpose or intent to commit the crimes. The Prosecutor was subsequently encouraged to demonstrate the accused’s intent for both the *actus reus* as well as the additional specific intent required for the two separate crimes.<sup>108</sup> In this way, it can be said that, like genocide, the crime of starving civilians as a method of warfare consists of an additional intent, or *dolus specialis*.

Consequently, both genocide and the war crime of starving civilians includes a mental element that supersedes the application of article 30. In accordance with this approach, the Pre-Trial Chamber I in *Prosecutor v. Al Bashir*, charged for acts of genocide in Darfur, claimed that the subjective elements should be examined in two ways. Firstly, where the material elements lack a *mens rea* of their own, like those under subparagraph (a) to (e), article 30 should be applied.<sup>109</sup> Performing the conducts stipulated in subparagraphs (a) to (e), namely killing, forcibly transferring children, preventing births and so on, without either a meaning to cause the consequence, or awareness of it occurring in the ordinary course of events, can be deemed improbable.<sup>110</sup> Thus, carrying out the *actus reus* specified requires that the perpetrator has some degree of intent and knowledge, as article 30 affirms.<sup>111</sup> Secondly, the Court stated that the element of “destroying, in whole or in part, a national, ethnic, racial or religious group”, based on its nature as a *dolus specialis*, must be evaluated accordingly as

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<sup>106</sup> Fisher (n 65) 166-167

<sup>107</sup> Kai Ambos, ‘What Does “Intent to Destroy” in Genocide Mean?’ (2009) 91 International Review of the Red Cross 833, 837.

<sup>108</sup> *Prosecutor v. Bemba* (n 66) [294]; [320]; [354]; fn.445

<sup>109</sup> *Prosecutor v. Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009) [139]

<sup>110</sup> Rome Statute (n 10) article 6

<sup>111</sup> *Ibid*

it otherwise provides.<sup>112</sup> Unlike the Katanga case, the Court saw both the usefulness of article 30 to the respective elements lacking an expressed *mens rea*, and its non-applicability to the elements having a mental element that ‘otherwise provides’.

Similar to the Al Bashir case, the cases of *Prosecutor v. Krstić*,<sup>113</sup> and *Prosecutor v. Jelisić* before the International Criminal Tribunal for the former Yugoslavia, amongst others, only referred to the application of *dolus specialis* to the specific intent referred to above, correspondingly implying that the specific intent applies to that element solely.<sup>114</sup> This aspect, evaluating intent on each material element separately, could also be applied to the war crime of starving civilians as a method of warfare. Implementing this interpretation to the war crime of starving civilians would, in relation to the first element in the Element of Crime document, entail that the perpetrator in connection to the conduct meant to deprive civilians of objects indispensable to their survival, or as to the consequence meant to cause the deprivation of objects, or was aware that it would occur in the ordinary course of events.<sup>115</sup> The second element, on the other hand, should be considered separately due to the presence of an additional element, which ‘otherwise provides’, meaning that the perpetrator must have intended to starve civilians as a method of warfare.<sup>116</sup> Element 3 exclusively states the contextual element in which the crime took place, disregarding the need for a *mens rea*.<sup>117</sup> Lastly, the fourth element, as previously emphasised, and as stated in the introductory to article 8 of the Elements of Crime document, the perpetrator’s awareness of the circumstances establishing the existence of an armed conflict is enough.<sup>118</sup>

### 3.2.2 ‘Method of Warfare’

The prohibition against starving civilians also contains the phrase ‘as a method of warfare’ in the Rome Statute,<sup>119</sup> as well as in AP I,<sup>120</sup> and AP II, with a replacement of the word ‘warfare’

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<sup>112</sup> *Prosecutor v. Al Bashir* (n 109) [139]

<sup>113</sup> *Prosecutor v. Krstić* (Appeal Judgement), IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), (19 April 2004) [542]

<sup>114</sup> *Prosecutor v. Jelisić* (Trial Judgement), IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (14 December 1999) [62]

<sup>115</sup> ICC, *Elements of Crime* (n 48) article 8(2)(b)(xxv)(1)

<sup>116</sup> *Ibid* article 8(2)(b)(xxv)(2)

<sup>117</sup> *Ibid* article 8(2)(b)(xxv)(3)

<sup>118</sup> *Ibid* article 8(c)

<sup>119</sup> Rome Statute (n 10) article 8(2)(b)(xxv)

<sup>120</sup> Additional Protocol I (n 9) article 54(1)

with ‘combat’ in the latter.<sup>121</sup> There is no general definition of what ‘method of warfare’ entails in international treaty law.<sup>122</sup> One interpretation holds that ‘method’ solely refers to how weapons are being used in warfare.<sup>123</sup> Authors Gaggioli and Melzer contest this narrower interpretation, stating that while ‘method’ may refer to the use of a specific weapon, it also describes a tactical or strategic measure aimed at weakening the opponent, without necessarily referencing any specific weapons. Furthermore, the authors exemplify this notion with starvation of civilians as a method of warfare, which does not necessitate the use of any specific weapons.<sup>124</sup>

The meaning of the phrase ‘as a method of warfare’ in the provision of the war crime of starving civilians has been debated. To some, the phrase simply refers to the nexus with the armed conflict,<sup>125</sup> which, as specified in section 2.3.1, serves as a prerequisite for the prohibition’s relevance as a war crime in the Rome Statute.<sup>126</sup> The Group of Experts on Yemen stated, on the other hand, that ‘method of warfare’ means to strategically use famine to achieve a military gain.<sup>127</sup> Similarly, in the commentaries to article 54 of AP I, starvation is explained as a deliberate conduct when used as a “method of warfare”.<sup>128</sup> Strategy is defined, by Oxford Dictionaries, as the practice and planning to achieve a specific aim, illustrating that to use starvation as a method is to intentionally want to perform the conduct with the belief that it will lead to a desired military advantage.<sup>129</sup>

Based on this, starvation of civilians ‘as a method of warfare’ conceivably involves a deliberate act used strategically to achieve a desired goal, excluding, for instance, such situations where combatants are the targeted group but civilians nevertheless fall victims as a

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<sup>121</sup> Additional Protocol II (n 9) article 14

<sup>122</sup> Gloria Gaggioli and Nils Melzer, ‘Methods of Warfare’, in Dapo Akande and Ben Saul (eds), *The Oxford Guide to International Humanitarian Law* (Oxford University Press, 2020) 235, 237

<sup>123</sup> Claude Pilloud and Jean Pictet, ‘Article 51 - Protection of the civilian population’ in Claude Pilloud and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross: Martinus Nijhoff Publishers 1987) 613, 621 [1957]

<sup>124</sup> Gaggioli, Melzer (n 122) 237

<sup>125</sup> Jordash, Murdoch, Holmes (n 12) 863

<sup>126</sup> ICC, *Elements of Crime* (n 48) article 8(2)(b)(xxv)(3)

<sup>127</sup> *Situation of human rights in Yemen, including violations and abuses since September 2014: Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen* (UN Human Rights Council, A/HRC/42/CRP.1, 3 September 2019) 177-178 [741]

<sup>128</sup> Pilloud, Pictet (n 34) 653 [2089]-[2090]

<sup>129</sup> Oxford Dictionaries, ‘Strategy’ in *The Oxford Essential Dictionary of the U.S. Military* (Oxford University Press 2002).

<<https://www-oxfordreference-com.proxy.annalindhbiblioteket.se/display/10.1093/acref/9780199891580.001.0001/acref-9780199891580-e-7956?rskey=xwvGeM&result=10>> accessed 28 November 2024

consequence. In addition to what is covered in the above sections 3.2.1 and 3.2.1.1, the inclusion of ‘as a method of warfare’ further stresses the additional mental element present in the prohibition. What the provision consequently indicates, by also including ‘as a method of warfare’, is the requirement of a specific intent for a perpetrator to be held accountable for breaches against the prohibition of starving civilians.

### 3.2.3 Historical interpretations

The prohibitions under the Hague Regulation, Geneva Convention, and perhaps more specifically the APs, are often referred to as being the parent norms of the war crimes stipulated in the Rome Statute.<sup>130</sup> A clarification of the drafting history that led to today’s prohibition against civilian starvation in the APs may therefore illuminate the general perception of what conduct was intended to be prohibited and on what premise.

While limited information exists on the drafting process of the Additional Protocols to the Geneva Conventions, and specifically the discussion behind the creation of the prohibition against starving civilians as a method of warfare, the available evidence suggests a focus on balancing the protection of civilians with considerations of military necessity. For instance, in the second session of the Diplomatic Conference on IHL in Armed Conflicts, it was established that the prohibition would not apply if the objects indispensable for civilian survival were being used by combatants or for military purposes.<sup>131</sup> Moreover, during the fourth session, it was noted that exceptions to the prohibition could be made, by a party to the armed conflict within its own territory, for crucial military necessity.<sup>132</sup> This indicates that the prohibition was created with limited application to the situations where civilians and civilian objects are the intended aim, while still being lawful to operations where combatants and military objects are the primary target.

Furthermore, while not the same as siege warfare, blockades also involve restricting access to supplies and can, like sieges, result in starvation of civilians.<sup>133</sup> The legitimacy of blockades has been addressed in both The San Remo Manual on International Law Applicable to Armed

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<sup>130</sup> Werle, Jessberger (n 63) 44

<sup>131</sup> *Diplomatic Conference on IHL* (n 31) 339

<sup>132</sup> *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: A Summary of the Work of the Fourth Session* (ICRC, Geneva 1977) 338, 348

<sup>133</sup> *Situation of human rights in Yemen* (n 125) 2



Conflicts at Sea in paragraph 102,<sup>134</sup> and the HPCR Manual on International Law Applicable to Air and Missile Warfare under article iii.<sup>135</sup> Both articles in the manuals illustrate the perceived unlawfulness of using blockades in naval and aerial operations, respectively, if the primary purpose is to starve civilians or deny them objects indispensable to their survival. While the manuals are not legally binding and do not directly concern siege warfare, they nonetheless reflect existing rules and customary practices regarding the denial of supplies to civilians, which may lead to starvation.<sup>136</sup>

The views expressed in the creation of the prohibitions, as well as those demonstrated in other treaties, as exemplified, further emphasises the necessity of an additional specific intent. This, in turn, raises questions about the significance of a knowledge-based approach in determining a breach of the prohibition against starving civilians as a method of warfare.

### 3.3 Modes of Liability

The ICC aims to hold individual perpetrators accountable for crimes,<sup>137</sup> however, most violations in armed conflicts are rarely conducted by a single individual.<sup>138</sup> Article 25(3) of the Rome Statute therefore outlines various modes of liability, holding perpetrators accountable for crimes against the Statute committed either alone, with or through others.<sup>139</sup> The war crime of starving civilians is plausibly such a crime where more than one perpetrator may be involved. For instance, a scenario could arise where a senior political leader, having the intent to starve civilians as a method of warfare, instructs a soldier on the ground to deny the access of humanitarian convoys to enter a besieged area, in which the soldier deprives civilians of objects indispensable to their survival. The example illustrates a hypothetical situation where the conduct of one perpetrator, combined with the intent of another, constitutes a breach of the prohibition against starving civilians as a method of warfare. Drawing on certain modes of liability present in the Rome Statute, the following sections will

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<sup>134</sup> International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994) [102]

<sup>135</sup> *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Program on HPCR at Harvard University, Cambridge University Press 2013) i, lvii [157]

<sup>136</sup> *Ibid* vii; International Institute of Humanitarian Law, 'FOREWORD' in Louise Doswald-Beck (eds.) *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995) ix, ix

<sup>137</sup> Rome Statute (n 10) article 1

<sup>138</sup> *Prosecutor v. Tadić*, (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), (15 July 1999) [191]

<sup>139</sup> Rome Statute (n 10)

examine the degree of intent required for accountability when multiple perpetrators contribute to the violation, each fulfilling different elements crucial to the crime.

### 3.3.1 Direct Perpetration

The first mode of liability in article 25(3)(a) of the Rome Statute describes direct perpetration, referring to the liability of an individual for physically committing the *actus reus* of the crime.<sup>140</sup> For an individual to be liable as a direct perpetrator for a specific crime they must have committed all the *actus reus* relevant to that crime alongside having the required *mens rea*, either through intent and knowledge as defined in article 30, or with an additional specific intent, as required by the crime.<sup>141</sup>

In the given hypothetical scenario, the soldier on the ground could be held liable as a direct perpetrator provided that they performed the *actus reus*, based on article 30, with the intent to deprive civilians of objects, and with the knowledge that the deprivation will lead to starvation as a consequence, or awareness of its likely occurrence in the ordinary course of events.<sup>142</sup> In addition, the perpetrator must have had the specific *mens rea* stated in article 8(2)(b)(xxv) of starving civilians as a method of warfare, if the perpetrator did not possess the additional intent, they could not be held liable for violating the war crime.<sup>143</sup> Instead, the soldier on the ground performing the *actus reus* with intent and knowledge, would only be held liable for the unlawful act of depriving civilians of objects indispensable to their survival as prohibited in article 54(2) of AP I,<sup>144</sup> and the second sentence of article 14 in AP II.<sup>145</sup> Moreover, the conduct could also constitute violations of other crimes under the Rome Statute, such as the war crime of wilfully causing great suffering under article 8(2)(a)(iii), given that the deprivation fulfilled the *actus reus* of that crime and that the requisite *mens rea* was present.<sup>146</sup> As for the senior political leader issuing instructions for the conduct, with the intent to starve civilians as a method of warfare, direct perpetration is not applicable due to the fundamental fact that the perpetrator did not physically carry out the act themselves.

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<sup>140</sup> Rome Statute (n 10)

<sup>141</sup> Tom Gal, 'Direct Commission' in Jérôme De Hemptinne and others (eds), *Modes of Liability in International Criminal Law* (1st edn, Cambridge University Press 2019) 17, 24-25

<sup>142</sup> ICC, *Elements of Crime* (n 48) article 8(2)(b)(xxv)(1); Rome Statute (n 10) article 30(2)

<sup>143</sup> Rome Statute (n 10)

<sup>144</sup> Additional Protocol I (n 9)

<sup>145</sup> Additional Protocol II (n 9)

<sup>146</sup> Cottier, Richard (n 17) 510; Rome Statute (n 10)

### 3.3.2 Indirect Perpetration

Contrary to direct perpetration, indirect perpetration describes the responsibility of an individual for a crime they did not themselves commit. The conduct was instead perpetrated ‘through another person’, as phrased in article 25(3)(a) of the Rome Statute.<sup>147</sup> This form of liability was created with the aim of holding the planners and initiators of the crime responsible, aiming to establish responsibility beyond those individuals used to commit the crimes.<sup>148</sup> In the case of *Prosecutor v. Katanga and Ngudjolo Chui* in the Pre-Trial Chamber I, the ICC highlighted that an indirect perpetrator must have “control over the will of those who carry out the objective elements of the offence”.<sup>149</sup> In addition to control, it must also be established that the indirect perpetrator acted in pursuit of their goal, as opposed to assisting someone else’s aims. Another prerequisite is that the indirect perpetrator fulfils all the mental elements relevant to the crime, whether this involves intent and knowledge under article 30, an additional intent, or both.<sup>150</sup> On this account, the main idea of indirect perpetration is that an individual can be held responsible if all aforementioned elements are fulfilled, and provided that the *actus reus* committed by another person is done so under the control of the perpetrator in question.<sup>151</sup>

The notion of complete control has been described through two possibilities, the ‘innocent agent’, and the ‘perpetrator behind the perpetrator’. The former refers to an individual who performs the *actus reus* under threats by the indirect perpetrator, leaving no option but for the individual to carry out the crime. The ‘perpetrator behind the perpetrator’ focuses instead on the indirect perpetrator’s manipulation or exploitation of the individual, who subsequently acts on the expressed directives. The individual committing the *actus reus* nonetheless remains a “fully responsible agent”, based on the fact that they still have intent and

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<sup>147</sup> Rome Statute (n 10) article 25(3)(a)

<sup>148</sup> Maria Granik, ‘Indirect Perpetration Theory: A Defence’ (2015) 28 *Leiden Journal of International Law* 977, 978

<sup>149</sup> *Prosecutor v. Katanga and Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07-717 (30 September 2008) [488]

<sup>150</sup> Alejandro Kiss, ‘Indirect Commission’ in Jérôme De Hemptinne and others (eds), *Modes of Liability in International Criminal Law* (1st edn, Cambridge University Press 2019) 30, 32-33

<sup>151</sup> *Prosecutor v. Lubanga Dyilo* (n 72) [332]

knowledge of the conduct.<sup>152</sup> This differs the two concepts apart, as the ‘innocent agent’ acts under, for instance, duress or mistake, lacking any intent and knowledge of the *actus reus*.<sup>153</sup>

The senior political leader, referred to in the hypothetical scenario exemplified above, could therefore be held responsible as an indirect perpetrator for committing the war crime of starving civilians as a method of warfare, despite not physically carrying out the *actus reus* of depriving civilians of indispensable objects. The aforementioned statement applies under the conditions that the perpetrator possesses the *mens rea* of the crime’s *actus reus*, as well as the additional specific mental element of intent to starve civilians as a method of warfare. Moreover, it must be asserted that the perpetrator conducting the *actus reus* did so under the complete control of the indirect perpetrator, as the concepts of both ‘innocent agent’ and ‘perpetrator behind the perpetrator’ contends. As for the soldier on the ground, if they are considered an ‘innocent agent’, they may be acquitted from the crime by invoking duress as a ground for excluding criminal responsibility under article 31(3)(d) of the Rome Statute.<sup>154</sup> If, on the other hand, the soldier on the ground is regarded as a ‘perpetrator behind the perpetrator’, they could be held responsible for the unlawful act of depriving civilians from objects indispensable to their survival as a direct perpetrator due to the existing *mens rea*, in accordance with the discussion in section 3.2.1. In both cases, the senior political leader would be solely responsible for the war crime of starving civilians as a method of warfare as an indirect perpetrator.

### 3.3.3 Co-perpetration

Article 25(3)(a) of the Rome Statute also includes the concept of co-perpetration, as specified by the phrase ‘jointly with another’ in relation to the committed act.<sup>155</sup> As the phrase indicates, co-perpetration refers to a crime committed jointly by more than one perpetrator, with a mutual goal, in which all contributions to the commission is crucial for the fulfilment

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<sup>152</sup> Stefano Manacorda and Chantal Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’ (2011) 9 *Journal of International Criminal Justice* 159, 169–170

<sup>153</sup> Kiss (n 150) 36

<sup>154</sup> Kai Ambos, ‘Article 25 Individual criminal responsibility’ in Kai Ambos and Otto Triffterer (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016) 979, 994

<sup>155</sup> Rome Statute (n 10)

of the crime.<sup>156</sup> The ICC Trial Chamber I defined co-perpetration in the case of *Prosecutor v. Lubanga Dyilo* to include the aforementioned requirements, as well as adding that the accused must have had awareness that the common plan would lead to the desired consequences, and awareness that their contribution to the crime would be critical for the fulfilment of the plan.<sup>157</sup>

In order to hold any of the perpetrators in the hypothetical scenario liable based on co-perpetration it must be established that they shared a common plan with awareness that the plan would bring about the desired result. Moreover, they must have shared the necessary *mens rea* present to the crime, such as the additional intent of starving civilians as a method of warfare, amongst others. Lastly, each co-perpetrator must have contributed in a manner crucial to the completion of the crime, in this case by depriving civilians of objects indispensable for their survival, as well as being aware of the significance of their involvement.<sup>158</sup> If the perpetrators demonstrably meet the aforementioned requirements, both may be held responsible as co-perpetrators for the war crime of starving civilians as a method of warfare.

### 3.3.4 Aiding and Abetting

Aiding and abetting is the mode of liability introduced under article 25(3)(c) of the Rome Statute, designed to hold perpetrators accountable for aiding, abetting, or assisting “[f]or the purpose of facilitating the commission of such a crime [...]”.<sup>159</sup> Distinctions have been drawn between what constitutes aiding and abetting. Aiding has been defined as providing objective assistance through material and practical means, while abetting refers to subjective support, such as moral encouragement.<sup>160</sup> The use of ‘or’ instead of ‘and’ when describing the modes of liability in the provision indicates that proving one method is sufficient to hold an

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<sup>156</sup> Elies Van Sliedregt and Lachezar Yanev, ‘Co-Perpetration Based on Joint Control over the Crime’ in Jérôme De Hemptinne and others (eds), *Modes of Liability in International Criminal Law* (1st edn, Cambridge University Press 2019) 85, 96.

<sup>157</sup> *Prosecutor v. Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) [1018]

<sup>158</sup> Alicia Gil Gil, ‘Mens Rea in Co-Perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-Perpetrator’ (2014) 14 *International Criminal Law Review* 82, 86.

<sup>159</sup> Rome Statute (n 10)

<sup>160</sup> Manuel J Ventura, ‘Aiding and Abetting’ in Jérôme De Hemptinne and others (eds), *Modes of Liability in International Criminal Law* (1st edn, Cambridge University Press 2019) 173, 173–174

individual liable.<sup>161</sup> For a perpetrator to aid or abet, their facilitation must substantially and significantly assist the commission of the crime, establishing a clear nexus between the contribution and the crime in question.<sup>162</sup>

The Trial Chamber VII in the case of *Prosecutor v Bemba, Kilolo, Mangenda, Babala and Arido* addressed the similarities between aiding and abetting and co-perpetration, as both require a contribution to the commission of the crime. At the same time, the Court underscored the key difference between the two modes, clarifying that aiding and abetting does not require the perpetrator to share a common plan with other perpetrators, and that the contribution of an aider and abettor need not to be decisive to the completion of the crime, unlike co-perpetration.<sup>163</sup> As for the *mens rea*, the Trial Chamber VII emphasised the need of a higher degree of intent in determining liability, referring to the requirement of the aider and abettor to have acted with ‘the purpose of facilitating the commission of the crime’, as stated in article 25(3)(c). Moreover, while the perpetrator does not necessarily need to know all the details of the main crime, it is nevertheless required that an aider and abettor have at least awareness that the primary crime will occur in the ordinary course of events, based on the minimum mental element present in article 30.<sup>164</sup>

A perpetrator could therefore be held liable as an aider or abettor in connection to the war crime of starving civilians as a method of warfare provided that they contributed either objectively or subjectively to the commission of the crime, with knowledge that their contribution would facilitate the results. In the scenario described in the introductory section on modes of liability, the soldier on the ground depriving civilians of objects indispensable to their survival could therefore be held liable as an aider and abettor, provided that they had the desire and knowledge that their support would, and ultimately did, contribute to the commission of the war crime.

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<sup>161</sup> Ambos (n 154) 1006

<sup>162</sup> Ventura (n 160) 177

<sup>163</sup> *Prosecutor v Bemba, Kilolo, Mangenda, Babala and Arido* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) [85]

<sup>164</sup> *Ibid* [97]-[98]

## 4 Conclusion

After analysing the complexities surrounding the interpretation of intent under the Rome Statute, it can be concluded that, to establish a violation of the prohibition against starving civilians as a method of warfare, it must be demonstrated that the perpetrator possessed the intent of *dolus specialis*. Additionally, for the *actus reus* of depriving civilians of objects indispensable to their survival, in the absence of a specific mental element, the perpetrator must act with the intent and knowledge as applied by the default rule of article 30. This interpretation contradicts the broader approach taken by the Court in the Katanga trial, as addressed in section 3.1, specifically by excluding the application of article 30 to the entirety of the crime. By examining the purpose and meaning behind the included words ‘intent’ and ‘method of warfare’ in section 3.2, the mental element illustrates a *dolus* that goes beyond the mere act of depriving civilians of objects indispensable to their survival. Therefore, like genocidal intent, the intent to starve civilians as a method of warfare constitutes a specific additional intent that ‘otherwise provides’ article 30, making its default mental elements of intent and knowledge non-applicable to that part of the crime. The drafting history of the provisions further illustrates the specific intent requirement by emphasising that the *actus reus* is unlawful only if civilians are the directed target.

The *dolus specialis* of intent to starve civilians as a method of warfare becomes more evident when analyzing the potential modes of liability for holding a perpetrator responsible for the war crime, as discussed in section 3.3. It is undeniable that a perpetrator is fully responsible as a direct perpetrator of the war crime if they commit the *actus reus* with the required *mens rea* for that act, as well as the additional *dolus specialis*. Rather, what became particularly significant to this analysis is the role of the additional intent in determining the liability of perpetrators who do not fulfill all elements of the crime themselves. The analysis revealed that a perpetrator can be held responsible for the war crime of starving civilians as an indirect perpetrator or co-perpetrator primarily based on their possession of *dolus specialis*, without personally committing the *actus reus* of the crime. Carrying out the *actus reus* without the *dolus specialis* intent to starve civilians as a method of warfare does not constitute a violation of that war crime, instead it makes the perpetrator liable as a direct perpetrator only for the specific conduct of depriving civilians of indispensable objects, or, at most, as an aider or abettor to the war crime as a whole. This further underscores that the intent required to starve

civilians as a method of warfare is a *mens rea* that extends beyond the mental elements specified in article 30, and the intent necessary for the *actus reus*. The absence of the specific additional intent thus excludes any liability for the war crime of starving civilians.

Throughout this thesis, emphasis has been placed on siege warfare and its connection to the prohibition of starving civilians as a method of warfare. Conclusively, siege warfare becomes an unlawful method of warfare if it is conducted with the *dolus specialis* to starve civilians. In other words, the absence of the *dolus specialis* intent means that the method of encirclement does not violate the prohibition, even when civilians starve as a consequence of methods used to target combatants or military objects.

Given the lack of case law, further research into the legal challenges of prosecuting starvation as a war crime would be valuable. Examining how intent can be proven in cases where the starvation of civilians results from methods such as siege warfare would be instrumental for gaining a deeper understanding of the prohibition itself, as well as exploring any other underlying reasons for its absence in international courts.



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