

Starvation at the International Criminal Court: Reflections on the Available Options for the Prosecution of the Crime of Starvation

1 Introduction

The Rome Statute does not criminalise, at least not expressly, the infliction of starvation outside of the context of armed conflicts. This article intends to show that there are feasible options for the prosecution of starvation crimes that cannot be prosecuted as war crimes because they were committed neither during an armed conflict nor as a method of warfare. More specifically, it addresses the question of whether nowadays peacetime starvation could be prosecuted by the International Criminal Court as an act of genocide, an act of persecution, an act of extermination or an “inhumane act”.

To attain this goal, the analysis focuses on the suggestions formulated in the scholarship as to the prosecution of peacetime starvation before the ICC. The validity of those suggestions will be examined by means of analysing two cases of peacetime starvation that occurred in the Soviet Union between 1932–1933 and 1946–1947. They will be examined through the lens of the RS provisions since peacetime starvation could be addressed by the ICC as the Court already possesses the instruments necessary to prosecute wartime starvation and since the Statute is the ‘normative focal point of international criminal law’.¹

Those are not cases where starvation was used as a method of warfare, but rather cases of peacetime starvation, which this article aims to examine as part of the ICC environment as if the respective incidents occurred today on the territory of a State that has signed and ratified the RS. The analysis of these cases will include the delineation of their historical background, the identification of the persons involved, whether as offenders or as victims, as well as the presentation of the incidents that pertain to them in the light of the material and the mental elements of the crimes currently typified in the RS. After having delved into these cases and the respective prosecution possibilities, this paper will discuss to what extent the RS provides the

¹ See T. Dannenbaum, ‘Siege Starvation: A War Crime of Societal Torture’, 22(2) *Chicago Journal of International Law* (2021) 358–442, p. 379. The ICC enjoys a potentially worldwide jurisdiction over the crime of genocide, war crimes and crimes against humanity when, pursuant to Art. 13 RS, a situation is referred to the Court by the UN Security Council acting under Chapter VII of the UN Charter. Indeed, in these cases, the ICC may exercise jurisdiction over every UN-Member State, irrespective of whether it is a State Party to the RS or not. S. Babaian, *The International Criminal Court – An International Criminal World Court?* (Springer, 2018), p. 50. See also D. Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities’, 7 *Journal of Criminal Justice* (2009) 333–352, p. 340, doi.org/10.1093/jicj/mqp034.

necessary tools to address the phenomenon of peacetime starvation in the area of international criminal law. Finally, this paper concludes by suggesting further areas of research and study as to how to address peacetime starvation in the realm of international criminal law.

2 The War Crime of Starvation and the Gap in the Rome Statute

According to Article 8(2)(b)(xxv) of the RS, intentionally using the starvation of civilians as a method of warfare is a war crime. Precisely, Art. 8(2)(b)(xxv) considers a war crime ‘intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies’.² Starvation is generally understood as ‘death by hunger or depriving of nourishment’ but also as ‘deprivation or insufficient supply of some essential commodity or something necessary to live’.³ Indeed, the term starvation ‘implies a high degree of deprivation, where survival is threatened’, although ‘it is not necessary for death to occur’.⁴

Hence, depriving someone of food already constitutes an act of starvation irrespective of whether the victim dies or not.⁵ In such cases, the prosecutor only needs to provide evidence that the perpetrators intended to starve and not also that people did starve as a result of their acts.⁶ In fact, what constitutes starvation is ‘the act of deprivation itself’, ‘not to the harm that follows from deprivation’.⁷

Art. 8(2)(b)(xxv) RS explicitly criminalises starvation of civilians which takes place in the context of an armed conflict and in association with that armed conflict. However, the RS lacks a provision that explicitly criminalises starvation of civilians which did not occur in the context of armed conflicts and in association with an armed conflict. Indeed, according to this article, starvation must have been used as a “method of warfare”, which has been interpreted as ‘any specific, tactical or strategic, ways of conducting hostilities ... that are intended to

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

³ World Peace Foundation and Global Rights Compliance, *The Crime of Starvation and Methods of Prosecution and Accountability*, p. 6, <https://sites.tufts.edu/wpf/files/2019/06/The-Crimes-of-Starvation-and-Methods-of-Prosecution-and-Accountability.pdf>, accessed 6 June 2022.

⁴ D. Akande and E. 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(4) *Journal of International Criminal Justice* (2019) 753–779, p. 753.

⁵ World Peace Foundation and Global Rights Compliance, *supra* note 3, p. 10.

⁶ *Ibid.*

⁷ T. Dannenbaum, ‘Criminalizing Starvation in an Age of Mass Deprivation in War: Intent, Method, Form, and Consequence’, 54 *Vanderbilt Journal of Transnational Law* (2021) 681–755, p. 737.

overwhelm and weaken the adversary.’⁸ Additionally, the term method of warfare underlines that the deprivation of objects indispensable to the survival of the civilian population must have been deliberate and ‘part of fighting the war’ instead of simply being ‘the incidental product of an attack on a legitimate military objective.’⁹

The specific use of starvation *as* a method of warfare has been understood as ‘a strategy to defeat the other party to the conflict’¹⁰ and ‘engaging intentionally in the transitive act of depriving civilians of essential objects.’¹¹ Therefore, the war crime of starvation includes all those acts that aim to ‘weaponize the civilian suffering associated with starvation.’¹² Indeed, in order for an act to amount to the war crime of starvation, the perpetrator must have had the intent to ‘deliberately provoke, increase or prolong the starvation by deprivation of objects indispensable for the survival with an aim to gain a military advantage, including, for instance, forcing civilians to transfer to another area or State.’¹³

Thus, it was argued that, in order to be used intentionally as a method of warfare, starvation ‘must be inflicted purposefully with a view to its weaponization.’¹⁴ This is due to the fact that the word method implies a ‘deliberate, purposive action’ and the indication that such method has to be used intentionally ‘bolsters that implication.’¹⁵ I believe, however, that it would be more correct to talk of “weaponization of the starvation of civilians”, rather than “weaponization of civilian suffering” as there is no specific reference to any kind of suffering in Art. 8(2)(b)(xxv).¹⁶ As to the wilful impeding relief supplies, the war crime of starvation does not cover every case of unlawful impeding but only those cases where the impeding results in ‘needs of the same severity as starvation’.¹⁷

⁸ World Peace Foundation and Global Rights Compliance, *supra* note 3, p. 14.

⁹ Dannenbaum, *supra* note 7, p. 741.

¹⁰ Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen (2009), para. 741; *See also* W. Jordash, C. Murdoch and J. Holmes, ‘Strategies for Prosecuting Mass Starvation’, 17(4) *Journal of International Criminal Justice* (2019) 849–879, p. 862.

¹¹ Dannenbaum, *supra* note 7, p. 734.

¹² Dannenbaum, *supra* note 1, p. 381.

¹³ M. Cottier and E. Richard, ‘Paragraph 2(b)(xxv): Starvation of Civilians as a Method of Warfare’, in Otto Triffterer (ed.), *Commentary on The Rome Statute of The International Criminal Court* (Munich: Beck, 2008), p. 791.

¹⁴ Accordingly, ‘[a]cts pursued with a view to weakening or weaponizing the suffering of combatants could be argued to fall outside the scope of the crime, even when they also cause widespread civilian deprivation, as is likely in a comprehensive starvation siege’: Dannenbaum, *supra* note 1, pp. 381–382.

¹⁵ *Ibid.*

¹⁶ According to another view, “method of warfare” simply describes the ‘conduct that is part of hostilities’. Moreover, ‘the specification that starvation of civilians be used “intentionally” ought to be understood in accordance with the default *mens rea* standards of Art. 30 RS: *Ibid.*

¹⁷ Akande and Gillard, *supra* note 4, p. 773.

Art. 8(2)(b)(xxv) RS notably draws on Article 54 of the Additional Protocol I (AP I), according to which ‘[s]tarvation of civilians as a method of warfare is prohibited.’¹⁸ Art. 54(2) AP I states that:

‘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.’¹⁹

Art. 54(3) AP I specifies that the prohibition shall not apply to objects used by the adverse Party ‘as sustenance solely for the members of its armed forces.’²⁰ Thus, the deprivation of these objects is considered permissible when the action would not cause starvation of civilians²¹ and using starvation as a method of warfare against combatants is not prohibited.²² However, such deprivation cannot be conducted indiscriminately as ‘starvation of civilians that may be expected to occur as a result of an attack directed against combatants or other military objectives must be taken into account under the rule of proportionality.’²³

Although Art. 54 AP I ‘shifted the law’s posture on starvation in war’, the ban on starvation was excluded from the grave breaches of the AP I and, as a result, ‘it remained a step removed from war crime status.’²⁴ Additionally, starvation was not typified or otherwise mentioned in the statutes of other international courts, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.²⁵ Thus, the RS was the first to elevate the intentional starvation of civilians to the status of war crime.²⁶

It is also worth noting that, for a long time, the RS criminalised starvation as a method of warfare only with regard to international armed conflicts (IAC).²⁷ Indeed, a provision

¹⁸ Protocol Additional to The Geneva Conventions Of 12 August 1949, and Relating To The Protection of Victims of International Armed Conflicts (hereafter AP I), 8 June 1977, Art. 54(2).

¹⁹ AP I, Art. 54(2).

²⁰ AP I, Art. 54(3).

²¹ See, Dannenbaum, *supra* note 1, p. 378; Dannenbaum also explains that starvation of civilians was still excluded from the grave breaches of AP I and, as a result, was not elevated to war crime status until its codification in the RS.

²² Akande and Gillard, *supra* note 4, p. 765.

²³ *Ibid.*

²⁴ Dannenbaum, *supra* note 1, p. 378.

²⁵ See M. Ventura, ‘Prosecuting Starvation under International Criminal Law: Exploring the Legal Possibilities’, 17 *Journal of International Criminal Justice* (2019) 781–81, p. 782. Ventura also argues that ‘no person has ever been directly prosecuted, let alone convicted, for starvation as such before an international court in the (relatively short) history of international criminal law’.

²⁶ Dannenbaum, *supra* note 1, p. 378: ‘it took two more decades for the criminality of the method to be codified in an international instrument.’

²⁷ According to Dannenbaum, this was due to an administrative error: *ibid.*, pp. 378–379.

criminalising starvation in non-international armed conflicts (NIAC) was deleted during the drafting process.²⁸ This, however, changed in December 2019 when the 18th Assembly of State Parties to the RS voted unanimously to make starvation a war crime in non-international armed conflicts as well.²⁹

Nevertheless, the RS does not criminalise, at least not expressly, starvation outside of the context of armed conflicts.³⁰ Instead, the act of starving civilians must have been committed as a method of warfare and the conduct must have taken place in the context of an armed conflict and in association with that armed conflict in order to constitute a war crime.³¹ Indeed, pursuant to Art. 8(2)(b)(xxv) RS, deliberately starving the civilian population cannot be prosecuted by the ICC as a war crime whenever starvation is inflicted neither in the context of an armed conflict nor as a method of warfare.³² The term method of warfare excludes, among the others, ‘failures of good governance or harmful resource allocations that are not themselves methods of warfare, even when shaped by the context of armed conflict.’³³ Hence, crimes of starvation committed during peacetime and not as a method of warfare are left out of the scope of this provision.³⁴ Such is the case of the crimes of starvation committed during the two famines described above which do not meet the requirements of the war crime of starvation as the Soviet leadership inflicted starvation neither in the context of an armed conflict nor in association with that armed conflict.

Shortly after the RS was adopted, several authors criticised this loophole which makes it easier for the perpetrators of crimes of starvation to escape prosecution³⁵ arguing that the current legal framework allows for gross violations of the right to food.³⁶ Because of this loophole, several proposals have been formulated in the scholarship as to how to prosecute

²⁸ Bartels argues that the omission was ‘an oversight, perhaps caused by the unfortunate placing of the proposed crime together with various versions of disproportionate use of force’: R. Bartels, ‘Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict’, 48(3) *Israel Law Review* (2015) 281–307, p. 298; For Lanz, the omission was ‘part of a bigger package where tradeoffs were made’: Dannenbaum, *supra* note 1, pp. 378–379.

²⁹ Resolution ICC-ASP/18/Res.5 of 6 December 2019.

³⁰ For additional information *see, e.g.*, K. Ambos and O. Triffterer, *The Rome Statute of the International Criminal Court: a Commentary* (C.H. Beck, Hart, Nomos, 2016).

³¹ ICC Elements of Crime, Art. 8(2)(b)(xxv).

³² *See, e.g.*, Ventura, *supra* note 25, p. 810.

³³ M. Cottier, ‘Article 8(2)(b)(xxv)’, in Otto Triffterer (ed.), *Commentary on The Rome Statute of The International Criminal Court* (Munich: Beck, 2008), p. 791.

³⁴ For additional information *see* A. Cassese, P. Gaeta and J. R. W. D. Jones, *The RS of the International Criminal Court: A Commentary* (July 2002).

³⁵ *See, e.g.*, D. Marcus, ‘Famine Crimes in International Law’, 97 *American Journal of International Law* (2003) 245–281, p. 252, doi.org/10.2307/3100102; Ventura, *supra* note 25; V. Jappah and D. Smith, ‘State Sponsored Famine: Conceptualising Politically Induced Famine as a Crime Against Humanity’, 4 *Journal of International and Global Studies* (2012) 16–31, available online at <https://digitalcommons.lindenwood.edu/cgi/viewcontent.cgi?article=1114&context=jigs> (accessed 6 June 2022).

³⁶ Jappah and Smith, *supra* note 35.

starvation not inflicted as a method of warfare.³⁷ It has been proposed that peacetime starvation could be prosecuted according to Art. 6 RS as crimes of genocide or according to Art. 7 RS as an act of extermination, an act of persecution or an “inhumane act”. Before examining these options in detail, it is necessary to provide a brief description of the events that led to mass starvation during the 1932–1933 and 1946–1947 famines.

3 The Famines

3.1 The 1932–1933 Famine

The 1932–1933 famine occurred in the Soviet Union and hit particularly hard the territory of modern-day Ukraine, Kazakhstan and the Kuban region of the Russian Soviet Socialist Republic. In fact, Ukraine, Kazakhstan and Kuban account for almost 90% of the total number of victims.³⁸ For the purposes of the legal analysis of this article, the examination of this famine will focus predominantly on starvation in Ukraine. In the Ukrainian Soviet Socialist Republic, between 3 and 6 million people perished from starvation and famine-related diseases.³⁹ The responsibility of the regime for causing mass starvation has been recognised by several scholars.⁴⁰ For instance, Mace explains that:

For the Ukrainians the famine must be understood as the most terrible part of a consistent policy carried out against them: the destruction of their cultural and spiritual elite ... against them the famine seems to have been designed as part of a campaign to destroy them as a political factor and as a social organism.⁴¹

According to the same author, the famine represented ‘a means used by Stalin to impose a ‘final solution’ on the most pressing nationality problem in the Soviet Union’.⁴² Similarly, Seirder argues that ‘the evidence of clearly premeditated mass murder on the scale of millions is most evident in Soviet Ukraine’.⁴³

³⁷ See, e.g., Jordash, Murdoch and Holmes, *supra* note 10 ; B. Conley, A. De Waal, C. Murdoch and W. Jordash, *Accountability for Mass Starvation: Testing the Limits of the Law* (Oxford University Press, September 2022).

³⁸ N. Pianciola, ‘Sacrificing the Qazaqs: The Stalinist Hierarchy of Consumption and the Great Famine of 1931-33 in Kazakhstan,’ 1 *Journal of Central Asian History* (2022) 225–272, p. 237.

³⁹ See R. Davies and S. Wheatcroft, *The Years of Hunger: Soviet Agriculture 1931–1933* (Palgrave Macmillan, 2010); R. Conquest, *Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (Oxford University Press, 1986).

⁴⁰ See, e.g., T. Snyder, *Bloodlands: Europe Between Hitler and Stalin* (Basic Books, 2010); A. Graziosi, ‘The Soviet 1931–1933 Famines and the Ukrainian Holodomor: Is a New Interpretation Possible, and What Would Its Consequences Be?’, 27 *Harvard Ukrainian Studies* (2004) 97–115, p. 11; Conquest, *supra* note 39, p. 196; R. Howard-Hassman, *State Food Crimes* (Cambridge University Press, 2016).

⁴¹ J. Mace, ‘The man-made famine of 1933 in Soviet Ukraine’, in R. Serbyn and B. Krawchenko (eds.), *Famine in Ukraine in 1932–1933* (Edmonton: Canadian Institute of Ukrainian Studies, University of Alberta, 1986), p. 12.

⁴² J. Mace, ‘Famine and nationalism in Soviet Ukraine’, 33 *Problems of Communism* (1984) 37–50.

⁴³ *Ibid.*, p. 42.

During those years the Soviet government overestimated agricultural productivity and, when it became clear that the agricultural output would be lower, they decided to increase the grain procurement quota for Ukraine by forty-four per cent while the collectors had to confiscate the grain by force.⁴⁴ Indeed, in 1932, the grain was enough to feed the people of Ukraine, even though it was available in lower quantity in comparison with 1931, because of ‘the struggle over collectivization.’⁴⁵

Thus, the regime caused mass starvation through ‘an unusually high grain allotment to the state as taxes’ while ‘thousands of acres of wheat were never harvested, and left to rot in the fields’ with the rest being stored in government granaries.⁴⁶ Most of this grain, which was ‘so vital to the lives of the Ukrainian people’, was exported in order to create credit abroad.⁴⁷ Subsequently, excessive grain requisitions resulted in widespread starvation and, despite receiving repeated warnings that its policies would lead to mass death, the Soviet regime decided to pursue those policies anyway and it kept doing so in the knowledge that the population was starving.⁴⁸

Lemkin points out that Stalin could have ordered the release of the grain to the rural population ‘in the clear knowledge that famine was now doing its worst.’⁴⁹ According to Conquest, the fact that Stalin saw the famine as an ‘acceptable weapon’ against the “kulak-nationalists” is made clear by ‘his determination to continue to employ policies which had produced the famine after the famine had clearly declared itself, and indeed to demand their more rigorous application.’⁵⁰ Similarly, according to Snyder, what killed millions of civilians in Soviet Ukraine was not the food shortage but the food distribution and it was Stalin the one who ‘decided who was entitled to what’.⁵¹

After causing mass starvation across grain-growing regions with its policies, in the autumn of 1932, the Soviet regime ‘twisted the knife further in Ukraine’ by creating a ‘famine within the famine, a disaster specifically targeted at Ukraine and Ukrainians.’⁵² On the 7th of August 1932, a decree imposed severe penalties for the appropriation of grain by the farmers,

⁴⁴ Davies and Wheatcroft, *supra* note 39, p. 435; See also A. Graziosi and F. Sysyn, *Genocide: The Power and Problems of a Concept* (McGill-Queen’s University Press, January 2022).

⁴⁵ R. Serbyn, ‘Lemkin on Genocide of Nations’ 7(1) *Journal of International Criminal Justice* (2009) 123–130, p. 128.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Marcus, *supra* note 35, p. 252.

⁴⁹ Serbyn, *supra* note 45, p. 128.

⁵⁰ Conquest, *supra* note 39, p. 326.

⁵¹ Snyder, *supra* note 40, pp. 42–46.

⁵² A. Applebaum, *Red Famine: Stalin’s War on Ukraine* (Penguin 2018), p. 135.

even when it was a small quantity for personal use.⁵³ With the Law on the Inviolability of Socialist Property, the government criminalised the resistance to grain collection and prescribed the death penalty for anybody who stole property.⁵⁴ Applebaum explains that ‘farmers were forbidden from holding back anything at all’ and ‘no excuses were accepted.’⁵⁵ For instance, ‘peasants found concealing food were robbed of their remaining possessions, evicted from their homes, and thrown into the snow without any clothes.’⁵⁶

In addition, the peasants did not receive any receipt for the grain that was confiscated and they were ‘subject to endless search and abuse’.⁵⁷ Moreover, those who could not fulfil the grain quota were obliged to pay an additional tax in meat.⁵⁸ To make things worse, farmers who failed to fulfil the grain quota were obliged to surrender fifteen times the amount of grain that was normally due in a whole month.⁵⁹ The regime blacklisted collective farms, cooperatives and villages that failed to meet their grain quotas and imposed on them a series of punishments and sanctions. For instance, communities that failed to meet the grain targets were excluded by trade with other communities.⁶⁰ Thus, they could not legally trade grain, flour or bread and ‘anyone caught trading anything was liable to be arrested.’⁶¹

The hunger was so great that starving peasants started eating weeds, cotton seeds, byproducts from brewing beer, apricot and cherry stones, subsequently dying from poisoning.⁶² In the Dnepropetrovsk region, for instance, cats, dogs and horses were eaten while in the Vinnytsia region, starving peasants resorted to eating carrions, garbage and a ‘concoctions from weeds and potato peelings’.⁶³

Additionally, Conquest explains that ‘[c]lear orders existed to stop Ukrainian peasants entering Russia where food was available and, when they succeeded in evading these blocks, to

⁵³ Decree promulgated by the TsIK (Central Executive Committee of the Soviet Union) and the Sovnarkom (Council of People’s Commissars) as reported in Davies and Wheatcroft, *supra* note 39, p. 165.

⁵⁴ J. Mace, *Toward the Understanding and Prevention of Genocide: Proceeding of the International Conference on the Holocaust and Genocide* (Westview Press, 1984), p. 74.

⁵⁵ Applebaum, *supra* note 52, p. 135. Applebaum also writes that ‘province men were held inside hot stoves until they confessed to hiding grain.’

⁵⁶ *Ibid*, pp. 158-159. Applebaum also writes that ‘people were punished for stealing frozen beets, sprouted grain, even wheat from their own private plots. In Cherkasy province activists broke all the millstones in the village of Tymoshivka. The locals assumed that this was ‘so that there would be no place to grind a handful of grain, even if there were some left somewhere.’

⁵⁷ Snyder, *supra* note 40, pp. 42–46.

⁵⁸ *Ibid*, p. 47; Snyder also explains that ‘cattle and swine had been a last reserve against starvation’ and that ‘whoever had a cow didn’t starve’.

⁵⁹ *Ibid*: Snyder also writes that ‘this meant the arrival of hordes of party activists and police with the mission and the legal right to take everything’.

⁶⁰ *Ibid*.

⁶¹ Applebaum, *supra* note 52, pp. 137–138.

⁶² Davies and Wheatcroft, *supra* note 39, p. 429.

⁶³ *Ibid*, p. 421.

confiscate any food they were carrying when intercepted on their return.⁶⁴ The fact that the authorities closed the borders of Ukraine in order to prevent peasants from moving around the Soviet Union in search of food only worsened the situation.⁶⁵ The regime also created an internal passport system, according to which those residing in the city needed a special passport in order to move around while the peasants were prevented from obtaining such passports.⁶⁶ Naimark argues that there is overwhelming evidence that the Soviet regime ‘prevented the peasants from seeking food themselves in the cities or elsewhere in the USSR’ and refused to relax restrictions on grain deliveries.⁶⁷

Furthermore, the regime made no effort to provide relief to the starving population.⁶⁸ Indeed, on the 8th of November 1932, Stalin sent a telegram to Kosior, First Secretary of the Communist Party of Ukraine, writing that ‘from today the despatch of goods for the villages of all regions of Ukraine shall cease until ... individual peasants begin honestly and conscientiously to fulfil their duty to the working class ... by the delivery of grain’.⁶⁹ Kosior himself declared, on the 2nd of December 1933, that ‘Ukrainian nationalism is our chief danger.’⁷⁰ It was argued that ‘[t]o eliminate that nationalism, to establish the horrifying uniformity of the Soviet state ... the Ukrainian peasantry was sacrificed.’⁷¹ Thus, the leadership decided to abandon the peasants to themselves and ‘let the famine run its course with the idea that it would teach the peasants a lesson.’⁷² Lemkin claims that ‘these have been the chief steps in the systematic destruction of the Ukrainian nation, in its progressive absorption within the new Soviet nation.’⁷³

Meanwhile, in the Kazakh Soviet Socialist Republic, more than a third of the entire population, 1.5 million people, died from starvation between 1930 and 1933⁷⁴ as the regime ‘blocked traditional nomadic routes and requisitioned livestock to feed the Russian cities, creating terrible suffering among the ethnic Kazakh nomads.’⁷⁵ This famine was the result of

⁶⁴ Conquest, *supra* note 39, p. 327.

⁶⁵ Applebaum, *supra* note 52, pp. 137–138. Also, peasants found outside Ukraine were returned to their place of origin.

⁶⁶ *Ibid.*, pp. 140–142.

⁶⁷ N. Naimark, *Stalin’s Genocides* (Princeton University Press, 2010), pp. 134–135.

⁶⁸ *Ibid.*

⁶⁹ RGASPI (Russian State Archive of Socio–Political History) 558/11/45, 32 as reported in Davies and Wheatcroft, *supra* note 39, p. 174.

⁷⁰ Serbyn, *supra* note 45, p. 128.

⁷¹ *Ibid.*

⁷² *Ibid.*, p. 129.

⁷³ *Ibid.*

⁷⁴ Pianciola, *supra* note 38, p. 262. Pianciola explains that ‘even though the rural population had already noticeably started to decrease during 1930, it was during 1931 that the famine had produced a devastating impact on the entire Soviet republic. This situation then remained the same during 1932.’

⁷⁵ Applebaum, *supra* note 52, p. 145; for additional information on the Kazakhstan famine see S. Cameron, *The Hungry Steppe: Famine, Violence, and the Making of Soviet Kazakhstan* (Cornell University Press, 2018).

food requisitions, ‘forced sedentarisation of the nomads and collectivisation’ and was used as a ‘special means or technique of bringing the Kazakhs under Soviet rule.’⁷⁶ Indeed, ‘the disruptive livestock and grain procurements pushed a significant part of the population below the subsistence line.’⁷⁷ Pianciola stresses the importance of the livestock requisitions campaigns when he explains that:

The extreme meat and livestock procurements implemented on the basis of Kremlin’s directives starting in the summer of 1930 were the crucial factor in multiplying the severity of the crisis and turning a famine that might otherwise have remained comparable in scale ... into an event of a magnitude comparable only with the Ukrainian Holodomor.⁷⁸

Thus, unlike the case of Ukraine, ‘the most important direct cause of the scale of the famine in Kazakhstan was the massive livestock requisition campaigns’, although grain procurements also contributed in part to cause widespread starvation.⁷⁹ The Soviet leadership consciously sacrificed the population of Kazakhstan, whose “mode of production” was seen as backward, and drained its resources.⁸⁰ It did so to feed the urban and industrial workers of Moscow, Leningrad and other industrial cities which were considered more important for the regime and the state.⁸¹

Cameron argues that, through the famine, ‘the Soviet leadership attempted to ‘eradicate pre-existing elements of Kazakh identity’ and their ‘pastoral nomadic way of life.’⁸² She also claims that ‘in many respects the Kazakh famine was more destructive than the Ukrainian famine’, as the Kazakh famine resulted in a ‘cultural transformation, the loss of Kazakhs’ nomadic way of life, that was even more extensive than that endured by the Ukrainians.’⁸³ Indeed, according to her:

While the Kazakh famine of 1930-33 resembles the other Soviet collectivization famines in its broad outlines, it has several distinctive features: In Kazakhstan the famine’s primary victims were pastoral nomads rather than peasants. Thus the dynamics

⁷⁶ T. Penter, ‘From a Local Erfahrungsgeschichte of Holodomor to a Global History of Famine’, 27(3) *Contemporary European History* (2018) 445–449, p. 447.

⁷⁷ Pianciola, *supra* note 38, p. 261. He also writes that ‘[t]he “sedentarization” trope in the official discourse of Stalinist administrative and repressive bodies helped to interpret the economic disruption, death, and flight of the population as part of a murderous but “progressive” process of socialist “creative destruction”’.

⁷⁸ *Ibid.*, p. 265.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, p. 225.

⁸¹ *Ibid.*, p. 265.

⁸² S. Cameron, ‘The Kazakh Famine of 1930-33: Current Research and New Directions’, 3(2) *East/West Journal of Ukrainian Studies* (2016) 117–132, pp. 118–120.

⁸³ S. Cameron, ‘Questioning the Distinctiveness of the Ukrainian Famine’, 27(3) *Contemporary European History* (2018) 460–464, p. 462; *see also* S. Cameron, *supra* note 75.

of hunger in Kazakhstan were different ... the flight of starving refugees, for instance, was much greater in the Kazakh famine, as nomads used their knowledge of seasonal migration route to evade repression—while the societal effects of the famine were arguably even more catastrophic. During the famine some ninety percent of the republic’s livestock herds perished, dealing a devastating blow to pastoral nomadic society. Without their herds, Kazakhs could not nomadize. They had no livelihood or means of acquiring food.⁸⁴

Research conducted on Kazakhstan’s secret police archives revealed ‘the violent nature of the regime’s assault on Kazakh society’ together with the fact that Stalin was well aware of the tragic situation in Kazakhstan but did not offer any concessions.⁸⁵ Thus, the Soviet regime used the famine as ‘a means of bringing Kazakhs under Soviet rule’ in a process called “Sovietization through hunger”⁸⁶ by Kindler and “etatization” by Pianciola.⁸⁷

The Soviet leadership saw state procurements and mass starvation as ‘tools in the ongoing war against the rural population, which was to be subjugated and forced into the collective farms.’⁸⁸ This can be inferred, for instance, by the fact that the political decisions that caused the crisis might have been reversed ‘once an awareness of the destructive consequences of these policies had reached the Kremlin’ and yet the regime chose to sacrifice the population of Kazakhstan instead.⁸⁹

Overall, Ukraine and Kazakhstan account for more than 80 per cent of the 1932–1933 famine victims with Ukraine accounting for about half of the victims and Kazakhstan for a quarter.⁹⁰ In fact, starvation killed ‘more than one-third of Qazaqs and perhaps one-sixth of Ukrainians’⁹¹ with the ethnic difference being defined as a main factor in the mass starvation:

Historians who deny that ethnic difference was a significant factor in the mass death focus either on predominantly Russian regions, or take a pan-Soviet approach, showing that the violent assault against peasant society, culture and religion was ubiquitous in the country and therefore involved no specific targeting of particular ethnic groups.⁹²

⁸⁴ S. Cameron, *supra* note 82, pp. 118–120.

⁸⁵ *Ibid.*, p. 125.

⁸⁶ R. Kindler, *Stalin’s Nomads: Power and Famine in Kazakhstan* (Pittsburgh: University of Pittsburgh Press, 2018), p. 12; Kindler also writes that ‘famine was inseparably linked to the Bolshevik experiment in widespread social reform in Central Asia, namely, the attempt to permanently sedentarize Kazakh nomads.’

⁸⁷ N. Pianciola, ‘Famine in the steppe - The collectivization of agriculture and the Kazak herdsmen 1928-1934’, 45(1) *Cahiers du Monde Russe, Russie, Empire Russe, Union soviétique États indépendants* (2004) 137–192, p. 191.

⁸⁸ Pianciola, *supra* note 38, p. 267.

⁸⁹ *Ibid.*, pp. 266–267.

⁹⁰ *Ibid.*, p. 237; see also N. Pianciola, ‘Ukraine and Kazakhstan: Comparing the Famines’ 27(3) *Contemporary European History* (2018) 440–444, p. 440.

⁹¹ Pianciola, *supra* note 38, p. 237.

⁹² Pianciola, *supra* note 90, p. 440.

3.2 The 1946–1947 Famine

The 1946–1947 Soviet famine hit the areas of modern-day Ukraine, Russia, Belarus and Moldova. Between 1 and 2 million people died from starvation with the food shortages becoming widespread in the summer of 1946.⁹³ In Moldova, one of the areas most affected by the famine, around 5% of the population died from starvation.⁹⁴ Historians stressed the regime's responsibility for intentionally causing mass starvation during this famine as well.⁹⁵ According to Ganson, for instance, the widespread starvation was a 'collateral damage that resulted from Soviet government policy and ideological dogmatism.'⁹⁶ Zima, on the other hand, writes that this famine was 'intentionally punitive and premeditated' and served the purpose to reassert the sociopolitical control over the society that was lost during the war.⁹⁷

In early 1946 a lack of rainfall led to a drought which affected the harvest and reduced the agricultural production of grain and potatoes by more than sixty per cent.⁹⁸ Despite the fact that environmental issues caused a lower agricultural production, the government decided to increase grain exports even though the lack of food was already evident.⁹⁹ Ganson writes that 'the government's decision to intensify grain requisitioning ... and the policy of grain confiscation at any price to human life was the primary and dominant factor that preceded the explosive growth of famine deaths.'¹⁰⁰ He also points out that the Soviet leadership decided to enforce the food requisition targets while being well aware that the population was starving.¹⁰¹

With much of the harvested grain going to the state, 'food supplies dwindled' and the rural population began to suffer 'acute hunger' in late 1946 with mortality peaking in the first half of 1947.¹⁰² Additionally, in late 1946, the government issued a decree, titled "On Economising in the Consumption of Grain", which reduced the number of people who had the right to receive rations.¹⁰³ This was done during a post-war period in which many people still

⁹³ N. Ganson, *The Soviet Famine of 1946–1947 in Global and Historical Perspective* (New York: Palgrave Macmillan, 2009), p. 15.

⁹⁴ See C. King, *The Moldovans: Romania, Russia, and the Politics of Culture* (December 1999); I. Volkov, 'The Drought and Famine of 1946–47', 31(2) *Russian Studies in History* (1992) 31–60.

⁹⁵ See, e.g., Ganson, *supra* note 93; M. Ellmann, 'The 1947 Soviet Famine and the Entitlement Approach to Famines', 24 *The Cambridge Journal of Economics* (2000) 603–630; V. Zima, *Famine in the USSR 1946–1947: Origins and Consequences* (Moscow: Institute of Russian History, Russian Academy of Sciences, 1996); S. Wheatcroft, 'The Soviet Famine of 1946–1947, the Weather and Human Agency in Historical Perspective', 64 *Europe-Asia Studies* (2012) 987–1005.

⁹⁶ Ganson, *supra* note 93, pp. 27–46.

⁹⁷ Zima, *supra* note 95.

⁹⁸ Ganson, *supra* note 93, pp. 27–40.

⁹⁹ Ganson, *supra* note 93, pp. 47–67.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, pp. 27–46.

¹⁰² *Ibid.*, p. 15.

¹⁰³ Joint decree of the Central Committee of the Communist Party of the Soviet Union titled 'On Economising in the Consumption of Grain', 27 September 1946.

depended on the rations to avoid starvation and while the rationing system was still used in many countries less devastated by war than the Soviet Union. According to Ganson, this decree was ‘the main precipitant of hunger’ while the ‘half-hearted support of the relief campaign clearly served as a major impediment to stemming the tide of the famine.’¹⁰⁴

Thus, despite the drought which resulted in a bad harvest and reduced food availability, during the famine, the regime had enough grain to feed the civilian population and ‘had the priorities of the government been different there might have been no famine (or a much smaller one) despite the drought.’¹⁰⁵ For these reasons, Ellmann argues that the starvation deaths were mediated by the “Soviet entitlement system”, according to which ‘those who died were those who in the Soviet system had no entitlement to food’ while ‘those who did have an entitlement to food (such as urban state employees) usually survived’.¹⁰⁶ Starvation deaths were also caused by:

The high level of rural taxation and high procurements combined with low level of procurement prices, which made it difficult for the rural population to provide for itself and the restrictions on private trade imposed by the Soviet government which made it difficult for many people to obtain food.¹⁰⁷

Finally, the food crisis was also worsened by the regime’s decision to refuse international food aid which might have been of great help. In fact, in 1946, the International Emergency Food Council was founded to better organise international food relief but the Soviet Union refused to join the organisation as every state that wanted to join had to share its economic statistics.¹⁰⁸

3.3 The Crime Concerned Activities, the ICC Jurisdiction, the Perpetrators and the Victims

Peacetime starvation can be described as the infliction of prolonged deprivation of food necessary for the sustenance of the civilian population which resulted in mass starvation. In the case of the episodes of mass starvation described above, this conduct took place in two different forms: first food requisitions and grain confiscation for the rural population and, second, extremely low food rations or complete exclusion from food rations for the urban population. Crime concerned activities were also the orders, issued by the Soviet leadership, to cease the dispatch of goods to Ukrainian villages, the orders prohibiting the internal movement

¹⁰⁴ Ganson, *supra* note 93, pp. 27–46.

¹⁰⁵ Ellmann, *supra* note 95, pp. 603 and 620.

¹⁰⁶ *Ibid.*, p. 623.

¹⁰⁷ *Ibid.*, p. 620.

¹⁰⁸ *Ibid.*

of people to prevent them from searching for food and the orders to arrest starving farmers who hid grain for personal use.

Regarding the jurisdiction of these cases, pursuant to Art. 12 RS, in order for the ICC to exercise jurisdiction on a certain conduct, the criminal activity must be committed either on the territory of a state which is Party to the RS or by a national of a state which is a Party to the RS. Additionally, according to the same article, Non-Member States may accept the jurisdiction of the Court on a certain conduct. Moreover, under Art. 13 RS, a crime can also be referred to the ICC Prosecutor by the UN Security Council acting under Chapter VII of the Charter of the United Nations.¹⁰⁹ In this case, the ICC shall enjoy jurisdiction over the referred crime irrespective of whether the State where the crime was committed is a Member or a Non-Member State. Indeed, through the Security Council referral, the Court may exercise worldwide jurisdiction over every UN-Member State.¹¹⁰

A detailed analysis of the preconditions to the exercise of jurisdiction by the ICC is out of the scope of this article as the main aim is to understand if the RS allows for the prosecution of peacetime starvation and if the Soviet leadership could be prosecuted by the ICC if those crimes were committed nowadays. Thus, for the purposes of this analysis, it will be assumed that the preconditions to the exercise of jurisdiction are satisfied and that in this case, the ICC has jurisdiction over the matter.

The perpetrators were those who held power when mass starvation occurred and specifically those who sat at the highest levels of the state and were leading members of the regime with the power to decide on state policies. Although the list might be long, it is out of the scope of this article to identify and name all the individuals who might have been prosecuted for starving the civilian population. Thus, for practical reasons, the two leading figures of the regime will be considered instead: Joseph Stalin, the man who sat at the very top of the regime hierarchy and Lavrentiy Beria, marshal of the Soviet Union and chief of the People's Commissariat for Internal Affairs during both famines.¹¹¹ These two persons were, due to their position in the state apparatus, able to effectively exercise control over or direct the

¹⁰⁹ According to Akande, in case of a Security Council referral the RS would also be binding on Non-Members: *see* Akande, *supra* note 1, p. 340.

¹¹⁰ Babaian, *supra* note 1, p. 50. Babaian also explains that 'the applicability of some of the Statute's rules for States not Party to the ICC arise not directly from the Statute itself, but out of the SC resolution and the Charter'.

¹¹¹ The People's Commissariat for Internal Affairs (or NKVD) was the interior ministry of the Soviet Union. It had an important role in political repression, political assassinations and extrajudicial executions all over the country. In 1934 the functions of the OGPU secret police organisation were transferred to the NKVD, further increasing its jurisdiction. In 1946 it became the Ministry of Internal Affairs (or MVD).

political or military action of the Soviet Union.¹¹² Additionally, as far as Stalin is concerned, he was in full control of all branches of the state apparatus and played an essential role in coordinating the planning and implementation of the policies and actions that resulted in mass starvation. Thus, from now on these two persons will be collectively referred to as “the leadership”.

As to the victims, they were those who died or suffered from both physical and mental pain as a result of starvation. Specifically, they were that part of the rural population that saw its food and other means of sustenance confiscated and that part of the urban population that received extremely low food rations or was excluded from them.

4 Prosecuting Peacetime Starvation as an Act of Genocide

One of the options suggested in the scholarship to prosecute peacetime starvation before the ICC is the use of RS provisions where genocide is typified.¹¹³ Indeed, Art. 6 RS states that acts of genocide include ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’.¹¹⁴

However, if we want to convict a person of the crime of genocide, we have to prove that he or she committed the crime with the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group; that is, the perpetrators must have a specific additional purpose and must intend to achieve a particular result with their actions.¹¹⁵ About the crime of genocide, the ICTR has once stated that ‘a distinguishing aspect of the crime of genocide is the specific intent to destroy a group in whole or in part’ and that this specific intent ‘distinguishes the crime of genocide from the ordinary crime of murder’.¹¹⁶

¹¹² For additional information on Beria see, e.g., A. Knight, *Beria: Stalin's First Lieutenant*, (Princeton University Press, December 1995); S. Beria, *Beria - My Father: Inside Stalin's Kremlin* (Bristol Classical Press, November 2003). For additional information on Stalin see, e.g., S. S. Montefiore, *Stalin: The Court of the Red Tsar* (New York: Random House Inc, 2003); T. Ali, *The Stalinist Legacy: Its Impact on Twentieth Century World Politics* (New Haven: Yale University Press, November 2008).

¹¹³ This possibility was explored by Marcus who argued that the perpetrators of crimes of mass starvation could be prosecuted by the ICC for committing acts of genocide. See Marcus, *supra* note 35, p. 273. The same has been proposed by Kearney: D. Kearney, ‘Food Deprivations as Crimes Against Humanity’, 46 *New York University Journal of International Law and Politics* (2013) 253–289, p. 283, available online at <https://nyujilp.org/wp-content/uploads/2010/06/46.1-Kearney.pdf> (accessed 1 June 2022).

¹¹⁴ Rome Statute, Art. 6; for additional information on genocide see Graziosi and Sysyn, *supra* note 44.

¹¹⁵ According to Schabas, ‘it is logically impossible to convict a person who is merely negligent of a crime of specific intent’. Thus, when subordinates commit crimes of starvation, their military commanders or superiors cannot be held accountable for their ‘negligent supervision’ and charged with genocide as this crime requires a specific intent. See W. Schabas, ‘Canadian Implementing Legislation for the Rome Statute’, 3 *Yearbook of International Humanitarian Law* (2000) 337–346, p. 342, doi.org/10.1017/S1389135900000684.

¹¹⁶ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Chamber II, Judgement, 21 May 1999, para. 116.

As far as the 1932-1933 famine is concerned, there is still uncertainty as to whether it was ‘a central act in a campaign of genocide’ or if the goal was simply to ‘cow Ukrainian peasants into submission’.¹¹⁷ According to Conquest, Stalin used the famine as a weapon against the Ukrainian farmers who were a potential problem for the regime as they were seen as a ‘bulwark of nationalism’.¹¹⁸ While it is true that the Soviet leadership deliberately inflicted certain conditions of life that caused the death of part of the population, it did not do so with the intention of destroying a particular national, ethnical, racial or religious group. Indeed, Mace argues that:

The famine of 1932–33 poses particular problems from the standpoint of internationally accepted definitions of genocide, since its focus was geographic, rather than discriminatory against specific groups within a given area, and it was clearly not an attempt to destroy all members of a given group.¹¹⁹

In the case of genocide, the perpetrators must actually aim at achieving the destruction, in whole or in part, of a group through their actions and if instead, they act without that specific goal then there is no specific intent. As explained above, the Soviet leadership targeted private landowners and farmers who were seen as an obstacle to full collectivization and the achievement of full communism and it wanted to destroy this “problematic” group. However, those landowners and farmers were targeted because of their socioeconomic status in Soviet society and not because they belonged to a specific national, ethnical, racial or religious group. It can therefore be assumed that the perpetrators lacked the genocidal intent and that their actions do not meet the standards for genocide because the leadership did not intend to exterminate the Ukrainians specifically as a national group.

As to the 1946–1947 famine, it has been argued that this has been instrumentalised by the regime to reassert the sociopolitical control over the Soviet society that was lost during the war years and that this famine was intentionally punitive and premeditated.¹²⁰ However, the leadership did not act with the intent to destroy, in whole or in part, a national, ethnic or racial group. The Soviet peasantry was not such a group as it did not belong to a single national, ethnic or racial group, but instead to many different groups including ethnic Russians.

¹¹⁷ Yaroslav Bilinsky, ‘Was the Ukrainian famine of 1932–1933 genocide?’, 1(2) *Journal of Genocide Research* (June 1999) 147–156. Among those who considered this famine as genocide: Snyder, *supra* note 40; A. Graziosi, ‘The Soviet 1931–1933 Famines’; Conquest, *supra* note 13; Mace, *supra* note 42; Naimark, *supra* note 67.

¹¹⁸ Conquest, *supra* note 13, p. 344; he also writes that ‘the assault by famine on the Ukrainian peasant population was accompanied by a wide-ranging destruction of Ukrainian cultural and religious life and slaughter of the Ukrainian intelligentsia’.

¹¹⁹ J. Mace, ‘Genocide in the U.S.S.R.’, in I. W. Charny and I. L. Horowitz (eds.), *The Widening Circle of Genocide* (New York: Facts on File, 1988), p. 117.

¹²⁰ Zima, *supra* note 95.

Subsequently, the actions of the Soviet leadership do not meet the standards for genocide in this case either.

Therefore, with regards to both famines, the requirements for the material element are not satisfied as the leadership lacked the specific intent required for the genocidal crime of inflicting conditions of life calculated to destroy a protected group. This shows that prosecuting peacetime starvation as genocide is not always possible because of the specific intent requirement that characterises this international crime.

5 Prosecuting Peacetime Starvation as a Crime Against Humanity

Several scholars argued that peacetime starvation could be prosecuted pursuant to Art. 7 RS as an act of extermination, an act of persecution or an “inhumane act”. Before assessing in detail these options it is necessary to explore whether the requirements of the so-called chapeau element, namely a systematic or widespread attack against civilians, can be met in the case of peacetime starvation.¹²¹

5.1 The Contextual Element: the Widespread and Systematic Attack Against the Civilian Population

Art. 7(1) RS states that the crimes against humanity must be committed ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. As to the characteristics of this attack, Art. 7(2) explains that ‘attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a State or organisational policy to commit such attack. According to the ICC Elements of Crime, the acts need not constitute a military attack.¹²²

As to the exact meaning of “widespread” and “systematic”, a significant contribution to these definitions has come from dissolved *ad hoc* tribunals such as the ICTY and the ICTR. Specifically, in *Prosecutor v. Akayesu*, the ICTR specified that an attack is widespread if it is a ‘massive, frequent, large-scale action, carried out collectively with considerable seriousness

¹²¹ For additional information see D. Robinson, ‘Defining Crimes Against Humanity at the Rome Conference’, 93 *The American Journal of International Law* (January 1999) 43–57, doi.org/10.2307/2997955.

¹²² ICC Elements of Crime, Art. 7(3).

and directed against a multiplicity of victims'.¹²³ Moreover, in *Prosecutor v. Musema*, the ICTR specified that an attack is systematic when it constitutes an 'organized action, following a regular pattern, on the basis of a common policy and involving substantial public or private resources'.¹²⁴ Indeed, in both famines, there was an attack against the civilian population. Such an attack was widespread as it took the form of massive and large-scale actions of deprivation of the means necessary for the survival of the population by confiscating grain. Those actions were carried out nationwide against a multiplicity of victims (most of the rural population and a considerable part of the urban one). Additionally, the attack was systematic as it consisted of organised actions carried out on the basis of common policies (economic policies directed towards economic or political objectives) following regular patterns with the involvement of considerable public resources. Furthermore, in *Prosecutor v. Blaskic*, the ICTY specified that an attack is systematic when there is a:

Political objective, a plan pursuant to which the attack is perpetrated or an ideology ... ; the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts ... ; the preparation and use of significant public or private resources ... ; the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.¹²⁵

Indeed, the political objectives, pursuant to which the attack was perpetrated, were the collectivization of agriculture, the creation of a fully communist state and the full industrialization of the country. Additionally, there was a repeated and continuous commission of inhumane acts such as depriving the civilian population of food necessary for its survival by confiscating its grain and providing very low food rations or even excluding part of the population from those rations. Moreover, as explained in the previous sections, high-level political authorities were involved in the definition of methodical plans that caused mass starvation.

Regarding the state policy element, the ICC Pre-Trial Chamber has also explained that this policy does not have to be conceived 'at the highest level of the State machinery'.¹²⁶ As to the organisational policy, the ICC Pre-Trial Chamber has also stated that such organisations can

¹²³ ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 580.

¹²⁴ ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber I, Judgement, 27 January 2000, para. 204.

¹²⁵ ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Chamber I, Judgement, 3 March 2000, para. 200.

¹²⁶ ICC, ICC-01/09-19-Corr, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 89, as reported in M. Klamberg, *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher, 2017), p. 62, available online at <https://www.legal-tools.org/doc/aa0e2b/pdf/> (accessed 30 May 2022).

be ‘groups of persons who govern a specific territory’ or ‘any organization with the capability to commit a widespread or systematic attack against a civilian population’.¹²⁷

As to the knowledge of the attack requirement, the ICC Elements of Crime explain that the knowledge of a widespread or systematic attack against the civilian population:

Should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.¹²⁸

Thus, the perpetrators do not need to know all the precise details of the plan or policy of the state but it is enough that they intend to further such an attack. In the case of the two famines outlined above, the perpetrators definitely intended to further the attack as they continued to enforce their policies despite the extensive evidence that their actions were causing widespread starvation. Additionally, as previously explained, they perfectly knew the precise details of the plan and the state policy as the leadership was sitting at the highest levels of the state apparatus and it is reasonable to say that it not only knew the plans but that it decided and defined them as well.¹²⁹

Indeed, although there were no official decrees including an express order to cause the mass starvation, yet, there were clear orders to stop the starving Ukrainian farmers from entering Russia and searching for food and, in case they succeeded, orders to confiscate any food they were carrying when intercepted on their return. These orders might have only come from the highest levels of government. Thus, in both famines, there was awareness of the attack against the civilian population. As a result, the acts of depriving the civilian population of food were committed as part of a widespread or systematic attack directed against the civilian population, with knowledge of the attack.

5.2 Prosecuting Peacetime Starvation as an Act of Persecution

Several scholars have proposed that the ICC could prosecute peacetime starvation as an act of persecution.¹³⁰ Kearney, for instance, points out that ‘there is nothing radical about

¹²⁷ ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Pre-Trial Chamber II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, 15 June 2009, para. 81 and ICC, *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 396, as reported in Klamberg, *supra* note 126, p. 62.

¹²⁸ ICC Elements of Crime, Art. 7(2).

¹²⁹ Conquest, *supra* note 39, p. 327.

¹³⁰ See, e.g., Kearney, *supra* note 113; R. DeFalco, ‘Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution’, 5

prosecuting widespread food ... deprivations ... as persecution'.¹³¹ Similarly, DeFalco argues that the international crime of persecution could be used to deal with those cases where episodes of widespread starvation, 'even if not completely caused by the perpetrator group, are manipulated to much more severely affect a particular group'.¹³² Indeed, Art. 7(1) RS typifies as a crime against humanity:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.¹³³

Persecution is further defined in Art. 7(2) RS as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.¹³⁴ Indeed, according to the ICTY jurisprudence, this crime consists of any act or omission that 'discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law'.¹³⁵ Notably, 'only gross or blatant denials of fundamental rights qualify as persecution'¹³⁶ while 'specific persecutory acts must be alleged rather than general mistreatment of a targeted group'.¹³⁷

The ICC Elements of Crimes also add that the perpetrators have to target the victims 'by reason of the identity of a group or collectivity'.¹³⁸ Indeed, the RS requires a specific intent (or *dolus specialis*) for this crime. Subsequently, if we want to convict a person of the crime of persecution, we have to prove that he or she committed the crime with the specific intent to discriminate against an identifiable group on political, racial, national, ethnic, cultural and

International Journal of Transitional Justice (2011) 142–158, doi.org/10.1093/ijtj/ijr001. Specifically, DeFalco argues that the mass starvation which occurred during the Khmer Rouge regime could be prosecuted by the ECCC not only as acts of extermination but also as acts of persecution because the regime deliberately targeted political groups such as the 'new people' and those who were considered hostile to the revolution.

¹³¹ Kearney, *supra* note 113, pp. 273–274.

¹³² R. DeFalco, 'Conceptualizing Famine as a Subject of International Criminal Justice: Towards a Modality-Based Approach', 38(4) *University of Pennsylvania Journal of International Law* (2016) 1113–1187, p. 1171.

¹³³ Rome Statute, Art. 7(1).

¹³⁴ Rome Statute, Art. 7(2).

¹³⁵ ICTY, *Prosecutor v. Krnojelac (Foča)*, Case No. IT-97-25, Appeals Chamber, Judgement, 17 September 2003, para. 185.

¹³⁶ ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14, Appeals Chamber, Judgement, 29 July 2004, para. 135.

¹³⁷ ICTY, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, para. 626; ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25 Trial Chamber, Judgement, 15 March 2002, para. 433.

¹³⁸ ICC Elements of Crimes, Art. 7(2).

religious grounds.¹³⁹ The view is largely supported in the scholarship.¹⁴⁰ DeFalco, for instance, argues that the key to any persecution conviction is establishing that the accused had the specific ‘intent to commit the underlying act and to discriminate on political, racial or religious grounds’.¹⁴¹ This has also been confirmed by the jurisprudence of *ad hoc* tribunals.¹⁴² In *Prosecutor v. Simić et al.*, for instance, the ICTY Trial Chamber stated that the discriminatory intent ‘must relate to the specific act or omission underlying the charge of persecution as opposed to the attack in general, notwithstanding the fact that the attack may also in practice have a discriminatory aspect’.¹⁴³ Moreover, the act or omission must have discriminatory consequences in fact, and ‘not merely be committed with discriminatory intent’.¹⁴⁴ Furthermore, in the past, the ICTY Trial Chamber specified that ‘the accused ... must consciously intend to discriminate.’¹⁴⁵ Also, ‘while the intent to discriminate need not be the primary intent with respect to an act of persecution, it must still be a significant one.’¹⁴⁶ Finally, according to the ICTY, ‘persecution may ... take the form of confiscation or destruction of ... means of subsistence.’¹⁴⁷

It can be argued that the deliberate starvation of civilians constitutes an intentional and severe deprivation of fundamental rights, including the right to food.¹⁴⁸ Thus, if it can be proven that the perpetrators intended to discriminate when starving the civilian population, that this intent was significant, and that specific persecutory acts occurred and had discriminatory consequences in practice, then an episode of peacetime starvation might be prosecuted as the

¹³⁹ Badar argues that specific intent is required for the crimes against humanity of persecution, enforced disappearance of persons and forced pregnancies: M. E. Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court: a Commentary from a Comparative Criminal Law Perspective’, 19 *Criminal Law Forum* (2008) 473–518, p. 484, doi.org/10.1007/s10609-008-9085-6.

¹⁴⁰ See, e.g., J. D. Van der Vyver, ‘The International Criminal Court And The Concept Of Mens Rea In International Criminal Law’, 12 *University of Miami International and Comparative Law Review* (2004) 57–149, p. 100, available online at <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1088&context=umiclr> (accessed 1 June 2022); Klamberg, *supra* note 126, pp. 56, 58–59; R. DeFalco, *supra* note 130, p. 158; M. Frulli, ‘Are Crimes against Humanity more Serious than War Crimes?’, 12 *European Journal of International Law* (2001) 329–350, p. 338, doi.org/10.1093/ejil/12.2.329, available online at <http://www.ejil.org/pdfs/12/2/1520.pdf> (accessed 11 May 2022); Badar, *supra* note 139.

¹⁴¹ DeFalco, *supra* note 130, p. 16.

¹⁴² In ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Chamber, Judgement, 15 March 2002, para. 435 the Trial Chamber stated that ‘[t]he crime of persecution also derives its unique character from the requirement of a specific discriminatory intent’.

¹⁴³ ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95-9, Trial Chamber, Judgment, 17 October 2003, para. 51.

¹⁴⁴ ICTY, *Prosecutor v. Prlić*, Case No. IT-04-74-T, Trial Chamber, Judgement, 29 May 2013, para. 73.

¹⁴⁵ ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Chamber, Judgement, 15 March 2002, para. 435. There is, however, ‘no requirement under persecution that a discriminatory policy exists’.

¹⁴⁶ ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Chamber, Judgement, 15 March 2002, para. 435.

¹⁴⁷ ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14, Trial Chamber Judgment, 3 March 2000, para. 227.

¹⁴⁸ The right to food is recognised, among the others, by Article 25 of the 1948 Universal Declaration of Human Rights: ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food’ and by Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights: ‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living ... including adequate food’.

CAH of persecution. However, although prosecuting peacetime starvation as an act of persecution is a valid option, the specific intent requirement may severely limit the practical application of this option and the number of starvation cases to which this strategy can be applied.

As to the 1932–1933 famine, a case could be made that the conduct of the Soviet leadership amounts to persecution. In fact, this conduct fits the material element of the CAH of persecution as the leadership severely deprived the civilian population, specifically, the Ukrainian population, of fundamental rights, such as the right to food, the right to health and the right to life. Additionally, the leadership consciously discriminated against the Ukrainians, who were specifically targeted because of their belonging to a specific group which was seen as problematic and untrustworthy, and its conduct had discriminatory consequences in practice. Indeed, it is undeniable that, during this famine, ‘ethnic difference was a significant factor in the mass death’ and there was a ‘specific targeting of particular ethnic groups.’¹⁴⁹ Finally, the leadership discriminated against a protected group as the Ukrainian people constituted one of the protected groups mentioned by Art. 7(2) RS and, specifically, an ethnic group as this is a ‘group whose members share a common language or culture’.¹⁵⁰

As to the 1946–1947 famine, the leadership did deprive the civilian population of their fundamental rights but it did not have the specific discriminatory intent required for this crime. Indeed, the regime acted to reassert the political control over the society that it had lost during the war years and intentionally targeted the Soviet farmers. However, it did not act with the purpose of discriminating against an identifiable group on political, racial, national, ethnic, cultural and religious grounds as the Soviet peasantry did not constitute such a group and it did not belong to a single national, ethnic or racial group, but instead to many different groups including ethnic Russians. Hence, with regard to this famine, the requirements for the material element are not satisfied as the leadership lacked the discriminatory intent required for the international crime of persecution. This shows that prosecuting peacetime starvation as an act of persecution is not always possible because of the specific intent requirement that characterises this crime.

5.3 Prosecuting Peacetime Starvation as an Act of Extermination

¹⁴⁹ See Pianciola, *supra* note 90, p. 440.

¹⁵⁰ According to the ICTR, ‘an ethnic group is generally defined as a group whose members share a common language or culture’: ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 513. A national group, on the other hand, is defined as ‘a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties’: ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 512.

Another view supported in the scholarship is in favour of prosecuting peacetime starvation as the crime against humanity of extermination.¹⁵¹ For instance, according to Marcus, ‘extermination, as far as the *actus reus* and attendant circumstances requirements go, fits famine crimes well’.¹⁵² Similarly, according to DeFalco, given that extermination is ‘a crime of indiscriminate mass killing’, it is ‘the most appropriate international crime’ to deal with peacetime starvation.¹⁵³

DeFalco also writes that the mass starvation which occurred during the Khmer Rouge regime could be prosecuted as an act of extermination by the ECCC and that senior officials could be prosecuted because of their role in causing and worsening the famine which occurred while they hold the power.¹⁵⁴ Indeed, according to Art. 7(2) RS ‘extermination includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’. Additionally, in the past, the ICTR has explained that extermination ‘can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals’.¹⁵⁵ Furthermore, in the Al Bashir case before the ICC, the prosecutor argued that the destruction of the means necessary for the survival of the civilian population constituted an act of extermination.¹⁵⁶ It is worth noting, however, that the ICC Pre-Trial Chamber ‘did not explicitly refer to this means of carrying out extermination when finding reasonable grounds to believe that the crime of extermination was committed’.¹⁵⁷ Overall, Art. 7(1) RS could be employed for the purposes of the prosecution of peacetime starvation, especially since it explicitly mentions the deprivation of access to food. However, this possibility may be limited by the fact that the RS requires a specific intent for the crime of extermination too. In fact, if we want to convict a person of the crime of extermination, we have to prove that he or she committed the crime with the specific intent to bring about the destruction of part of a population.¹⁵⁸ Indeed, extermination ‘differs

¹⁵¹ See, e.g., Ventura, *supra* note 32, p. 783; Kearney, *supra* note 113.

¹⁵² Marcus, *supra* note 35, p. 273.

¹⁵³ DeFalco, *supra* note 132, p. 1164.

¹⁵⁴ DeFalco, *supra* note 130.

¹⁵⁵ ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber I, Judgement, 6 December 1999, para. 84.

¹⁵⁶ Klamberg, *supra* note 126, p. 39.

¹⁵⁷ ICC, *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, paras. 91 as reported in *ibid.*, p. 38.

¹⁵⁸ Several scholars have agreed that the crime of extermination requires a specific intent to bring about the destruction of part of a population. See, e.g., DeFalco, *supra* note 130; Van der Vyver, *supra* note 140; Klamberg, *supra* note 126.

from genocide because extermination covers situations in which a group of individuals who do not share any common characteristics are killed'.¹⁵⁹

Additionally, in order for an act to amount to extermination, the victims have to perish as a result of the starvation inflicted and the number of such victims has to be substantial.¹⁶⁰ There is, however, no minimum number of victims required in order for an act to amount to extermination.¹⁶¹ Nevertheless, the fact that this crime does not require the victims to share common characteristics might allow it to be more useful for the prosecution of peacetime starvation and to be applied to a higher number of cases in comparison with the crime of genocide or the crime of persecution.

As to the 1932–1933 famine, the leadership could be prosecuted for acts of extermination. As a matter of fact, the leadership inflicted conditions of life that were calculated to bring about the destruction of part of a population. Such conditions of life included the deprivation of access to food in the form of grain confiscation and denial of sufficient food rations. The part of the population that the leadership aimed to destroy were private landowners and farmers who were intentionally targeted because they were seen as an obstacle to collectivization and a bulwark of Ukrainian nationalism. Also, as previously mentioned, even if there are no official decrees, including explicit orders, to cause mass starvation, there were orders to stop farmers from entering Russia and searching for food and, in case they succeeded, orders to confiscate the food they were carrying on their return.

As to the 1946–1947 famine, the leadership could also be prosecuted for acts of extermination. Indeed, it inflicted conditions of life that resulted in the destruction of part of a population including the deprivation of access to food. To reassert its political control over the countryside, the leadership deprived the civilian population of food and of the means necessary to its survival by confiscating grain and providing very low food rations or even excluding part of the population from those rations.

Finally, it is worth mentioning that, according to the ICC Elements of Crimes, a fundamental component of an act of extermination is the fact that ‘the conduct constituted, or took place as part of, a mass killing of members of a civilian population’.¹⁶² This element was

¹⁵⁹ Klamberg, *supra* note 126, p. 38.

¹⁶⁰ ‘The scale of the killing required for extermination must be substantial’: ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20, Trial Chamber, Judgment, 15 May 2003, para. 340; ‘The material element of extermination is the large-scale killing of a substantial number of civilians’: ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54, Appeals Chamber, Judgment, 22 January 2004, para. 698.

¹⁶¹ In 1998, the ICTR Trial Chamber found Jean-Paul Akayesu guilty of extermination for the murder of 16 people, a quantity apparently sufficient for a finding of extermination: ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Trial Chamber Judgment, 2 September 1998, paras. 512–515.

¹⁶² ICC Elements of Crimes, Art. 7(2).

also present during the above-considered cases of starvation. Indeed, in both famines, the conduct constituted a mass killing of members of the civilian population, carried out through the deprivation of access to food.

Therefore, with regards to both famines, the requirements for the material element are satisfied as the leadership committed the act of starving the civilian population with the specific intent required for the crime of extermination. As a consequence, in theory, the Soviet leadership could be prosecuted by the ICC for the crime against humanity of extermination if those acts were committed nowadays. This shows that prosecuting peacetime starvation as an act of extermination is possible despite the existence of a specific intent requirement.

5.4 Prosecuting Peacetime Starvation as an “Inhumane Act”

Art. 7(1) RS typifies as a crime against humanity “other inhumane acts” of a similar character intentionally causing great suffering, or ‘serious injury to body or to mental or physical health’.¹⁶³ Those acts need to have a character similar to the other ten crimes listed in the first paragraph.¹⁶⁴

The option of prosecuting the act of starving the civilian population as an “inhumane act” has been explored by DeFalco, who argues that ‘the conditions of life associated with periods of famine involve a degree of suffering clearly comparable to that of other enumerated crimes against humanity’ as the victims of starvation suffer from ‘severe, prolonged physical pain as their bodies break down and weaken’.¹⁶⁵ Indeed, the outcome of starvation crimes includes ‘suffering and increased mortality’.¹⁶⁶ According to the same author, this crime could be used to ‘recognize the suffering of victims of famine who ultimately survive, as the suffering of survivors is often ignored in discussions of famine in Cambodia and elsewhere’.¹⁶⁷

Prosecuting peacetime starvation as an “inhumane act” has also been explored by Kearney who argued that the “other inhumane acts” are ‘perhaps the most viable way that ESR violations can be criminalised under the CAH umbrella’.¹⁶⁸ Indeed, several *ad hoc* tribunals and

¹⁶³ Rome Statute, Art. 7(1).

¹⁶⁴ This provision constitutes a sort of ‘catch-all provision’ which, at a first sight, seems to violate the criminal principle of *nullum crimen sine lege*. In Klamberg, *supra* note 126, p. 60, the author argues that, ‘by linking it with the other crimes against humanity, the drafters sought to achieve a more precise definition and thus consistency with the principle of *nullum crimen sine lege*’. Klamberg also explains that these residual provisions show that ‘the list of expressly named acts is not exhaustive’ and this ‘reflects the sentiment that it is not possible to create such an exhaustive list’.

¹⁶⁵ DeFalco, *supra* note 132, p. 1175.

¹⁶⁶ B. Conley and A. De Waal, ‘The Purposes of Starvation: Historical and Contemporary Uses’, 17(4) *Journal of International Criminal Justice* (2019) 699–722, p. 703.

¹⁶⁷ DeFalco, *supra* note 132, p. 1175.

¹⁶⁸ Kearney, *supra* note 113.

hybrid courts have already used this option in the past.¹⁶⁹ For instance, in *Co-Prosecutor v. Kaing Guek Eav alias Duch*, the ECCC convicted a Khmer Rouge prison commissioner for committing “other inhumane acts” because he deliberately deprived the inmates of adequate food in order to maintain control over the prison and prevent riots.¹⁷⁰

Similarly, in *Prosecutor v. Nikolić*, the ICTY convicted the commander of a detention camp for committing “other inhumane acts” and specifically for ‘depriving detainees of adequate food and providing living conditions that threatened their health and welfare’.¹⁷¹ Likewise, in *Prosecutor v. Kayishema & Ruzindana*, the accused was charged with “other inhumane acts” because the perpetrators imprisoned a large number of people and withheld the necessities of life which resulted in mass death’.¹⁷²

Overall, prosecuting starvation as an “inhumane act” is the option with the highest chances of being practically effective and assisting the ICC in addressing gross violations of the right to food. This is due to the fact that, unlike the other international crimes examined, the perpetrator of “other inhumane acts” does not need to commit the act with a specific intent in order to be liable for punishment under the RS. Also, unlike the crime of extermination, the victims of starvation do not need to perish in order for the act to amount to an “inhumane act”.

As for the 1932–1933 famine, the leadership could be prosecuted for “other inhumane acts” as the regime definitely committed inhumane acts intentionally causing great suffering. The starving population suffered extensively from hunger during the famine and experienced serious injuries to mental or physical health caused by an inhumane and severe deprivation of food, malnutrition and ensuing health issues and related illnesses.

In the 1946–197 famine, the starving population also suffered extensively from hunger and received serious injuries to mental or physical health caused by an inhumane and extreme deprivation of food. In both cases, the victims were not only those who died but also those who survived. They suffered greatly and received serious injuries to both their mental and physical health.

Therefore, with regards to both famines, the requirements for the material element are met and the Soviet leadership could be prosecuted by the ICC for the CAH of “other inhumane acts” if those acts were committed nowadays.

¹⁶⁹ *Ibid.*

¹⁷⁰ ECCC, *Co-Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, paras. 268, 273.

¹⁷¹ ICTY, *Prosecutor v. Nikolić*, Case No. IT-94-2-I, Indictment, 4 November 1994, para. 24.

¹⁷² ICTR, *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgement, 21 May 1999, para. 146.

6 The Mental Element and Article 30 of the Rome Statute

As argued above, peacetime starvation could be prosecuted as an act of extermination or as an “inhumane act”. However, to be liable for a crime within the jurisdiction of the ICC, the perpetrators must commit the crime with intent and knowledge. Hence, to understand if the Soviet leadership could be prosecuted for extermination and “other inhumane acts” it is necessary to assess if they had a *mens rea* (or guilty mind) at the moment they committed the criminal acts.

As far as the mental element is concerned, the direct intent (or *dolus directus*) and the indirect intent (or *dolus indirectus*) are the standard minimum threshold for individual criminal responsibility unless otherwise provided. Indeed, according to Art. 30(1) RS, ‘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’. Additionally, according to Art. 30(2) RS, a person has intent when, in relation to the conduct, he or she means to engage in it and when, in relation to the consequences, he or she means to cause that consequence or is aware that it will occur in the ordinary course of events. Paragraph 3 also specifies that knowledge means ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events.’

Hence, as previously explained, to be liable for committing a crime within the jurisdiction of the ICC, the perpetrator has to act with intent. He or she must mean to engage in the conduct and cause the consequences or be aware that they will occur in the ordinary course of events. In fact, the RS’s definition of intent covers two kinds of *dolus*: *dolus directus* and *dolus indirectus*.¹⁷³ In the case of *dolus directus* (direct intent), also known as *dolus directus* of the first degree, the perpetrators mean to engage in the conduct and mean to cause the consequences.¹⁷⁴ On the other hand, in the case of *dolus indirectus* (indirect intent), also known as *dolus directus* of second degree, the perpetrators mean to engage in the conduct and, although they do not mean to necessarily cause the consequences, they foresee that those consequences will almost certainly occur in the ordinary course of events as a result of their

¹⁷³ For additional information on the mental element in the RS see S. Finnin, ‘Mental Elements Under Article 30 Of The Rome Statute Of The International Criminal Court: A Comparative Analysis’, 61 *The International and Comparative Law Quarterly* (2012) 325–359.

¹⁷⁴ A classic example that is usually made to explain this kind of *dolus* is the following: A wishes to kill B so A intentionally poisons B’s food to cause the B’s death.

behaviour but they reconcile themselves with the unlawful consequences.¹⁷⁵ In the case of *dolus eventualis* (conditional intent or recklessness), the perpetrators behave very unreasonably and they foresee that certain consequences *may* occur in the ordinary course of events as a result of their very unreasonable and reckless behaviour but they reconcile themselves with the unlawful consequences.¹⁷⁶

The terminology used in Art. 30 RS implies that it does not cover *dolus eventualis*. Indeed, in relation to the consequences, the RS does not cover *dolus eventualis* because the provision that ‘the perpetrator means to cause that consequence or he knows it will occur in the ordinary course of events’ clearly excludes *dolus eventualis* which applies to situations where the consequences *are likely* to occur.¹⁷⁷ This interpretation has been confirmed by the ICC Pre-Trial Chamber which, in *Prosecutor v. Bemba*, stated that ‘a literal interpretation of the words “will occur”, read together with the phrase “in the ordinary course of events”, clearly indicates that the required standard of occurrence is close to certainty’.¹⁷⁸ Additionally, in *Prosecutor v. Lubanga*, the ICC Appeals Chamber confirmed this interpretation and stated that under Art. 30 RS ‘the standard for the foreseeability of events is virtual certainty’.¹⁷⁹ So, as both conduct and consequences are required, *dolus eventualis* is below the standard threshold required for individual criminal responsibility.

Indeed, if the drafters of the RS had wanted Art. 30 to accommodate a standard of *mens rea* below the threshold of knowledge of practically certain results, they would have used the words ‘may occur’ or ‘might occur in the ordinary course of events’.¹⁸⁰ Subsequently, unless

¹⁷⁵ A classic example that is usually made to explain this kind of *dolus* is the following: A wishes to poison B so A poisons all the food at a dinner where many other people are present. In this case, A knows that in the ordinary course of events the other guests will almost certainly die from poisoning too.

¹⁷⁶ On this point *see, e.g.*, D. K. Piragoff and D. Robinson, ‘Mental Element’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Munich: Beck, 2008), p. 860. According to Piragoff and Robinson, there is *dolus eventualis* whenever the perpetrator is aware of ‘a substantial or high degree of probability that the consequence will occur’.

¹⁷⁷ *See, e.g.*, J. D. Ohlin, ‘Targeting and the Concept of Intent’ 35(1) *Michigan Journal of International Law* (2003) 79–130, p. 106, available online at <https://repository.law.umich.edu/mjil/vol35/iss1/4>. According to Ohlin, ‘*dolus eventualis* is precluded by Article 30 of the Rome Statute, which requires that the actor be aware that the event “will occur” rather than “might occur” or “probably occur”’. For additional information on *dolus eventualis* in the Rome Statute *see, e.g.*, Mohamed Elewa Badar, ‘Dolus Eventualis and the Rome Statute Without It?’, 12(3) *New Criminal Law Review: An International and Interdisciplinary Journal* (2009) 433–467, doi.org/10.1525/nclr.2009.12.3.433x.

¹⁷⁸ ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-424, Pre-Trial Chamber, Decision on the Confirmation of Charges, 15 June 2009, para. 362 as reported in Klamberg, *supra* note 126, p. 318.

¹⁷⁹ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-A-5, Appeals Chamber, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against his Conviction, 1 December 2014, para. 441 as reported in *ibid.*

¹⁸⁰ *See ibid.*, p. 316; as Klamberg himself explains, this was recognized *inter alia* by Ohlin, *supra* note 77, p. 23; Van der Vyver, *supra* note 140, p. 70; S. Finnin, *Elements of Accessorial Modes of Liability* (Martinus Nijhoff Publishers, August 2012), p. 172; K. J. Heller and M. D. Dubber, *The Handbook of Comparative Criminal Law* (Stanford Law Books, 2011), p. 604; M. E. Badar, *The Concept of Mens Rea in International Criminal Law. The Case for a Unified Approach* (Oxford: Hart Publishing, 2013), p. 392.

otherwise provided, the perpetrator is not liable for committing crimes within the jurisdiction of the ICC with a mental state of recklessness. Specific provisions within the RS can derogate from the general rule and impose a lower threshold for individual responsibility.¹⁸¹ For instance, the RS contemplates negligence as the minimum threshold for criminal responsibility in certain cases.¹⁸² Additionally, the ICC Elements of the Crime can lower the minimum threshold in some cases as well.¹⁸³ Nevertheless, as mentioned above, the crime of genocide and the crimes against humanity must be committed with either *dolus directus* or *dolus indirectus*.¹⁸⁴

Regarding the knowledge requirement, the perpetrator acts with knowledge when he or she is aware that a circumstance exists and that the consequences will occur in the ordinary course of events.¹⁸⁵

6.1 The Mental Element in the 1932–1933 Famine

In order to establish if during the 1932–1933 famine the Soviet leadership committed the act of depriving the civilian population of food with a guilty mental state, it is necessary to assess if the Soviet leadership acted with intent and knowledge. Thus, it must be examined if it meant to engage in the conduct and if it meant to cause the consequences or if it was aware that they would occur in the ordinary course of events. The ICC Elements of Crime, in their general introduction, state that the ‘existence of intent and knowledge can be inferred from relevant facts and circumstances’.¹⁸⁶

In relation to the conduct, namely the act of depriving the civilian population of food by confiscating grain, providing very low food rations or even excluding part of the population from those rations, arresting starving farmers who hid grain for personal use and preventing internal movements of people, the leadership meant to engage in it. Indeed, according to the

¹⁸¹ For additional information on the threshold for criminal responsibility see A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *European Journal of International Law* (1999) 145–171, pp. 156–157, available online at <http://www.ejil.org/pdfs/10/1/570.pdf> (accessed 23 May 2022).

¹⁸² Art. 28 RS contemplates negligence as the minimum threshold for criminal responsibility in the case of military commanders and other superiors who can be held accountable for their ‘negligent supervision’.

¹⁸³ For instance, they lower the threshold to negligence in the case of the genocidal crime of transferring children between different groups (the perpetrator should have known that such person or persons were under the age of 18 years) and in the case of the war crime of enlisting children under the age of fifteen in the military (the perpetrator should have known that such person or persons were under the age of 15 years).

¹⁸⁴ Van der Vyver, *supra* note 140, p. 95.

¹⁸⁵ Regarding knowledge, in Klamberg, *supra* note 126, p. 320, the author explains that ‘a strict interpretation of the wording ‘awareness that a circumstance exists’ appears to limit the meaning of this standard of culpability to actual awareness of the relevant fact’. For additional information on the standard threshold for culpability see, e.g., G. Werle and F. Jeßberger, ‘Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law’, 3 *Journal of International Criminal Justice* (2005) 35–55.

¹⁸⁶ ICC Elements of Crime, general introduction, para. 3.

previous analysis, these actions were the result of the execution of policies organised, planned and decided at the highest level of the state.

As to the consequences, namely the mass death of civilians caused by starvation, several historians suggest that the leadership intended to cause the consequences. For instance, Conquest argues that ‘the Soviet leaders were direct accomplices in the killing of millions of Ukrainians to establish the political and social order prescribed by their doctrine’.¹⁸⁷ Besides, he explains that ‘the leading Ukrainians Communists were well aware of the situation and they had always known that the grain quotas were too high’.¹⁸⁸ He also adds that the leadership in Moscow was aware of the famine too as Molotov, a leading figure in the Soviet government, visited Ukraine in 1932 and was told by local officials that the population was starving.¹⁸⁹ Thus, Conquest explains that Stalin’s decision to ‘employ policies which had produced the famine after the famine had clearly declared itself, and indeed to demand their more rigorous application, does show that he regarded the weapon of famine as acceptable’.¹⁹⁰

Also, as previously explained, mass starvation was rather caused by the food distribution and not by the lack of food and it was the leadership who decided who had the right to what.¹⁹¹ The famine was used by the regime against wealthy farmers and landowners who were not only seen as an obstacle to the achievement of full communism and industrialization but also as a “problematic” bulwark of Ukrainian nationalism which was considered a danger to the Soviet Union. Additionally, the leadership knew that its policies were causing widespread starvation. Despite this, it decided to proceed with its policies.

The leadership’s decision to keep on enforcing policies which had clearly shown their faminogenic effects and to even demand their more rigorous application shows that it meant to engage in the conduct and to cause the consequences or that, at least, it was aware that they would occur in the ordinary course of events as they had already occurred. Conquest also observes that, although we cannot document Stalin’s criminal responsibility in the sense that there are no official decrees or express orders to cause the mass starvation, yet, there were clear orders to stop starving farmers from entering Russia and searching for food and to confiscate any food they had when intercepted on their return in case they succeeded. These orders might only have come from the highest levels of the state, namely the regime’s leadership.¹⁹² As a

¹⁸⁷ Conquest, *supra* note 39, p. 324.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.* Conquest also explains that there are several letters written by the Russian ambassador to Bulgaria Fedor Raskolnikov to Stalin from which we can understand that ‘the inner party knew perfectly well that the famine had been organised’.

¹⁹⁰ *Ibid.*, p. 326.

¹⁹¹ Snyder, *supra* note 40, p. 42.

¹⁹² Conquest, *supra* note 39, p. 327.

result, the leadership acted with intent as it meant to engage in the conduct and cause the consequences.

Lastly, with regard to the element of knowledge, the grain requisition quotas were incredibly high and the farmers were not able to provide that much food to the state without starving themselves – circumstances of which the leadership was aware. Likewise, it was aware that the consequences, death by hunger caused by the infliction of severe and prolonged starvation, would almost certainly occur in the ordinary course of events. Hence, the perpetrators acted with knowledge, with the elements of Art. 30 RS being fulfilled.

6.2 The Mental Element in the 1946–1947 Famine

On the basis of the analysis conducted in the previous sections, it is safe to argue that, in relation to the conduct, namely the act of depriving the civilian population of food and of the means necessary to its survival by confiscating the grain and denying sufficient food rations or excluding part of the population from it, the leadership surely meant to engage in it. Indeed, these actions were the result of the execution of policies organised, planned and decided at the highest level of the state.

As to the consequences, the analysis of several historians suggests that the leadership intended to cause the mass death of civilians. According to Zima, the regime used the famine to impose state control over the countryside. More specifically, by causing mass starvation, ‘Stalin’s government attempted to reassert sociopolitical control over Soviet society after the loss of political control during the chaotic war years’.¹⁹³ He also underlines how the famine was ‘intentionally punitive’ and ‘premeditated’.¹⁹⁴

Although the leadership did not mean to cause the consequences, it knew that they would almost certainly happen in the ordinary course of events. The grain requisitions continued throughout the famine and even after it was clear that the faminogenic effects of state policies were causing widespread starvation.¹⁹⁵ Those policies were carried out with the knowledge that such actions had already caused widespread starvation in 1932–1933 and with the knowledge that, after the devastation of the Second World War, millions of people were still

¹⁹³ Zima, *supra* note 95.

¹⁹⁴ *Ibid.*; a similar opinion has been expressed in Wheatcroft, *supra* note 95.

¹⁹⁵ Ganson, *supra* note 93, p. 95. Ganson writes that the famine ‘was not a case of state brutality or hostility toward the countryside, just a case of squeezing the peasantry to make agriculture more productive’. It is however hard to agree with Ganson and to believe that there was no ‘hostility towards the countryside’ after considering that there was a selection of victims and that the Soviet farmers were hit harder than those who the regime considered necessary.

depending on the rationing system. Despite this, the leadership required the most rigorous application of those policies, acting intentionally in terms of Art. 30 RS.

Finally, the leadership was aware of the circumstances, namely the fact that the grain requisition quotas were incredibly high and that the farmers were not able to provide that much food to the state without starving themselves. Likewise, it was aware that the consequences, death by hunger caused by the infliction of severe and prolonged starvation, would almost certainly occur in the ordinary course of events. Hence, the perpetrators acted with knowledge with the elements of Art. 30 RS being fulfilled.

7 Conclusion

If the Soviet leadership caused mass starvation during peacetime in the same terms as described above nowadays, their conduct could not be prosecuted as a crime of genocide or as the CAH of persecution because the offenders lacked the specific intent required for these crimes. However, they could likely be prosecuted for the CAHs of extermination and other inhumane acts because they inflicted conditions of life calculated to destroy part of the population, they committed inhumane acts intentionally causing great suffering, they meant to engage in the criminal conduct and cause the consequences or they were aware that they would occur in the ordinary course of events. Consequently, the question of whether peacetime starvation could be prosecuted as an act of extermination or as an ‘inhumane act’ can be answered affirmatively.

This paper has shown that there are indeed feasible alternatives to the prosecution of starvation as a war crime that can be used for all those cases of peacetime starvation that cannot be prosecuted as war crimes because they were committed neither during an armed conflict nor as a method of warfare. Thus, the act of starving civilians during peacetime could be prosecuted before the ICC despite the current regulatory gap in the RS and the apparently inexplicable omission of peacetime starvation.

The results of the analysis conducted above have shown us that the options of prosecuting the crimes of starvation as acts of genocide or acts of persecution are not always possible and that the specific intent requirement severely limits the number of situations in which these options can be applied. The results also demonstrated that the options of prosecuting starvation as an act of extermination or as an “inhumane act” are rather valid options that can be used to prosecute the perpetrators. Moreover, prosecuting peacetime

starvation as an ‘inhumane act’ is the option with the highest chance of being useful and effective in practice because, unlike the CAHs of extermination and persecution, the perpetrators of “other inhumane acts” do not need to commit the crime with a specific intent in order to be liable for punishment under the RS. Also, unlike the crime of extermination, the victims of starvation do not need to perish and the number of victims does not have to be substantial in order for the act to amount to an “inhumane act”.¹⁹⁶

These findings may have important implications for the further development of international criminal law with regard to peacetime starvation and they also imply that the assessment made on the cases of starvation considered in this article could be replicated for other cases of peacetime starvation. Nonetheless, a formal codification of starvation, by means of an amendment to the RS is highly recommended in order to tackle crimes of starvation. Such codification, together with the consequent prospects of prosecution, can be fundamental in assisting the ICC to properly prosecute crimes of starvation and address gross violations of the right to food. As a matter of fact, the perspective of a formal codification of starvation and the identification of its main characteristics and elements have not been properly analysed, studied or even sufficiently discussed by the scholars. Further research should be undertaken to investigate the topic in the near future as it deserves additional research and attention.

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