

FAMINE CRIMES IN INTERNATIONAL LAW

By David Marcus*

Some of the worst human rights catastrophes of the twentieth century were famines created or manipulated by governments. In 1932 at least five million Ukrainians starved to death, while hunger was largely unknown across the border in Russia.¹ The Soviet government imposed disastrous grain quotas on the Ukraine, then let its own citizens literally collapse in the streets while it exported grain to further its “revolutionary” objectives.² The Ethiopian famine of 1983–1985, preserved in popular memory as a natural disaster of biblical proportions, most fiercely struck those parts of the country that harbored irredentist movements. In a stunning, but telling, rejoinder to international pity for the purportedly hapless Ethiopian government, the Ethiopian foreign minister told a U.S. chargé d’affaires that “food is a major element in our strategy against the secessionists.”³ Since 1994, more than two million out of a population of twenty-two million in North Korea have starved to death,⁴ while South Koreans, affected by similar weather patterns, have remained completely untouched by famine.⁵ Non-governmental organizations (NGOs), trying to distribute aid earmarked for famine victims, have watched helplessly as the government callously interfered and have arrived at the conclusion that “the authorities are deliberately depriving hundreds of thousands of truly needy Koreans of assistance.”⁶

These three histories tragically rebut the shibboleth that natural disasters create famine.⁷ In contradistinction to assumptions fostered by television images of cracked earth and withered crops, the fate of a famine-prone population is often entirely within human control. Amartya Sen effectively suggests that national governments may choose whether to allow their populations to starve in observing that “[f]amines are, in fact, so easy to prevent that it is amazing that they are allowed to occur at all.”⁸ When mass death results from hunger, governments, not God or nature, deserve scrutiny for their relationship to the catastrophe.

The government officials responsible for crafting and pursuing faminogenic policies should be considered some of history’s worst criminals.⁹ However, when Ethiopians began starving

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¹ ROBERT CONQUEST, *THE HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR-FAMINE* 327 (1986).

² Nicholas Werth, *A State Against Its People: Violence, Repression, and Terror in the Soviet Union*, in STÉPHANE COURTOIS ET AL., *THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION* 33, 167 (Jonathan Murphy & Mark Kramer trans., 1999) (“In 1933, while these millions were dying of hunger, the Soviet government continued to export grain . . . ‘in the interests of industrialization.’”).

³ ALEX DE WAAL, *FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA* 117 (1997) (quoting Ethiopian Foreign Minister Tibebe Bekele).

⁴ Don Kirk, *North Korean Death Rate Is Said to Be up Sharply Since 1994*, N.Y. TIMES, Nov. 22, 2001, at A5.

⁵ Aidan Foster-Carter, *North Korea’s Kim-Made Famine*, ASIA TIMES ONLINE, May 23, 2001, at <<http://www.atimes.com/Koreas/CE23Dg02.html>>.

⁶ Action Against Hunger, *Action Against Hunger Stops Its Activities in North Korea* (Mar. 9, 2000), at <<http://www.aah-usa.org/DPRK.html>>.

⁷ For a good, recent example of this, see Mark Lacey, *Front Line of Famine in Ethiopia Is the Soil*, N.Y. TIMES, Nov. 4, 2001, at A7 (presenting famine in Ethiopia as an inevitability and discussing the causes of famine as stemming from poor growing conditions and drought).

⁸ AMARTYA SEN, *Famines and Other Crises*, in *DEVELOPMENT AS FREEDOM* 160, 175 (1999); see also DE WAAL, *supra* note 3, at 7 (“For almost a century there has been no excuse for famine.”).

⁹ I have coined the term “faminogenic,” meaning “creating or aiding in the creation of famine.”

en masse in 1984, the world responded with “Live Aid,” “We Are the World,” and a voyeuristic fascination with the plight of the Third World, not demands that Colonel Mengistu or his top lieutenants be imprisoned.¹⁰ Stalin, of course, takes pride of place among the twentieth century’s most notorious criminals. However, the Ukrainian famine is often left off lists of the century’s worst human rights atrocities. The *New York Times* depicted Norbert Vollertsen, a German human rights activist who has made the North Korean famine his cause célèbre, as a crackpot for comparing Kim Jong Il’s government to Nazi Germany’s.¹¹ A statistic in the article attests to the failure to perceive the regime’s depravity, noting that “while 82 percent of American respondents thought Iraq’s government was ‘evil’ and 69 percent placed Iran in that category, only 54 percent said North Korea fit the label.”¹² Indeed, North Korea may be the world’s worst current human rights catastrophe, as well as its most ignored.¹³

International blindness to this criminal conduct of the most nefarious sort is odd, given that existing international law criminalizes first- and second-degree faminogenic behavior. An international lawyer looking to hold Kim Jong Il responsible for annihilating innocent North Koreans could find ample legal doctrine in the law of genocide, war crimes, and crimes against humanity to support such an indictment. However, while Ethiopia did indict and try certain officials,¹⁴ the international community has never called for international criminal trials for government officials responsible for creating, inflicting, or prolonging famine. In this article, I therefore demonstrate how international criminal law criminalizes government action that creates or abets famine. Because the applicable law is scattered throughout international legal jurisprudence, I also advocate the formal codification of this law.

At the outset, one must not confuse famines with a myriad of other pathologies stemming from inadequate nutrition. India stands as living testimony of that. The country is home to one of the world’s largest malnourished populations but has not suffered a famine since 1943.¹⁵ Sen’s definition of famine, which stresses its singularity, is used here. A famine is a “‘a particularly virulent form of [starvation] causing widespread death.’”¹⁶

Four degrees of government conduct related to famine form an analytical framework that can explain where famine erupts and why. Fourth-degree faminogenic behavior is the least deliberate. Typically, incompetent or hopelessly corrupt governments, faced with food crises created by drought or price shocks, are unable to respond effectively to their citizens’ needs. Starvation follows, although the government itself may not desire this result. Third-degree faminogenic behavior is marked by indifference. Authoritarian governments, impervious

¹⁰ For a brief discussion of the international reaction to the Ethiopian famine of 1984–1985, see MICHAEL IGNATIEFF, *Is Nothing Sacred? The Ethics of Television*, in THE WARRIOR’S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE 9, 9–11 (1997).

¹¹ James Brooke, *One German, and His North Korean Conscience*, N.Y. TIMES, Mar. 19, 2002, at A4.

¹² *Id.*

¹³ E.g., Michael K. Young, Testimony Before the Congressional Human Rights Caucus of the United States House of Representatives (Apr. 17, 2002), at <<http://www.house.gov/lantos/caucus/TestimonyYoung041702.htm>> (“Notwithstanding the efforts of many who are devoted to helping North Koreans, the international community—governments and human rights groups—has paid insufficient attention to the plight of the North Korean people.”).

¹⁴ Mohammed Hassen, *Ethiopia: Missed Opportunities for Peaceful Democratic Process*, in STATE BUILDING AND DEMOCRATIZATION IN AFRICA 233 (Kidane Mengisteab & Cyril Daddieh eds., 1999); Julie V. Mayfield, Note, *The Prosecution of War Crimes and Respect for Human Rights: Ethiopia’s Balancing Act*, 9 EMORY INT’L L. REV. 553 (1995).

¹⁵ Sara Millman & Robert W. Kates, *On Ending Hunger: The Lessons of History*, in HUNGER IN HISTORY: FOOD SHORTAGE, POVERTY, AND DEPRIVATION 389, 395 (Lucile F. Newman ed., 1990). As David Arnold observes:

Even in the most impoverished societies, famines are not everyday occurrences, and definitions that equate famine with “severe nutrition”, “acute food shortages”, or even “extreme hunger”, while identifying some of the salient aspects of the famine situation, fall short of capturing its totality; they fail to convey the urgency and abhorrence, the sense of crisis and despair. . . . [F]amine connotes more than a shortfall in individual nutritional needs and daily caloric intake.

DAVID ARNOLD, FAMINE: SOCIAL CRISIS AND HISTORICAL CHANGE 6 (1988).

¹⁶ Alex de Waal, *A Re-assessment of Entitlement Theory in the Light of the Recent Famines in Africa*, 21 DEV. & CHANGE 469, 470 (1990) (quoting AMARTYA SEN, POVERTY AND FAMINES 40 (1981)).

to the fate of their populations even though arguably possessing the means to respond to crises, turn blind eyes to mass hunger. While deplorable, the behavior of government officials responsible for mismanagement in these countries is often not characterized by the *mens rea* for criminal responsibility and therefore does not necessarily implicate criminal responsibility under international criminal law.

Recklessness is the *mens rea* for second-degree faminogenic behavior. Governments implement policies that themselves engender famine, then recklessly continue to pursue these policies despite learning that they are causing mass starvation. Finally, first-degree faminogenic behavior is intentional. Governments deliberately use hunger as a tool of extermination to annihilate troublesome populations.

I argue in this article for the formal criminalization of these last two degrees of faminogenic behavior as crimes against humanity. International criminal law already criminalizes certain faminogenic conduct, but the legal doctrine that penalizes this behavior resembles the "patch-work coverage" that typifies the customary law of crimes against humanity.¹⁷ As M. Cherif Bassiouni urges, this condition "needs to be remedied" with more specific codification of crimes against humanity to improve enforcement of the law and rebut nagging charges of *nullum crimen sine lege*.¹⁸ Without the formal recognition of famine crimes in international law, governmental officials can take advantage of what will be demonstrated to be a rich, but scattered, body of law that criminalizes certain types of faminogenic behavior to slip below the radar of international scrutiny. Also, without a clear appreciation in the international community of the criminal nature of first- and second-degree faminogenic conduct, government officials can evade responsibility by portraying their countries' experiences with mass starvation as a regrettable by-product of unfortunate weather.

The last two degrees of faminogenic behavior correspond to the two degrees of famine crimes. A person commits a first-degree famine crime when he or she knowingly creates, inflicts, or prolongs conditions that result in or contribute to the starvation of a significant number of persons. A first-degree famine crime is committed by someone¹⁹ determined to exterminate a population through famine. A person commits a second-degree famine crime by recklessly ignoring evidence that his or her policies are creating, inflicting, or prolonging the starvation of a significant number of persons. A second-degree famine crime is committed by an official recklessly pursuing policies that have already proven their faminogenic tendencies. Third- and fourth-degree faminogenic behavior, while regrettable, is not criminal and will not be discussed in this article. These types of faminogenic behavior suggest that mass starvation can erupt absent any criminal intent on the part of government officials.

My argument proceeds as follows. In part I, I discuss the relationship between famine and human agency, illustrating the connections between famine and gross human rights violations with the examples of the Ukraine in the 1930s, Ethiopia in the 1980s, and present-day

¹⁷ M. Cherif Bassiouni, "Crimes Against Humanity": *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 476 (1994) [hereinafter *Specialized Convention*]; see also M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 15 (1996).

¹⁸ Bassiouni, *Specialized Convention*, *supra* note 17, at 476.

¹⁹ "Government official" is used throughout this article as the relative "someone" for international criminal law. I use this term because government officials are those most likely to have the resources and authority to commit famine crimes. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted, "[t]he involvement of the state in a criminal enterprise generally results in the availability of extensive resources to carry out the criminal activities in question and therefore greater risk for the potential victims." *Prosecutor v. Kunarac*, Judgment, No. IT-96-23, para. 493 (Feb. 22, 2001) [hereinafter *Foča* judgment]. Selected ICTY decisions since 1997 are available online at the Tribunal's Web site, <<http://www.un.org/icty>>. However, the discussion contained herein applies equally well to nongovernmental actors who create, inflict, or prolong famine as to government actors. The ICTY has indicated that international criminal law applies to nonstate actors. For example, in the *Foča* judgment, the Tribunal stated, "A violation of one of the relevant articles of the [Tribunal's] Statute will engage the perpetrator's individual criminal responsibility. . . . With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences." *Id.*; see also *Prosecutor v. Kupreškić*, Judgment, No. IT-95-16, para. 555 (Jan. 14, 2000).

North Korea. In part II, I show where in existing international criminal law the elements of famine crimes are rooted. I discuss the law of genocide, international humanitarian law, and the jurisprudence of crimes against humanity to demonstrate how international criminal law criminalizes the *actus reus* elements of first- and second-degree famine crimes. I contend that famine crimes are best conceived of as crimes against humanity, and I explain why codification is necessary. Finally, I show how existing international criminal law supports the *mens rea* elements of the definitions of famine crimes.

Since famines are often functionally equivalent to genocide, it makes no moral or legal sense not to extend the protections of international law to famine-prone populations. Moreover, as international law already criminalizes first- and second-degree faminogenic conduct, it is particularly lamentable that government officials responsible for famines do not find themselves harshly condemned as criminals. This article aims at strengthening an international law that already recognizes as criminal some of the world's worst violators of human rights. Those who deliberately or recklessly starve their own citizens through systematic human rights violations commit crimes against humanity and should no longer go unpunished.

I. FAMINES AS HUMAN RIGHTS DISASTERS

In searching for a jurisprudential basis on which to build the definitions of famine crimes, it is tempting to look to economic rights, particularly the right to food, as a starting point. Famines, however, are not simply the end results of massive violations of the right to food. As the following discussion of the relationship between human agency and famine suggests, and as the examples of the Ukraine, Ethiopia, and North Korea illustrate, famines often arise out of a host of rights violations committed by murderous governments bent on manipulating hunger to further their own purposes.

Famine as a Violation of the Right to Food

Conceiving of famines solely as massive violations of the right to food effectively precludes the criminalization of faminogenic behavior. *Ex cathedra* statements of intergovernmental organizations and scholars suggest that the right to food enjoys universal recognition.²⁰ Two of the most important codes of international human rights, the Universal Declaration of Human Rights (UDHR) and its descendant, the International Covenant on Economic, Social and Cultural Rights (ICESCR), express in no uncertain terms a right to food. The UDHR asserts that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food,”²¹ and Article 11(2) of the ICESCR “recogniz[es] the fundamental right of everyone to be free from hunger.”²² Article 11 is the most important source of the right, and, according to Ian Brownlie, its “provisions constitute evidence of the generally accepted standard of general international law applicable to the subject-matter.”²³ The right has been repeatedly articulated in other documents, including

²⁰ Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 9, 9 (Philip Alston & Katarina Tomaševski eds., 1984) (stating that “the right to food has been endorsed more often and with greater unanimity and urgency than most other human rights”); *see also* Human Rights Committee, General Comment No. 12, *The Right to Adequate Food*, UN Doc. E/C.12/1999/5, para. 4 (“The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights.”).

²¹ Universal Declaration of Human Rights, GA Res. 217A (III), Art. 25(1), UN Doc. A/810, at 71 (1948), *available at* <<http://www.unhcr.ch/html/menu3/b/69.html>> [hereinafter UDHR].

²² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Art. 11(2), 993 UNTS 3 [hereinafter ICESCR].

²³ IAN BROWNIE, *THE HUMAN RIGHT TO FOOD: STUDY PREPARED FOR THE COMMONWEALTH SECRETARIAT*, para. 16 (1987). Not all commentators agree that the right to food is established in international law, in spite of the ICESCR. *See, e.g.*, Robert L. Bard, *The Right to Food*, 70 *IOWA L. REV.* 1279, 1280 (1985).

the Universal Declaration on the Eradication of Hunger and Malnutrition,²⁴ and it has been frequently reasserted by various United Nations bodies.²⁵

However, the right to food occupies a controverted position in the pantheon of global human rights. States are unwilling to accept that the right to food imposes an absolute obligation on them, as illustrated by a recent UN General Assembly resolution. While reaffirming “the right of everyone to have access to safe and nutritious food,” the resolution only “[e]ncourages all States to take steps with a view to *achieving progressively* the full realization of the right to food, including steps to promote the conditions for everyone to be free from hunger and, as soon as possible, to enjoy fully the right to food.”²⁶ This language of progressivity reflects similar language in other important documents discussing the right to food. Article 2(1) of the ICESCR sets the tone for all the rights contained therein, including the right to food: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant”²⁷

The 1996 UN Rome Declaration on World Food Security and Plan of Action also attach this language of progressivity to the right to food:

Promotion and protection of all human rights and fundamental freedoms, including the right to development and *the progressive realization of the right to adequate food* for all and the full and equal participation of men and women are also indispensable to our goal of achieving sustainable food security for all.²⁸

Guy Goodwin-Gill, comparing the immediacy of political rights defined in the International Covenant on Civil and Political Rights to that of the right to food, deems the latter “equivocal.”²⁹ The purported universality of the right to food, or at least the nature of the state’s obligation to realize it, is contested.³⁰

Critics of the so-called economic rights qua rights, including the right to food, have leveled various charges against them, arguing that they are vague,³¹ that they are positive rather than negative,³² and that they are nonjusticiable.³³ Whether these infirmities are exaggerated is

²⁴ Universal Declaration on the Eradication of Malnutrition and Hunger, GA Res. 3180 (XXVIII), pmb. (Nov. 16, 1974).

²⁵ See, e.g., Commission on Human Rights, Res. 1999/24 (Apr. 23, 1999); Sub-Commission Res. 1996/25, *The Realization of Economic, Social and Cultural Rights* (Nov. 25, 1996).

²⁶ The Right to Food, GA Res. 56/155, op. paras. 2, 4 (Feb. 15, 2002) (second emphasis added).

²⁷ ICESCR, *supra* note 22, Art. 2(1) (emphasis added).

²⁸ World Food Summit, Plan of Action, UN Doc. WFS/3, para. 13 (1996), available at <http://www.fao.org/wfs/index_en.htm>.

²⁹ Guy S. Goodwin-Gill, *Obligations of Conduct and Result*, in *THE RIGHT TO FOOD*, *supra* note 20, at 111, 111 (“The briefest comparison of article 2 [of the ICESCR] with its counterpart in the Civil and Political Rights Covenant is already revealing. In the latter, states undertake ‘to respect and to ensure’, and to take the necessary steps ‘to give effect’, to the rights recognized . . .”).

³⁰ Twenty states have adopted constitutions that refer to the right to food. But only a few have adopted legislation or policies to ensure that the right is realized. MARY ROBINSON, *THE RIGHT TO FOOD: ACHIEVEMENTS AND CHALLENGES* (2002), available at <<http://www.fao.org/Legal/rtf/wfs.htm>>.

³¹ See, e.g., Bard, *supra* note 23, at 1288.

³² See, e.g., Danilo Türk, *The Realization of Economic, Social and Cultural Rights*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1992/16, para. 12; see also THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* §2-10 (1995) (noting that in comparison to the protection of most civil and political rights, “[t]he burden tends to be heavier and the task more complicated when economic, social or cultural rights are involved. In general, their enjoyment cannot be fully ensured without economic and technical resources, education and planning, the gradual reordering of social priorities and, in many cases, international cooperation.”).

³³ For a discussion of this problem, see Martin Scheinin, *Economic and Social Rights as Legal Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 41, 42 (Asbjørn Eide et al. eds., 1995). But see Scott Leckie, *Violations of Economic, Social and Cultural Rights*, in *THE MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 35, 36 (Theo C. van Boven et al. eds., 1998), available at <<http://www.law.uu.nl/english/sim/specials/simps20.asp>>.

beyond the scope of this article. What marks economic rights in comparison to political rights is the degree to which their violation is tolerated.³⁴ This tolerance, reflecting states' weak or at least ambiguous acceptance of the right to food, is facilitated by the progressivity principle. The World Food Summit in 1996 made its goal the elimination of half the world's malnutrition by 2015,³⁵ tacitly admitting that the endemic violation of the right to food is a normal, not deviant, social condition.

Conceiving of famines as massive violations of the right to food renders the criminalization of famines a dead letter. The consensus necessary to deem the immediate implementation of the right to food as universally accepted is lacking. Also, the progressive nature of the right would make the criminalization of its violation hypocritical, as it would be unfair to prosecute individuals for violating a right that requires no obligatory conduct. The rest of this part shows that famines often arise out of deliberate or recklessly indifferent human conduct that cannot be adequately described as the failure to live up to the progressive obligation to help people realize their right to food.

Famine and Human Agency

Famines warrant criminal sanction if it can be demonstrated that human agency inflicts, creates, or prolongs them. This qualification recognizes that factors like drought and poverty not within obvious human control play roles in famine creation. However, the direct relationship between human agency and famine has been sufficiently established to be thought of as part of the orthodox understanding of famine.³⁶ As Sen and Jean Drèze assert, the effects of factors beyond human control on a given population depend on the social and political organization of the societies concerned.³⁷ North Korea and South Korea, for example, both suffered similar floods starting in 1995, but famine erupted only in the former.³⁸ Also, Sudan benefits from better weather and more fertile growing conditions than Botswana, but Sudan is one of the most famine-prone countries in Africa, while Botswana has avoided mass starvation in spite of chronic drought.³⁹

³⁴ The UN Committee on Economic, Social and Cultural Rights observes:

The shocking reality . . . is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.

World Conference on Human Rights, Preparatory Committee, Contribution Submitted by the Committee on Economic, Social and Cultural Rights, UN Doc. A/CONF.157/PC/62/Add.5, para. 5 (1993); see also HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 256–57 (1996) (observing that most governments support the “equal status and importance of economic and social rights” but fail to “take particular steps to entrench those rights constitutionally, to adopt any legislative or administrative provisions based explicitly on the recognition of specific economic and social rights as human rights, or to provide effective means of redress to individuals or groups alleging violations of those rights”).

³⁵ Commission on Human Rights, *The Right to Food: Report of the High Commissioner for Human Rights*, UN Doc. E/CN.4/1998/21, para. 17(a).

³⁶ Amartya Sen, widely understood as the most successful proponent of this argument, won the Nobel Prize in Economics for his work on famines in 1998. His theory of public action, which argues that through certain governmental interventions famine can be entirely avoided, has won widespread acceptance in the academic literature. See de Waal, *supra* note 16, at 469; Joachim von Braun, Tesfaye Teklu, & Patrick Webb, *Famine as the Outcome of Political Production and Market Failures*, *IDS BULL.*, NO. 4, 1993, at 73, 74.

³⁷ Drèze and Sen argue that “it has to be recognized that even when the prime mover in a famine is a natural occurrence such as a flood or a drought, what its impact will be on the population would depend on how society is organized.” JEAN DRÈZE & AMARTYA SEN, *HUNGER AND PUBLIC ACTION* 46 (1989).

³⁸ Brooke, *supra* note 11.

³⁹ Tesfaye Teklu, *The Prevention and Mitigation of Famine: Policy Lessons from Botswana and Sudan*, 18 *DISASTERS* 35, 39 (1994); see also DE WAAL, *supra* note 3, at 43.

Sen's seminal observation, that "there has never been a famine in a functioning multiparty democracy,"⁴⁰ constitutes the backdrop for the argument connecting famine to human agency. Sen and Drèze observe that it is not exogenous faminogenic shocks like drought but "negligence or smugness or callousness on the part of the non-responding authorities"⁴¹ that results in mass death when a natural disaster strikes. Democratic rulers cannot afford such callousness, as they will face the pain of electoral backlash if they are indifferent to their citizens' deprivations. The exercise of democracy—which endows citizens with political rights, including the right to a free press, the right to associate, and the right to vote in regular, fair elections⁴²—furnishes representatives with incentives to respond to food emergencies.⁴³ The potential for disaffected citizens gives rulers "the political incentive to *try* to prevent any threatening famine, and since famines are in fact easy to prevent . . . , the approaching famines are firmly prevented."⁴⁴

This relationship between political accountability and starvation leads to the conclusion that when and where famine strikes is "above all about the . . . lack of[] power and rights."⁴⁵ Democratic governments respect rights and therefore do not allow famine. Alternatively, indifferent authoritarian rulers can ignore faminogenic conditions, just as, by definition, they trespass a host of civil and political rights without incurring real political accountability. However, as I suggest as regards the four degrees laid out above, it is often not simply indifference born of political impunity but, rather, recklessness at best or homicidal malice at worst that leads governments to "allow" famines. If governments by their callousness can really allow famine, they can also by their cruelty create famine. Alex de Waal, in his caustically insightful study *Famine Crimes: Politics and the Disaster Relief Industry in Africa*, begins with the following observation:

[H]uman rights abuses are *invariably* an intimate part of famine creation. Particular forms of warfare (most of them prohibited by the Geneva Conventions) are instrumental in creating war famines. Violations of the residence and property rights of small farmers, and the freedom of movement of pastoralists, have been important in many famines. The repression of freedoms of expression and association has prevented civil organizations from mobilizing to protest against or prevent famine, and has encouraged the abusive forces that create famine.⁴⁶

The following three examples underline de Waal's contention and illustrate how famine can result above all from massive human rights violations.

Twentieth-Century Famine Crimes

As Kurt Jonassohn and Karin Solveig Björnson observe, "In an age of a highly developed, but also very costly, technology of aggression, famine is a low-cost and low-technology method

⁴⁰ SEN, *supra* note 8, at 178. Others have made the same observation. Michael Watts, *Entitlements or Empowerment? Famine and Starvation in Africa*, REV. AFR. POL. ECON., NO. 51, 1991, at 9, 11 ("Indeed, it is not easy to find an example of a famine in countries in which a free press, harnessing the power of famine images and the moral weight of the right to be free from hunger, is capable of mobilizing popular support and political opposition.").

⁴¹ DRÈZE & SEN, *supra* note 37, at 263.

⁴² Philip Alston observes that respect for these rights is important in securing the right to food: "[I]n the vast majority of cases progress towards the realization of the right to food has gone hand in hand with the enjoyment of other rights such as those concerning popular participation in decision-making, the rights to freedom of association, expression and information . . ." Alston, *supra* note 20, at 20.

⁴³ Alex de Waal, *A Human Rights Agenda to Prevent Starvation in Africa*, PEACE & DEMOCRACY NEWS, Summer 1991, at 50.

⁴⁴ SEN, *supra* note 8, at 180; *see also* DE WAAL, *supra* note 3, at 16 (noting that "in a country where some basic political liberties can be enjoyed," famine "is also a concern for politicians"). A cursory historical glance supports Sen's linking of democratic political rights with famine. In sub-Saharan Africa, where most of the world's famines occur, countries with strong commitments to democracy do not suffer from famine. In contrast, their authoritarian or anarchic neighbors have a much more lamentable record. JOACHIM VON BRAUN, TESFAYE TEKLU, & PATRICK WEBB, *FAMINE IN AFRICA: CAUSES, RESPONSES AND PREVENTION* 19 (1998).

⁴⁵ Watts, *supra* note 40, at 17.

⁴⁶ DE WAAL, *supra* note 3, at 2 (emphasis added).

that is available even to the poorest and most underdeveloped state. It requires neither sophisticated expertise nor elaborate bureaucracy in order to achieve its intended goal.⁴⁷ Famine, to put it succinctly, is a cheap weapon of mass murder. The governments of the former Soviet Union, Ethiopia, and North Korea at one point each employed this tool, creating famines or fanning the flames of existing ones to achieve political objectives.

As an introductory note, I recognize that each of these governments was or is self-avowedly Communist. They serve as highly illustrative examples but should not be taken to stand for the proposition that only Communists commit famine crimes. Dozens of governments, representing all forms of political organization other than genuine democracies, have deliberately created or manipulated famine. Also, I do not argue that experimentation with collectivization or other nonmarket techniques of organizing agricultural production are per se felonious. Rather, these illustrations should be taken for the proposition that a government forcing certain policies on its own citizens that are clearly creating mass starvation is criminally reckless or intentionally murderous if it continues to use these policies to coerce its citizens.

Ukraine. The Ukrainian famine of 1932–1933, judged by the pace of the human destruction it wrought, was one of the most severe of the unprecedented European human rights disasters of the first half of the twentieth century. In one year, between five and eleven million Ukrainians died of hunger or famine-related maladies in a famine deliberately manufactured by the Soviet government⁴⁸ to achieve a set of political and economic ends.⁴⁹

Poor harvests alone cannot explain the famine. The Soviet Union's total harvest in 1932 was below average but more than sufficient to keep the population from starving.⁵⁰ Rather, the roots of the famine lie in two decisions made by Lenin in 1921 in response to the economic chaos left in the wake of civil war and to the centrifugal pressures in the peripheries of the empire for independence. First, his New Economic Program (NEP) permitted private ownership of small parcels of land and a truncated market economy, which amounted to an admission that the Soviet citizenry was not ready for collectivization or centralization. Second, *korenizatsiia* allowed a certain horizontal integration of local cultures into the Soviet mosaic, enabling the flowering of national cultures, the training of a local bureaucratic elite in regional universities, and the use of native languages.⁵¹ These two measures largely pacified the indigenous peasantry in various regions, neutralizing the irredentist pressures threatening to rip the nascent empire apart.⁵² In the fiercely independent Ukraine, *korenizatsiia* was a double-edged sword. On the one hand, it stilled rebellious pressures; on the other, it encouraged an already strong nationalist identity.⁵³

In the late 1920s, Stalin undid these reforms with two interrelated measures. He eliminated the NEP, pushing the Soviet Union toward "pure" communism along the dual revolutionary

⁴⁷ KURT JONASSOHN WITH KARIN SOLVEIG BJÖRNSON, GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS IN COMPARATIVE PERSPECTIVE 33 (1998).

⁴⁸ W. A. Dando, *Man-Made Famines: Some Geographical Insights from an Exploratory Study of a Millennium of Russian Famines*, 4 *ECOLOGY FOOD & NUTRITION* 219, 229 (1976). Robert Conquest observes that "the number dying in Stalin's war against the peasants was higher than the total deaths for all countries in World War I." CONQUEST, *supra* note 1, at 4 (emphasis added).

⁴⁹ JONASSOHN & BJÖRNSON, *supra* note 47, at 33, summarize the motives for the famine:

Stalin in the Ukraine performed the first carefully planned, large-scale famine in the twentieth century. He wanted to collectivize agriculture not only to eliminate the kulaks [middle class peasants], but also in order to increase production. At the same time, he wanted to accelerate industrialization. The increased agricultural production was intended for export in order to pay for the import of the technology that was essential to his program of industrialization. . . . The Ukraine was particularly targeted by him because it was the bread basket of the USSR and also the seat of a strong, nationally self-conscious identity.

⁵⁰ CONQUEST, *supra* note 1, at 264.

⁵¹ ORLANDO FIGES, *A PEOPLE'S TRAGEDY: THE RUSSIAN REVOLUTION 1891–1924*, at 705 (1996). For a description of the NEP, see James E. Mace, *The Man-Made Famine of 1933 in the Soviet Ukraine: What Happened and Why? in TOWARD THE UNDERSTANDING AND PREVENTION OF GENOCIDE* 67, 69 (Israel W. Charny ed., 1984).

⁵² FIGES, *supra* note 51, at 705; see also Mace, *supra* note 51, at 71.

⁵³ Mace, *supra* note 51, at 70.

tracks of “de-kulakization” and collectivization. At the same time, he rejected *korenizatsiia* and resolved to clamp down on whatever nationalism had emerged, particularly in the Ukraine.⁵⁴ De-kulakization purportedly meant the elimination of the middle class but actually resulted in the annihilation of millions of peasants. Collectivization entailed the substitution of state-run farms for private agriculture and the imposition of grain quotas on each agricultural region.⁵⁵ Because Ukrainian kulaks were not only economically suspect but also identified as nationalistic,⁵⁶ collectivization offered a means of destroying the separatist element in the region.⁵⁷ Not surprisingly, the collectivization and de-kulakization campaigns went hand in hand with a direct assault on the Ukrainian intelligentsia, religious leaders, and political authorities.⁵⁸

The Ukraine consistently failed to meet its impossibly high grain quotas in the first years of the collectivization campaign. In response, Soviet authorities, feeding off the mythology that justified the war on the kulaks, blamed these failures on Ukrainian anti-Bolshevik and counterrevolutionary attitudes.⁵⁹ Perversely, the Soviet central authorities upped the Ukrainian grain quotas, imposing an utterly fantastic standard for the 1932 harvest. As historian Robert Conquest observes, these requisition levels “were not merely excessive, but quite impossible” and, “if enforced, could only lead to starvation of the Ukrainian peasantry.”⁶⁰

Together with this quota, the government promulgated a law criminalizing resistance to the central authorities’ efforts to collect the requisitioned grain, leaving no doubt that Ukrainian peasants’ entitlements to grain had completely disappeared. The “Law on the Inviolability of Socialist Property,”⁶¹ prescribing the death penalty or harsh prison terms for anyone suspected of stealing or damaging any property in the Soviet Union, effectively eradicated individuals’ rights to their own labor and their own product. It earned the nickname the “ear law,” as many of the 125,000 who were sentenced under it in 1932–1933 had done nothing more than steal an ear of corn from a collective farm.⁶²

The process of requisitioning illustrates the extent to which a state, by eradicating individuals’ entitlements, can manufacture starvation. Authorities were ordered to take not only every last ounce of grain but anything that might be eaten or traded for food. Any resistance met with a brutal and ruthless response. Conquest describes the requisition brigades’ modus operandi:

[A]t the lower level the rank-and-file activist “brigades” . . . were often little more than thugs. Their technique consisted of beating people up

. . . .

. . . “In some cases [according to an activist] they would be merciful and leave some potatoes, peas, corn for feeding the family. But the stricter ones would make a clean sweep. They would take not only the food and livestock, but also ‘all valuables and surpluses of clothing’, including ikons in their frames, samovars, painted carpets and even metal kitchen utensils which might be silver. And any money they found stashed away.”⁶³

Starvation became the status quo: “It aroused suspicion not to be in a starving state.”⁶⁴

⁵⁴ *Id.* Stalin announced the liquidation of the kulaks as a class and the total forced collectivization of agriculture on December 29, 1929. *Id.* at 72.

⁵⁵ CONQUEST, *supra* note 1, at 3.

⁵⁶ *Id.* at 219.

⁵⁷ The newspaper *Proletars'ka Pravda*, on January 22, 1930, gave the rationale for collectivization in the Ukraine: “to destroy the social basis of Ukrainian nationalism—individual peasant agriculture.” Mace, *supra* note 51, at 73 (quoting the newspaper).

⁵⁸ CONQUEST, *supra* note 1, at 219.

⁵⁹ *Id.* at 223.

⁶⁰ *Id.* at 222–23.

⁶¹ Mace, *supra* note 51, at 74.

⁶² Werth, *supra* note 2, at 162.

⁶³ CONQUEST, *supra* note 1, at 229–30.

⁶⁴ *Id.* at 231.

In addition to the forcible expropriation of property and the imprisonment and killing of obstreperous peasants, the Soviet authorities obliterated rights crucial to resisting the ravages of famine. One important and intuitive “coping mechanism”⁶⁵ to ward off death by hunger is mobility. Soviet authorities denied Ukrainians the freedom to travel, refusing them permits to go to Russia to look for food⁶⁶ and intercepting starving peasants en route to cities in search of food.⁶⁷ Also, in times of mass hunger, the international community often gives humanitarian aid to help a famine-prone population cope. In spite of pleas for assistance, and in spite of offers of help, Stalin allowed absolutely no food imports or food aid into the affected region.⁶⁸ The cruelest irony is that the Ukraine could have fed itself out of emergency supplies. Starving peasants were often tantalized by the sight of huge stores of grain and potatoes, held as “State reserves” for distribution in times of emergency. The famine did not qualify as such an emergency.⁶⁹

The most generous characterization would label those responsible for the 1932 Ukrainian policies as recklessly indifferent to their effects. Evidence suggests, however, that high-ranking Soviet officials knew that their collectivization efforts would lead to catastrophe. The Politburo received reports of a “critical food situation” in July of 1932, and in August Molotov reported a “real risk of famine.”⁷⁰ By August 1932, Stalin had also received numerous letters from regional commissars, warning him that the quotas assigned for their regions would result in famine if enforced. Molotov responded, “Your position is profoundly mistaken, and not at all Bolshevik . . . We Bolsheviks cannot afford to put the needs of the state—needs that have been carefully defined by Party resolutions—in second place, let alone discount them as priorities at all.”⁷¹ Several high-ranking officials in the Ukraine complained of starvation and begged for help.⁷² Conquest quotes Stalin’s answer to one of these pleas:

“We have been told that you, Comrade Terekhov, are a good speaker; it seems that you are a good storyteller, you’ve made up such a fable about famine, thinking to frighten us, but it won’t work. Wouldn’t it be better for you to leave the post of provincial committee secretary and the Ukrainian Central Committee and join the Writers’ Union? Then you can write your fables and fools will read them.”⁷³

This regime was not experimenting with agricultural policy and economic organization in a well-intentioned effort to best serve its citizenry. This government had received repeated warnings that its policies would lead to mass death but pursued them anyway. Stalin’s deliberate feigning of ignorance, added to decisions such as orders issued to worsen the famine (by preventing population movements, for example), leads Conquest to conclude that the Soviet officials knew of and purposefully exacerbated the famine: “The verdict must be that they knew that the decrees of 1932 would result in famine, that they knew in the course of the famine itself that this had indeed been the result, and that orders were issued to ensure that the famine was not alleviated, and to confine it to certain areas.”⁷⁴

⁶⁵ Social scientists refer to the action taken by at-risk individuals to protect themselves against famine by improving their exchange entitlements as “coping”; included among various coping strategies is movement to where food is more readily available. Von Braun, Teklu, & Webb, *supra* note 36, at 77.

⁶⁶ CONQUEST, *supra* note 1, at 237 (“The Ukrainian peasant was indeed prevented by border guards from entering Russia proper; and if he evaded these and returned with bread, which was at least obtainable there, the bread was seized at the border, and the owner often arrested . . .”).

⁶⁷ Werth, *supra* note 2, at 164. In one month in early 1933, the government intercepted 219,460 people trying to reach the cities. *Id.*

⁶⁸ FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 306 (1990).

⁶⁹ CONQUEST, *supra* note 1, at 235–36.

⁷⁰ Werth, *supra* note 2, at 163.

⁷¹ *Id.* at 164.

⁷² Mace, *supra* note 51, at 77.

⁷³ CONQUEST, *supra* note 1, at 324–25.

⁷⁴ *Id.* at 329.

Why did the Soviet government deliberately kill its own citizens? Conquest argues that the Soviets used the famine to destroy Ukrainian nationalism:

[T]he 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. Stalin . . . saw the peasantry as the bulwark of nationalism; and common sense requires us to see this double blow at Ukrainian nationhood as no coincidence.⁷⁵

The cultural attack prior to 1932 corroborates the suspicion that Stalin used mass hunger to extinguish nationalism. The famine has also been interpreted as a weapon of class warfare. Stalin portrayed the struggle in the Ukraine in these terms, insisting that the kulaks needed to be destroyed even though the earlier de-kulakization campaign had already done the job.⁷⁶ The account given by one of the activists sent to the Ukraine to gather grain supports this explanation:

“We were obtaining grain for the socialist fatherland. For the Five Year Plan.

. . . .

. . . With the others, I emptied out the old folks’ storage chests, stopping my ears to the children’s crying and the women’s wails. For I was convinced that I was accomplishing the great and necessary transformation of the countryside; that in the days to come the people who lived there would be better off for it; that their distress and suffering were a result of their own ignorance or the machinations of the class enemy; that those who sent me—and I myself—knew better than the peasants how they should live, what they should sow and when they should plough.”⁷⁷

The importance of the actual intent of Stalin and his comrades becomes an issue in part II in determining whether or not the famine was genocide. For the moment, it suffices to say that the famine offers an illustration of both first- and second-degree famine crimes. The reckless imposition of faminogenic economic policy in spite of significant evidence that it would lead to disaster speaks to the latter; the purposeful worsening of the famine by interfering with people’s abilities to cope with shortages through a myriad of rights violations underscores the former.

Ethiopia. In contrast to 1932, when the Soviet government created a famine *sui generis*, in 1983–1985 the Ethiopian government took advantage of existing faminogenic conditions, namely severe drought, to direct starvation against insurgent populations in Tigray and Wollo.⁷⁸ The cracked earth and dry riverbeds facilitated the government’s portrayal of the million who starved as pitiable victims of natural disasters. Africa Watch assesses the famine’s causes more accurately: “The most important factors explaining the famine [were] the counter-insurgency strategy adopted by the government, and restrictions and burdens imposed on the population of non-insurgent areas in the name of social transformation.”⁷⁹ The famine in northern

⁷⁵ *Id.* at 328. James Mace claims that the “purpose . . . was to destroy the Ukrainian nation as a political factor and social organism, a goal which could be attained far short of complete extermination.” Mace, *supra* note 51, at 67.

⁷⁶ CONQUEST, *supra* note 1, at 220, writes:

By [1932] everyone who could possibly be called a kulak under any rational analysis whatever had already been removed. The famine-terror was to be inflicted wholly on the collectivized ordinary peasant and the surviving individual peasants, usually even poorer. That is, it was not part of the collectivization drive, which was already virtually complete. Yet, incredibly, the “kulak” still remained The kulak [Stalin said], “had been defeated but not completely exterminated.”

⁷⁷ *Id.* at 233.

⁷⁸ For an excellent discussion of the history of the Ethiopian famine of 1984–1985, see AFRICA WATCH, *EVIL DAYS: THIRTY YEARS OF WAR AND FAMINE IN ETHIOPIA* (1991).

⁷⁹ *Id.* at 5.

Ethiopia in 1983–1985 killed four hundred thousand people, most of whom died not because of drought “but [because of] the government’s gross violations of human rights.”⁸⁰

Cursed with chronically oppressive and incompetent governments, Ethiopians have endured mass starvation almost as a matter of course.⁸¹ During the early 1970s, the country suffered a series of droughts that put tremendous strain on its food supply. Emperor Haile Selassie and his government by and large ignored the resulting hunger.⁸² They paid a price for this indifference; by exploiting national unrest fueled in part by starvation, a Communist-led uprising overthrew Haile Selassie and, after a few years of internecine fighting, the Dergue, an extreme left-wing faction, took over.

The Dergue, led by Col. Mengistu Haile Meriam, embarked in the late 1970s on a radical Marxist redistribution of property and collectivization of agriculture, echoing Stalin’s “reforms.”⁸³ True to the Soviet model, the state levied large grain quotas on farmers, subjected them to heavy taxation, and forced them to sell grain to the government at greatly undervalued prices.⁸⁴ These policies destroyed incentives and led to dramatic falls in productivity.⁸⁵ It was not so clear as in Stalin’s case that the government had declared war on its own citizens. However, the misguided adherence to Communist dogma by an inept regime eviscerated individuals’ preexisting abilities to feed themselves while the government took no corresponding action to provide an alternative.⁸⁶

This government-manufactured food shortage, however inadvertent, left Ethiopians increasingly vulnerable to exogenous faminogenic shocks by the early 1980s. Such a shock came in the form of severe drought. It is tempting, but incorrect, to hold this natural disaster liable for the famine that ensued.⁸⁷ Other parts of sub-Saharan Africa were hit at the same time—neighboring Kenya suffered the same drought as Ethiopia—without an outbreak of famine.⁸⁸ The Dergue’s disastrous macroeconomic policies made Ethiopia particularly susceptible. The forcible expropriation of property in the form of high grain quotas and excessive taxation, combined with artificially low market prices due to government constraints, prevented farmers from either keeping their grain for themselves or selling it for enough to buy food. Faced with poor weather, peasants were defenseless, unable to exercise their traditional “coping” mechanisms to mitigate the effects of drought.⁸⁹ A report on the famine labels these as long-term causes, finding that hunger was due to the deterioration in the productive capacity of the

⁸⁰ *Id.* at 13.

⁸¹ In addition to the 1984–1985 famine, Ethiopians starved in 1974 and faced faminelike conditions as recently as the autumn of 2001. Lacey, *supra* note 7.

⁸² Haile Selassie apparently believed in the preservation of existing social relationships, including those involving beggars, and was hesitant to intervene. Angela Penrose, *Before and After*, in *THE ETHIOPIAN FAMINE* 80, 96 (Kurt Jansson et al. eds., rev. ed. 1990).

⁸³ For a description of Ethiopian land reforms, see VON BRAUN, TEKLU, & WEBB, *supra* note 44, at 27. Elsewhere these same authors refer to Mengistu’s policies as “Stalinist.” Von Braun, Teklu, & Webb, *supra* note 36, at 75.

⁸⁴ DE WAAL, *supra* note 3, at 110.

⁸⁵ On incentives, see Penrose, *supra* note 82, at 120. On declines in food production, which fell by one-half to two-thirds between the Dergue’s takeover and the mid-1980s, see JASON W. CLAY & BONNIE K. HOLCOMB, *POLITICS AND THE ETHIOPIAN FAMINE 1984–1985*, at 191 (1985).

⁸⁶ Dawit Wolde Giorgis, the head of the Relief and Rehabilitation Commission (RRC), nominally in charge of famine relief, reports the idealistic intent of the Dergue upon wresting power from Haile Selassie. DAWIT WOLDE GIORGIS, *RED TEARS: WAR, FAMINE AND REVOLUTION IN ETHIOPIA* 267 (1989). However, he observes that the Dergue was utterly incapable of effecting its idealistic visions:

An examination of Mengistu’s agricultural policies reveals a legacy of unforgiveable folly, mismanagement, and neglect. Fertile farmlands are ill-used and the morale of the peasant farmers has been crushed under revolutionary “innovations.” . . . [State] farms intended to be showcases of socialist prosperity are models of inefficiency and waste, while natural resources are squandered by both individuals and government.

Id. at 266.

⁸⁷ AFRICA WATCH, *supra* note 78, at 133 (“The most remarkable fact about the famine of 1983–5 in Ethiopia was that, by the time the drought struck, the famine was already well under way.”).

⁸⁸ JONASSOHN & BJÖRNSON, *supra* note 47, at 36.

⁸⁹ CLAY & HOLCOMB, *supra* note 85, at 191.

peasant populations and the elimination of traditional methods of coping with predictable fluctuations in climatic and environmental factors. “Foremost among these factors were *government programs, redistribution of land, confiscation of grain and livestock through excessive taxes and obligations, and coercive labor programs and a decline in available labor force.*”⁹⁰

As Clay and Holcomb observe, “Famine . . . resulted primarily from government policies . . . implemented in order to accomplish massive collectivization of agricultural production and to secure central government control over productive regions of the country where indigenous peoples have developed strong anti-government resistance.”⁹¹ These government policies, while perhaps not intentionally faminogenic, were pursued in spite of significant evidence that they were leading to disaster. After years of such malpractice, the consequences were made clearer and clearer to the government.⁹² Still, in 1985, after the famine was already in full swing, the Dergue authorities persisted with their disastrous policies.⁹³

But the Dergue was not just recklessly indifferent. The famine did not strike all of Ethiopia equally but, rather, was targeted at Wollo and Tigray, with a sharp, but brief, episode in Eritrea.⁹⁴ Not coincidentally, these three areas were homes to separatist rebellions that were assailed in accordance with a withering counterinsurgency strategy. The fierceness of the famine in these combat zones arose out of the Dergue’s deliberate use of starvation as a weapon.

In the past, attacking food supplies has been a time-honored military strategy.⁹⁵ In civil wars hunger can defang opposition movements; “[b]y undermining the ability of communities to produce and procure food, they are rendered destitute, dependent on the state or welfare agencies, and thus politically compliant.”⁹⁶ By the early 1980s, though, international law had evolved to the point of proscribing the deliberate starvation of civilians.⁹⁷ The Dergue ignored this legal development, manufacturing hunger as part of its strategy of “draining the sea to catch the fish” in Tigray.⁹⁸ The military pursued a five-pronged strategy: it “aimed at the [rebel] strongholds (which were largely in the surplus-producing western lowlands)”; it bombarded “markets in rebel-held areas”; it put “restrictions on movement and trade”; it forcibly relocated populations; and it interfered with relief efforts and used them to its advantage.⁹⁹

Each of these techniques can be construed as a violation of international human rights or international humanitarian law, and, like the Soviets’ policies of denying peasants freedom of movement, proved disastrous to civilians’ abilities to feed themselves. The indiscriminate attacks greatly diminished farmers’ productive possibilities by forcing them to work at night to avoid air strikes.¹⁰⁰ Moreover, by killing livestock and obliterating crops, they destroyed farmers’ resources that could have been traded or consumed.¹⁰¹ Bombings of markets, aimed at breaking up economic networks in rebel-controlled areas, had the predictable effect of making trade impossible.¹⁰² The government restricted commerce and migration in contested

⁹⁰ *Id.* (emphasis added).

⁹¹ *Id.* at 194.

⁹² Dawit Giorgis claims that by 1985 “it was hardly a secret that [Ethiopia was] in trouble. Anyone who cared to know had read it in the reports of [the RRC] and the international voluntary agencies.” GIORGIS, *supra* note 86, at 127.

⁹³ Giorgis describes a planning meeting in 1985 when the Dergue crafted a plan for continuing the economic policies that had led to famine. *Id.* at 127–28.

⁹⁴ DE WAAL, *supra* note 3, at 112. Tigray, whose inhabitants were distinct ethnically and religiously from other Ethiopians, has traditionally been unhappily wedded to Ethiopia. See Penrose, *supra* note 82, at 129.

⁹⁵ See generally Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 VA. J. INT’L L. 353 (1999).

⁹⁶ Joanna Macrae & Anthony B. Zwi, *Food as an Instrument of War in Contemporary African Famines: A Review of the Evidence*, 16 DISASTERS 299, 301 (1992).

⁹⁷ See *infra* pt. II.

⁹⁸ AFRICA WATCH, *supra* note 78, at 141. The insurgents in Tigray referred to their strategy of intermingling with civilians to evade detection as moving “like a fish through water.” *Id.* at 139.

⁹⁹ DE WAAL, *supra* note 3, at 117.

¹⁰⁰ Macrae & Zwi, *supra* note 96, at 304.

¹⁰¹ CLAY & HOLCOMB, *supra* note 85, at 194.

¹⁰² DE WAAL, *supra* note 3, at 118; see also Macrae & Zwi, *supra* note 96, at 305–06.

areas, refusing travel permits and authorizing soldiers to confiscate shipments of food arbitrarily.¹⁰³ The denial of freedom of movement was particularly egregious; interference with this right robbed affected individuals of a critical and well-tested coping strategy.¹⁰⁴

The manipulation of relief played an especially important role in the government's counterinsurgency campaign. It cannot be said with certainty that international law in its current incarnation includes an unambiguous right to humanitarian aid.¹⁰⁵ However, the Rome Statute of the International Criminal Court lists the manipulation of relief as a war crime.¹⁰⁶ The Ethiopian government engaged in this illicit conduct, keeping the aid that poured into the country from reaching affected populations in Tigray and Wollo. The threat of air strikes kept convoys off the road and food aid immobilized.¹⁰⁷ Relief that did go through went to specific areas controlled by the Ethiopian army.¹⁰⁸ Luring people to these government-controlled distribution centers, soldiers would forcibly conscript young men into the army and detain people for resettlement elsewhere in Ethiopia.¹⁰⁹ The soldiers would commonly send a few people back to their native village with a little grain so as to entice the other villagers to come to the center, and would then detain and relocate them.¹¹⁰ These measures amounted to a de facto denial of aid, as candidates for such abuse chose to starve rather than risk impressment or resettlement for a handout of grain. Interviews of survivors reported that "[n]ot one of the people interviewed felt that they could safely go to the government feeding centers and receive food."¹¹¹

The means by which the Ethiopian government brought the famine to its nadir in Tigray in 1984 are classic examples of first-degree famine crimes. De Waal observes that "[d]rought and harvest failure contributed to the famine but did not cause it. The economic and agricultural policies of the government also contributed, but were not central." Rather, rights abuses lay at the heart of the disaster: "The principal cause of the famine was the counter-insurgency campaign of the Ethiopian army and air force in Tigray and north Wollo during 1980–85."¹¹² Other commentators agree, finding longer term roots in the disastrous agricultural and economic policies of the Dergue regime¹¹³ but short-term ones in the deprivations that accompanied the war in Tigray and Wollo. One social scientist asserts that "it would have been possible, with coordinated effort, to have averted the full disaster of 1984."¹¹⁴ However, rather than try to end the disaster, "the Ethiopian government played a significant role in the creation, maintenance and expansion of the [1983–1985] famine."¹¹⁵

As for famine writ large in Ethiopia, the Mengistu regime was reckless at best with regard to the creation of faminogenic conditions through economic policies and therefore committed a second-degree famine crime. The Ethiopian government clearly had knowledge

¹⁰³ DE WAAL, *supra* note 3, at 118.

¹⁰⁴ Macrae & Zwi, *supra* note 96, at 307 ("Where people maintain their freedom to move in and around the area, . . . they can trade grain for other commodities, and may be able to supplement rations with wild foods. They can also take advantage of employment and trade opportunities, or claim patronage from kin . . .").

¹⁰⁵ See generally Rohan J. Hardcastle & Adrian T. Chua, *Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters*, INT'L REV. RED CROSS, NO. 325, Dec. 1998, at 589.

¹⁰⁶ Rome Statute of the International Criminal Court, July 17, 1998, Art. 8(2)(b)(xxv), UN Doc. A/CONF.183/9* (1998), reprinted in 37 ILM 999 (1998), corrected through May 8, 2000, by UN Doc. CN.177.2000.TREATIES-5, available at <<http://www.un.org/icc>> [hereinafter ICC Statute] ("[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions").

¹⁰⁷ Macrae & Zwi, *supra* note 96, at 306.

¹⁰⁸ De Waal, *supra* note 43, at 52.

¹⁰⁹ *Id.* In all, six hundred thousand people were resettled.

¹¹⁰ CLAY & HOLCOMB, *supra* note 85, at 50.

¹¹¹ *Id.* at 49.

¹¹² DE WAAL, *supra* note 3, at 115.

¹¹³ See, e.g., GIORGIS, *supra* note 86, at 268.

¹¹⁴ Penrose, *supra* note 82, at 136.

¹¹⁵ CLAY & HOLCOMB, *supra* note 85, at v.

of the effects of its economic planning before the worst of the famine, and yet the Dergue refused to reconsider its policies. By 1982 the Relief and Rehabilitation Commission, the Dergue's famine-watch agency, was issuing accounts detailing a dire food situation in parts of Ethiopia; by 1983 the international media were reporting increasing evidence of mass starvation,¹¹⁶ and Mengistu himself mentioned the famine in his May Day speech.¹¹⁷ Dawit Giorgis, the director of the RRC at the time, describes an economic planning meeting in 1984, chaired by Mengistu, in which planners crafted a ten-year plan for the further collectivization of agriculture, knowing full well the danger they had created and would continue to create. "Cynicism pervaded the atmosphere at the conference," he writes. "We knew that even the people who drew up the ten-year plan didn't believe in it. The agricultural and economic policies of the regime had proved unworkable . . ."¹¹⁸ However, Mengistu, when confronted with evidence of famine, repeated Stalin's refrain that what counted was the advancement of the revolution, not the fate of individual Ethiopians.¹¹⁹ Indeed, the Dergue's growing awareness of the famine only opened its members' minds to the potential of the famine as an instrument of war.¹²⁰

North Korea. North Korea has created a famine by grossly mismanaging its economy, then recklessly enforcing the policies responsible for calamitous hunger in spite of mass starvation. The government has decided to triage part of the country to stave off political catastrophe. North Korea's infliction of hunger on a particular section of the country can be explained only as a government's willing sacrifice of its own population for the sake of political survival.

Information on North Korea is hard to come by, given the extreme secrecy of the Kim Jong Il government and the difficulty foreigners have in accessing parts of the country, so the details of the famine that erupted in the mid-1990s are unfortunately vague.¹²¹ By the government's own admission, three million people have died since 1995 in a famine that continues to plague the country.¹²² The regime claims that bad floods in 1995 and 1996 that supposedly ruined the nation's agriculture and the evaporation of aid from former Communist bloc allies triggered the famine.¹²³ Certainly, the reduction in aid from the Soviet Union and China proved faminogenic.¹²⁴ However, this withdrawal of support simply unveiled the lunacy of North Korean central planning. Observers have estimated that the floods caused no more than 15 percent of the damage necessary to spark famine. North Korean agro-economic

¹¹⁶ Penrose, *supra* note 82, at 134–36.

¹¹⁷ AFRICA WATCH, *supra* note 78, at 155.

¹¹⁸ GIORGIS, *supra* note 86, at 135; *accord* AFRICA WATCH, *supra* note 78, at 156.

¹¹⁹ Giorgis describes confronting Mengistu with the facts of the famine in 1984:

I approached Mengistu respectfully, making a great effort not to anger him. I told him that . . . what I had personally observed indicated the makings of a terrible famine . . . I explained that we needed more money to prepare for the crisis.

He listened impatiently, then told me not to be so panicky—to stay cool. He said that the very name of the agency I was heading [the RRC] invited trouble and encouraged begging. "You must remember that you are a member of the Central Committee," he said. "Your primary responsibility is to work toward our political objectives. Don't let these petty human problems that always exist in transition periods consume you. There was famine in Ethiopia for years before we took power—it was the way nature kept the balance."

GIORGIS, *supra* note 86, at 128.

¹²⁰ AFRICA WATCH, *supra* note 78, at 156.

¹²¹ Michael Baker, *Empathy Wins Trust of Wary N. Koreans*, CHRISTIAN SCI. MONITOR, Oct. 6, 1997, at 7.

¹²² *N. Korea Says 3 Million Dead in Famine*, UPI, Feb. 18, 1999, available in LEXIS, News Library, Wire Services File.

¹²³ Foster-Carter, *supra* note 5.

¹²⁴ Action Against Hunger, *supra* note 6 ("The break-down of the Soviet Union and China's economic turn have . . . plunged the North Korean economy into a very serious energy crisis. The productivity of Korean agriculture, highly dependent on machines and fertilisers, has rapidly fallen."); see also ANDREW NATSIOS, THE POLITICS OF FAMINE IN NORTH KOREA 2 (1999), available at <<http://www.usip.org/oc/sr/sr990802.html>> ("The food crisis did not begin with the floods in August 1995, as has been commonly understood, but with the sharp reduction in heavily subsidized food, equipment, and crude oil from the Soviet Union and China in the early 1990s.")

policies of collectivization did the rest.¹²⁵ Without artificial propping up by outsiders, North Koreans have been forced to swallow the bitter harvest that their devotion to *juche*, or self-reliance, has left in its wake.¹²⁶

The responses by the North Korean government to the food shortages range from the laughable to the counterproductive to the criminal. One initial response was the “Let’s eat two meals a day” campaign.¹²⁷ Another was the reduction of the grain ration to farm families by 35 percent, taking it far below subsistence level. This action further weakened productivity, as farmers faced the choice of letting their families starve or covertly squirreling away parts of their harvest, which led to urban food shortages.¹²⁸ The government has stubbornly refused to reform its agro-economic practices, in spite of the undeniable evidence of their destructiveness.¹²⁹ More disturbingly, North Korea has used famine victims as a political pawn, at times demanding food aid from Japan, the United States, and South Korea as a prerequisite to dialogue,¹³⁰ and holding its own population hostage to make sure that the United States and others do not have too strong a bargaining position.¹³¹ This perverse treatment of its own citizenry reflects the North Korean government’s desperate desire to hold on to power.¹³² As one official said, “[W]e’re not going to beg too hard. We are not going to change and have openness. If those people die, they die.”¹³³

North Korea’s behavior in refusing to admit that its policies are flawed and using starvation as a tool of diplomacy constitutes a second-degree famine crime. In addition, the government is knowingly manipulating the famine to target certain populations that threaten its political survival. It has triaged less politically important areas of the country by cutting off all food shipments to them and letting their residents starve to death.¹³⁴ An NGO, Action Against Hunger, claims that the North Hamgyong region, one of these areas, received absolutely no food from the Public Distribution System, the central agency for feeding the country, in 1999.¹³⁵

This mass starvation has continued apace even though the international community has donated food aid in generous quantities.¹³⁶ Action Against Hunger explains that, “[a]s in other countries, . . . the ‘famine’ situation is not caused simply by there not being enough food, but more [because] certain categories of the population do not have access to it.”¹³⁷ A report issued by the United States Institute of Peace places some of the blame on the timing of the relief but concludes that the government deliberately kept food aid from some parts of the population:

¹²⁵ Barbara Crossette, *Hunger in North Korea: A Relief Aide’s Stark Report*, N.Y. TIMES, June 11, 1997, at A8.

¹²⁶ Foster-Carter, *supra* note 5.

¹²⁷ NATSIOS, *supra* note 124, at 2.

¹²⁸ *Id.* at 3–4.

¹²⁹ Jennifer Brill, *North Korean Famine Claims Two Million Lives* (Aug. 24, 1998), at <<http://www.disasterrelief.org/Disasters/980824NorthKorea/>>.

¹³⁰ Bruce W. Nelan, *The Politics of Famine*, TIME, Aug. 25, 1997, at 51.

¹³¹ *See, e.g., id.*

¹³² Sen. Joseph Biden, *North Korean Famine—A Human Tragedy and a Threat to Peace*, 143 CONG. REC. S8487 (daily ed. July 31, 1997).

¹³³ Nelan, *supra* note 130, at 52.

¹³⁴ NATSIOS, *supra* note 124, at 5; *see also* Action Against Hunger, *supra* note 6.

¹³⁵ Action Against Hunger, *supra* note 6; *see also* PEACEWATCH, NORTH KOREA LOOSENS CONTROL TO COMBAT STARVATION (Aug. 1997), available at <<http://www.usip.org/pubs/PW/897/korea.html>>. According to Andrew Natsios:

Pyeongyang, the capital, is getting 450 grams of food a day, which is a minimum ration, but it will keep you alive. The rest of the country is getting 100 grams, which is way below what you need to survive. And the Northeast region, where we believe the greatest starvation is . . . [t]hey are getting no food distribution; from what we hear, have gotten nothing this year at all.

The Newshour: Starvation in North Korea (PBS television broadcast, June 11, 1997) (interview with Andrew Natsios), at <http://www.pbs.org/newshour/bb/asia/june97/korea_6-11.html>.

¹³⁶ Action Against Hunger, *supra* note 6.

¹³⁷ *Id.*

[M]ajor contributions or sales [of food] were made by the Chinese, donor governments, and private organizations, [but] the timing of the pledges and deliveries did not match the peak period of the famine. Second, the central authorities seem to have panicked at the poor crop in the fall of 1996 and the lack of donor governments' pledges or delivery of food until late spring and early summer 1997, which resulted in a shutdown of the public distribution system. Third, the central government saw to it that triaged populations did not have access to imported food *because they were not seen as critical to the survival of the state*.¹³⁸

Action Against Hunger tried to get food aid to affected populations in the North Hamgyong region but was met with obstruction by government officials. They showed the NGO Potemkin villages filled with seemingly healthy children in an attempt to mask the utterly deplorable conditions. They also refused it permission to travel unaccompanied outside Pyongyang, preventing it from making objective inquiries into famine conditions; and they denied it authorization to set up its own system of food distribution.¹³⁹

Action Against Hunger concludes that the North Korean government intentionally created famine: "By confining humanitarian organisations to the support of these state structures that we know are not representative of the real situation of malnutrition in the country the authorities are deliberately depriving hundreds of thousands of truly needy Koreans of assistance."¹⁴⁰ North Korea's refusal to allow the NGO to assist starving children it discovered abandoned in orphanages evoked the following blunt statement from Action Against Hunger with regard to government culpability: "the Korean authorit[ies'] refusal is criminal," it contends, "as Action against Hunger could have saved the lives of these children if they had been able to treat them."¹⁴¹ This intentional infliction of famine is a first-degree famine crime.

II. THE CRIMINALIZATION OF FAMINE

The means by which the three governments discussed in part I created, inflicted, or prolonged famine would violate numerous human rights guaranteed by international law, not just the right to food, if perpetrated today. For example, the UDHR protects individuals' freedom of movement and right to property, both of which Stalin violated with his policies in the Ukraine.¹⁴² The International Covenant on Civil and Political Rights (ICCPR) guarantees individuals the right to live where they want, a right violated by the Dergue with its faminogenic policies of forced relocation.¹⁴³ The UDHR also establishes the right to fair compensation, a right violated by all three governments through their excessive and unremunerated expropriation of crops.¹⁴⁴ Moreover, a famine is ultimately a massively perpetrated violation of the right to life,¹⁴⁵ the right that unquestionably crowns the pantheon of human interests in the commonly shared values of the world community.¹⁴⁶

¹³⁸ NATSIOS, *supra* note 124, at 8 (emphasis added).

¹³⁹ All humanitarian aid must flow through government channels. Action Against Hunger, *supra* note 6.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² UDHR, *supra* note 21, Art. 13(1) ("Everyone has the right to freedom of movement and residence within the borders of each State."); *id.*, Art. 17(1) ("Everyone has the right to own property . . ."); *id.*, Art. 17(2) ("No one shall be arbitrarily deprived of his property.").

¹⁴³ International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 12(1), 999 UNTS 171 [hereinafter ICCPR].

¹⁴⁴ UDHR, *supra* note 21, Art. 23(3) ("Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity . . .").

¹⁴⁵ Philip Alston spells out this simple equivalence: "[A]ny proposed limitations on the right to food which could result in death by starvation are clearly unacceptable. Apart from violating the right to food provisions, such limitations would also violate the right to life . . ." Alston, *supra* note 20, at 21.

¹⁴⁶ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 104 (1993) (noting that "without effective guarantee of this right, all other rights of the human being would be devoid of meaning").

Of course, “[i]nternational criminal law . . . does not ‘incorporate’ all humanitarian or human rights law.”¹⁴⁷ Nonetheless, a survey of existing international criminal law shows that faminogenic rights violations like these, committed with the appropriate degree of intentionality, incur criminal responsibility. This existing law, as well as the Ukrainian, Ethiopian, and North Korean experiences, informs the following definitions of famine crimes:

- An individual commits a first-degree famine crime by knowingly creating, inflicting, or prolonging conditions that result in or contribute to the starvation of a significant number of people.
- An individual commits a second-degree famine crime by recklessly ignoring evidence that the policies for which he or she bears responsibility for creating, inflicting, or prolonging are leading to the starvation of a significant number of people.

In this part, I show how the three major categories of international criminal law prohibit first- and second-degree famine crimes. First, I turn to the *actus reus* elements of these definitions and demonstrate that they are rooted in existing law.

The Actus Reus Elements

Famine and the law of genocide. Finding *actus reus* equivalents for famine crimes in the law of genocide has important expressive value, since, as an influential UN report on genocide puts it, “[g]enocide is the ultimate crime and the gravest violation of human rights it is possible to commit.”¹⁴⁸ Assuredly, genocide law includes the *actus reus* elements of famine crimes as defined above. However, the *mens rea* and required attendant circumstances for establishing a charge of genocide prevent this law from serving as a satisfactory ground for a definition of famine crimes.

The Genocide Convention defines the crime of genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁴⁹

Notwithstanding the redundant *mens rea* tag of deliberateness,¹⁵⁰ famine crimes fit subparagraph (c), the infliction of conditions of life calculated to bring about the physical destruction of a group. The Preparatory Commission for the International Criminal Court, in its draft text on the elements of crimes that fall within the proposed court’s jurisdiction, notes that “[t]he term ‘conditions of life’ may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food.”¹⁵¹ The official *Commentary*

¹⁴⁷ STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 12 (1997).

¹⁴⁸ Benjamin Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1985/6, para. 14.

¹⁴⁹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. 2, 78 UNTS 227 (entered into force Jan. 12, 1951).

¹⁵⁰ WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 243 (2000) (“[T]he word ‘deliberately’ is a pleonasm, because the *chapeau* of article II already addresses the question of intent. The acts defined in paragraphs (a) and (b) of article II must also be ‘deliberate’, although the word is not used” (footnote omitted)).

¹⁵¹ Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, Art. 6(c) n.4, available at <<http://www.umn.edu/humanrts/instree/iccelementsofcrimes.html>>.

to the first Protocol Additional to the Geneva Conventions agrees: “[I]t should be mentioned that an action aimed at causing starvation . . . could also be a crime of genocide”¹⁵² In addition, case law supports the idea that deliberately inflicting conditions of life calculated to bring about physical destruction includes the intentional use of starvation.¹⁵³ Commentators thus have argued that deliberately perpetrated famines are genocides.¹⁵⁴

The narrow focus of the *mens rea* requirement of genocide, however, limits the usefulness of the law as a basis for anchoring the definitions of famine crimes. Generally speaking, an individual incurs criminal liability under international criminal law if he or she acts with knowledge and intent.¹⁵⁵ Although commentators have asserted that a *mens rea* of recklessness should be enough to sustain a genocide accusation,¹⁵⁶ case law on point clearly requires *more* than knowledge. The International Criminal Tribunal for Rwanda (ICTR) notes that “[a] distinguishing aspect of the crime of genocide is the specific intent (*dolus specialis*) to destroy a group in whole or in part. The *dolus specialis* applies to all acts of genocide It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.”¹⁵⁷

For offenses to be considered “specific intent” crimes, the alleged perpetrator must actually aim at achieving certain results by his or her acts.¹⁵⁸ William Schabas discusses the distinction between crimes of general intent and crimes of specific intent:

In a general intent offence, the only issue is the performance of the criminal act, and no further ulterior intent or purpose need be proven. An example would be the minimal intent to apply force in the case of common assault. A specific intent offence requires performance of the *actus reus* but in association with an intent or purpose that goes beyond the mere performance of the act. Assault with intent to maim or wound is an example drawn from ordinary criminal law.¹⁵⁹

The tag “as such” at the end of the definition of genocide as the “intent to destroy, in whole or in part,” certain groups means that the perpetrator must have a purpose going beyond simple mass annihilation. He or she must exterminate particular individuals because they are members of that group.¹⁶⁰ Mere foreseeability that actions taken will affect a particular group disproportionately, even when coupled with one of the acts that otherwise meets the *actus reus* requirement for genocide, falls short of the required specific intent.¹⁶¹ Thus, as the

¹⁵² INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 654, para. 2097 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987), available at <<http://www.icrc.org>> [hereinafter PROTOCOL COMMENTARY].

¹⁵³ Prosecutor v. Kayishema, Judgment and Sentence, No. ICTR-95-1-T, para. 116 (May 21, 1999). ICTR decisions are available online at the Tribunal’s Web site, <<http://www.ictt.org>>.

¹⁵⁴ See generally JONASSOHN & BJÖRNSON, *supra* note 47.

¹⁵⁵ ICC Statute, *supra* note 106, Art. 30(1).

¹⁵⁶ SCHABAS, *supra* note 150, at 211. Schabas describes a situation that fits well with the historical illustrations discussed in this article:

Although there is as yet no case law on this subject, it is relatively easy to conceive of examples of recklessness within the context of genocide. A commander accused of committing genocide by “inflicting on the group conditions of life calculated to bring about its physical destruction”, and who was responsible for imposing a restricted diet or ordering a forced march, might argue that he or she had no knowledge that destruction of the group would indeed be the consequence. An approach to the knowledge requirement that considers recklessness about the consequences of an act to be equivalent to full knowledge provides an answer to such an argument.

Id. at 212.

¹⁵⁷ Kayishema, *supra* note 153, para. 91.

¹⁵⁸ Alexander K. A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2266 (1999).

¹⁵⁹ SCHABAS, *supra* note 150, at 218.

¹⁶⁰ Prosecutor v. Krstić, Judgment, No. IT-98-33-T, para. 561 (Aug. 2, 2001), excerpted in 40 ILM 1346 (2001); Prosecutor v. Bagilishema, Judgment, No. ICTR-95-1A-T, para. 61 (June 7, 2001).

¹⁶¹ Draft Code of Crimes Against the Peace and Security of Mankind, Commentary to Art. 17, para. 5, in Report of the International Law Commission on the Work of Its Forty-eighth Session, UN GAOR, 51st Sess., Supp. No. 10, at 14, UN Doc. A/51/10 (1996), available at <<http://www.un.org/law/ilc/texts/dcodefra.htm>> [hereinafter ILC

International Criminal Tribunal for the Former Yugoslavia (ICTY) noted in its *Krstić* decision, a *mens rea* of recklessness does not suffice.¹⁶² Even if a government knows that its policies will create famine among Tigrayans, for example, unless it specifically intends to exterminate the Tigrayans in whole or in part, its actions will not meet the standard for genocide.

This requirement—that a perpetrator specifically intend to destroy a population—maintains the fairly rigid borders of genocide, preserving its exclusive domain for the worst of human rights abuses but unfortunately making it too inflexible to reach many famine crimes. If the perpetrator kills for reasons unrelated to the extermination of a particular group, the perpetrator’s mental state does not qualify.¹⁶³ Of the three histories discussed earlier, only Stalin’s famine, in part perpetrated in the name of destroying the kulaks as a class, arguably satisfies this element of the *mens rea* threshold requirement (but not every element of the Convention’s definition, as will be discussed below). The North Korean government has given no indication that it wishes to exterminate the citizens in the northern provinces; the rationale for triaging this section of the country is unclear, but it probably involves the government’s desire to prevent political unrest. The Ethiopian famine grew out of an anti-insurgency campaign. The goal of the Dergue was military victory, not the extermination of groups as such, and, if left to its own devices, it presumably would have stopped its faminogenic military practices (bombing food convoys, for example) once the campaign was concluded.

The limited set of groups protected by the law of genocide also diminishes its utility as a weapon against famine. Repeating an oft-cited criticism of the Convention, Steven Ratner and Jason Abrams observe that “it is clear from both the text and the *travaux* of the Convention that it does not include political, economic, or professional groups.”¹⁶⁴ As a regrettable result, this lacuna “offers a wide and dangerous loophole which permits any designated group to be exterminated, ostensibly under the excuse that this is for political reasons.”¹⁶⁵ This loophole allows the conduct of the North Korean government and perhaps even Stalin’s slaughter to slip through the cracks in the law. The Dergue targeted the inhabitants of Tigray and Wollo, who arguably compose distinct racial or religious groups and as such fit within the confines

Report] (“[A] general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide.”); see also *Krstić*, *supra* note 160, para. 561.

¹⁶² *Krstić*, *supra* note 160, para. 571, which states:

Some legal commentators further contend that genocide embraces those acts whose foreseeable or probable consequence is the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act [footnote omitted]. Whether this interpretation can be viewed as reflecting the status of customary international law at the time of the acts involved here is not clear. For the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompasses only acts committed with the *goal* of destroying all or part of the group.

¹⁶³ Alexander K. A. Greenawalt gives two helpful examples of this quandary. First, discussing Pol Pot’s Cambodia, he notes that because the higher-level cadres of the Khmer Rouge had as their purpose the establishment of a Communist system, they did not specifically intend the mass destruction of the Cambodian population, even though the destruction of this group was a foreseeable result. The Khmer Rouge specifically intended to revolutionize the Cambodian political economy; the massacre of most of the Cambodians (principally by starvation and disease) was merely instrumental to this goal and not the goal itself. Second, Greenawalt notes that the annihilation of 50% of Paraguay’s Ache Indians between 1962 and 1972 during a campaign to free Ache land for economic development does not fall within the purview of the law of genocide, as the purported goal of the government was to further economic development. Greenawalt, *supra* note 158, at 2285.

This result, which stems from the particular definition of genocide, seemingly conflates motive and intent. Motive is almost never a consideration when ascertaining a mental state. GLANVILLE WILLIAMS, *THE MENTAL ELEMENT IN CRIME* 14 (1965) (calling motive “legally irrelevant”). The “as such” phrase in the definition, however, arguably incorporates a motive into the *mens rea* standard under the Convention. For a general discussion of the motive versus intent debate in this regard, see SCHABAS, *supra* note 150, at 245–54 (concluding that motive cannot be altogether dismissed as an element of the crime of genocide, because “as such” was included “as a compromise” with those calling for a “motive component”).

¹⁶⁴ RATNER & ABRAMS, *supra* note 147, at 32.

¹⁶⁵ Whitaker, *supra* note 148, para. 36.

of the Convention. The law of genocide may recognize auto-genocide;¹⁶⁶ thus, North Koreans qua national group could fall under the aegis of the Convention. However, as far as the triaged segments of the population are concerned, they are dying because they are politically pliant and therefore bear the cost of the food shortage better than more politically threatening parts of the citizenry. These North Koreans are more accurately thought of as a political group, if they constitute a group at all. Stalin's famine had two goals, the destruction of nascent strains of Ukrainian nationalism and the elimination of the kulaks as a class. The former motive satisfies the Convention's requirement that a particular type of group be targeted, but the latter does not. If it was intended as a weapon against the kulaks, a group at least formally defined by their economic status, the famine resists characterization as genocide.

In short, although the law of genocide offers a body of jurisprudence rooting the *actus reus* elements of the two degrees of famine crimes in existing international law, its *dolus specialis* requirement makes it too restrictive to include either definition of famine crimes. Specific intent is significantly higher than knowledge, let alone recklessness, and the types of protected groups are too narrowly defined.

Famine and international humanitarian law. Like the law of genocide, international humanitarian law¹⁶⁷ contains the *actus reus* elements of first- and second-degree famine crimes and further anchors those crimes in international criminal law. The protections of civilians from the ravages of famine under international humanitarian law are sufficiently established to raise the question "why the people of the world are not entitled to equally strong protection against hunger in times of peace as in times of war."¹⁶⁸ But the requirement of a nexus to armed conflict prevents this body of law from effectively criminalizing most deliberately or recklessly perpetrated famines.

Historically, the laws of war permitted the starvation of civilians as a means of forcing a surrender.¹⁶⁹ The Lieber Code, drafted at President Lincoln's behest, recognized that "[w]ar is not carried on by arms alone," and stated that "[i]t is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy."¹⁷⁰ This law reflected a history of military strategy that valued the tactical possibilities of starvation. Mass hunger created by blockades or sieges was justified by the argument that the military gain ultimately achieved outweighed the collateral damage inflicted on civilian populations.¹⁷¹ An especially notable tragedy, the Nazi siege of Leningrad during World War II, which left more than one million Russians dead, was given an imprimatur of legality *ex post facto*.¹⁷² Responding to charges made against German Field Marshal Wilhelm Ritter von Leeb, the International Military Tribunal, in its *High Command* judgment, admitted that

¹⁶⁶ *Id.*, para. 31 ("It is noteworthy that the definition" of genocide in the Convention "does not exclude cases where the victims are part of the violator's own group.").

¹⁶⁷ By international humanitarian law, I mean the law of armed conflict, defined by the International Committee of the Red Cross (ICRC) as follows:

[T]he expression of international humanitarian law applicable in armed conflict means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.

PROTOCOL COMMENTARY, *supra* note 152, at xxvii.

¹⁶⁸ Alston, *supra* note 20, at 26.

¹⁶⁹ Waxman, *supra* note 95, at 408–09. For a general discussion of sieges and blockades, see MICHAEL WALZER, *JUST AND UNJUST WARS* 160–75 (1977).

¹⁷⁰ U.S. War Department, General Orders No. 100, Apr. 24, 1863, Art. 17, reprinted in *THE LAWS OF ARMED CONFLICTS* 3 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988), available at <<http://www.civilwarhome.com/liebercode.htm>>.

¹⁷¹ Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 31 (1989) ("Acts directed at starvation of people, including the impediment of relief efforts on behalf of starving populations, have long roots in the history of warfare."). For a thorough discussion of the history of siegecraft, see generally Waxman, *supra* note 95, at 357–401.

¹⁷² Allen, *supra* note 171, at 32.

[a] belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate.¹⁷³

The court then remarked, “[W]e might wish the law were otherwise but we must administer it as we find it.”¹⁷⁴

The modern trend in both treaty law and customary law reflects an abandonment of the sort of total war accepted by the Nuremberg Tribunal.¹⁷⁵ The Geneva Conventions of 1949 heralded a new age of international humanitarian law and began to move it toward an explicit prohibition of civilian starvation. The Conventions still recognized the legitimacy of sieges and blockades but asserted that certain limited categories of people were protected from the ravages of hunger. Article 23 of the Fourth Convention states:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores . . . intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential food-stuffs, clothing and tonics intended for children under fifteen, expectant mothers, and maternity cases.¹⁷⁶

Nevertheless, the obligation to protect young children and expectant mothers is conditioned on there being

no serious reasons for fearing . . . [t]hat a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.¹⁷⁷

This sizable loophole pulls the rug from under even the qualified protection Article 23 mandates. The authors of the Geneva Conventions explicitly recognized this qualification as leaving too much discretion to warring parties but believed that they “had to bow to the harsh realities of war.”¹⁷⁸ Even an optimistic reading of Article 23 thus deems it “a ‘clearly worded moral obligation’” and “a nod towards special protection for civilians in nonoccupied areas against measures to deprive them of needed sustenance during armed conflict.”¹⁷⁹ It certainly is not a blanket prohibition against starving civilians.¹⁸⁰

The Geneva Conventions protect civilians in occupied territories more assertively. Article 55 of the Fourth Convention sets forth the relevant rule:

¹⁷³ United States v. Von Leeb, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 563 (1950) (quoting 3 CHARLES CHENEY HYDE, INTERNATIONAL LAW 1802–03 (2d rev. ed. 1945)) [hereinafter TRIALS].

¹⁷⁴ *Id.*

¹⁷⁵ Because “[d]etermining the precise content of customary international law presents momentous difficulties,” I emphasize treaty law. Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 242 (2002).

¹⁷⁶ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 23, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention IV]. Yoram Dinstein remarks on the limited reach of the protection of Article 23 with regard to civilians generally: “But even if Article 23 is applicable to sieges in land warfare, it is noteworthy that there is no requirement to allow supply of essential foodstuffs to the civilian population in general, as distinct from certain groups deemed particularly ‘vulnerable’.” Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 145, 148 (Astrid J. M. Delissen & Gerard J. Tanja eds., 1991).

¹⁷⁷ Geneva Convention IV, *supra* note 176, Art. 23.

¹⁷⁸ INTERNATIONAL COMMITTEE OF THE RED CROSS, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 182–83 (Jean Pictet gen. ed., 1958), available at <<http://www.icrc.org>> [hereinafter GENEVA IV COMMENTARY].

¹⁷⁹ Allen, *supra* note 171, at 39.

¹⁸⁰ See, e.g., PROTOCOL COMMENTARY, *supra* note 152, at 1457, para. 4797 (observing that “up to now [i.e., 1977] there has been no express rule of law forbidding besieging forces to let civilians die of starvation”).

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary food-stuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition food-stuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.¹⁸¹

The reach of this article is broader, applying to “the civilian population” and not just expectant mothers, children, and “maternity cases.” Also, it does not include a derogation clause like that in Article 23. The phrase “to the fullest extent of the means available to it” offers a small loophole, but the official *Commentary* to this article claims that “the Occupying Power is nevertheless under an obligation to utilize all the means at its disposal” to ensure an adequate food supply.¹⁸² The difference between the two norms likely reflects the contrast between the inevitability that siege warfare will be employed¹⁸³ and the lack of military necessity in starving an already occupied (and therefore defeated) civilian population.

The rules in the Geneva Conventions on sieges and blockades mirror the belief that international humanitarian law “must achieve a compromise between military requirements and humanitarian considerations.”¹⁸⁴ For better or for worse, the 1977 Protocols Additional to the Geneva Conventions reject deference to strategy and articulate a more robust prohibition of the starvation of civilians during times of armed conflict. Article 54 of Protocol I puts it the most bluntly:

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, 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.¹⁸⁵

Article 54 “radically changed” the legal position of international humanitarian law as regards the tactics available to a besieging force.¹⁸⁶ Yoram Dinstein believes that this article makes it “clear that the destruction of foodstuffs indispensable to the survival of the civilian population is strictly forbidden by the Protocol.”¹⁸⁷

However, the prohibition of starvation in Protocol I is not quite as unambiguous as it might seem at first blush. Reflecting on the status of the Article 54 prohibitions in customary international law, Antonio Cassese noted some years ago that “[t]his is an area where there exists great confusion and uncertainty concerning the content of [the] law.”¹⁸⁸ Notably, the official *Commentary* waffles on the subject of blockades, seeming even to permit disproportionate

¹⁸¹ Geneva Convention IV, *supra* note 176, Art. 55.

¹⁸² GENEVA IV COMMENTARY, *supra* note 178, at 310.

¹⁸³ See generally Waxman, *supra* note 95, at 421 (“[S]iege methods have long been given leniency in customary law because they were seen as the only viable means of securing certain military objectives.”).

¹⁸⁴ Peter Macalister-Smith, *Protection of the Civilian Population and the Prohibition of Starvation as a Method of Warfare*, INT’L REV. RED CROSS, NO. 284, Sept.–Oct. 1991, at 440, 441.

¹⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 54, 1125 UNTS 3 [hereinafter Protocol I].

¹⁸⁶ Dinstein, *supra* note 176, at 148.

¹⁸⁷ *Id.* at 150.

¹⁸⁸ Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55, 90 (1984).

or indiscriminate interference with the provisioning of civilian populations so long as humanitarian assistance is permitted:

It should be emphasized that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians. Unfortunately it is a well-known fact that all too often civilians, and above all children, suffer most as a result. *If the effects of the blockade lead to such results*, reference should be made to Article 70 of the Protocol (*Relief actions*), which provides that relief actions should be undertaken when the civilian population is not adequately provided with food and medical supplies, clothing, bedding, means of shelter and other supplies essential to its survival.¹⁸⁹

Thus, in theory at least, humanitarian aid should soften the faminogenic effects of blockades. Reference to Article 70, however, yields an ultimately qualified and therefore unsatisfying result, as it makes relief efforts for civilians exposed to hunger by a blockade “subject to the agreement of the Parties concerned.”¹⁹⁰ This qualification represents genuflection to state sovereignty¹⁹¹ and amounts to a “severe limitation” on affected populations’ right to receive relief.¹⁹² The *Commentary* notes this infirmity but argues that the clause does not mean that “the Parties concerned ha[ve] absolute and unlimited freedom to refuse their agreement to relief actions.” Rather, “a Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.”¹⁹³ Yet this concern for national sovereignty raises the troubling specter of ambiguity in the obligation to allow humanitarian assistance. In spite of protestations to the contrary,¹⁹⁴ this confusing language unfortunately results in rendering a clear obligation—to ensure humanitarian relief when blockade is used as a tool of warfare—into one that can be abrogated in certain circumstances. Nevertheless, this exception does not license other techniques of civilian starvation, such as direct assaults on food convoys and attacks on crops and pastureland. Consequently, many of the activities of the Dergue in Tigray and Wollo do not fit into this loophole.

Protocol I is explicitly limited in its application to international conflicts. As such, it would not have applied to Ethiopia in the 1980s even if Ethiopia had been a state party.¹⁹⁵ Protocol II, which prescribes rules governing internal armed conflicts and is therefore more relevant to the famines discussed in this article, includes many of the same protections as Protocol I. Article 14 contains language similar to that of Article 54:

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.¹⁹⁶

The *Commentary*’s elaboration on this article is even more unyielding than that accompanying Article 54. No measure of military necessity justifies the starvation of civilians.¹⁹⁷ However,

¹⁸⁹ PROTOCOL COMMENTARY, *supra* note 152, at 654, para. 2095 (first emphasis added).

¹⁹⁰ Protocol I, *supra* note 185, Art. 70(1).

¹⁹¹ PROTOCOL COMMENTARY, *supra* note 152, at 819, para. 2805 (observing that this clause in Article 70 “was added . . . essentially out of a concern to protect the national sovereignty of the State receiving the relief”).

¹⁹² MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 182 (1999).

¹⁹³ PROTOCOL COMMENTARY, *supra* note 152, at 819, para. 2805.

¹⁹⁴ *See, e.g.*, The Right to Food, Report of the High Commissioner for Human Rights, UN Doc. E/CN.4/1999/45, para. 41 (in defining the rights to food and nutrition, the right to food “in emergency situations should be taken into account. This included the right to receive food aid in times of critical need, and the obligation of States to grant access to impartial humanitarian organizations to provide food aid and other humanitarian assistance, as established in international humanitarian law.”).

¹⁹⁵ Ethiopia became a party to Protocols I and II in 1994.

¹⁹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, Art. 14, 1125 UNTS 609 [hereinafter Protocol II].

¹⁹⁷ PROTOCOL COMMENTARY, *supra* note 152, at 1456, para. 4795 (“The prohibition on using starvation against civilians is a rule from which no derogation may be made. A form of words whereby it would have been possible to make an exception in case of imperative military necessity was not adopted.”).

it, too, retreats from its blanket statements when it comes to the subject of blockades,¹⁹⁸ and, duplicating the *Commentary* to Article 54, it suggests that in times of blockade reference should be made to the article providing for relief actions.¹⁹⁹

Like Article 70 of Protocol I, Article 18, which enunciates the rule respecting relief actions, falls short of unequivocally requiring that relief be allowed:

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken *subject to the consent of the High Contracting Party concerned*.²⁰⁰

This language of consent significantly weakens the provision. What party concerned, if its intention is to starve its own civilian population, would consent to humanitarian relief, frustrating those very designs? The *Commentary* tries to establish a beachhead against the erosion of the law, arguing that

[t]he fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. . . . The authorities . . . cannot refuse such relief without good grounds.²⁰¹

Perhaps “good grounds” presents more of a hurdle than “arbitrary and capricious,” but the prohibition against starving civilians still retreats in the face of the military necessity of blockade.

Nonetheless, the 1977 Protocols prescribe a significant, if qualified, ban on the starvation of civilians during times of armed conflict. In situations where the exigencies of military strategy do not offer compelling reasons to the contrary, such as during an occupation, there is simply no way combatants can defend the legality of inflicting mass hunger on civilians. Viewed in that light, Articles 54 and 18 strongly support the argument that the faminogenic behavior engaged in by the Soviets, the Dergue, and the North Koreans meets the *actus reus* requirements for violations of the laws of war.

Customary international law also prohibits the deliberate starvation of civilians during armed conflicts. Cassese claims that custom proscribes “any attack upon means of subsistence which serves solely the civilian population.”²⁰² This article has stressed treaty law over custom because the “lack of state practice, the contradictions that often exist between various pieces of state practice, [and] the difficulty in determining whether a rule has become binding *qua* customary international law”—all make customary international law more difficult to analyze with confidence.²⁰³ However, customary international law may be particularly fertile soil in which to root the definitions of famine crimes, for, as Theodor Meron observes:

Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.²⁰⁴

Moreover, customary international law extends many of the protections of law applicable to international conflicts to internal armed struggles. While customary international law does

¹⁹⁸ *Id.*, at 1457, para. 4796 (admitting that blockades may “remain legitimate”).

¹⁹⁹ *Id.*, para. 4798.

²⁰⁰ Protocol II, *supra* note 196, Art. 18(2) (emphasis added).

²⁰¹ PROTOCOL COMMENTARY, *supra* note 152, at 1479, para. 4885.

²⁰² Cassese, *supra* note 188, at 91.

²⁰³ Mettraux, *supra* note 175, at 242.

²⁰⁴ Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AJIL 348, 361 (1987).

not incorporate Protocol I by rote, those provisions of Article 54 that protect civilians from starvation are considered to reflect custom and as such apply in internal conflict.²⁰⁵

In addition, treaty law often restricts criminalization to violations committed in international conflicts, but customary international law makes individuals criminally responsible for violations committed in internal conflicts. Although the Rome Statute criminalizes the deliberate starvation of civilians in international armed conflict,²⁰⁶ it does not include intentional starvation inflicted in internal conflicts in its list of war crimes.²⁰⁷ Traditionally, violations of international humanitarian law perpetrated in internal conflicts could not serve as the basis for individual criminal responsibility.²⁰⁸ However, developments in customary international law have chipped away at this two-tiered edifice.²⁰⁹ The 1996 draft code of the International Law Commission criminalizes in certain instances “violence to the life, health and physical or mental well-being of persons” when committed “in armed conflict not of an international character.”²¹⁰ Its commentary notes that “this subparagraph [is] of particular importance in view of the frequency of non-international armed conflicts in recent years.”²¹¹ The ICTY accepted this logic in one of its first decisions, holding that violations of international humanitarian law

entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect “elementary considerations of humanity” widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.²¹²

The Tribunal has repeatedly extended the reach of individual criminal responsibility through the vector of customary international law to include violations of international humanitarian law committed in internal armed conflict.²¹³ In its *Čelebići* decision, the appeals chamber held that, “as a matter of customary law, breaches of international humanitarian law committed in internal conflicts . . . could also attract individual criminal responsibility.”²¹⁴

Treaty law prohibits many of the acts that government officials commit in creating, prolonging, or inflicting famine, demonstrating that the *actus reus* elements of the two definitions are established in international criminal law. Customary international law extends this law to apply to internal conflicts and creates individual criminal responsibility for certain violations committed in such situations. This last innovation is especially important, since most famines, like those discussed in this article, occur within a single state’s boundaries. The fact that war crimes can only be committed during times of armed conflict alone prevents

²⁰⁵ Cassese, *supra* note 188, at 90. Certainly, the prohibitions in the Geneva Conventions are declaratory of customary international law. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, 558 (1995).

²⁰⁶ ICC Statute, *supra* note 106, Art. 8(2) (b) (xxv) (providing for individual criminal liability for “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival”).

²⁰⁷ *Id.*, Art. 8(2) (e).

²⁰⁸ Theodor Meron observes that “[u]ntil very recently, the accepted wisdom was that [the laws of internal armed conflict] . . . constituted, at least on the international plane, an uncertain basis for individual criminal responsibility.” Meron, *supra* note 205, at 559; *see also* SASSÖLI & BOUVIER, *supra* note 192, at 247.

²⁰⁹ SASSÖLI & BOUVIER, *supra* note 192, at 247.

²¹⁰ ILC Report, *supra* note 161, Art. 20(f) (i).

²¹¹ *Id.*, commentary to Art. 20, para. 14.

²¹² Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 129 (Oct. 2, 1995), *reprinted in* 35 ILM 32 (1996); *see also* Prosecutor v. Akayesu, Appeals Judgment, No. ICTR-96-4, paras. 442-43 (June 1, 2001) [hereinafter *Akayesu Appeals Judgment*] (arguing in favor of the criminalization of breaches of the Geneva Conventions in situations of internal armed conflict).

²¹³ *See* Prosecutor v. Delalić, Appeals Judgment, No. IT-96-21-A, para. 140 (Feb. 20, 2001), *excerpted in* 40 ILM 630 (2001) [hereinafter *Čelebići Appeals Judgment*] (interpreting its jurisprudence on customary international law as “blurring . . . the distinction between interstate and civil wars as far as human beings are concerned”).

²¹⁴ *Id.*, para. 160.

international humanitarian law from being an effective jurisprudential tool in the fight against famine.²¹⁵ Therefore, of the three famines described in part I, only the one perpetrated by the Mengistu regime would be governed by international humanitarian law.

Famine crimes and the law of crimes against humanity. The jurisprudence of crimes against humanity²¹⁶ provides perhaps the most flexible, if least defined, precedent for anchoring the *actus reus* elements of famine crimes. The major problem with using this law is its notorious vagueness, an infirmity that has bedeviled the pertinent jurisprudence since its inception at the Nuremberg trials.²¹⁷ While the case law of the ICTY and the ICTR has made significant strides toward defining the parameters, crimes against humanity remain in a state of flux, as evidenced by the difficulty experienced by the publicists at the Rome Conference in arriving at a satisfactory definition.²¹⁸

The law of crimes against humanity, as noted above, is a famously open and flexible doctrine whose ill-defined borders are themselves often subjected to the *nullum crimen sine lege* critique.²¹⁹ As Bassiouni observes:

The piecemeal uncoordinated developments [in defining crimes against humanity] have resulted in a diversity of legal instruments with differing legal effects, applicable to different and sometimes overlapping contexts and parties. . . . [T]hey have left gaps in the protective scheme, particularly with respect to certain types of mass killings not accompanied by the specific intent required in the Genocide Convention. All of this leads to the inescapable conclusion that a comprehensive codification is needed.²²⁰

Indeed, it is precisely this quality of crimes against humanity—their open-endedness—that motivates the discussion in this article. Although famine crimes are understood as crimes against humanity, codification of that law is needed.

The nature of the act element of a crime against humanity has been hotly contested,²²¹ but essentially there are two *actus reus* requirements. First, the accused must perpetrate the act necessary to accomplish the specific offense (i.e., murder, extermination). Second, the act must be committed as part of a widespread or systematic attack directed against a civilian population.²²² “Widespread” and “systematic” are terms of art requiring explanation.

²¹⁵ *Tadić*, *supra* note 212, para. 67 (“International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict.”).

²¹⁶ For a thorough discussion of the development of crimes against humanity in the case law of the two international tribunals, see Mettraux, *supra* note 175. Some have argued that crimes against humanity should replace international humanitarian law. L. C. Green, ‘*Grave Breaches*’ or *Crimes Against Humanity*? 8 U.S.A.F. ACAD. J. LEGAL STUD. 19 (1997–1998). However, the distinction between the two branches of international criminal law has not broken down. See William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?* 37 COLUM. J. TRANSNAT’L L. 767, 784 (1999) (“At the present time, crimes against humanity constitute a distinct and significant part of international criminal law . . .”).

²¹⁷ See, e.g., HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 255 (rev. ed. 1964) (discussing the “new and unprecedented” nature of crimes against humanity); *id.* at 257 (noting that “there was no other crime in the face of which the Nuremberg judges felt so uncomfortable, and which they left in a more tantalizing state of ambiguity”).

²¹⁸ On the drafting of the crimes against humanity section of the ICC Statute, see Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AJIL 22, 30–31 (1999).

²¹⁹ See generally Bassiouni, *Specialized Convention*, *supra* note 17.

²²⁰ *Id.* at 479. Although he does not necessarily argue for codification, William Fenrick, *supra* note 216, at 785, calls the content of crimes against humanity “skeletal.”

²²¹ See, e.g., Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT’L L. J. 457, 494–504 (discussing the controversy regarding the definition of the *actus reus* requirements at the Rome Conference).

²²² Prosecutor v. Blaškić, Judgment, No. IT-95-14, para. 200 (Mar. 3, 2000) (“A crime against humanity is made special by the methods employed in its perpetration (the widespread character) or by the context in which these methods must be framed (the systematic character) as well as by the status of the victims (*any* civilian population.”); Prosecutor v. Rutaganda, Judgment, No. ICTR-96-3-T, para. 66 (Dec. 6, 1999), *reprinted in* 39 ILM 557 (2000) (holding that for crimes against humanity, “the *actus reus* must be committed as part of a widespread or systematic attack” and that “the *actus reus* must be committed against members of the civilian population”).

The two terms are not the same. “‘Widespread’ refers to the number of victims, whereas ‘systematic’ refers to the existence of a policy or plan.”²²³ Put another way, “the term ‘widespread’ requires large-scale action involving a substantial number of victims, whereas the term ‘systematic’ requires a high degree of orchestration and methodical planning.”²²⁴ According to the ICTR, an attack is “widespread” if it is a “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”²²⁵ The ICTR has defined “systematic” as “constitut[ing] organized action, following a regular pattern, on the basis of a common policy and involv[ing] substantial public or private resources. . . . [T]here must exist some preconceived plan or policy.”²²⁶ The ICTY trial chamber in its *Blaškić* judgment lists four elements of a plan that signal its systematic quality:

the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;

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 linked to one another;

the preparation and use of significant public or private resources, whether military or other;

the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.²²⁷

Finally, “attack,” as Simon Chesterman notes, “is best understood as qualifying the words ‘widespread’ and ‘systematic.’”²²⁸ Viewed independently of the “systematic” requirement, “attack directed at a civilian population” incorporates a plan or policy element into the definition of crimes against humanity.²²⁹ The plan or policy need not be formally articulated; it may be inferred from the circumstances, including “the scale of the acts of violence perpetrated.”²³⁰

The plan or policy requirement derived from the “attack” term proves confusing and raises a note of hesitation. Does this requirement bring a *mens rea* element into the terms of the *actus reus*, a sort of wolf in sheep’s clothing that raises the bar on what qualifies as a crime against humanity? Must famine crimes be part of a deliberate strategy by the state to annihilate its citizens? If so, this characteristic would likely preclude liability for second-degree famine crimes. The argument that a plan or policy to annihilate citizens through famine can be arrived at recklessly makes little sense. This plan or policy requirement either renders redundant the element of systematicity or conjoins the “widespread” and “systematic” requirements, against the expressed positions of the Tribunals.²³¹ If a plan or policy is indeed implied by the term “attack directed against any civilian population,” then even when it was demonstrated that acts were widespread, the prosecution would still have to establish that there was a plan or policy—that is, it would have to prove systematicity.²³²

²²³ Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT’L L. 307, 314 (2000) (footnote omitted).

²²⁴ Darryl Robinson, *Defining “Crimes against Humanity” at the Rome Conference*, 93 AJIL 43, 47 (1999).

²²⁵ Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T, para. 580 (Sept. 2, 1998) [hereinafter *Akayesu* Trial Judgment]; see also Prosecutor v. Musema, Judgment, No. ICTR-96-13-T, para. 204 (Jan. 27, 2000) (using same language).

²²⁶ *Musema*, *supra* note 225, para. 204.

²²⁷ *Blaškić*, *supra* note 222, para. 203 (footnotes omitted).

²²⁸ Chesterman, *supra* note 223, at 316.

²²⁹ Robinson, *supra* note 224, at 48 (“The plain meaning of the phrase ‘attack directed against any civilian population’ also implies an element of planning or direction . . .”); Chesterman, *supra* note 223, at 316; see also ICC Statute, *supra* note 106, Art. 7; *Rutaganda*, *supra* note 222, para. 69.

²³⁰ *Blaškić*, *supra* note 222, para. 204.

²³¹ See, e.g., *Rutaganda*, *supra* note 222, para. 68 (“customary international law requires that the attack be either of a widespread or systematic nature and need not be both”).

²³² Hwang, *supra* note 221, at 484.

In an additional gloss on this definitional morass, the ICTY has dealt with this odd redundancy by essentially defining away the policy element. In an early decision, it held that crimes result “if the acts occur on a widespread *or* systematic basis that demonstrates a policy to commit those acts, whether formalized or not.”²³³ This means that “widespread” serves as a placeholder for plan or policy. If the acts are widespread, they would satisfy the *actus reus* requirements for crimes against humanity regardless of whether a plan or policy has been formulated. Second-degree famine crimes, which are widespread by definition, thus fit within the law’s parameters.²³⁴

As for the act necessary to accomplish the offense itself, the law of crimes against humanity includes several possibilities that match the *actus reus* elements in the definitions of famine crimes. Murder is a crime against humanity.²³⁵ Alternatively, famine crimes, especially those of the first degree, could be considered crimes of extermination. This crime has seen little jurisprudential development, making it ripe ground for rooting famine crimes.²³⁶ Extermination is defined as “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.”²³⁷ “It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals.”²³⁸ And, although the ICTR trial chamber found Jean-Paul Akayesu guilty of extermination for the murder of eight people,²³⁹ because “[t]he very term ‘extermination’ strongly suggests the commission of a massive crime,” the Tribunal characterized the offense as “generally involv[ing] a large number of victims.”²⁴⁰ As such, extermination, as far as the *actus reus* and attendant circumstances requirements go, fits famine crimes well. Furthermore, extermination is distinguished from genocide in that it does not have the latter’s prohibitively high *mens rea* standard or limited scope of applicability.²⁴¹

²³³ Prosecutor v. Tadić, Opinion and Judgment, No. IT-94-1-T, para. 653 (May 7, 1997), *excerpted in* 36 ILM 908 (1997) (emphasis added).

²³⁴ An examination of the case law of the two international tribunals reveals that “there is nothing in customary international law which mandates the imposition of an additional requirement that the acts be connected to a policy or plan.” Mettraux, *supra* note 175, at 281.

²³⁵ See *Blaškić*, *supra* note 222, para. 271 (giving the elements of the offense of murder qua crimes against humanity).

²³⁶ The *Krstić* judgment makes the following observation:

Extermination is also widely recognised as a crime against humanity in many international and national instruments. Nevertheless, it has rarely been invoked by national courts and it has not yet been defined by this Tribunal. The term “extermination” appeared in a number of post-war decisions by the Nuremberg Military Tribunal and the Supreme National Tribunal of Poland. However, although the crime of extermination was alleged, the judgements generally relied on the broader notion of crimes against humanity and did not provide any specific definition of the term “extermination.”

Krstić, *supra* note 160, para. 492 (footnotes omitted). The ICTR has discussed the crime in a number of its opinions. See, e.g., *Akayesu* Trial Judgment, *supra* note 225, paras. 591–92, 735–44; *Musema*, *supra* note 225, paras. 217–19; *Rutaganda*, *supra* note 222, paras. 82–84. However, in none of these has it discussed the crime in any detail. For a helpful, but somewhat dated, discussion of extermination in the law review literature, see Chesterman, *supra* note 223, at 334–38.

²³⁷ ICC Statute, *supra* note 106, Art. 7(2)(b).

²³⁸ *Rutaganda*, *supra* note 222, para. 84.

²³⁹ *Akayesu* Trial Judgment, *supra* note 225, para. 744.

²⁴⁰ *Krstić*, *supra* note 160, para. 501. In *Krstić* the ICTY insisted that “the definition should be read as meaning the destruction of a numerically significant *part* of the population concerned.” *Id.*, para. 502.

²⁴¹ The ICTY distinguishes extermination from genocide on these grounds:

[E]xtermination distinguishes itself from the crime of genocide by the fact that the targeted population does not necessarily have any common national, ethnical, racial or religious characteristic, and that it also covers situations where “some members of a group are killed while others are spared.” For this reason, extermination may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent nor intention to destroy the group as such on national, ethnical, racial or religious grounds has been demonstrated; or where the targeted population does not share any common national, ethnical, racial or religious characteristics.

Id., para. 500; see also *id.*, para. 488. The ICTR ruled in its *Akayesu* and *Rutaganda* decisions that the perpetrator needs to act with discriminatory intent in order to commit the crime of extermination. However, as the *Akayesu*

The *actus reus* requirements for crimes against humanity can accommodate both degrees of famine crimes. Moreover, other elements of these crimes are more flexible than for genocide or war crimes—crimes against humanity do not require a *dolus specialis*, and the acts constituting such crimes do not have to be committed during times of armed conflict to qualify as violations.²⁴² Added to a *mens rea* of recklessness or knowledge derived from the superior responsibility jurisprudence discussed next, these material elements join to form a set of crimes that are firmly anchored in existing jurisprudence. The law of crimes against humanity adds a final panel to the international criminal law triptych, completing the foundation for the *actus reus* elements for the two degrees of famine crimes. A powerful argument can be made by analogy from this jurisprudence to support the two degrees of famine crimes defined in this article: what moral or legal sense would it make to criminalize deliberately or recklessly perpetrated mass starvation in times of war but not in peacetime? What moral or legal sense would it make to criminalize mass starvation when undertaken to exterminate a group as such and not to annihilate a group for other reasons?

The Mens Rea Requirements

As with the *actus reus* elements, current international criminal law supports the *mens rea* requirement of knowledge for a first-degree famine crime and recklessness for a second-degree famine crime. Knowledge as a *mens rea* is firmly established in international criminal law. The Rome Statute assigns criminal liability when a perpetrator acts “with intent and knowledge.”²⁴³ Intent is defined in such a way as to become blurred into knowledge, so that the ICC effectively requires only the latter.²⁴⁴

The ICTR Statute ascribes direct responsibility, or responsibility that flows directly from the perpetrator’s conduct, to perpetrators who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” under international criminal law.²⁴⁵ The Tribunal has required that an accused be “at least aware that his conduct would . . . contribute to [a] crime” so as to be found directly responsible.²⁴⁶ That is, the perpetrator must have knowledge that he or she is instigating, planning, committing,

appeals chamber observed, this requirement was mandated by the Security Council specifically for the ICTR by its Statute. “[I]n doing so,” the chamber insisted, “the Security Council did not depart from international humanitarian law nor did it change the legal ingredients required under international humanitarian law with respect to crimes against humanity. It limited at the very most the jurisdiction of the Tribunal to a sub-group of such crimes . . .” *Akayesu* Appeals Judgment, *supra* note 212, para. 465 (footnote omitted). The Tribunal stated its opinion that “except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity.” *Id.*, para. 464.

²⁴² Unlike war crimes, crimes against humanity may be committed in the absence of an armed conflict. *Akayesu* Trial Judgment, *supra* note 225, para. 565 (“Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”); see also Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 787 (1999) (concluding that contemporary international law has replaced the war crimes nexus with a revised *mens rea* requirement and the existence of a widespread or systematic attack against a civilian population).

²⁴³ ICC Statute, *supra* note 106, Art. 30(1).

²⁴⁴ The Statute states with regard to intent: “[A] person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.” *Id.*, Art. 30(2). Part (a) is redundant. Intending a certain consequence is what differentiates the various levels of *mens rea*. The Statute effectively redefines “intent” in part (b) as “knowingly,” since “is aware that it will occur in the ordinary course of events” is, in the strictest interpretation, “knowingly.” Interpreted more restrictively, it is “recklessly.”

²⁴⁵ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, Art. 6(1), UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994).

²⁴⁶ *Kayishema*, *supra* note 153, para. 207.

or aiding and abetting a violation of international criminal law.²⁴⁷ The definition of first-degree famine crimes requires that the perpetrator “knowingly” engage in faminogenic conduct, which places him or her within this existing *mens rea* standard.

Many of the famine crimes described in this article, such as the deliberate bombing of food convoys and the massive, uncompensated expropriation of food, fall within the first-degree category and therefore fit well within the law’s established *actus reus* and *mens rea* boundaries. Second-degree famine crimes pose a more difficult challenge in light of the *nullum crimen sine lege* critique. In a sense, these crimes need to be firmly rooted in international criminal law more than first-degree famine crimes. As in the three examples discussed above, much of the suffering wrought by famine in totalitarian societies arises out of misguided agro-economic policies that are recklessly maintained, resulting in the systematic destruction of individuals’ abilities to feed themselves. But these famines are more likely to be ignored by the law as currently articulated, since they occur within a single state’s boundaries and are not necessarily linked to armed conflict. For legal action to be possible against officials responsible for these famines, therefore, international criminal law must be understood as capable of supporting a *mens rea* of recklessness.

None of the three categories of international criminal law discussed above contain crimes for which a *mens rea* of recklessness satisfies the requirements for direct criminal responsibility.²⁴⁸ While the ICTY has hinted that such a *mens rea* might trigger direct responsibility,²⁴⁹ in applying the law it has required knowledge to hold an individual directly responsible. However, this fact does not impale second-degree famine crimes on the *nullum crimen sine lege* charge. Indirect criminal responsibility in the form of superior responsibility provides a well-established and often-used avenue for finding perpetrators of international criminal law violations responsible when they act recklessly. This doctrine ascribes to superiors the criminal liability of their subordinates if they recklessly fail to prevent or punish their subordinates for committing a crime. The subordinates’ criminal acts are imputed to the superior, even if the superior does not manifest the mental state necessary for the commission of the underlying act.²⁵⁰ Effectively, this means that the *actus reus* committed by subordinates attaches to the superior, provided that the superior is at least reckless. Thus, the doctrine establishes a *mens rea* of recklessness for any of the crimes discussed above. While a *mens rea* of recklessness cannot make the superior directly responsible for these *acti rei*, for all practical purposes he is held to be, since recklessness alone suffices for vicarious liability to attach.

A person acts recklessly, according to the United States Model Penal Code,

when he *consciously disregards* a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree

²⁴⁷ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/25704, annex, Art. 8(1) (1993), reprinted in 32 ILM 1192 (1993).

²⁴⁸ There are other forms of direct responsibility, notably aiding and abetting liability and joint enterprise liability, that might appear to be relevant to this discussion. However, both aiding and abetting liability and joint enterprise liability require that the perpetrator intend to commit some crime, if not the exact crime for which he or she is charged. See Prosecutor v. Kvočka, Judgment, No. IT-98-30/1, para. 312 (Nov. 2, 2001) (“accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise”); Foča, *supra* note 19, para. 392 (“aider and abettor need not share the *mens rea* of the principal but he must know of the essential elements of the crime (including the perpetrator’s *mens rea*) and take the conscious decision to act in the knowledge that he thereby supports the commission of the crime”).

²⁴⁹ In *Blaškić*, *supra* note 222, para. 278, the ICTY trial chamber held that “proof is required that whoever planned, instigated or ordered the commission of a crime possessed the criminal intent, that is, that he directly or indirectly intended that the crime in question be committed.” Previously, the Tribunal defined “indirect intent” as that “corresponding to the notion of recklessness in common law.” *Id.*, para. 267.

²⁵⁰ Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 455 (2001) (describing superior responsibility as criminal conduct “in which not only a military commander, but also a non-military leader, is held *criminally* liable for the conduct of his subordinates as if he personally had executed the criminal deed”).

that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation.²⁵¹

Stressing that it involves the conscious disregard of risk, Glanville Williams defines recklessness as "the state of mind of one who knows that a consequence is likely to follow from his conduct but pursues his course notwithstanding."²⁵² In other words, recklessness is the *mens rea* of foreseeability. If a consequence is foreseen as substantially certain, but the actor nevertheless engages in the conduct, he acts recklessly.

Recklessness makes its appearance in international criminal law as the *mens rea* supporting liability rooted in superior responsibility. Superior responsibility²⁵³ boasts a venerable pedigree in international criminal law. Grotius recognized a form of this derivative liability.²⁵⁴ The need for such a specific version of command responsibility was felt distinctly after World War I,²⁵⁵ and it figured prominently in post-World War II jurisprudence as a means of holding high-ranking commanders and officials responsible for the crimes of their subordinates.²⁵⁶ It has since been recognized in both national military codes²⁵⁷ and international conventions.²⁵⁸ The doctrine of superior responsibility responds to the powerful moral intuition that giving superiors impunity for the offenses of their subordinates simply because the superiors did not directly participate in committing the offenses themselves frustrates the placement of real responsibility. Functionally, it ascribes the acts of subordinates to their superiors, regardless of whether or not they showed the specific degree of intention of the subordinates.²⁵⁹

Three elements must be proven to establish that a superior is responsible for the acts of his or her subordinates. The prosecution must show that (1) "a superior-subordinate relationship" existed; (2) "the superior *knew or had reason to know* that a crime was about to be committed or had been committed"; and (3) "the superior did not take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator" thereof.²⁶⁰

²⁵¹ MODEL PENAL CODE §2.02(2)(c) (1985) (emphasis added).

²⁵² WILLIAMS, *supra* note 163, at 55.

²⁵³ "Superior responsibility" is a more inclusive term than "command responsibility." Command responsibility implies a military hierarchy. Recent developments in international criminal law establish that at least some form of derivative responsibility for acts of subordinates attaches to civilian superiors in a nonmilitary bureaucracy. ICC Statute, *supra* note 106, Art. 28 (describing two types of superior responsibility, one for military commanders and another for civilian superiors); *Kvočka*, *supra* note 248, para. 315 ("[A] civilian leader may incur responsibility in the same way as a military commander, provided that the civilian has effective control over subordinates."); *Kayishema*, *supra* note 153, para. 213. *But see Bagilishema*, *supra* note 160, para. 40 ("[T]he broadening of the case-law of command responsibility to include civilians, has proceeded with caution.").

²⁵⁴ L. C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 321 (1995).

²⁵⁵ Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AJIL 573, 573 (1999).

²⁵⁶ *See, e.g., In re Yamashita*, 327 U.S. 1 (1946); *United States v. List*, 11 TRIALS, *supra* note 173, at 757.

²⁵⁷ U.S. DEP'T OF ARMY, LAW OF LAND WARFARE, para. 501 (Field Manual No. 27-10, 1956, rev. 1976), available at <<http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/toc.htm>> (holding commander responsible if he "has actual knowledge, or should have knowledge . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof").

²⁵⁸ Protocol I, *supra* note 185, Art. 86(2) (holding superiors responsible "if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that [a subordinate] was committing or was going to commit" a breach of the Geneva Conventions or Protocol I and "they did not take all feasible measures within their power to prevent or breach").

²⁵⁹ *See, e.g., Decision of the United States Military Commission at Manila* (Dec. 7, 1945), reprinted in THE LAW OF WAR: A DOCUMENTARY HISTORY 1596, 1597 (Leon Friedman ed., 1972) ("[W]here murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops . . ."); *see also* Andrew D. Mitchell, *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381, 381 (2000).

²⁶⁰ Prosecutor v. Aleksovski, Judgment, No. IT-95-14/1, para. 69 (June 25, 1999) (emphasis added).

Viewing these elements in the practice of the ad hoc Tribunals, a commentator observes:

The ICTY and ICTR case law shows that in order to prosecute successfully under the concept of superior responsibility, four conditions need to be fulfilled. The prosecution must prove beyond a reasonable doubt that: (1) an offense was committed; (2) the accused exercised superior authority over the perpetrator of the offense or over his superiors; (3) the accused knew or had reason to know that [the] perpetrator was about to commit the offense or had already done so; and (4) the accused failed to take the necessary and reasonable measures to prevent the offense or to punish the perpetrator.²⁶¹

Of these four conditions, two concern the *actus reus* requirements—an underlying offense must have been about to be committed or have been committed, and the superior must have failed to prevent or punish the underlying act. Another concerns an attendant circumstance—the status of the alleged superior and whether or not the subordinate was within his or her effective control. Finally, the fourth—whether the superior “knew or had reason to know”—is the *mens rea* requirement for establishing superior responsibility.

“Knew” is a straightforward knowledge requirement—the prosecutor must prove that the superior actually knew about the underlying offense. In contrast, the precise meaning of “had reason to know” has been a bone of jurisprudential contention in recent years. At one extreme, on the theory that a superior must be apprised of the acts of his or her subordinates, “had reason to know” could be interpreted as imposing strict liability on all superiors in a chain of command. This interpretation would impose a “duty to know” on superiors for all acts done by their subordinates.²⁶² At the other extreme, the “had reason to know” standard could mean that only those superiors who had actually seen information that enabled them to conclude with certainty that specific crimes were being committed by their subordinates would meet the standard. At this extreme, “had reason to know” blurs into the actual knowledge standard.

The ICTY trial chamber in its *Blaškić* decision arrived at a position between these two extremes, but one that edged closer to the strict liability approach. Adopting a negligence *mens rea* interpretation of “had reason to know,” the Tribunal opined:

[I]f a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.²⁶³

This interpretation falls short of strict liability, for those commanders who discharge their duties of supervision with reasonable care escape inculpation for the crimes of their subordinates. However, negligence is a low bar for a *mens rea* requirement. Rejecting the *Blaškić* interpretation, the ICTY appeals chamber in the *Čelebići* case posited a higher *mens rea* requirement. It feared that a *Blaškić*-like approach, urged by the prosecutor, would tread too closely to strict liability.²⁶⁴ Instead, it decided that “a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would

²⁶¹ Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT'L L. 747, 760 (2001).

²⁶² Although it refers to the actual knowledge standard and not the “had reason to know,” the ICTY trial chamber’s discussion of superior responsibility in its *Aleksovski* judgment noted that a superior’s position in a bureaucracy may serve as evidence of that individual’s actual knowledge of malfeasance by subordinates. *Aleksovski*, *supra* note 260, para. 80.

²⁶³ *Blaškić*, *supra* note 222, para. 332.

²⁶⁴ *Čelebići* Appeals Judgment, *supra* note 213, para. 226 (“The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so.”).

have put him on notice of offences committed by subordinates.”²⁶⁵ This interpretation, rather than imposing a duty to know on superiors, establishes liability in situations where superiors had information suggesting illicit activity by their subordinates but ignored it.²⁶⁶ The superior incurs liability by consciously disregarding such information.

Interpreted most restrictively, “had reason to know” translates into a recklessness standard for the *mens rea* requirement for superior responsibility.²⁶⁷ The superior who consciously disregards information about the commission of atrocities consciously disregards the significant risk that his subordinates will continue to engage in atrocities. In other words, one should easily foresee, with such information in hand, that unless the superior takes action, further crimes will ensue. The Rome Statute uses the language “consciously disregarded” in its discussion of superior responsibility for nonmilitary superiors, making clear that recklessness is the appropriate understanding of the *mens rea* requirement of “had reason to know.”²⁶⁸

It may be objected that superior responsibility is not intended to cover situations where high-ranking officials plan or order policies that lead to famine. First, because officials directly order subordinates to put faminogenic policies in place, their responsibility may better be thought of as direct.²⁶⁹ Second, and perhaps more important, for a superior to be held indirectly responsible, a subordinate must commit an underlying offense. In the case of crimes against humanity, the ICTY has interpreted the *mens rea* for that subordinate as follows: “[T]he requisite *mens rea* for crimes against humanity appears to be comprised by (1) the intent to commit the underlying offence, combined with (2) knowledge of the broader context in which that offence occurs.”²⁷⁰ The subordinate must act with knowledge and intent if the superior is to be held responsible for recklessly disregarding information. Therefore, for a superior to commit a second-degree famine crime, a subordinate must commit a first-degree famine crime.

Whenever a subordinate knows that by carrying out his orders he is inflicting, prolonging, or creating starvation, he commits a first-degree famine crime. This is the underlying crime against humanity for which the superior who issues the order can be held indirectly responsible. Consider the following hypothetical fact pattern, offered here as a prototypical situation involving superior responsibility. A commanding officer orders his troops to occupy a village, a command that in itself does not violate international criminal law. After the first day of occupation, he receives reports that a dozen of his troops have systematically raped many of the women in the town, but he does nothing to investigate, punish those responsible, or prevent future misdeeds. This officer is indirectly responsible for these rapes, even if he was merely reckless.

A similar fact pattern marks the second-degree famine crime scenario. A government official issues an order that is *prima facie* legal, such as the imposition on the Ukraine of a certain

²⁶⁵ *Id.*, para. 241.

²⁶⁶ Bantekas, *supra* note 255, at 590.

²⁶⁷ It is arguable that it is actually a gross negligence test. The prosecution need not show that the superior actually acquainted himself with the information that would have put him on notice. *Čelebići Appeals Judgment*, *supra* note 213, para. 239. Ilias Bantekas thus argues that “[t]he ‘reason to know’ standard means that commanders who are in possession of sufficient information to be on notice of subordinate criminal activity cannot escape liability by declaring their ignorance, even if such ignorance of the specific crime is amply established. This standard creates an objective negligence test . . .” Bantekas, *supra* note 255, at 590 (footnote omitted).

²⁶⁸ ICC Statute, *supra* note 106, Art. 28 (holding superior criminally responsible when he or she “either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit [the covered] crimes”) (emphasis added).

²⁶⁹ See Prosecutor v. Kordić, Judgment, No. IT-95-14/2, para. 371 (Feb. 26, 2001) (characterizing as direct responsibility where it is demonstrated that “a superior would not only have been informed of subordinates’ crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes”); see also Krstić, *supra* note 160, para. 605 (stating that “where a commander participates in the commission of a crime through his subordinates, by ‘planning’, ‘instigating’ or ‘ordering’ the commission of the crime, any [indirect] responsibility . . . is subsumed under [direct responsibility]”).

²⁷⁰ Kupreškić, *supra* note 19, para. 556.

grain quota, and instructs subordinates to go into the field and collect the grain. A subordinate, like the one quoted above (p. 255), takes every last ounce of sustenance from peasant families, knowing full well that his actions will lead to starvation. Because he meets the knowledge requirement, this subordinate commits a first-degree famine crime. The superior receives reports indicating that starvation is erupting because of the conduct of his subordinates. He recklessly ignores this information and continues to push forward with his policies. He therefore takes on the criminal responsibility of his subordinate, since he recklessly disregards information and fails to correct the behavior of subordinates who are committing crimes against humanity.

The requirement that someone be directly responsible for a famine crime fits well with an important assertion that bears repeating here: this article does not argue that government officials who initiate economic policies that lead to mass starvation are ipso facto criminal. International law does not criminalize any form of economic organization.²⁷¹ Thus, the fact that the Dergue embarked on a collectivization program does not itself make top Dergue officials criminally responsible for the misery that resulted. Liability would not attach until it became clear that the soldiers carrying out the collectivization policies were coercing people in a way that was leading to mass starvation. Only after these soldiers realized that their conduct in carrying out the Dergue's agro-economic policies was leading to famine, and after this information became available to government officials, would the Dergue's collectivization program turn into a second-degree famine crime.

III. CONCLUSION

International criminal law contains the *mens rea* and *actus reus* elements of first- and second-degree famine crimes. Their formal codification does not raise the specter of *nullum crimen sine lege* but simply brings together these elements from the law's interstices into a pair of cohesive definitions. Why, then, is codification necessary? If crimes against humanity already include famine crimes, what value is there in a famine crimes convention? As the preceding discussion was meant to demonstrate, precedent used to anchor the elements of famine crimes is scattered throughout international criminal law. At the very least, codification will organize the law in a more coherent fashion.

More important, codification will convey expressive value that will force the international community to address outbreaks of famine appropriately. In part because the popular imagination associates famine with cracked earth and dry riverbeds, the international community has been able to avoid accusing the responsible government officials of crimes against humanity. The responses of the United States government and the United Nations to the Ethiopian famine are highly illustrative. In 1985 the Reagan administration released a report accusing the Ethiopian government of "deliberate policies that 'have no doubt caused vast and unnecessary suffering, including starvation.'"²⁷² However, the report concluded that the evidence did not indicate that "at this time [the Dergue was] conducting a deliberate policy of starvation."²⁷³ Africa Watch argues that while the "US administration could justifiably have returned a verdict of 'guilty,'" fears of upsetting domestic political constituencies prevented it from harshly indicting the Ethiopian government.

²⁷¹ See, e.g., The Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant), General Comment No. 3, UN Doc. E/1991/23, para. 8 (1990) (characterizing the ICESCR as neutral and not predicated on the necessity or desirability of any particular economic system).

²⁷² AFRICA WATCH, *supra* note 78, at 369 (quoting Pres. Determination No. 85-20, Determination with Respect to Ethiopia (Sept. 7, 1985)).

²⁷³ *Id.* (quoting Pres. Determination No. 85-20, *supra* note 272).

The rationale behind the American decision to reject the charge that the Ethiopian government was deliberately using starvation “was a domestic one: since BandAid and Live Aid, it was necessary in terms of domestic politics to be seen to be giving generously. As television cameras and politicians could not visit rebel-held areas . . . , it was necessary for US assistance to have a high media profile”²⁷⁴

Accusations of crimes against humanity would have made it difficult for the Reagan administration to cooperate with the Dergue and to take measures that would appeal to television audiences. The United Nations, for different political reasons, refused to compromise its delicate political position in Addis Ababa by charging Ethiopia with crimes against humanity. It went even farther by deliberately concealing evidence of government involvement in creating starvation.²⁷⁵

This pattern of giving political concerns priority over legal ones has repeated itself in the North Korean context. Famine has been raging in North Korea for almost a decade, and not once has the Security Council, the General Assembly, the European Union, or the United States called for criminal sanctions against the Kim Jong Il regime for starving millions of people to death. The lack of an explicit definition of famine crimes in international criminal law enables the international community to eschew legal action in the face of one of the world’s greatest human rights disasters. The popular myth about famines—that they are the result of natural disasters, not human misconduct—persists.

Codification of famine crimes can help debunk this myth and force governments to take legal action. The formal codification of certain crimes in international criminal law has strongly influenced the shaping of legal responses to catastrophes. The Genocide Convention is a case in point. In “*A Problem from Hell*,” Samantha Power demonstrates the power that a carefully defined, internationally accepted legal term can project when it comes to forcing the international community to act. She describes the incredible contortions of the Clinton administration to avoid labeling the massacres in Rwanda in 1994 as genocide. It dodged the term for fear that speaking candidly and using the term “genocide” would commit the United States and the Security Council to “do something.”²⁷⁶ Eventually, the administration was forced to recognize that the Hutu Power regime was committing genocide. This recognition led to the establishment of the ICTR, in part because the international community did not want to be seen as standing idly by in the face of such evil. The Genocide Convention clearly expressed why the actions of the Hutu Power regime were illegal and why its conduct warranted an international legal response.

Similarly, if famine crimes were codified, the international community would be forced, by virtue of the clear criminalization of faminogenic conduct, to determine whether a famine had erupted as a result of criminal behavior. It could not take advantage of the currently scattered state of the law to shield itself from honestly confronting those responsible for mass starvation. The formally codified law by its very existence would raise the political stakes for ignoring famine, and, like the Genocide Convention, demonstrate the appropriateness of an international legal response. Consequently, codification will direct international legal attention to the Ukraines, Ethiopias, and North Koreas of the future, a host of rights violators that might otherwise slip below the law’s radar.

The prospect of codification raises several questions that are briefly addressed here but require further discussion to be fully answered. First, is criminalizing faminogenic behavior an effective means of dealing with criminal governments, or should a nonlegal avenue be pursued?

²⁷⁴ *Id.* at 370.

²⁷⁵ *Id.* at 367.

²⁷⁶ See SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 358–64 (2002).

As mentioned, law can have a powerful shaping effect on political responses to tragedies. Moreover, while the hard contours of the law may narrow possible responses to starvation, codification of famine crimes does not exclude numerous nonlegal responses. Second, is codification of famine crimes a realistic possibility? Will states enter into a famine crimes convention or accept an amendment to the Rome Statute that extends individual criminal responsibility to faminogenic conduct, in light of the fact that many governments have used famine as a technique of political control or have sat idly by while their populations have starved en masse? As a simple response, just because governments around the world consistently commit particular human rights violations does not mean that they are always unwilling to sign on to formal conventions criminalizing their conduct. They are especially disposed to doing so when other areas of international criminal law already proscribe such conduct. The UN Convention Against Torture is an excellent case in point.²⁷⁷ That governments engage in faminogenic practices does not *ipso facto* doom a proposed famine crimes convention to the dustbin of Panglossian ideas.

Third, what does the formal codification of famine crimes imply regarding the responsibilities of third states? Should third states incur some sort of responsibility to make sure that another state's citizens do not starve? On a different note, would a famine crimes convention give third states an excuse not to aid suffering populations or, indeed, prohibit states from rendering such assistance? As to the former concern, I do not believe that international criminal law could extend liability for failure to undertake such a positive obligation. The Genocide Convention obliges state parties to "undertake to prevent and punish" genocide,²⁷⁸ but no head of state has been criminally charged for failing to do so in the face of mass slaughter. This hesitation to widen the ranks of those potentially responsible under international criminal law beyond the various sides to a conflict or past a nation's borders reflects deeply felt sovereignty values. Extending criminal liability to officials in third states for famine crimes would impermissibly tread on these values.

Of more concern is the potential for states to use a famine crimes convention to evade their moral, if not legal, obligation to provide humanitarian assistance to starving populations. Since humanitarian relief often ends up as a tool wielded by the faminogenic government, as the Ethiopian experience demonstrates, a state could justify its refusal to give food aid by invoking the law and arguing that it should not support criminal regimes. More people could die as a result. I do not believe that this result will come to pass. Especially at the dawn of the age of a functioning international criminal court, the real threat of prosecution could work as a powerful incentive for governments to be seen as law-abiding by allowing untrammelled access to humanitarian organizations to provide relief to affected populations.

Undoubtedly, the codification of famine crimes raises other concerns. But at a time of ever-developing international criminal law, it makes no moral or legal sense to allow governments to hide behind a curtain of natural disasters and state sovereignty to use hunger as a genocidal weapon. Raphael Lemkin put it best: "Sovereignty implies conducting an independent foreign and internal policy, building of schools, construction of roads . . . all types of activity directed towards the welfare of people. Sovereignty cannot be conceived as the right to kill millions of innocent people."²⁷⁹

The formal recognition of famine crimes will help eradicate another tool of mass murder, bringing international law ever closer to incorporating Lemkin's vision.

²⁷⁷ Customary international law provided for universal jurisdiction over torturers before the Convention came into existence. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁷⁸ Genocide Convention, *supra* note 149, Art. 1.

²⁷⁹ POWER, *supra* note 276, at 19 (quoting Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ch. 1 (unpub. ms., on file at Jewish Institute of Religion, Cincinnati, Ohio)).

