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**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW**

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**THE NAZI HUNGER PLAN AND STARVATION CRIMES IN INTERNATIONAL LAW**

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Working Paper

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## I. INTRODUCTION

Starvation has been used as a method of warfare since time immemorial.<sup>1</sup> Until the Geneva Conventions were widely adopted in 1949, siege warfare – resulting in starvation of civilian populations – was considered a legitimate military tactic.<sup>2</sup> Even today, sieges and blockades are not violations of the Geneva Conventions *per se*, but the Additional Protocols to the Geneva Conventions stipulate the rules that parties to an armed conflict must follow with respect to sieges and blockades, and contain prohibitions on destruction of objects indispensable to survival and starving civilians.<sup>3</sup> Perhaps the most notable change in recent history is the view that the use of starvation to achieve a military objective is morally repugnant and perpetrators of starvation crimes should be stopped from deploying this barbaric practice to harm civilian populations.<sup>4</sup> And yet, the crime of starvation as defined in the Rome Statute<sup>5</sup> has never been prosecuted.

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<sup>1</sup> During the Peloponnesian War, for example, more than 100 sieges were attempted by Alexander the Great's Army from 334 to 332 BC. See BRIAN CAMPBELL, *THE OXFORD HANDBOOK OF WARFARE IN THE CLASSICAL WORLD*, 644 (2018). Indeed, Alexander the Great was notorious for cutting off the enemy's access to water sources in order to hasten defeat. See ESBJÖRN ROSENBLAD, *Starvation as a Method of Warfare – Conditions for Regulation by Convention*, 7 *INT'L LAWYER* 255, 252-270 (1973).

<sup>2</sup> DAVID MARCUS, *Famine Crimes in International Law*, 97 *AM. J. INT'L L.* 265, 271-278 (2003) (noting the perspective that mass hunger caused by siege warfare was justified because the military advantage outweighed collateral damage to civilians).

<sup>3</sup> Emanuela-Chiara Gillard, *Sieges, the Law and Protecting Civilians*, Chatham House: The Royal Institute of International Affairs, 2-4 (June 2019), [https://www.chathamhouse.org/sites/default/files/publications/research/2019-06-27-Sieges-Protecting-Civilians\\_0.pdf](https://www.chathamhouse.org/sites/default/files/publications/research/2019-06-27-Sieges-Protecting-Civilians_0.pdf).

<sup>4</sup> S.C. Res. 2417 (May 24, 2018); See comments made by Lise Gregoire Van Haaren of The Netherlands supporting adoption of S.C. Res. 2417: "For the first time, this Council unequivocally condemns starvation as a method of warfare," UN News, *Adopting Resolution 2417 (2018), Security Council Strongly Condemns Starving of Civilians, Unlawfully Denying Humanitarian Access as Warfare Tactics*, (May 24, 2018), <https://www.un.org/press/en/2018/sc13354.doc.htm>.

<sup>5</sup> Rome Statute of the International Criminal Court, Art. 8(2)(b)(xxv), July 17 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 9 ("Intentionally using starvation as a method of warfare by depriving civilians of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions.") [hereinafter, Rome Statute].

The use of starvation as a method of warfare was used extensively during WWI and WWII.<sup>6</sup> Starvation in Germany is widely considered to be a primary factor in Germany's defeat and surrender in WWI.<sup>7</sup> This paper investigates the Nazi Hunger Plan within the context of WWII and the use of starvation as a method of warfare. Specifically, this paper addresses the questions of whether the Nazi officials responsible for developing and implementing the Hunger Plan could have been charged with crimes against humanity or war crimes under existing international law in 1945; and, if they could have been charged, why the International Military Tribunal at Nuremberg (IMT-N) did not pursue charges against the perpetrators of the Hunger Plan.

To answer these questions, this paper first explores the historical context and key elements of the Nazi Hunger Plan. Next, this paper examines the developments in international law on the prohibition on starvation as a method of warfare, focusing in particular on the custom at the time of WWII (1939-1945). Then, a legal analysis lays forth the arguments for and against prosecuting perpetrators of the Hunger Plan. Finally, the paper concludes by posing the questions: what if Nazi officials had been prosecuted for starvation of civilians under the Hunger Plan? Would a Nazi conviction for starvation crimes have prevented or deterred perpetrators from using starvation as a method of warfare in other conflicts, including Biafra, Bangladesh, Sudan, and Yemen?

## II. THE NAZI HUNGER PLAN

It is well established that the Germans capitulated in WWI because they were starving and could no longer carry on military objectives without access to adequate food supplies.<sup>8</sup> As many as

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<sup>6</sup> See generally, LIZZIE COLLINGHAM, *The Taste of War: World War II and the Battle for Food* (2012).

<sup>7</sup> The winter of 1916-17 came to be known in Germany as the "turnip winter" because it was all the food had left due to the blockades and embargo on exports against Germany. *Id.* at 24.

<sup>8</sup> *Id.* See also, ALEX DE WAAL, *Mass Starvation: The History and Future of Famine*, 74 (2018); GESINE GERHARD, *Food and Genocide: Nazi Agrarian Politics in the Occupied Territories of the Soviet Union*, 18 CONTEMPORARY EUROPEAN HISTORY 45, 45-65.

750,000 Germans died as a result of malnutrition from the war.<sup>9</sup> In the lead up to WWII, the fact that so many Germans experienced starvation was very much at the forefront of Hitler's concerns and plans for world domination.<sup>10</sup> A combination of not wanting a repeat of Germany's defeat from WWI, and the Nazi plan to expand the living space for Germans through the Lebensraum policy, the Nazis relied on the Reich Ministry of Food and Agriculture to develop policies to address food shortages and rationing to help the Nazis achieve victory in the war.<sup>11</sup> While much of the work of the Ministry in the early part of the war was to increase food production in Germany and Nazi-Occupied territories as well as ration food for German civilians and soldiers, the Ministry was also responsible for setting the caloric requirements for Holocaust victims in concentration camps as well as POWs.<sup>12</sup> Nazi victims were allowed a mere 184 to 845 calories a day – a starvation diet.<sup>13</sup>

By 1941, it was clear that in order for the Nazis to defeat the Red Army and pursue global domination, the Wehrmacht (German Army) would need a steady supply of food, which was not available in Germany.<sup>14</sup> The Nazis calculated that each of the 9.5 million men in the army would need to eat 3,000 calories a day to carry out military activities.<sup>15</sup> By 1943, the Wehrmacht was consuming 40% of the total grain and 62% of the total meat available to the Reich, leading to

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<sup>9</sup> De Waal, *supra* note 8.

<sup>10</sup> *Id.* at 75.

<sup>11</sup> *Id.* at 101.

<sup>12</sup> Collingham, *supra* note 6, at 4-5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 179-180.

<sup>15</sup> *Id.* at 180.

shortages in the food supply for civilians in Germany.<sup>16</sup> The most valuable weapon of war, therefore, was food.

Fearing a repeat of Germany's defeat in WWI, the Nazis developed a plan that would help them defeat the Red Army and provide ample food to Germans for the duration of the war.<sup>17</sup> In March-May 1941, a series of high-level meetings took place between Herbert Backe, the author of the Hunger Plan, Hermann Göring, Plenipotentiary of the Four Year Plan and Supreme Commander of the Luftwaffe (Air Force), Adolf Hitler, and other high-ranking Nazi leaders regarding the Nazis Four-Year Plan for victory.<sup>18</sup> The result of those meetings was a plan to starve 30 million "useless eaters" in the Soviet Union.<sup>19</sup> The Hunger Plan, or *Hungerpolitik*, identified surplus zones of food production and deficit zones in the Soviet Union.<sup>20</sup> The surplus zones – predominantly Ukraine, which was known as the granary of the Soviet Union, as well as southern Russia and the Caucasus region, were to be captured by the Wehrmacht and used to send 8.7 million tons of surplus food to Germany, while the deficit zones – large urban centers like Moscow in northern and central Russia that required food be brought in, were to be cut off from all food supplies in order to exterminate the population.<sup>21</sup> The result of the policy, had it fully succeeded, would have led to the starvation of 30 million Slavic and Jewish people in the Soviet Union.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> De Waal, *supra* note 8, at 102; Gerhard, *supra* note 8, at 46-47.

<sup>18</sup> ALEX J. KAY, *Exploitation, Resettlement, Mass Murder: Political and Economic Planning for German Occupation Policy in the Soviet Union, 1940-1941*, 47-67 (2011 e-book).

<sup>19</sup> De Waal, *supra* note 8, at 102; Gerhard, *supra* note 8, at 46.

<sup>20</sup> Gerhard, *supra* note 8, at 56-57.

<sup>21</sup> *Id.* See also, Kay, *supra* note 18, at 127.

<sup>22</sup> De Waal, *supra* note 8, at 102-3.

In May 1941, the Nazis held a conference in Wannsee, a small lake town just outside Berlin. Following the Wannsee Conference, a 20-page document from the Economic Policy Guidelines for Economic Organization East outlining the Hunger Plan was circulated to top Nazi officials.<sup>23</sup> It noted:

The population of these territories, in particular the population of the cities will have to face the most terrible famine. . . . Many tens of millions of people in this territory will become superfluous and will die or must emigrate to Siberia. Attempts to reduce the population there from death through starvation by obtaining surpluses from the black earth zone can only be at the expense of the provisioning of Europe. They prevent the possibility of Germany holding out till the end of the war, they prevent Germany and Europe from resisting the blockade.<sup>24</sup>

The Nazis had committed their starvation plan to paper and would soon instigate the worst famine crime in history.<sup>25</sup>

The Nazis pursued the Hunger Plan under the guise of Operation Barbarossa – the Axis invasion of the Soviet Union.<sup>26</sup> But the Nazis miscalculated the scale of the offensive, and were ultimately unable to achieve victory against the Red Army due to attrition – i.e. the Red Army had worn down the Wehrmacht through continuous losses of soldiers.<sup>27</sup> The Nazis severely underestimated the difficulty of defeating the Red Army, which outnumbered the Wehrmacht by 2:1.<sup>28</sup> Despite the Nazis’ miscalculation of the Red Army’s strength, the Nazis did achieve a small fraction of their intended purpose in the Hunger Plan – Operation Barbarossa led to the deaths of

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<sup>23</sup> Gerhard, *supra* note 8, at 58.

<sup>24</sup> Kay, *supra* note 18, at 135.

<sup>25</sup> De Waal, *supra* note 8, at 15.

<sup>26</sup> *Id.* at 102.

<sup>27</sup> Holocaust Encyclopedia, “Invasion of the Soviet Union, June 1941, US Holocaust Memorial Museum,” <https://encyclopedia.ushmm.org/content/en/article/invasion-of-the-soviet-union-june-1941>.

<sup>28</sup> Reina Pennington, “Was the Russian Military a Steamroller? From World War II to Today,” WAR ON THE ROCKS (Jul. 6, 2016) <https://warontherocks.com/2016/07/was-the-russian-military-a-steamroller-from-world-war-ii-to-today/#:~:text=The%20Red%20Army%20was%20outnumbered,the%20beginning%20of%20Operation%20Barbarossa.&text=The%20Red%20Army%20in%20the,Germany's%20inability%20to%20replace%20losses>.

1 million Soviets due to starvation during the 900-day Siege of Leningrad.<sup>29</sup> A further 1-2 million Soviet POWs were starved to death in Nazi labor camps.<sup>30</sup>

One of the primary reasons the Hunger Plan failed is because the Nazis underestimated the difficulty and time needed to starve 30 million people. It takes 2 months of no food for the average human being to starve to death.<sup>31</sup> For example, the IRA Hunger Striker Bobby Sands died without food after 66 days.<sup>32</sup> But the Nazis were never able to completely cut off the food supply in the Soviet Union, in part, due to the availability of food on the black market.<sup>33</sup> And, therefore it took much longer to starve the population, all the while trying to defeat the Red Army through combat. It was too much to achieve, and eventually the Nazis retreated.<sup>34</sup> The Nazi Hunger Plan, which planned to kill 30 million people, ultimately killed around 4.7 million.<sup>35</sup> Had it succeeded, it would have been the worst atrocity ever committed.

Despite the fact that 4.7 million people were murdered under the Hunger Plan, neither Herbert Backe, Hermann Göring, nor Walter Darré (Reich Minister of Food and Agriculture during the Hunger Plan) were ever charged with violating the laws of war with respect to starvation of civilians as a method of warfare. The reasons for this relate to the custom of the time.

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<sup>29</sup> Collingham, *supra* note 6, at 5.

<sup>30</sup> Collingham, *supra* note 6, at 193; Gerhard, *supra* note 8, at 60-61.

<sup>31</sup> Collingham, *supra* note 6, at 5-6 (describing in excruciating detail the biological processes of death by starvation); De Waal, *supra* note 8, at 21.

<sup>32</sup> *Id.*

<sup>33</sup> Kay, *supra* note 18, at 134-35.

<sup>34</sup> ENCYCLOPEDIA BRITANNICA ONLINE, “Stalingrad and the German retreat, summer 1942-February 1943,” <https://www.britannica.com/event/World-War-II/Stalingrad-and-the-German-retreat-summer-1942-February-1943>.

<sup>35</sup> De Waal, *supra* note 8, at 104 (noting that it is impossible to know exactly how high the death toll of the Hunger Plan was, but settling on the figure 4.7 million on the basis of leading historians’ calculations).

### III. THE PROHIBITION ON STARVATION AS A METHOD OF WAR IN INTERNATIONAL LAW

The laws of war – *jus in bello* or international humanitarian law (IHL) – govern the conduct of parties to an armed conflict and what military tactics are permissible in a just war.<sup>36</sup> Among the core humanitarian rules of warfare in the 19th and 20th centuries were the principles of military necessity and proportionality – the idea that parties to an armed conflict may undertake an attack when it is actually necessary to accomplish a legitimate military purpose, but it must be balanced with the principle of proportionality to minimize civilian harm.<sup>37</sup> Oppenheim’s treatise *International Law* describes the first and second principles of the laws of war – necessity and humanity – as a contradiction that must be reconciled.<sup>38</sup> International humanitarian law, in the form of regulations and conventions, thus developed to reconcile the necessities of war with the principle of humanity.<sup>39</sup>

Prohibitions on *unnecessary* use of starvation as a method of warfare can be traced back to the 1863 Lieber Code, which acknowledges that starvation of the enemy is allowed to hasten capitulation, but that civilian casualties must meet the international humanitarian law principles of necessity and proportionality – i.e. civilian deaths must be necessary and proportionate to a

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<sup>36</sup> International humanitarian law is generally regarded as having developed after Henry Durant witnessed the 1859 Battle of Solferino and established the Red Cross movement. The Lieber Code is considered the first example of a codification of the laws of war. However, the laws of war and international humanitarian law, though often used interchangeably, are actually distinct: Geneva law, deriving from the early Geneva Conventions, represent customs of humanitarian principles, whereas Hague law, deriving from the 1899 and 1907 Hague Peace Conferences, represent the conventional rules of the conduct of war. Most legal scholars no longer treat the Hague and Geneva laws as distinct. See AMANDA ALEXANDER, *A Short History of International Humanitarian Law*, 26 EUROPEAN J. OF INT’L L. 109, 112-116 (2015).

<sup>37</sup> See e.g., JUDITH GARDAM, *Necessity, Proportionality and the Use of Force by States*, 28-30 (Cambridge University Press 2004 e-book)(explaining that necessity and proportionality had been part of just war theory since the Middle Ages); General Order No. 100 (April 24, 1863) Lieber Code, Instructions for the Government of Armies of the United States in the Field, Arts. 14-16, [https://avalon.law.yale.edu/19th\\_century/lieber.asp#sec1](https://avalon.law.yale.edu/19th_century/lieber.asp#sec1) [hereinafter, Lieber Code].

<sup>38</sup> See, e.g., L. OPPENHEIM, *International Law: A Treatise*, 84-85 (edited by R.F. Roxburgh (3rd edn, 1921).

<sup>39</sup> Alexander, *supra* note 7.



legitimate military objective, such as bringing an end to war.<sup>40</sup> Developed for the U.S. Union Army during the Civil War, the Lieber Code provides:

17: War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy. 18: When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, *it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.*<sup>41</sup>

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

Although no express prohibitions on the use of starvation of civilians existed in the 19th century, the 1899 Hague Convention could be construed to prevent starvation of civilians under

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<sup>40</sup> Lieber Code, *supra* note 37, at Arts. 17-18.

<sup>41</sup> Lieber Code, *supra* note 37, at Arts. 17-18 (emphasis added). The Lieber Code’s permissions to drive combatants back into a besieged area in order to hasten the defeat of an enemy stands in stark contrast to the modern convention that, whenever possible, civilians and non-combatants must be allowed to leave a besieged area or humanitarian aid must be allowed through the siege for civilians. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Arts. 54, 70.

the Martens Clause, which prohibits methods of warfare that would shock the public conscience.<sup>42</sup>

The Martens Clause, which is articulated in the preamble of the 1899 Hague Convention II, provides:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it is right to declare that in cases not included in the Regulations adopted by them, *populations and belligerents remain under the protection and empire of the principles of international law*, as they result from the usages established between civilized nations, *from the laws of humanity and the requirements of the public conscience*.<sup>43</sup>

This humanity principle is intended to act as a failsafe to prevent belligerents from engaging in anti-humanitarian warfare. The principle of humanity prohibits means and methods of warfare that are not necessary for attaining a definite military advantage.<sup>44</sup> Regarding civilians, Jean Pictet has interpreted the principle of humanity to mean that “. . . non-combatants shall be spared as far as possible.”<sup>45</sup> A broad interpretation is that even if a treaty or convention does not expressly prohibit an act or conduct of belligerents, that does not mean that the act or conduct is *ipso facto* permitted. Rather, such an act or conduct must be subject to the principles of customary international law.<sup>46</sup> In the context of starvation, then, it can be argued that although no treaty or convention expressly prohibited starvation of civilians at the time of WWII, the Martens humanity principle suggests that if the use of starvation as a method of warfare did not meet a legitimate military necessity or was not proportionate, then it was not lawful under the customs of the time.

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<sup>42</sup> The principle of humanity, sometimes referred to as the Martens clause, protects civilians from violations of IHL not expressly covered by treaties. It was introduced by Fyodor Fyodorovich Martens in the preamble of the 1899 Hague Convention. See ICRC, *Fundamental Principles of IHL*, <https://casebook.icrc.org/glossary/fundamental-principles-ihl>.

<sup>43</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, Preamble (emphasis added).

<sup>44</sup> E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, 36 (Kluwer Academic, Dordrecht, 1992).

<sup>45</sup> Jean Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff and Henry Dunant Institute, 62 (Dordrecht/Geneva, 1985).

<sup>46</sup> Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict,” *International Review of the Red Cross* No. 317 (Apr. 30, 1997), <https://casebook.icrc.org/glossary/fundamental-principles-ihl>.

Given that Hitler's Hunger plan was not meant to hasten the end of the war, or ultimately save lives, but rather explicitly sought the death of civilians, one could argue under this analysis that the Hunger Plan violated the principle of humanity.

Similarly, the 1907 Hague Convention does not expressly mention starvation as a method of warfare, but does provide that siege warfare, which has the effect of starving civilians and combatants alike, is permissible.<sup>47</sup> Additionally, the 1907 Hague Convention reemphasized the humanity principle of the Martens Clause, and the principle of necessity.<sup>48</sup> Thus, the 1907 Hague Convention could also be interpreted to ban a military tactic like the Hunger Plan, which used starvation as a means of eliminating civilians, rather than bringing an end to war.

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

The rules of land warfare expressed in the [1907 Hague] Convention undoubtedly represented an advance over existing international law at the time of their adoption . . . but by 1939 these rules . . . were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.<sup>49</sup>

However, despite the fact that the 1907 Hague Convention prohibits belligerents from causing unnecessary suffering and destruction of property,<sup>50</sup> the IMT-N did not charge Nazi perpetrators with the crime of starvation for the Hunger Plan. The IMT-N did, however, charge Field Marshall Wilhelm von Leeb for the Siege of Leningrad in the High Command trial. As the name suggests, the High Command trial was the trial of 12 Nazi high commanding officers for their alleged war

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<sup>47</sup> Articles 27 of the Hague Convention IV places prohibitions on belligerents to attack the sick and wounded during siege warfare, but not civilians specifically, and Article 28 prohibits pillaging of a besieged town or village. See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Arts. 27-28 [hereinafter, Hague Convention IV].

<sup>48</sup> *Id.* at Preamble.

<sup>49</sup> International Military Tribunal at Nuremberg, reprinted in 41 AJIL 248-249 (1947).

<sup>50</sup> Hague Convention IV, *supra* note 47, at Art. 23.

crimes and crimes against peace during WWII; von Leeb's trial was for his role in the invasion of the Soviet Union during Operation Barbarossa. The IMT-N determined, however, that although starvation by siege was egregious, it was ultimately lawful, concluding:

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. It is said that if the commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back so as to hasten surrender. . . . Hence the cutting off every source of sustenance from without is deemed legitimate . . . . We might wish the law were otherwise, but we must administer it as we find it. Consequently, we hold no criminality attached on this charge.<sup>51</sup>

Indeed, evidence of state practice would suggest that the major parties to WWII, with the exception of the Soviet Union, all believed that starvation for the purpose of causing the enemy to capitulate was a legitimate and legal method of warfare. For example, both the U.S. and U.K. used blockades of food supplies to Germany, German-Occupied Territory, and Japan; the U.S. even named its blockade of Japanese harbors "Operation Starvation."<sup>52</sup> Thus, starvation caused by sieges and blockades during WWII was not *ipso facto* prohibited under international law. But this conclusion does not rule out the possibility that the use of starvation for an illegitimate purpose does not comply with the principles of military necessity, proportionality, or humanity, and therefore violates international law.

The horrors of WWII are what led to two significant developments in international law: the 1948 Genocide Convention and 1949 Geneva Convention for treatment of Civilians – both of which expressly prohibit starvation of civilians.<sup>53</sup> The Genocide Convention prohibits "Deliberately inflicting on the group conditions of life calculated to bring about its physical

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<sup>51</sup> Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. XI (U.S. Government Printing Office, Washington, D.C., 1950), at 563.

<sup>52</sup> De Waal, *supra* note 8, at 127-28.

<sup>53</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, Art. II(c); Geneva Convention relative to the protection of civilian persons in time of war, Geneva 8 December 1949.

destruction in whole or in part.”<sup>54</sup> Starvation undoubtedly meets this criterion. More recently, the 1977 Additional Protocols to the Geneva Conventions provide detailed explanation of permissions and prohibitions on sieges, blockades, and humanitarian aid;<sup>55</sup> and the 1998 Rome Statute<sup>56</sup> and 2019 Amendments criminalize starvation as a method of warfare during both international and non-international armed conflicts.<sup>57</sup> These recent developments on the prohibitions on starvation as a method of warfare are beyond the scope of this paper,<sup>58</sup> they do, however, provide a glimmer of hope for deterrence and punishment of future perpetrators of starvation crimes.

#### IV. LEGAL ANALYSIS

This section seeks to answer two questions: Could Nazi officials responsible for developing and implementing the Hunger Plan have been charged with crimes against humanity or war crimes under existing international law during WWII? And, if they could have been charged, why did the IMT-N not pursue charges against the perpetrators of the Hunger Plan?

The short answer to these questions is that starvation of civilians during war was not prohibited *ipso facto* under existing custom during WWII, and the Allied Forces also starved civilians

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<sup>54</sup> *Id.*

<sup>55</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, at Art. 54(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 609, at Arts. 14, 69-70.

<sup>56</sup> Rome Statute of the International Criminal Court, Art. 8(2)(b)(xxv), July 17 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 9 (“Intentionally using starvation as a method of warfare by depriving civilians of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions.”).

<sup>57</sup> International Criminal Court Assembly of State Parties, Report of the Working Group on Amendments, Eighteenth session, 2-7 December 2019, 7-9, ICC-ASP/18/32 (Dec. 3, 2019), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-32-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-32-ENG.pdf).

<sup>58</sup> For a thorough examination of modern prohibitions on starvation in international law, see LAURA GRAHAM, *Pathways to Accountability for Starvation Crimes in Yemen*, 63 CASE WESTERN RESERVE J. OF INT’L L. (forthcoming 2021).

for the purpose of causing the enemy to capitulate.<sup>59</sup> But, the Nazi perpetrators of the Hunger Plan could have and *should* have been charged with war crimes or crimes against humanity because the plan to starve 30 million Soviets is distinct from the permissible uses of starvation as a method of warfare in two ways.

First, the purpose of the Hunger Plan was the extermination of “useless eaters”<sup>60</sup> to support Germany’s racial policy of Lebensraum. Extermination is not a legitimate military objective. In fact, extermination was strictly prohibited under customary international law, and constituted a crime against humanity under the London Charter, which created the Nuremberg Tribunal.<sup>61</sup> The Nazi perpetrators of the Hunger Plan, therefore, could have been charged with crimes against humanity for the extermination of 4.7 million people and the common plan or conspiracy to exterminate 30 million Soviets. This extends to anyone who led, organized, instigated, or was an accomplice to the common plan or conspiracy.<sup>62</sup> Thus, Herbert Backe, Hermann Göring, and Walter Darré, at a minimum, could have and *should* have been charged with crimes against humanity for exterminating 4.7 million Soviets and attempting to exterminate 30 million.

Second, even if the Hunger Plan could be deemed a legitimate military objective, it does not meet the international humanitarian law principles of necessity and proportionality. Attempting to starve 30 million people to increase food supply for Germans and the Wehrmacht was not necessary or proportionate to a legitimate military objective because (a) Operation Barbarossa was a war of aggression (not of defense) and (b) even in self-defense, necessity requires minimization of civilian harm. Indeed, while Operation Barbarossa was aimed, in part, at defeating the Red Army, the clear

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<sup>59</sup> De Waal, *supra* note 8, at 127-28.

<sup>60</sup> Gerhard, *supra* note 8, at 46.

<sup>61</sup> Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, Art. 6(c) [hereinafter London Charter].

<sup>62</sup> *Id.* at Art. 6.

intent of that victory was to create food surpluses for Germany so that the Nazis could turn their attention to defeating the Allied Forces in Western Europe. The Huger Plan, therefore, was not designed to bring about an end to war, but rather, to provide the Nazi Wehrmacht with the resources to pursue aggressive warfare and world domination. Therefore, the Nazi perpetrators of the Hunger Plan could have and *should* have also been charged with war crimes under the London Charter for the murder and devastation not justified by military necessity.<sup>63</sup>

The IMT-N likely did not charge Nazi perpetrators of the Hunger Plan for a couple of reasons. The first is that building a case against Nazis for starvation of civilians would have been extremely difficult because starvation as a war crime or crime against humanity was not expressly prohibited in any law or convention of the time. And even if it had been, it is tremendously difficult to find sufficient evidence to support the conclusion that a victim died due to starvation, as opposed to some other factors. However, the Nazi memoranda do show clear intent to commit mass starvation of the Soviets,<sup>64</sup> and that could have been used to build a case against Herbert Backe, at the very least. The other reason the IMT-N likely did not charge perpetrators is because the IMT-N was led and staffed by the Allied Forces, who, with the exception of the Soviet Union, had used starvation as a method of warfare during the war to bring about the capitulation of the enemy. It is unlikely, therefore, that the Allied Forces and the subsequent IMT-N would have considered it high priority to charge Nazi perpetrators of the Hunger Plan. It is clear, though, from the High Command trial, that the Prosecutor thought that Field Marshall von Leeb had violated the prohibitions on starvation in the Siege of Leningrad. Therefore, it is not as though charges for the Hunger Plan were completely outside the realm of possibilities for convictions.

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<sup>63</sup> London Charter, *supra* note 61, at Art. 6(b).

<sup>64</sup> For a detailed examination of the Nazi Hunger Plan in writing, see Kay, *supra* note 18, at 133-139.

## V. CONCLUSION

This paper has shown that although starvation of civilians as a method of warfare was not prohibited *ipso facto* by customary international law during WWII, the Nazi perpetrators of the Hunger Plan could have and should have been prosecuted for war crimes and crimes against humanity for the murder of 4.7 million Soviets and attempted murder of 30 million Soviets. This examination of the Hunger Plan concludes with a reflection on the what might have happened if Nazi officials had been prosecuted for starvation of civilians under the Hunger Plan.

If the perpetrators of the Hunger Plan, in particular Backe, Darré, and Göring, had been charged at the IMT-N with crimes against humanity for the extermination of the Soviets, or for war crimes for the murder and devastation not justified by military necessity, there would have been one of two outcomes: either they would have been convicted, or they would have been acquitted. If acquitted, the outcome could have stalled the development of the prohibitions on starvation codified in the 1977 Additional Protocols to the Geneva Conventions and Rome Statute. If convicted, however, the outcome could have crystalized the custom prohibiting starvation of civilians as a method of warfare.

This leads to the question of whether a Nazi conviction for starvation crimes would have prevented or deterred future perpetrators from using starvation as a method of warfare in other conflicts, including Biafra, Bangladesh, Sudan, and Yemen. It is impossible to know for sure what would have happened if the IMT-N had charged and convicted the Nazi perpetrators of the Hunger Plan. Some might argue that would-be war criminals and genocidaires would not be deterred by others' convictions. This is undoubtedly true, as evidenced by the continued perpetration of genocides in Cambodia, Rwanda, Yugoslavia, Sudan, and Burma, as well as the use of starvation as a method of warfare in Sudan and Yemen.<sup>65</sup> However, a conviction for the perpetration of the Hunger

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<sup>65</sup> For a detailed discussion on the crime of starvation in Yemen's civil war, see Graham, *supra* note 58.



Plan would have sent a clear message to the international community that starvation of civilians as a method of warfare is an unacceptable atrocity warranting accountability. There is no way to know how many lives could have been spared since 1945 if the IMT-N had convicted perpetrators of the Hunger Plan. As a consequence, the world continues to see starvation of civilians in conflict on a massive scale in places like Yemen and Sudan. And until the perpetrators are charged and convicted for starvation crimes, war criminals will continue to use this tactic with impunity.