

## Conflict Related Hunger, ‘Starvation Crimes’ and UN Security Council Resolution 2417 (2018)

by Salvatore Zappalà\*

*Abstract: There is no doubt that Security Council Resolution 2417 (2018) is a première. More than its content, however, it is its very adoption (by unanimity) that represents a success. For the first time, the Security Council engaged in a thematic manner with the issue of hunger (or food insecurity) in armed conflict, highlighting in general terms the vicious circle between food insecurity and armed conflicts, the duties of parties to conflicts to protect civilian population and to allow passage for humanitarian assistance and relief measures, as well as reiterating the prohibition of starvation as a method of combat, and its potential prosecution as war crime. On the basis of this resolution (which, inter alia, requests the Secretary-General to report on the matter more robustly, including through a sort of early-warning mechanism that is per se an important contribution) there is room for strengthened commitment to act more incisively on the part of the United Nations system as well as the Member States and other international actors. Moreover, the resolution paves the way for creative solutions which could entail, for example, the adoption of measures at the domestic level leading to more stringent regulation (and potential prosecution) of ‘starvation crimes’ and of any forms of deliberate obstruction to the delivery of humanitarian assistance. The resolution could also provide arguments for interpreting existing rules more in line with the objective, clearly promoted by the resolution itself, to strengthen the protection of civilians in armed conflicts.*

### 1. Preliminary Remarks: The Path to Security Council Resolution 2417 (2018)

In early 2017 the Secretary-General of the United Nations (UN), António Guterres, called on Member States to react to the imminent and serious threat of famine linked to some specific situations of armed violence or armed conflict in four states: North-east Nigeria, Somalia, South Sudan and Yemen.<sup>1</sup>

Only a few months later, on 16 June 2017, Security Council members held a so-called ‘Arria formula’ meeting<sup>2</sup> in which the Deputy Secretary-General, Amina Mohammed, and other speakers

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\* Professor of International Law, University of Catania. I wish to thank the anonymous reviewers and the editors of this special issue for their comments and suggestions, as well as some people directly involved in the negotiations of resolution 2417 (2018) for being so kind as to share background information and other relevant materials, and for a number of specific points mentioned in the course of our exchanges. I also wish to thank all participants to the Oxford workshop on the issue of starvation in international law for the lively discussion, which motivated me to write this paper. Naturally, all errors are solely mine.

<sup>1</sup> See <https://www.un.org/sg/en/content/sg/press-encounter/2017-02-22/full-transcript-secretary-generals-joint-press-conference> (visited 16 September 2019); see also <https://www.nytimes.com/2017/02/22/world/africa/why-20-million-people-are-on-brink-of-famine-in-a-world-of-plenty.html> (visited 16 September 2019).

<sup>2</sup> These meetings are called ‘Arria formula’ after the Venezuelan diplomat, Ambassador Diego Arria, former Permanent Representative of Venezuela to the United Nations, who suggested this kind of gatherings. These are informal meetings, with no official record, nor any official standing, in which members of the Security Council meet and discuss a broad variety of topics relating to the work of the Council. They can be held at the initiative of one or more Security Council members, and normally include external briefers (they were originally held precisely to be able to hear from people some Council members did not want to hear from), as well as occasionally non-members of the Council. Not all members of the Council necessarily participate, but the meetings can give an indication of the political support for some initiatives and are a useful way of testing the waters for further initiatives in the Council. Additionally, these meetings are an instrument for more transparency in the work of the Council. For more details see L. Sievers, S. Daws (eds), *The Procedure of the UN Security Council* (4<sup>th</sup> edn., Oxford University Press, 2014) at 74-92, as well as the Council’s website at <https://www.scpcedure.org/chapter-2-section-11> (visited 16 September 2019); see also <https://www.securitycouncilreport.org/un-security-council-working-methods/aria-formula-meetings.php> (visited 16 September 2019). The latest ‘official’ document of the Security Council on its working methods is the *Note [on measures*

highlighted the seriousness of the threat as well as the recurrent interplay between conflict and hunger, and further promoted the need for urgent mobilization of the international community to find the necessary resources to allow effective action. At that stage, however, the Council was unable to agree on any ‘product’.<sup>3</sup>

After a couple of months of negotiations, on 9 August 2017, a Presidential Statement (S/PRST/2017/14, ‘PRST’)<sup>4</sup> was eventually adopted laying out a few general principles regarding conflict-related hunger and food insecurity in those affected four countries as well as, *inter alia*, requesting the Secretary-General to include in his reports to the Council specific information regarding the risks of famine.<sup>5</sup> The Council also ‘committ[ed] to engage constructively on the Secretary-General’s specific recommendations’.<sup>6</sup>

In the 2017 PRST, the Council reaffirmed that ongoing conflict was in itself a major cause of famine. In addition, it underlined the obligations of all parties to armed conflict to respect and protect civilians, and it reminded parties to conflict of their obligation to comply with international humanitarian law. The Council further stigmatized that ‘certain parties have failed to ensure unfettered and sustained access for deliveries of vital food assistance, as well as other forms of humanitarian aid’ and called ‘on all parties to allow the safe, timely and unhindered access for humanitarian assistance to all areas and to facilitate access for essential imports of food, fuel and medical supplies’.<sup>7</sup>

The PRST contained some form of recognition of the general issue of hunger in armed conflict, however it was still limited to the four conflict-affected countries. Similarly, specific resolutions on Syria, at least since 2014, had been dealing with relief-assistance-related issues occurring in the Syrian context.<sup>8</sup>

Despite its shortcomings such presidential statement was a clear indication that the Members of the Council (at least a majority) were willing to engage with the issue of hunger and armed conflict in a broader manner.

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*to enhance the efficiency and transparency of the work of the Security Council*], UN Doc. S/2017/507, 30 August 2017, and ‘Arria formula’ meetings are mentioned at paras. 98-99.

<sup>3</sup> See <https://www.un.org/webcast/pdfs/170616pm-sc-arria-famine.pdf> and <https://www.whatsinblue.org/2017/06/arria-formula-meeting-on-the-risk-of-famine-in-conflict-affected-areas.php> (both visited 16 September 2019)

<sup>4</sup> *Statement by the President of the Security Council*, UN Doc. S/PRST/2017/14, 9 August 2017. A presidential statement (PRST) is a declaration made by the President of the Security Council on behalf of the entire Council. The text is adopted at a formal meeting of the Council and issued as an official document of the Council. The adoption of such statement requires the non-opposition of all Council members. Although it bears some resemblance to Security Council resolutions (sometimes being a first step towards one of them), normally a PRST is not considered *per se* a binding text and, despite the occurrence of pretty intensive negotiations for its approval, it is not seen by Council members as a ‘negotiated’ document — with the consequence that the language contained in PRSTs can hardly be presented during negotiations as ‘agreed language’. The abovementioned note on the Council’s working methods outlines the procedure for the preparation and adoption of outcome documents, among which presidential statements feature prominently. See UN Doc. S/2017/507, *supra* note 2, Section VII – ‘Outcome documents’, paras. 78-88. For more details on this kind of outcome from a legal perspective see S. Talmon, ‘The Statements by the President of the Security Council’, 2 *Chinese Journal of International Law* (2003) 419-465.

<sup>5</sup> In particular, it was stated that ‘[the] Security Council requests the Secretary-General to continue to provide information on the humanitarian situation and response, including on the risk of famine, in the conflict-affected Yemen, Somalia, South Sudan and northeast Nigeria, as part of his regular comprehensive reporting’.

<sup>6</sup> UN Doc. S/PRST/2017/14, *supra* note 4, at para. 13.

<sup>7</sup> *Ibidem*, para. 7.

<sup>8</sup> SC Res 2139 (2014) and 2165 (2014), where the Council had recalled that starvation as a method of combat was prohibited under international humanitarian law (IHL). On resolution 2165 (2014) and its impact, see A. Zimmermann, ‘Humanitarian Assistance and the Security Council’, 50 *Israel Law Review* (2017) 3-23.

Meanwhile, reports continued to indicate that famine was spreading in armed conflicts around the world and starvation was being specifically used as a tool of war in many of the armed conflicts or armed confrontation underlying those situations.<sup>9</sup> Efforts to address such issues contributed to increase awareness and readiness to engage with the issue of conflict related hunger, famine or food insecurity more broadly. In parallel, during the whole year 2017, the Netherlands and Switzerland organized a number of events, including workshops and dialogues among experts, which highlighted the issue and lead to a well documented report. All this preparatory work constituted the foundation for the initiative that would lead to the adoption of resolution 2417 (2018) in May 2018.<sup>10</sup>

Naturally, the topic of hunger in armed conflict is far from being new (although, in recent times, numerous conflicts, e.g., in South Sudan, Syria and Yemen, brought renewed attention for the issue). Civilian population has been suffering deprivation during armed conflicts for centuries, even millennia; and starvation has been recurrently seen as one of the distinctive traits of wars.<sup>11</sup> The Security Council had engaged with the issue already in the nineties, with respect to the situations in the former Yugoslavia and in Somalia.<sup>12</sup> Nonetheless, thus far, the reaction of the Security Council was limited to specific conflicts and situations. Admittedly some Member States were and still are of the opinion that the link between hunger and conflict is too broad, and famine in armed conflict is only one among many aspects regarding food insecurity that need to be explored. In this connection, for these Members of the Security Council in order to justify any action by the Council, there has to be context-specific elements. These States would often argue that malnourishment and famine have several causes, which need to be addressed in a holistic manner and require the intervention of development agencies, or would need reforming the world trade system<sup>13</sup> — all measures which of course do not squarely fall within the Security Council's ordinary prerogatives.

However, despite such sceptical approach and reluctance to engage with the topic by some Member States, it became hard to deny autonomous relevance to the issue of food insecurity in situations of armed conflict, where the civilian population is normally already living in particularly dire conditions, and combatants often do not hesitate to block delivery of essential objects, inducing unbearable deprivation of fundamental goods, which rapidly worsens the conditions of civilian populations and might easily become a technique of combat. Hence, despite the persistence of some divergence of opinions as to the appropriateness for the Council to deal with the issue, Security

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<sup>9</sup> World Food Program, *2018 Global Report on Food Crises*, 21 March 2018, available at <https://www.wfp.org/publications/global-report-food-crises-2018> (visited 16 September 2019).

<sup>10</sup> For more information and the report itself, see the website of the Permanent Mission of the Netherlands to the United Nations at <https://www.permanentrepresentations.nl/latest/news/2017/12/14/release-report-conflict-and-hunger> (visited 16 September 2019).

<sup>11</sup> A. deWaal, 'Armed Conflict and the Challenge of Hunger: Is an End in Sight?', *IFPRI Global hunger index 2015*, at 22-29 available at [https://www.ifpri.org/sites/default/files/ghi/2015/feature\\_3710.html](https://www.ifpri.org/sites/default/files/ghi/2015/feature_3710.html) (visited 16 September 2019). See also, more broadly, A. deWaal, *Mass Starvation: The History and Future of Famine* (Polity Press, 2017).

<sup>12</sup> See e.g. SC resolutions S/RES/752 on Bosnia and Herzegovina and S/RES/757 on Somalia.

<sup>13</sup> See *Security Council Report Monthly Forecast March 2018*, which highlights that '[there] have been some divergent views among members about the role of the Council in addressing the issue of hunger and famine in conflict situations. Russia initially objected to the presidential statement eventually adopted in August, feeling the issue was not appropriate for the Council. Several other members during negotiations on the statement also raised concerns about over-emphasising the link between conflict and famine at the expense of other contributing factors. The P3, Sweden, and last year's African Council members (Egypt, Ethiopia and Senegal) were among the co-sponsors of the Arria-formula session that initiated Council efforts to more broadly consider the risk of famine facing some of the conflict situations it was seized with. Sweden initiated and served as penholder for the presidential statement', available at [https://www.securitycouncilreport.org/monthly-forecast/2018-03/conflict\\_and\\_hunger.php?print=true](https://www.securitycouncilreport.org/monthly-forecast/2018-03/conflict_and_hunger.php?print=true) (visited 16 September 2019).

Council members continued to maintain attention on the topic and addressed it in further meetings in October 2017<sup>14</sup> and in March 2018<sup>15</sup> consolidating the momentum and reiterating the need for more robust SC engagement. In so doing, Member States eventually managed to bring the process to fruition through the adoption of the first thematic resolution which focuses on hunger and armed conflict in general terms. In particular, the ‘open debate’ on conflict and hunger — held on 23 March, during the Dutch Presidency of the Security Council — was instrumental in preparing solid grounds for the adoption of the resolution, also thanks to the presence of high-level officials at the political level, a key element to move negotiations forward.

## **2. The Adoption: ‘United for a Landmark Resolution’**

On 24 May 2018 the Security Council unanimously adopted resolution 2417 (2018). The resolution is part of the larger action of the Security Council in the area of the ‘protection of civilians’ — a general item in the Security Council’s agenda which has allowed the Council, starting with resolution 1265 (1999), systematically to deal with a variety of topics, ranging from special attention to the situation of children and women in armed conflicts to the protection of journalists as well as health care workers and medical facilities.<sup>16</sup>

Traditionally, it has always appeared extremely hard to tackle in general terms the issue of conflict-related hunger or food insecurity in conflict, and starvation in particular, in the framework of the Security Council — let alone through a resolution. There seem to have been two main reasons for the Council’s reluctance. Firstly, at least broadly speaking, several States, including some of the Permanent Members (China, Russia and, although to a lesser extent, the US), are of the view that the Council should be cautious in engaging with thematic issues, as its competence is normally crafted as to deal with the maintenance of peace and security in specific situations, and its interventions should be limited to aspects regarding this angle.<sup>17</sup> When problems have multiple causes, some of which may not be directly linked to peace and security, reluctance is strengthened. In this vein, objections are usually raised whenever the suggestion is made to deal with issues in a more holistic manner, including — inter alia — when dealing with aspects relating to transnational organized crime, piracy, or human rights (all of which are now in one way or the other within the Council’s purview). Secondly, there were specific doubts as to the fact that the issue of hunger in particular could be treated by the Security Council, as normally it has been predominantly considered to be a

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<sup>14</sup> In October 2017, the Security Council held a briefing by the Secretary-General focusing on the four countries threatened by famine as earlier identified. Secretary-General Guterres briefed the Council on progress towards addressing the famine risks in these countries: an update that the Council had requested in its August presidential statement. For more background and information on previous steps leading to this meeting see [https://www.securitycouncilreport.org/monthly-forecast/2018-03/conflict\\_and\\_hunger.php](https://www.securitycouncilreport.org/monthly-forecast/2018-03/conflict_and_hunger.php).

<sup>15</sup> The meeting in March 2018 was not meant to be limited to the four countries which were dealt with in 2017, but it intended to consider more broadly a trend in food insecurity linked to conflict, and to raise awareness of international laws and norms to protect civilian populations from hunger and food insecurity during war; for details see <https://www.whatsinblue.org/2018/03/conflict-and-hunger-briefing.php>.

<sup>16</sup> The overall work of the Security Council in this area is usefully summarized in a recently updated ‘aide memoire’, annexed to *Statement by the President of the Security Council*, UN Doc. S/PRST/2018/18, 21 September 2018.

<sup>17</sup> The statement of the Russian representative immediately after adoption of resolution 2417 (2018) is quite clear in this respect: ‘[w]e continue to believe that the problem of food security is complex and involves many factors. Armed conflicts are only one of the issues that can have a negative effect on supplying a population with food [...] This problem cannot be solved on the political front alone. It extends far beyond the scope of the Security Council.’ See UN Doc. S/PV.8267, 24 May 2018, at 3-4.

development issue.<sup>18</sup> In this regard, it was maintained that the Council should refrain from encroaching on the sphere of competence of other UN organs such as the General Assembly or the ECOSOC which have the ability to deal with this issue more in depth and with a broader perspective (this was e.g. the position held by Ethiopia with specific regard to the issue of hunger). Moreover, in the background there were usual concerns that such thematic issue could be employed (including through humanitarian assistance) as a tool to interfere in the internal affairs of states.

These positions have been more or less consistently invoked to oppose attempts to deal in a structured manner with the topic of hunger and armed conflict in the realm of the Security Council's activities.

However, over the past two decades (at least), the Council has increasingly been called to engage with broader issues of a general or thematic nature, where a variety of aspects comes into play, some of which clearly go beyond specific situations (e.g. in the area of the fight against transnational organized crime or the protection of cultural heritage). Additionally, in recent years, the issue of hunger, particularly in relation with some specific armed conflicts, became more pressing than ever. Therefore, despite some residual resistance, after 2017's renewed momentum, it took only a few more months of discussion and negotiations for all Council members to accept the idea that it would be possible to try to set out, through a Security Council resolution, a more general framework that would help enhance the international community response to conflict related cases of famine and starvation in armed conflicts.

Resolution 2417 (2018) came as an achievement of such path, which enabled to place the issue as such on the table, and at the same time it represents the first step of a long road to come. The drafters had to strike a balance between opposing visions (and interests) and the aspiration to strengthen the international framework to counter hunger in conflict. The resolution is important both as a 'landmark' document<sup>19</sup> and, no less important, for the fact that it was adopted unanimously<sup>20</sup>

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<sup>18</sup> At the start of the negotiations, it seems that China, Ethiopia and Russia pushed back on the language in the draft text. Russia had stated at the March 2018 briefing its concerns about the Council discussing as a thematic issue food insecurity and hunger, which can have numerous causes. It noted that the Council already addresses the issue when it arises in country situations under discussion. Ethiopia, which stated at the briefing that the General Assembly and ECOSOC are usually more appropriate venues to consider food insecurity, contended during negotiations that, as a Council issue, this should fall under the thematic discussion on protection of civilians, and is already being reported on by the Secretary-General as part of this annual report and briefing. According to Security Council Report 'some of these concerns were addressed by the core group taking steps to accommodate comments on the text, and further demonstrating that their objective with the resolution was to address only conflict-induced food insecurity. An initial proposal for semi-annual Secretary-General's reports and briefings was reduced to requesting an annual briefing that seemed to help further alleviate Russia's concerns. Ethiopia appeared the most sensitive among Council members about making sure that the draft resolution only applied to conflict situations. Responding to its concerns, efforts were made to specify the focus of the resolution as precisely as possible, such as adding additional references throughout the draft to "armed" conflict and 'conflict-induced food insecurity'. And it was also reported that 'Ethiopia broke silence [...] over the proposal requesting the Secretary-General to brief the Council every twelve months on the draft resolution's implementation. This was supported by Bolivia and China. The compromise reached with Ethiopia, which has now expressed its support for the draft resolution, is that the Secretary-General should brief the Security Council every twelve months on the resolution's implementation in the context of his annual briefing on the protection of civilians. Language calling for the Council to remain seized of the matter was also removed'. See Security Council Report, *Security Council to adopt a resolution on hunger in armed conflict*, 23 May 2018, at <https://www.whatsinblue.org/2018/05/security-council-to-adopt-a-resolution-on-hunger-in-armed-conflict.php> (visited 16 September 2019).

<sup>19</sup> This was the term used by the Deputy Permanent Representative of the Netherlands, H.E. Lise Gregoire Van Haaren, in her statement after the adoption on 24 May 2018. For the verbatim records of the meeting see UN Doc. S/PV.8267, at 2.

<sup>20</sup> The statements after the adoption of the resolution by the representative of the Netherlands and by the representative of the Russian Federation are quite revealing in this regard. The Dutch representative stated that '[i]t is truly an encouraging sign that the Council has managed to agree unanimously on some of the basic norms of humanity. We would

(particularly in light of the clashes, including the exercise of veto on various occasions, that marked the life of the Council over the conflict in Syria in 2017).

Resolution 2417 (2018) contains 21 preambular and 13 operative paragraphs. As is customary, the Council initially recalls some relevant resolutions adopted under the agenda item ‘protection of civilians’, including resolution 2286 (2016) on the protection of healthcare facilities and personnel.<sup>21</sup> It also recalls the 2017 presidential statement mentioned above, which, while taking a broader approach to the topic, was still limited to the situation in four specific countries. It then expresses concern for ‘the level of global humanitarian needs and the threat of famine presently facing millions of people in armed conflicts’ as well as for the broader problem of undernourishment, particularly of children, and for the high number of people (75 millions) affected by food insecurity linked to armed conflicts.<sup>22</sup> Thereafter, the Council stigmatizes starvation as a potential war crime, expresses its intention to further examine the matter in relation to specific situations, and requests the SG to report on the issue periodically, and hence assist in improving coordination efforts.

The resolution emphasizes, with deep concern, the link between armed conflicts and the frequent hindering of delivery of humanitarian aid as a ‘major cause of the current risk of famine’. The Council in this regard still tends to juxtapose the two — conflict and hence difficulties in humanitarian relief, on the one hand, and risks of famine on the other — without characterizing the consequence (famine) as the product of the often unlawful conduct of one or more parties to the conflict (the action of hindering aid). In this regard, of course, the difficulties of negotiating a resolution on such a pressing issue in general and broad terms, trying to keep all Council members onboard, without explicit references to the responsibilities of the parties to some well present specific conflicts (e.g. Syria and Yemen) explains the relatively nuanced statements in preambular paragraph 3. The resolution continues, in preambular paragraphs 4 and 5, by expressing the habitual concern for the growing number of armed conflicts all over the globe and by reiterating the Council’s commitment to pursue all avenues to put an end and prevent conflicts, as well as to tackle the underlying causes. This is a rather rhetorical clause, often used to highlight the complexity of a matter and the difficulties, or lack of sufficient political will, in addressing the phenomenon more effectively; in particular, in the specific case of hunger and armed conflicts, the root causes are hardly a matter for the Council alone to address — as any broader strategy would involve a concerted effort and the exercise of competences of other organs and organizations. And, in this regard, this would appear as a pretty obvious and innocuous statement, albeit it conveys the idea that the issue is almost impossible to solve.

Despite the absence of substantive progress on the merits, the adoption of the first thematic resolution on such a sensitive issue, with the entire Council rallied behind it, is extremely important *per se*. The resolution has the merit of flagging the issue and emphasizing the multiple levels of

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like to thank all Council members for their genuinely constructive engagement throughout the negotiation process’ — which could be read as meaning ‘for the sake of unanimity we had to make several concessions’. And the Russian representative echoing ‘[we] have noted our partners’ professionalism and constructive approach to problem-solving and finding consensus-based language for a number of delegations’ most sensitive issues. We are grateful for their willingness to consider the priorities and concerns of all delegations during the course of a quite complex negotiation process, which has ultimately enabled us to achieve a balanced document supported by all Council members’. For more details see the verbatim records, *supra* note 20, at 2 and 4.

<sup>21</sup> In preambular paragraph 1 the Council is ‘[r]ecalling all relevant Security Council resolutions, including resolutions 1296 (2000), 1894 (2009), 2175 (2014) and 2286 (2016) and its presidential statement of 9 August 2017 (S/PRST/2017/14)’.

<sup>22</sup> SC Res 2417 (2018), preambular paragraph 2.

interplay between the scourge of hunger in armed conflicts and different bodies of law, as well as the various actors involved and their capabilities and obligations. Clearly, it would have been impossible for negotiators to obtain both unanimity in the Council and major progress in terms of language.

This is particularly true if one considers the ‘external’ pre-existing legal context in which resolution 2417 (2018) has been adopted, which is by far less developed and stringent than one might suppose (and wish), considering how ancient is the problem of civilians suffering hunger and deprivation in times of war.

Actually, there are three main problems, which sometimes tend to overlap, with the approach several Member States adopt in this area: widespread acceptance of hunger as an ordinary consequence of armed conflict; the view that there is no general and absolute (or unconditioned) prohibition of starvation under international humanitarian law (IHL), nor other relevant bodies of law; and a large measure of deference to State sovereignty as far as the delivery of assistance is concerned.

The process of drafting and negotiating the resolution had to deal with these basic ‘assumptions’ on the part of several key players (including the majority of the Permanent Members) that seems to be underlying the engagement of international law with the topic. The idea appears to be that hunger is almost inevitable in armed conflict. In addition, food insecurity has many causes which go beyond conflict and that require more global approaches. Finally, at least broadly speaking, especially for some more cynical actors, hunger in the context of armed conflict is seen as an inescapable fact of life, for which there can be hardly any responsibility.

There might be several reasons for this almost ‘fatalistic’ approach. Clearly, however, it has influenced (and, in yet another vicious circle, it has been influenced by) the rather unsatisfactory regulation of the topic under international law.

The political divergences and the ‘unclear’ legal background made it impossible for the drafters and negotiators of resolution 2417 (2018) to be more ambitious in terms of adopting more stringent language. The fear that, in specific contexts, the issue could be instrumentalized by internal or external actors, made it unrealistic to have a text bearing more stringent obligations for parties to armed conflicts and establishing appropriate consequences for breaches of the law.

The main success of the resolution lies in the very fact that, for the first time, it was possible to deal with the issue of hunger and armed conflict in a thematic way — and not merely with regard to one or more specific situations, as the Council has done so far. Moreover, and equally importantly, there is now a single text which represents the ‘summa’ of the Council’s engagement with the issue. The resolution also signals that — if there is sufficient political will — the Security Council could do more to tackle the issue in question.<sup>23</sup> In this regard, the reporting mechanisms devised under operative paragraph 12 represents one of the achievements of this resolution. It has the potential of providing the UN Secretariat (also in cooperation with UN agencies, such as the World Food Programme and the Food and Agriculture Organization) with a powerful tool to call on the Security Council — and the international community as a whole — to act in situations where man-made food crises in the course of conflicts occur.<sup>24</sup>

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<sup>23</sup> See the statement by the representative of the USA after the adoption of the resolution on 24 May 2018, verbatim records, UN doc. S/PV.8267, at 3.

<sup>24</sup> See, e.g., UN Food and Agriculture Organization, World Food Programme, *Monitoring food security in countries with conflict situations: A joint FAO/WFP update for the United Nations Security Council*, January 2019, at <http://www.fao.org/3/ca3113en/CA3113EN.pdf> (visited 16 September 2019).



In broader terms, resolution 2417 (2018) also indicates a reorientation of the international community's general approach to the issue of hunger in conflict situations: from a fatalistic stance towards starvation in armed conflicts to a more proactive role. This new approach could entail encouraging States to act more effectively at the domestic level, providing a clear basis for more incisive Security Council action, allowing the Secretary-General to monitor and report more robustly, as well as promoting interpretation of relevant rules more in line with the objective of protecting civilians in armed conflicts.

### 3. *Setting the Context by Highlighting the Interplay between Armed Conflicts and Food Insecurity*

There is no doubt that one of the merits of resolution 2417 (2018) lies in the fact that it highlighted the link between armed conflicts and food insecurity in general terms; even the sceptics will have to recognize that famine is indeed linked to conflict on multiple levels, and conflict often might be both cause and effect of famine and hunger.<sup>25</sup> Certainly, resolution 2417 will make it (almost) impossible for anyone to deny that food insecurity is strictly connected to conflict. The very resolution alludes to it in preambular paragraph 6, where it recognizes the 'need to break the vicious cycle between armed conflict and food insecurity'.

This is an important statement, as it appears to be the first time the Council explicitly recognizes such link in such general terms and acknowledges the need to act, which is further reflected in preambular paragraph 7 where the 'commitment to address conflict induced food insecurity, including famine, in situations of armed conflict' is further expressed.

In resolution 2417 (2018) itself, however, there is little to concretely break such circle (apart from the strengthened reporting mechanisms under operative paragraphs 11-13). Subsequent paragraphs highlight the different nature of the relationship between armed conflicts and their impact of food security (direct and indirect) as well as the long-lasting effects of conflicts (e.g. the impact of landmines on agriculture, or refugees and other vulnerable groups). In operative paragraphs 1 and 2 of the resolution the effects of the vicious circle of conflict and food insecurity are well highlighted; e.g. the Council clearly indicates that hunger related issues can be a driver of population displacement. The broad context of hunger is exposed and the fact that the threat of famine can be both cause and effect of conflict properly acknowledged. The Council places some emphasis on the fact that forcing displacement of civilians through resort to food insecurity is prohibited (in operative paragraph 2). It does not, however, make the further step of clearly affirming the criminal responsibility of those imposing such conditions onto the civilian population, nor their potential prosecution before domestic or international courts (which it could have since forced displacement can be both a war crime and a crime against humanity).

Moreover, having established the link and its circular nature, the Council devotes some specific attention to the need to take measures to break such circles, both through the obligations for parties to allow humanitarian access as well as the involvement of the entire international community, including the Council in potential reaction — even though at this stage most of these measures remain on the abstract level. In fact, the resolution *per se* does not contain specific measures. And yet, there

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<sup>25</sup> As the US representative put it: '[...] the connection between conflict and hunger is undeniable. We are pleased that today's resolution definitively resolves any remaining doubt about that link', see verbatim records, cit. *supra* note 23. For a more detailed analysis of the historical and political links between hunger and conflict, see B. Conley, A. DeWaal, 'The Purposes of Starvation: Historical and Contemporary Uses'; and B. Lander, R. Richards, 'Addressing Hunger in Situations of Armed Conflict: Laying the Foundations for Peace', both in this special issue.



is recognition that, on the basis of resolution 2417 (2018), further measures could be envisaged in specific situations, ranging from more stringent obligations imposed on the parties through Security Council resolutions to the broadening and strengthening of the mandates of peace operations, as well as the inclusion of cases of wilful denial of access to humanitarian assistance, or forms of inducing hunger onto civilian population, under the sanction regimes (operative paragraph 9).

These measures of course will become possible only when, and if, the Council finds an agreement in a given situation. Nonetheless, at least as a matter of principle, resolution 2417 (2018) lays the foundation for Member States to engage in trying to find such an agreement to adopt further measures: this could be construed as a strong commitment — an obligation, even? — to negotiate, at the very least, seriously and in good faith some form of Security Council reaction to the crisis in question. In particular, in preambular paragraph 16, the Council — albeit with very cautious language — recalls its intention to include in UN peacekeeping operations' mandates language implying the task 'to assist in creating conditions conducive to safe, timely and unimpeded humanitarian assistance'. Clearly, the Council has been careful in not taking too strong a commitment to act swiftly to prevent or stop hunger related crisis. It limits itself to a light commitment, an intention to be followed up only 'where appropriate'. This provision is also a broader reflection of the different approach that often underlies the definition of peacekeeping mandates, where a balance needs to be found between those who want to assign broader and more incisive tasks, as well as updated mandates to peacekeepers, and those who tend to rely on more traditional notions of impartiality and neutrality, which do not always conform too well with increased tasks regarding the protection of civilians. Nonetheless, since the definition of mandates and the concrete tasks to be assigned to peace operations are intrinsically linked to the specificities of the context in which they would have to intervene, it is clear that the Council could have hardly expressed more than a generic commitment to engage in such an evaluation whenever the time comes.

In essence, as far as the Security Council is concerned, one could say that resolution 2417 (2018) represents a solid basis for (a) recognizing the autonomous relevance of hunger/food insecurity as a situation that may lead to a threats to peace and security; (b) allowing the Secretary-General to launch the alarm at an early stage of a conflict-related food crisis (a sort of early warning mechanism); (c) affirming the Council's readiness, in cases of armed conflicts or other forms of armed violence, to intervene with specific measures — e.g. by mandating peacekeepers with task of facilitating the provision of assistance, or by addressing specific requests to the parties to a conflict, or by imposing sanctions against those who provoke hunger crisis either directly or by impeding humanitarian relief; and (d) committing Members of the Council, at the very least, to engage in good-faith negotiations to try to find an agreement on such 'specific measures'.

At the same time, it is worth noting that the Council was unable to include the recurrent formula that 'it remains seized of the matter'. Such language was apparently present in the draft for some time, but was eventually removed prior to adoption — as if some members of the Council wanted to indicate that resolution 2417 (2018) does not *per se* imply that there will be continuous attention for the topic in the future.<sup>26</sup>

#### ***4. The Prohibition of Starvation Conducts Between International Humanitarian and Human Rights Law***

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<sup>26</sup> Security Council Report, *Security Council to adopt a resolution on hunger in armed conflict*, *supra* note 18.

As mentioned above, resolution 2417 (2018) is adopted against a legal background — both under international humanitarian law ('IHL') and international human rights law ('IHRL'), as well as more broadly general international law — which unfortunately appears to be (or at least is perceived as being) rather ambiguous vis-à-vis what we could call 'starvation conducts' (i.e. actions or omissions which deliberately aim at provoking hunger among civilians). This is reflected in the approach taken by members states and the resulting language of the resolution, whereas the Council remains rather vague as to the obligations imposed on parties to a conflict and on the consequences for those who act in breach (e.g. even for those who use hunger as a tool of war, and/or impede humanitarian assistance).

Given the strong divergences of views as to its very involvement in the matter, the Council could have hardly opted for clarifying the law or providing progressive interpretation or developed new principles in this area; hence, it could only engage in trying to articulate a legal framework based on traditional reading of existing law and aiming at making it more difficult for the parties to ignore the existence of some minimal obligations. Moreover, at least in principle, the resolution shows a strengthened commitment of the international community not to remain inactive. Ultimately, however, it is still very much in the hands of the Security Council in the future to further adopt specific obligations for parties to conflicts and to determine in each given case which consequences, if any, will flow from the violation of applicable law.

Several paragraphs in resolution 2417 (2018) refer to existing obligations of parties to an armed conflict under IHL, as well as some reference more in general to international law and human rights law. Both in the preambular and in the operative parts of the resolution, the Council recalls the obligations of the parties with reference to the protection of civilians, as well as civilian objects and infrastructures, and with regard to humanitarian access and the protection of relief operations personnel. All these paragraphs rely on pre-existing obligations. Along these lines, the preamble reiterates that the Council is

'[d]emanding that all parties to armed conflicts fully comply with their obligations under international law, including international human rights law, as applicable, and international humanitarian law, in particular their obligations under the Geneva Conventions of 1949 and the obligations applicable to them under the Additional Protocols thereto of 1977 and 2005, to ensure the respect and protection of all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities'.<sup>27</sup>

Furthermore, in the same vein the second part of operative paragraph 1 mirrors the preamble and calls on

'[...] all parties to armed conflict to comply with their obligations under international humanitarian law regarding respecting and protecting civilians and taking constant care to spare civilian objects, including objects necessary for food production and distribution such as farms, markets, water systems, mills, food processing and storage sites, and hubs and means for food transportation, and refraining from attacking, destroying, removing or rendering useless objects that are indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, agricultural assets, drinking water installations and supplies, and irrigation works, and respecting and protecting humanitarian personnel and consignments used for humanitarian relief operations'.<sup>28</sup>

These are just some examples. Even if the obligations of parties to conflicts are reiterated in very broad terms and lack specificity, these clauses are still useful to highlight the fundamental

<sup>27</sup> SC Res 2417 (2018), preambular paragraph 17.

<sup>28</sup> SC Res 2417 (2018), operative paragraph 1.

approach that ought to be taken to the treatment of civilians in armed conflicts, and set the tone for the correct interpretation of the resolution, as well as those pre-existing obligations.

The general principles of IHL suggest strong protection for civilian population and civilian objects. However, the devil is in the details, and more specific regulation of armed conflict often is silent or substantially permits a vast array of conducts in which civilians and civilian objects are left to bear the consequences of the conflict. This resolution is no exception as it imports the ambiguities of IHL rules and thus, at least implicitly, recognizes that, in some instances, combatants might be provoking hunger in civilian populations without being (necessarily) acting unlawfully. This is due to a great dose of realism (and cynicism, some may say) in accepting that in war people are bound to suffer. It would appear that some Member States, in negotiating the resolution, might have been influenced by the notion that under IHL there are a number of caveats and requirements linked to military necessity that make it possible to justify denial, as well as delay or obstruction of delivery of assistance; and that the obligation on parties to a non-international armed conflict to allow delivery of humanitarian assistance is not devoid of ambiguities. The idea being, at least broadly speaking, that there might be justifications which — under the umbrella of non-unlawful military measures — would allow for restrictions. Moreover, these States were probably influenced by the idea that sieges and blocks on the delivery of food, water, medicines and other essential supplies might be permissible. In this regard, it is true that the starvation of civilians appears to be prohibited (and criminalized) only to the extent that it is used as a method of warfare. Nonetheless, it is worth noting that the resolution does not attempt to clarify the matter, and does not explicitly mention any caveat or justification, leaving open any interpretative problems as to the scope of IHL provisions.

Even IHRL, which recognizes both the right to life as well as the right to food and to other essential elements for survival, does not really seem to have been particularly relevant for the purpose of this resolution as a tool to offer strong and effective responses, which could allow to tackle the phenomenon of starvation as conduct of those who deliberately inflict conditions of hunger onto civilian populations.<sup>29</sup> Although, broadly speaking, IHRL has been recognized to be applicable also in times of armed conflict, the operation of the provisions guaranteeing the right to food seems (at least as far as it appears from a plain reading of the resolution) to have been considered more an instrument of broad and programmatic nature, operating on more long-term (development related) perspective, rather than a useful protection to be invoked in concrete situations to prevent starvation, protect the victims, or stigmatise and punish those responsible.

Clearly IHRL could be of assistance in the interpretation of provisions both of IHL, international criminal law ('ICL') and general international law, particularly those regarding the obligations of parties to a conflict to allow access to humanitarian assistance and relief operations, as well as more broadly the duties and responsibilities any state towards its civilian population. However — at least *prima facie* — it would not seem that IHRL, as reflected in the resolution, can *per se* provide more solid tools to a strong communal response to the scourge of 'starvation crimes'.

Moreover, the resolution is very much based on traditional views of the relationship between state sovereignty and humanitarian assistance: normally the consent of the territorial state is required for the delivery of assistance to take place.<sup>30</sup> The resolution clearly adheres to this model, and

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<sup>29</sup> For a more detailed analysis of the prohibition of starvation in international human rights law, see S. Hutter, 'Starvation in Armed Conflicts: An Analysis Based on the Right to Food', in this special issue.

<sup>30</sup> See in general F. Lattanzi, *Assistenza Umanitaria e Intervento d'Umanità* (Giappichelli, 1997) and F. Zorzi Giustiniani, *Le Nazioni Unite e l'Assistenza Umanitaria* (ESI, 2010); see also A. Zimmermann, *supra* note 8, at 18-19, discussing SC

although it provides for mechanisms to report to the Council obstructive behaviours and does indicate that states have responsibilities towards their civilian population, it is still pretty deferential towards state sovereignty.

As far as the delivery of humanitarian assistance is concerned, the resolution recalls the obligations of parties to the conflict to allow unimpeded delivery to those in need (preambular paragraph 15) and it recalls that personnel delivering such assistance is protected under international law (preambular paragraph 18). These provisions are reflected in the operative part of the resolution where, in paragraph 4, the Council again '[calls] on all parties to armed conflict to comply with their obligations under international humanitarian law, and underlines the importance of safe and unimpeded access of humanitarian personnel to civilians in armed conflicts'. The second part of the paragraph, however, lays down broader obligations, including for 'neighbouring States', which are invited 'to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing such access'. Moreover, the most innovative part of paragraph 4 is where 'States and the Secretary-General [are invited] to bring [to the attention of the Council] information regarding the unlawful denial of such access in violation of international law' albeit only 'where such denial may constitute a threat to international peace and security'. Thereafter, the Council 'expresses its willingness to consider such information and, when necessary, to adopt appropriate steps'. This last segment of paragraph 4 represents the possibility that the Council could act, on the basis of information as to obstacles to the delivery of humanitarian assistance and relief. Now clearly this is an extremely mild form of commitment for the future to do something and there is no automaticity whatsoever. There is no guarantee that the Council will do anything. Moreover, the Council — irrespective of such paragraph — already had such power. However, from a political standpoint this could be seen as the first step towards the institutionalization of a mechanism of reporting, and it creates the potential for further sanctions for non-compliance; and it could be seen as a sort of 'obligation' (or at least a political commitment) for the Council to look specifically into the matter of obstacles to the delivery of humanitarian assistance to civilian populations.

Of course, the expressions 'when necessary' and taking 'appropriate steps' (it would not sound too well to affirm the intention to take 'inappropriate steps', nor 'when unnecessary'!) intend to stress the fact that the Council enjoys the broadest discretion, both as to the question of whether or not it would react and by which means. Nonetheless, here again a systematic reading of the very same resolution could assist and shows that the Council indicates, among possible reactions to the unlawful denial of humanitarian access, potential resort to the tool of sanctions. In operative paragraph 9, the Council '[r]ecalls that [it] has adopted and can consider to adopt sanction measures, where appropriate and in line with existing practice, that can be applied to individuals or entities obstructing the delivery of humanitarian assistance, or access to, or distribution of, humanitarian assistance'.<sup>31</sup> This is, again, a power that the Council would have even in the absence of resolution 2417. However, the fact of spelling it out is part of the systematization/institutionalization exercise undertaken through this resolution. In addition, the resolution has the merit of calling on all States (and the Secretary-General) to provide information on unlawful refusal to authorize delivery.

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Res 2165 (2014) on Syria, which if interpreted *a contrario* clearly highlights that, unless otherwise provided, in general terms the territorial state's consent is always required.

<sup>31</sup> R. Gunaratne, 'Advocating for a Separate Designation Criterion on Starvation', *Just Security*, 6 June 2018, at <https://www.justsecurity.org/57480/advocating-separate-designation-criterion-starvation/> (visited 16 September 2019).

At the same time, some of the mentioned political sensitivities reappear in other paragraphs of the resolution. For example, the concern looms in some paragraphs that humanitarian assistance and relief operations might be exploited for purposes other than merely providing civilian population with necessary means of survival. Most likely, this was due lengthy discussions and negotiations with those who emphasized the risk that humanitarian relief be instrumentalized and could potentially lead to undue interference with the conflict. To assuage these concerns, preambular paragraph 19 emphasizes the principles by which humanitarian organizations are bound (i.e. '[r]eaffirming the need for all parties to armed conflict to respect the humanitarian principles of humanity, neutrality, impartiality and independence in the provision of humanitarian assistance, including medical assistance, and reaffirming also the need for all actors engaged in the provision of such assistance in situations of armed conflict to promote and fully adhere to these principles'). In a similar effort to reassure those who are afraid that humanitarian intervention might become a tool for undue interference, the Council highlights the protection of sovereignty (preambular paragraph 8), while also emphasizing the special burden on sovereign states to protect their civilian populations (preambular paragraph 21).

In operative paragraph 6, the Council strongly condemns the unlawful denial of humanitarian access and 'depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access for responses to conflict induced food insecurity in situations of armed conflict, which may constitute a violation of international humanitarian law'.<sup>32</sup> Something strongly condemned should hardly be seen as 'lawful'. Here again the permissive stance under IHL is the 'cause' of such seemingly contradictory language. It would appear to be largely inconsistent with the spirit of the relevant provisions of international law to condemn 'unlawful denial of access', on the one hand, and to indicate, on the other, that wilfully impeding relief may constitute a violation: one would be tempted to say that unlawful denial is *per se* a violation (otherwise it would not be unlawful)! The fact that the Council condemns unlawful denial is actually the bare minimum it could have done.

Finally, in operative paragraph 8, the Council urges those with influence over parties to armed conflict to remind the latter of their obligations under IHL. This is a reference, albeit ambiguous and rather light, to 'proxy conflicts' and to potential involvement of third parties. This paragraph could have been drafted more stringently as a reflection of the principle whereby parties to the Geneva Conventions and Protocols have a duty to (respect and) ensure respect of the obligations contained in the Conventions.<sup>33</sup> The relatively mild way in which the Council engaged with the role of third parties, without even reiterating what appears to be an otherwise clear obligation of all states parties in the Geneva system, is further evidence of the caution employed in tackling this theme with regard to obligations under IHL. Nonetheless, despite legal shortcomings, this can be still considered an important 'messaging' statement. Although *per se* deprived of concrete effects, it indicates to 'those with influence' that the Council is fully aware and that in the future it might be looking into their

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<sup>32</sup> The paragraph reads as follows: '6. Strongly condemns the unlawful denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access for responses to conflict induced food insecurity in situations of armed conflict, which may constitute a violation of international humanitarian law'.

<sup>33</sup> See, in general, L. Condorelli and L. Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'', in C. Swinarski (ed), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (International Committee of the Red Cross, Geneva, 1984), at 17-35.

conduct — with the exception of course of ‘those with influence’ that are also Permanent Members of Council itself.

To sum up, the resolution: recalls all relevant IHL obligations; includes references to IHRL as apposite reminders that these bodies of law are not suspended in situations of conflict; invites all those with influence over the parties to use such influence to promote compliance with IHL; and creates a mechanism whereby the Secretary-General could be more active. At the same time, the resolution: is mindful of the concerns of sovereign states and takes into account that humanitarian assistance must not be exploited to interfere with internal affairs and with the conflict) (preambular paragraphs 8 and 21); recalls the obligation of impartiality of assistance (preambular paragraph 19); and expresses the general position that the Security Council will not instrumentalize the issue (preambular paragraph 7). Redundancy is easily explained by great caution in negotiating these texts. Resort to an abundance of ‘may’, ‘where applicable’, ‘where appropriate’, ‘if necessary’ and so on is linked to the fact that IHL has not been perceived by the member states as entailing an unreserved prohibition of starvation nor of the denial of access for humanitarian assistance. The approach which seems to have inspired the Council is that these occurrences are illegal only insofar as there is no military justification for them, nor other fundamental state interests at issue. Now, such an approach, which should be more directly challenged, and the fundamental acceptance that in war civilians must necessarily suffer, has not been entirely reversed by resolution 2417 (2018). Arguably, the Security Council’s discretion remains almost unfettered and any further measure would require uniformity of views among Council Members, particularly the P5, and strong(er) political will. The Council wants to preserve its own discretion in adopting measures whenever it deems appropriate.<sup>34</sup> On the other hand, the Council, particularly after this resolution, has assumed a commitment, at the very least, to do more. Certainly it can be argued that UN Member States (and those who are members of the Security Council in particular) are already under an obligation to do more, whether by proposing resort to sanctions or other measures.<sup>35</sup> Furthermore, any state individually — as I will further mention below — can refer to resolution 2417 (2018) to adopt domestic measures dealing with conflict-related food insecurity and in particular with starvation of civilians in armed conflict.

##### **5. Starvation Crimes after Resolution 2417 (2018)**

The member states perception of IHL rules transpiring from resolution 2417 (2018), irrespective of good intentions to spare civilians from the most gruesome aspects of war (naturally reiterated in the resolution), and of the recurrent calls on all parties to respect and protect civilians, seems to be that

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<sup>34</sup> As an example of measures that can be adopted by the Security Council one can refer to the sanctions, in this regard see, e.g., *Final report of the Panel of Experts on Yemen*, UN Doc. S/2018/594, 24 August 2018, paras. 187-196 (section on ‘Obstruction of humanitarian assistance’). The report indicated — at para. 190 — that ‘[t]he blockade [was] essentially using the threat of starvation as a bargaining tool and an instrument of war. The Houthi forces [were] also using the population as a pawn when they escalate their strikes against Saudi Arabia, knowing full well the brunt of reprisals will be felt by the civilian population. The Houthis [were] relying on public condemnation of Saudi Arabia’s reprisals to offset any liability on their part for those actions’. The report further recommended that the Security Council call on the Saudi-led coalition not to misuse the Council-mandated arms embargo as a justification to obstruct the delivery of essential goods and humanitarian aid. It also described access constraints and diversion of aid inside Yemen by the Houthis.

<sup>35</sup> Zimmermann, *supra* note 8, at 19-22.

there is no clear and unequivocal general ban on starvation.<sup>36</sup> Despite the opinions to the contrary<sup>37</sup> and the fact that the text of the relevant rules is sufficiently broad as to include more progressive interpretation, there seems to be no agreement on the fact that there exists an unconditioned prohibition of resorting to the use of blocks on the delivery of essential goods to the civilian population. The provisions of the 1949 Geneva Conventions were rather minimalistic in this regard, but also the more detailed provisions of the 1977 Additional protocols were carefully drafted so as to leave room for combatants to manoeuvre, allowing for techniques of combat which may bear the traits of medieval warfare (e.g. sieges), but are still to some extent accepted. There are constraints and guarantees, there are progressive interpretations resorting to the object and purpose of the law, to the principles of distinction and proportionality,<sup>38</sup> but – at least as far as resolution 2417 (2018) is concerned – no absolute prohibition appears to be generally accepted by states. Arguably, in some circumstances, it would not be unlawful to cut supply sources, irrespective of the consequences that this may have on the civilian population. In this context, wilful depriving cities and villages of food, water, medicines, and so on, continues to be extensively employed in conflicts in which civilian populations continue to bear alarming levels of suffering, including due to the employment of these techniques.

Some might argue that IHL rules are sufficiently clear, that starvation is already prohibited in an absolute manner and in turn (and to a large extent) criminalized. Along those lines, it could be suggested that the real problem is more in its implementation and the fact that IHL rules are not respected in practice. This view, however, would appear to be incorrect and too optimistic, both in light of the interpretation given by several states, including in their domestic legislation regulating law applicable to military operations, as well as the history of the prohibition (which is rather recent) and the practice to date.<sup>39</sup> This approach seems to be reflected in the difficulties in having more progressive (or clearer) language in resolution 2417 (2018), which — at least in part — may be attributed to the diverging views on the interpretation of IHL prohibition.

Unfortunately, it would seem that among Council members the view that under IHL starvation can be seen as a collateral damage that somehow can be justified found support.<sup>40</sup> Clearly such a ‘permissive’ stance has influenced criminalization and ICL provisions, or at the least the way in which

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<sup>36</sup> For a more detailed analysis on the complexity of IHL rules on starvation, see D. Akande, E.-C. Gillard, ‘Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law’, in this special issue.

<sup>37</sup> For such an approach, see e.g. F. D’Alessandra, M. Gillett, ‘The War Crime of Starvation in Non-International Armed Conflict’, in this special issue.

<sup>38</sup> G. Gaggioli, ‘Are Sieges Prohibited under Contemporary IHL?’, *EJIL:Talk!*, 30 January 2019, at <https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/> (visited 16 September 2019); as well as M. Lattimer, ‘Can Incidental Starvation of Civilians be Lawful under IHL?’, *EJIL:Talk!*, 26 March 2019, at <https://www.ejiltalk.org/can-incident-starvation-of-civilians-be-lawful-under-ihl/> (visited 16 September 2019).

<sup>39</sup> See also the concise and excellent piece by B. Van Schaack, ‘Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime’, *Just Security*, 4 February 2016, at <https://www.justsecurity.org/29157/siege-warfare-starvation-civilians-war-crime/> (visited 16 September 2019).

<sup>40</sup> Such a view emerges, for example, also in some domestic military manuals, see e.g. United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict*, 1 July 2004, which clearly indicates that incidental starvation is not a breach of the law. In particular, para. 5.27.1 states that ‘[t]he law is not violated if military operations are not intended to cause starvation but have that incidental effect’. Similar provisions can be read in the Australian and US relevant regulations. For a more detailed commentary of this practice, see Akande and Gillard, *supra* note 36.



they have been implemented. Thus, practically, there has been no prosecution for starvation crimes so far.<sup>41</sup>

The heart of the condemnation by the Council of the phenomenon of ‘starvation of civilians’ is found in operative paragraph 5 of resolution 2417 (2018). Through this clause the Council ‘[s]trongly condemns the use of starvation of civilians as a method of warfare in a number of conflict situations’ and further recalls that ‘it is prohibited by international humanitarian law’. However, it is surprising, and regrettable, that the Council was unable to explicitly state that individuals who use starvation as a method of warfare, and those who wilfully and unlawfully impede humanitarian assistance are to be held criminally responsible — something the Council had instead done back in 1992, in the Somali context.<sup>42</sup>

Actually, the whole resolution is rather timid when it comes to the criminal law aspects of starvation. Only in the preamble of resolution 2417 (2018) is there a reference to the fact that starvation may amount, in certain cases, to a war crime. And it is perplexing that the Council, in these limited preambular provisions dealing with the criminal law aspects, did not even mention the sole instrument which grants an international criminal court jurisdiction over the crime of starvation and explicitly lists it as a war crime — i.e. the Rome Statute of the International Criminal Court (ICC) at Article 8(2)(b)(xxv). It is evident that the current ‘phobia’ of the P3<sup>43</sup> towards the ICC makes it impossible even just to mention it in the framework of a Security Council resolution.

Over 15 years ago, some authors had already argued for the need to establish more robust accountability mechanisms for what rightly can be called ‘famine crimes’.<sup>44</sup> Even in this area, however, international law advances with great caution and resolution 2417 (2018) reflects the cautious approach inscribed in the relevant legal regulation.

Probably ICL is ‘affected’ by the fact that, until relatively recent times, starvation was still considered a lawful occurrence in armed conflicts.<sup>45</sup> Only after the Second World War starvation of the civilian population as a method of war came to be prohibited and hence criminalized. The fundamentally permissive approach in which starvation crimes have struggled to develop is well illustrated by reference to traditional laws of war. For example, the Lieber Code clearly indicated that ‘[it] is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjugation of the enemy’ and ‘[when] a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an

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<sup>41</sup> A tendency which Jordash, Murdoch and Holmes argue could and should be reversed. See W. Jordash, C. Murdoch, J. Holmes, ‘Strategies for Prosecuting Mass Starvation’, in this special issue.

<sup>42</sup> S/RES/794 (1992), para. 5.

<sup>43</sup> China, Russia and the United States are partners in the endeavour to attempt to ignore the existence of the only permanent international criminal jurisdiction. Russia and the USA in particular have both expressed formally their intention not to ratify the Rome Statute — the USA already back in 2002: see <https://treaties.un.org/doc/Publication/CN/2002/CN.434.2002-Eng.pdf>; while Russia sent a communication along similar lines to the UN Secretariat, more recently, on 30 November 2016: see <https://treaties.un.org/doc/Publication/CN/2016/CN.886.2016-Eng.pdf> (both visited 16 September 2019). This position may have to do with the fact that the Court is in theory entitled to exercise its jurisdiction over nationals of either of these States, irrespective of their acceptance of the Statute, for crimes allegedly committed in the territory of States Parties.

<sup>44</sup> D. Marcus, ‘Famine Crimes in International Law’, 97 *American Journal of International Law* (2003) 245-281, more recently criticized by R.C. DeFalco, ‘Conceptualizing Famine as a Subject of International Criminal Justice: Towards a Modality-Based Approach’, 38 *University of Pennsylvania Journal of International Law* (2017) 1113-1187. In addition, see the article by Jordash, Murdoch and Holmes, *supra* note 41, in this special issue of the *Journal of International Criminal Justice*.

<sup>45</sup> See B. Van Schaack *supra* note 39.

extreme measures, to drive them back, so as to hasten on the surrender'.<sup>46</sup> And the same holds true for subsequent developments ranging from the aftermath of the First World War to the Yugoslav wars of the 1990s.<sup>47</sup> And, although sporadically in some ICTY cases there were references to starvation, it is undeniable that the crime of starvation as such was not explicitly contained in the ICTY Statute nor in the ICTR Statute.

Hence, one could argue that, as a consequence of the permissive approach to starvation under IHL, international criminal law only managed to criminalize starvation very recently, and still it requires that starvation crimes are narrowly construed as to limit punishment to instances where deprivation of objects indispensable for survival is clearly unlawful, and starvation is used 'as a method of warfare'. Moreover, at least under the ICC Statute — and until the amendment recently proposed by Switzerland<sup>48</sup> is adopted — the war crime of starvation can only be prosecuted when committed in international armed conflicts.<sup>49</sup> In this regard, it is interesting to note that resolution 2417 (2018) does not differentiate between IAC and NIAC (as neither the preamble nor operative paragraph 10 mention it).

Despite some basic elements, it is thus warranted to conclude that ICL (similarly to IHL and IHRL) is still largely inadequate to counter effectively and to stigmatize appropriately the use of starvation in situations of armed conflict, let alone in cases of internal strife and violence (which escape the characterization as armed conflicts altogether) that remain outside the scope of the current criminalization of starvation. Additionally, even though one may certainly suggest that — where the necessary conditions are met — starvation crimes may be captured under the umbrella of crimes against humanity,<sup>50</sup> the stigmatization effect that is linked to criminalization would be lost for lack of specificity, since starvation-related conducts are not mentioned explicitly anywhere in ICL instruments referring to crimes against humanity.

The text of resolution 2417 (2018) is not particularly progressive in this regard, but it might be still seen as a useful element for interpretative purposes. As far as the 'criminal dimension' of starvation is concerned the resolution is extremely vague. The current lack of popularity among the P3 of ICL in general, and the ICC more in particular, also explains why resolution 2417 (2018) has been so timid from a criminal-law point of view. As mentioned above, not only the resolution purposely refrains from mentioning the only international instrument which criminalizes starvation as a war crime, but it also avoids referring to the ICC in any way. In this regard, the resolution merely contains a vague reference to the international criminal justice system in its preamble. The reference is contained in preambular paragraph 20, when '[s]tressing that the fight against impunity and to ensure accountability for genocide, crimes against humanity, war crimes and other egregious crimes has been strengthened through the work on and prosecution of these crimes in the national and international criminal justice system, ad hoc and mixed tribunals as well as specialized chambers in national tribunals'. A rather empty formula which of course cannot produce any immediate effect. It is, nonetheless, a reminder that the tools of ICL can be employed also to react to actions or omissions

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<sup>46</sup> *Instructions for the Government of Armies of the United States in the Field* (Lieber Code), 24 April 1863, Arts 17 and 18, available at <https://ihl-databases.icrc.org/ihl/INTRO/110> (visited 16 September 2019).

<sup>47</sup> See, in greater detail, Van Schaack, *supra* note 39.

<sup>48</sup> The amendment proposal was submitted on 28 August 2019, and is available online at <https://treaties.un.org/doc/Publication/CN/2019/CN.399.2019-Eng.pdf> (visited 16 September 2019).

<sup>49</sup> On the status of customary international law on the war crime of starvation in non-international armed conflict, and the Swiss amendment proposal, see D'Alessandra and Gillett, *supra* note 37.

<sup>50</sup> In this sense, M. Ventura, 'Starvation as an Underlying International Crime: Exploring the Legal Possibilities', in this special issue.

leading to deliberate starvation. Clearly such vague language was a price to pay for a unanimous resolution which could represent the starting point of a longer journey towards the abolishment of hunger in armed conflict. It is still puzzling to note that the Council could not go further than restating the obvious on the war crime of starvation. It is all the more surprising, particularly if one notes that already back in early nineties, in resolution 794 (1992), the Council had ‘strongly [condemned] all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirm[ed] that those who commit or order the commission of such acts will be held individually responsible in respect of such acts’ (operative paragraph 5). And, in the case of Somalia, the Council was clearly referring to a non-international armed conflict — and hence the Council was already implicitly endorsing the idea that starvation and wilful impediment of delivery of humanitarian aid were a war crime in such type of conflict back in the early nineties.<sup>51</sup>

As far as the criminal-law dimension is concerned, it appears that the Council preferred to focus more closely on the role of domestic systems of criminal law. In this regard one could refer to operative paragraph 10, whereby the Council

‘[s]trongly urges States to conduct, in an independent manner, full, prompt, impartial and effective investigations within their jurisdiction into violations of international humanitarian law related to the use of starvation of civilians as a method of warfare, including the unlawful denial of humanitarian assistance to the civilian population in armed conflict, and, where appropriate, to take action against those responsible in accordance with domestic and international law, with a view to reinforcing preventive measures, ensuring accountability and addressing the grievances of victims’.

Now this provision can be read as entailing a robust encouragement to states to operate within their domestic criminal law systems to criminalize, to investigate, to prosecute and to punish effectively offences which can be characterized as starvation crimes. Moreover, the fact that prosecution and punishment might occur at domestic level would entail that preparatory conducts as well as criminal omissions could also be captured and appropriately criminalized. Paragraph 10, by strongly urging states to conduct investigations is more than an authorization, could be interpreted as an invitation to states to undertake swift and prompt action at domestic level with the purpose of investigating and with a view to reinforcing preventive measures. This means establishing criminal accountability under national legislation,<sup>52</sup> where not yet done, and allow both domestic and international courts to establish and exercise jurisdiction over such crimes. This would also entail that ICC States Parties should, in accordance with operative paragraph 10, support the extension of Article 8(2)(b)(xxv) to non-international armed conflicts, as per an amendment proposal introduced by Switzerland, which should be examined by the Assembly of States Parties in 2019.<sup>53</sup>

In essence, resolution 2417 (2018) restates that starvation can amount to a war crime without any distinction between international and non-international armed conflicts; hence it can be interpreted as encouraging States to adopt domestic legislation to fully criminalize starvation crimes. Moreover, it would also seem to invite all states to support amendments to the Rome Statute that would reflect the criminal nature of starvation also in non-international armed conflicts. This appears

<sup>51</sup> Zimmermann, *supra* note 8, at 5-6.

<sup>52</sup> E.g. the German Code of Crimes Against International Law (CCAIL, *Völkerstrafgesetzbuch*), 22 April 2002, Section 11.5, available in English at <https://ihl-databases.icrc.org/ihl-nat/0/09889d9f415e031341256c770033e2d9/SFILE/Act%20to%20Introduce%20the%20Code%20of%20Crimes%20against%20International%20Law%20of%2026%20June%202002%20%5B1%5D.pdf> (visited 16 September 2019).

<sup>53</sup> *Supra*, note 48.

to be particularly fitting, especially considering that the resolution does not make any distinction between IAC and NIAC as far as the war crime dimension is concerned.

Finally, the general scope of the resolution and its broader overarching message could be of some use in the interpretation of ICL provisions and in the implementation of criminal responsibility for starvation crimes at domestic level.

To sum up: On the basis of the general condemnation contained in resolution 2417 (2018) one may consider (a) that there is definitive evidence that starvation as a method of combat is criminalized both in international and non-international armed conflicts; (b) it would be consistent with the spirit of the resolution for Member States to criminalize in their domestic criminal law systems the unlawful deprivation of food and other objects essential to survival, irrespective of the nature of the conflict and even of whether or not there is a conflict; (c) states are encouraged to cooperate at the international level to prosecute and punish starvation crimes, including by amending the ICC Statute as appropriate.

#### **6. Conclusion: A Step in the Right Direction.**

Resolution 2417 (2018) restated general and important principles of IHL, IHRL and ICL. It made it explicit that the Security Council has the power to do more and expressed its commitment to do so. It requested three forms of reporting by the Secretary-General in various formats:<sup>54</sup> through the general annual report on the protection of civilians (and in this regard it is a bit disappointing that the 2019 Secretary-General's Report devoted only two paragraphs to the topic);<sup>55</sup> in the context-specific reports (operative paragraph 11); and in cases where there is a risk of widespread food insecurity related to conflict (operative paragraph 12) as well as deliberate and unlawful denial of humanitarian assistance or unlawful obstruction. Depending on how they will be used by the UN Secretariat, these could be important tools in the fight against conflict-related hunger.

Soon after the adoption of the resolution, the UN Office for Coordination of Humanitarian Affairs issued a 'white note' on Yemen,<sup>56</sup> which led to a session of the Council on 23 October 2018. Admittedly, resolution 2417 (2018) helped in pushing forward debates and some limited action by the Council. Although the reaction so far has been mostly limited to discussions, these are normally the first necessary step of any sustainable strategy to address a specific matter in conflict situations, where the belligerent parties and their allies often have competing interests.

Broadly speaking, this resolution may represent the foundation for more systematic engagement by the Council with the issue of hunger in armed conflicts and, at the same time, it calls on Member States to do more in different ways (e.g. neighbouring states are requested to provide

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<sup>54</sup> SC Res 2417 (2018), operative paras 11-13: '11. Requests the Secretary General to continue to provide information on the humanitarian situation and response, including on the risk of famine and food insecurity in countries with armed conflict, as part of his regular reporting on country specific situations; 12. Further requests the Secretary General to report swiftly to the Council when the risk of conflict induced famine and widespread food insecurity in armed conflict contexts occurs, and expresses its intention to give its full attention to such information provided by the Secretary General when those situations are brought to its attention; 13. Further requests the Secretary General to brief the Security Council every 12 months on the implementation of this resolution within his annual briefing on the protection of civilians.'

<sup>55</sup> *Protection of civilians in armed conflict – Report of the Secretary-General*, UN Doc. S/2019/373, 7 May 2019, paras 47-48.

<sup>56</sup> Security Council Report, *Yemen: Briefing on the Humanitarian Crisis*, 22 October 2018, at <https://www.whatsinblue.org/2018/10/yemen-briefing-on-the-humanitarian-crisis.php> (visited 16 September 2019). And see, in particular, the reference to SC Res 2417 (2018) in the presentation by the Under-Secretary-General in charge of OCHA, Mark Lowcock, in the verbatim records of the meeting of the Council, UN Doc. S/PV.8379, 23 October 2018, at 1-3.

assistance to facilitate delivery of aid; all those with information on unlawful denial of assistance are invited to inform the Secretary-General and the Council; all States that are in a position to open proceedings in cases where starvation as a war crime has been committed should do it). The resolution does not necessarily require — but it certainly allows — states to take a more robust stance in reacting to crimes of starvation by adopting relevant national legislation. Moreover, it can be argued that the resolution is an implicit recognition that starvation is a war crime in any kind of armed conflict, and it can serve as a basis for states to adopt the proposed amendment to the ICC Statute reflective of such stance.

Although the resolution refrains from any major leap, it is a step in the right direction and strengthens the commitment of the international community to react to the trend. It could be resorted to in advancing an innovative interpretation of provisions regarding starvation crimes.

The next steps ought to be taken by Member States in different context — their domestic legal systems, in the Assembly of States Parties to the Rome Statute, as well as (if need be) in the framework of the parties to the Geneva Conventions and protocols, by reducing the space for starvation conduct to be carried out with impunity. At the very least, we should move towards a reversed presumption, by which starvation of civilians in armed conflict should be presumed to be both unlawful and criminal, particularly when there is obstruction to the delivery of humanitarian assistance, unless there is any evidence to the contrary (e.g. that starvation is an unforeseen consequence of lawful military measures; or that it has occurred as a consequence of a mistake in the implementation of measures which are not *per se* prohibited under IHL).

It is unsatisfactory that current IHL and ICL rules are ambiguous, in particular as far as they prohibit starvation of civilians ‘as a method of warfare’. This is perplexing as civilians cannot — as a general rule — be the object of military violence and hence no act against civilians could be employed as a lawful method of warfare. As a matter of fact, it may be argued that deliberately depriving the civilian population of objects indispensable for its survival should be seen *per se* as a war crime — there is no need to require that starvation be used ‘as a method of warfare’. Even the fact of using starvation against combatants, by deliberately depriving civilians of objects indispensable for their survival, could hardly be seen as coherent with the principles of distinction or proportionality. The resolution does not take any position on the issue, refers back to IHL obligations and merely restates traditional language. However, it could be argued that, in light of the renewed condemnation by the international community of starvation of civilians, despite the flaws of resolution 2417 (2018) (which are also due to the ambiguities of IHL and IHRL provisions with respect to the issue of starvation), an interpretation more in line with the overarching goal of ensuring strengthened protection for civilians could be suggested. For example, the redundant and misleading requirement (*hélas* codified in the ICC Elements of Crimes) that ‘[the] perpetrator intended to starve civilians *as a method of warfare*’ (*emphasis added*) could be ignored altogether as objectively inherent in the use of starvation against civilians during an armed conflict.

Despite some inevitable flaws, resolution 2417 (2018) has the undeniable merit of placing the issue of starvation on the agenda of the Security Council and creating the basis for a systematic treatment of the topic in conflict-related situations, with a robust involvement of the UN Secretariat that will be reporting on the issue in both a specific and a cross-cutting manner. Whether or not this resolution will be a game changer in the fight against starvation is yet to be seen — and will very much depend on the follow-up measures that both states at domestic level and the Security Council at the international level will adopt to strengthen the protection of civilians.