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Hidden Hunger in Peacetime and Wartime: Retailoring the ‘Responsibility to Protect’ to Food- Power Discourses in Burundi and North Korea, Between International Politics and International Law

Riccardo Vecellio Segate[†]

ABSTRACT: The framework known as ‘Responsibility to Protect’ (‘R2P’) has afforded legal endorsement and codification to the doctrine that States hold responsibility under public international law for the protection of their own citizens and of those who reside within their prescriptive jurisdiction. This holds true in peacetime and wartime alike, and it is shaped by an understanding of ‘security’ which increasingly calls for comprehensive and multifaceted assessments (human security) to replace the traditional ones centred on military protection. Within the human-security paradigm, the right to food stands at the forefront of a reconceptualization which proceeds beyond the quantity of available (or accessible) food, up to scrutinise its nutritional value more pertinently, and human capabilities in context. ‘Hidden hunger’—the chronic insufficiency of nutrients intake that victimises hundreds of millions of children worldwide—is currently dismayingly unaddressed in legal scholarship, despite

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representing a proven trigger of violent spirals which turn countries to conflict and frustrate their Gross Domestic Product (“GDP”). It is therefore essential to analyse the chances to successfully invoke the R2P framework as to intervene in countries whose ruling classes can be identified as the major cause of protracted hidden hunger (either because those regimes keep their population in a condition of civil conflict, or due to those rulers’ individual greed and unconstrained authoritarianism). The case studies of Burundi and North Korea respectively are enlightening to this end, and surprisingly illustrate that whereas, strictly legally, the R2P provides (modest) enhanced room for perpetrators accountability, its political impact restricts the options available for the international community to argue that the wilful production (or passive acceptance) of hidden hunger violates the internationally recognised ‘right to food’, and intervene accordingly whenever necessary.

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I. Introduction

Once inside, there is an unnerving quiet to the children’s ward. The healthier babies cry, but many just stare blankly. It’s not immediately clear if their eyes look too big or their faces too small. *Malnourishment can have very few tell-tale signs to an untrained eye* — perhaps just a paleness, a smallness. As the scale continues, some children have lost hair or had their hair turn orange, some have swollen bellies, or no belly to speak of, or bones sticking out through wilted skin. Some of them have aged faces, with skin that wrinkles when they cry.¹

¹ Jane Ferguson, *How We Got the Images You Weren’t Meant to See in Yemen*, PBS NEWSHOUR, (July 3, 2018), <https://www.pbs.org/newshour/world/reporting-in-yemen-the-city-that-has-fallen-off-a-cliff> [<https://perma.cc/CF4A-HKFH>] (discussing the Author’s experience reporting from Yemen, which won her several international prizes for

The purpose of this study is to provide an innovative analytical framework to compare the cases of Burundi and North Korea in relation to potential claims of non-compliance with their responsibility to protect (“R2P”) their populations. This comparison will be performed by engaging with ongoing discourses on the right to food (“RTF”), scrutinised primarily—although not exclusively—from an international human rights law (“IHRL”) perspective, and in its unavoidable interfaces with international humanitarian law (“IHL”),² international criminal law (“ICL”),³ and general public international law (“PIL”). More accurately, this article wonders whether the international community is entitled to invoke a ‘breach’ of the R2P owing to States’ non-compliance with their duty to address their populations’ RTF, with particular reference to long-lasting ‘hidden hunger’ (a sub-typology of perpetually harmful state of chronic malnutrition⁴). Indeed, whilst the controversial R2P concept applies to man-made (or man-worsened) situations of manifest, acute hunger—and even in these situations, international politics may hinder its effectiveness—its applicability to pervasive, underground malnutrition due to a State’s grave hindrance or omissions is far less straightforward a conjecture.

To answer this interrogative, several steps will need to be accomplished. Part II will inspect the RTF, especially in its qualitative component linked to the fighting against the so-called hidden hunger,⁵ and report insightful exemplifications from Israel

investigative war journalism) (emphasis added).

² See ILIAS BANTEKAS & LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS: LAW AND PRACTICE* 658–59 (2d ed. 2013).

³ “[V]iolations of the right to housing, food, education, work, health or other ESCR [. . .] can give raise to a [S]tate’s violation of ESCR as well as individual criminal responsibility for war crimes.” Evelyne Schmid, *War Crimes Related to Violations of Economic, Social and Cultural Rights*, 71 *HEIDELBERG J. INT’L L.* 523, 540 (2011).

⁴ HANS KONRAD BIESALSKI, *HIDDEN HUNGER* 2 (2013). Overweight and underweight can both be symptomatic of this malaise, which is not necessarily as much *prima facie* evident as extreme starvation is, yet it is in potential equally disruptive for affected individuals’ life and the ‘proficient,’ resilient running of their societies. See also AMY R. BEAUDREAULT, *NUTRITION POLICY PRIMER: THE UNTAPPED PATH TO GLOBAL HEALTH, ECONOMIC GROWTH, AND HUMAN SECURITY* 1, 3 (CTR. FOR STRATEGIC & INT’L STUD. 2019), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/NutritionPrimer_layout_WEB_v5.pdf [<https://perma.cc/W35R-G6JK>]. For exhaustive data on hidden hunger, see Hannah Ritchie & Max Roser, *Micronutrient Deficiency*, *OUR WORLD IN DATA* (Aug. 2017), <https://ourworldindata.org/micronutrient-deficiency> [<https://perma.cc/5C5N-E5S9>].

⁵ The reader is advised that certain academic publications on food insecurity are

and Palestine. Part III will assess the soft law of R2P, with particular care to the different normative stances expressed by key global players. Part IV will expound the case-studies of Burundi and North Korea, enucleating the different approaches to the aforementioned rights and concepts in peacetime (North Korea) and wartime (Burundi).⁶ Part V will draw a comparison between Burundi and North Korea, supported by the theoretical grounds made explicit in the first sections. Part VI will conclude, perhaps surprisingly, that not only is the R2P of negligible help in addressing RTF violations in wartime, but paradoxically, by spelling out more precise grounds for intervention, it politically (although *not* legally) resulted in a de facto restricting regime. On the contrary, R2P in peacetime can provide some useful legal bases to secure populations' right to enjoy sufficient nutrition (not exclusively in quantitative terms). It has been hypothesised that “[h]umanitarianism may have become an outlet for those looking for a place to express their politics in a place of purity, but it offers no such refuge[.]”⁷ This article seeks to demonstrate that with regards to human-induced or human-worsened (hidden) hunger, this prophecy has already fulfilled itself.

This analysis will rely primarily on process-narratives extrapolated from the selected case-studies, and secondarily rest on statistics, estimations, projections, and other empirical data retrieved from works by other Authors. This is to best cater⁸ for the

unaware of the aforementioned technical, scientific meaning of ‘hidden hunger,’ so that they rather intend to examine generalised conditions of nutritional insecurity that escape metrics, surveys, and figures as reported in publicly released statistics. *See, e.g.,* Madeleine ‘Maddy’ Power et al., *Hidden Hunger? Experiences of Food Insecurity Amongst Pakistani and White British Women*, 120 BRIT. FOOD J., 2716, 2716-32 (2018).

⁶ Burundi and North Korea have been chosen not only for exemplifying wartime and peacetime conditions, but also for standing as the most food-insecure countries in Africa and Asia respectively, once one has omitted to consider ‘failed States’ such as Somalia. SARAD TANDON ET AL., , PROGRESS AND CHALLENGES IN GLOBAL FOOD SECURITY 41 (U.S. DEP’T OF AGRIC. 2017), <https://www.ers.usda.gov/webdocs/publications/84526/eib-175.pdf?v=7156> [<https://perma.cc/6BSV-ASX8>] (pursuing the same logic adopted by previous studies, and illustrating “different degrees of abuse of the right to food and different political and economic mechanisms that resulted in its abuse.”). RHODA E. HOWARD-HASSMANN, STATE FOOD CRIMES 4 (2016).

⁷ MICHAEL N. BARNETT, EMPIRE OF HUMANITY: A HISTORY OF HUMANITARIANISM 237 (2011).

⁸ Deborah R. Hensler & Matthew Alexander Gasperetti, *The Role of Empirical Legal Studies in Legal Scholarship, Legal Education and Policy Making: A US Perspective*, in RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE 450, 452 (Rob Van Gestel, Hans W. Micklitz & Edward L. Rubin eds., 2017).

exigency to uncover what lies behind phenomena which have been described at length in social-science scholarship, but whose *legal* meaning and implications are yet to be assessed.

II. Hidden Hunger: Towards a Qualitative ‘Right to Food’ for a Dignifying Life

In public health, there is increasing evidence that social inequality, *not just absolute deprivation*, is bad for our health. . . . Historically, human rights law has highlighted that poverty is not only about lack of money; it is also about discrimination and disempowerment. . . . Further, in a human rights framework, the ways in which certain people are low on the ladder represent not just a tragedy inherent vulnerability but active processes of exclusion and marginalization, for which there should accountability and redress.⁹

The RTF,¹⁰ which must “not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories,”¹¹ is ordinarily understood as a negative right rather than a positive one. Indeed, the obligation that States owe their citizens is not necessarily to provide them with food directly for free (regardless of the circumstances),¹² but to avoid any undue interference with their access to sufficient amount of food¹³ for their survival and, in the understanding of some Authors, their overall wellbeing. This bounds the work of international organizations as well,¹⁴ not to mention the functioning of private

⁹ Alicia Ely Yamin, *Shades of Dignity: Exploring the Demands of Equality in Applying Human Rights Frameworks to Health*, 11 HEALTH & HUM. RTS. J. 1, 2 (2009) (emphasis added).

¹⁰ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948).

¹¹ Comm. on Econ., Soc. & Cultural Rts., General Comment No. 12: The Right to Adequate Food, U.N. Doc. E/C.12/1999/5, ¶ 6 (May 12, 1999).

¹² BANTEKAS & OETTE, *supra* note 2, at 349.

¹³ Especially in armed conflicts, “such scenarios can often be understood as violations of ESCR, particularly where [S]tates fail to respect rights, such as *by directly interfering* with the enjoyment of people’s access to housing, food, education or health, or where states fail to protect persons within their jurisdiction from abuses by non-state actors.” See Schmid, *supra* note 3, at 524, 527 (emphasis added).

¹⁴ Fons Coomans, *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations*, in 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 360, 371–72 (Armin von Bogdandy, Rüdiger Wolfrum & Christiane E. Philipp eds., 2007).

companies within numerous domestic jurisdictions¹⁵ as much as transnationally.¹⁶ And yet, either by providing it directly or not hampering the access to it, a State's duty to guarantee food availability is part of any security-based modern 'social contract' between governors and governed.¹⁷ Any Hobbesian-Rousseauian pact bestows a duty of policy coherence upon the governors, especially when resources are scarce or ill-distributed: that "a [S]tate ... simultaneously commit[s] to a national hunger reduction strategy while participating in trading arrangements that leave their citizens virtually without recourse to corporations that commit rights abuses" is not acceptable.¹⁸ Managing food security presupposes a careful balance between domestic consumption and stockpiling and international import/export of foodstuffs, which is why even the policies pursued by the World Trade Organization (WTO) strive to ensure that States never choose to disregard food security for the only sake of trading more openly or efficiently.¹⁹ The same holds true with regards to land-intensive foreign investments, that are to be sought only insofar as they do not prevent local citizens from feeding themselves by managing their own properties and—collectively—their State's natural resources.²⁰

¹⁵ See Surabhi Chopra, *The Rights to Food and Water: Dependencies and Dilemmas*, INST. FOR HUM. RTS. & BUS. 27 (2010), https://www.ihrb.org/pdf/Right_to_Food_and_Water_Dependencies_and_Dilemmas.pdf [<https://perma.cc/Q3FV-4X2L>].

¹⁶ See Jessica Fanzo et al., *Tying the Knot: An Interdisciplinary Approach to Understanding the Human Right to Adequate Nutrition*, 57 COLUM. J. TRANSNAT'L L., 62, 104-07 (2018).

¹⁷ Redie Bereketeab, *State Legitimacy and Government Performance in the Horn of Africa*, 79 AFR. STUD. 51, 58 (2020).

¹⁸ Nandini Ramanujam, Nicholas Caivano & Semahagn Gashu Abebe, *From Justiciability to Justice: Realizing the Human Right to Food*, 11 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 1, 16 (2015).

¹⁹ See generally Michael Fakhri, *A History of Food Security and Agriculture in International Trade Law, 1945-2017*, in NEW VOICES AND NEW PERSPECTIVES IN INTERNATIONAL ECONOMICS LAW, 55 (John D. Haskell & Akbar Rasulov eds., 2019); Kerstin Mechlem, *Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture*, in 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 127 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2006).

²⁰ See Christian Häberli & Fiona Smith, *Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid 'Land Grab'*, 77 MOD. L. REV. 189, 200 (2014); see also Carmen G. Gonzalez, *World Poverty and Food Insecurity*, 3 PENN. ST. J.L. & INT'L AFF. 56, 80-2 (2015).

Relatively recently,²¹ the focus also shifted from quantity to quality:²² not only does a population enjoy the right to access a sufficient ‘level’ of nutrition, but nourishment must also cover their basic physical needs.²³ For instance, it must compute the access to essential micronutrients, the lack thereof leading to the so-defined ‘hidden hunger,’²⁴ severe diseases and, ultimately, to death.²⁵ Children are particularly vulnerable to this phenomenon,²⁶ which is detrimental to their physical and mental development and significantly shortens their life expectancy.²⁷ “What the United

²¹ Unfortunately, until one decade ago, it was still possible to denote the perpetuation of exceedingly parochial narratives such as that food quality in the developing world is not a concern because people there are hungry [*sic*], thus only quantity matters instead. See, e.g., HANS MORTEN HAUGEN, *THE RIGHT TO FOOD AND THE TRIPS AGREEMENT: WITH A PARTICULAR EMPHASIS ON DEVELOPING COUNTRIES’ MEASURES FOR FOOD PRODUCTION AND DISTRIBUTION* 120-26 (2007). “This emphasis on hunger also implies that the focus in this study will be on accessibility of food, which is the prevailing concern in developing countries. Issues relating to food quality or acceptability, which is a stronger concern in many industrialized countries, will not receive much attention. [. . . T]here is no doubt that, concerning food, the term ‘adequate’ must refer to a minimum daily food intake. Hunger exists as a consequence of food deprivation, or not having enough to eat.” *Id.* at 120.

²² See Cecilia Rocha, *Food Insecurity as Market Failure: A Contribution from Economics*, 4 J. HUNGER & ENV’T NUTRITION 5, 7-8 (2007).

²³ “The degree to which concern with micronutrient deficiencies became established within the development discourse could be seen, for instance, in the 2008 Copenhagen Consensus conference of leading international economists and specialists, who chose micronutrient remediation as one of the most cost-effective development interventions.” AYA HIRATA KIMURA, *HIDDEN HUNGER: GENDER AND THE POLITICS OF SMARTER FOODS* 2 (2013).

²⁴ “A chronic lack of micronutrients – vitamins and minerals – whose effects may not be immediately apparent and whose consequences may be long-term and profound.” Hans Konrad Biesalski, *Hidden Hunger in the Developed World*, in *THE ROAD TO GOOD NUTRITION: A GLOBAL PERSPECTIVE* 39, 40 (Manfred Eggersdorfer et al. eds., 2013); see also Destaw A. Yigzaw, *Hunger and the Law: Freedom from Hunger as a Freestanding Right*, 36 HOUS. J. INT’L L. 655, 660–61 (2014).

²⁵ According to the United Nations, hidden hunger “increases vulnerability to infection, birth defects and impaired development and can lead to premature death.” Hilal Elver (Special Rapporteur on the Right to Food), *Rep. of the Special Rapporteur on the Right to Food and Nutrition*, U.N. Doc. A/71/282 (Aug. 3, 2016).

²⁶ See generally Judith Hodge, *Hidden Hunger: Approaches to Tackling Micronutrient Deficiencies*, in *NOURISHING MILLIONS: STORIES OF CHANGE IN NUTRITION* 35 (Stuart Gillespie et al. eds., 2016); Victor M. Aguayo, *One in Three Children Do Not Get the Nutrition They Need*, *WORLD ECON. F.* (Oct. 15, 2019), <https://www.weforum.org/agenda/2019/10/one-in-three-children-dont-get-the-nutrition-they-need/> [<https://perma.cc/ED89-V6U4>].

²⁷ “For instance, iron deficiency anaemia impacts negatively on cognitive

Nations Children's Fund (UNICEF) calls 'hidden hunger' is undernourishment and/or malnutrition between birth and the age of five, and it has disastrous effects: a child . . . will never recover . . . and will be disabled for life".²⁸ Unsurprisingly, the relevant Convention specifies that the food provided must be "nutritious,"²⁹ echoed by the later Principles for Responsible Investment in Agriculture and Food Systems.³⁰ Scholars have plentifully demonstrated that as a consequence of the deregulated financialization of the real economy,³¹ the resultant sharp price inflation of food commodities between 2006 and 2008, and governments' inability to handle the crisis by ensuring essential levels and diversity of *affordable* food,³² children in Central

development and academic performance in school-age children . . . [v]itamin A deficiency is a leading cause of blindness and corneal damage. In developing countries, 163 million children were estimated to be vitamin A-deficient." U.N. DEP'T OF ECON. & SOC. AFF., WORLD ECONOMIC AND SOCIAL SURVEY 2013: SUSTAINABLE DEVELOPMENT CHALLENGES, U.N. Doc. ST/ESA/344, at 89-91, U.N. Sales No. E.13.II.C.1 (2013), available at https://www.un.org/en/development/desa/policy/wess/wess_current/wess2013/WESS2013.pdf [<https://perma.cc/A4FB-MET4>]. Another example—an exceedingly severe one—comes from the noma disease. See 'The Tragedy of Noma', prepared by Mr. Jean Ziegler, member of the Human Rights Council Advisory Committee, A/HRC/AC/3/CRP.3, 31 July 2009, ¶¶ 5, 9, 12, 41; Human Rights Council, Preliminary Study on Severe Malnutrition and Childhood Diseases with Children Affected by Noma as an Example, A/HRC/AC/7/CRP.2, ¶ 37 (Aug. 2, 2011); Human Rights Council, Study of the Human Rights Council Advisory Committee on severe malnutrition and childhood diseases with children affected by noma as an example, A/HRC/AC/8/7, ¶¶ 8-9 (Jan. 23, 2012).

²⁸ Jean Ziegler (Special Rapporteur on the Right to Food), *Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food*, ¶ 6, U.N. Doc. A/56/210 (July 23, 2001).

²⁹ G.A. Res. 44/25, United Nations Convention on the Rights of the Child art. 24.2(e) (Sept. 2, 1990).

³⁰ Principles 1(i), 1(iv) and 8(vi); all of these ten Principles, which are obviously soft law, were endorsed by the Committee on World Food Security on October 15, 2014. COMM. ON WORLD FOOD SEC., PRINCIPLES FOR RESPONSIBLE INVESTMENT IN FOOD AND AGRICULTURE (2014), <http://www.fao.org/3/a-au866e.pdf> [<https://perma.cc/T9QM-N6XG>].

³¹ See generally Anna E. Chadwick, *Gambling on Hunger? The Right to Adequate Food and Commodity Derivatives Trading*, 18 HUM. RTS. L. REV. 233 (2018).

³² "There are three basic approaches to coping with the impact of high food prices once they hit world markets: domestic price stabilisation, increasing supplies available in local markets, and providing safety nets to poor consumers. All three are directed at and must be managed by individual countries themselves." Charles Peter Timmer, *Food Security in Asia and the Pacific: The Rapidly Changing Role of Rice*, 1 ASIA & PAC. POL'Y STUD. 73, 85-86 (2014).

African Republic, Ethiopia, Liberia and Sierra Leone have suffered long-term physical harm provoked by scarce dietary diversity and restricted intake of essential nutrients.³³ This is not surprising: “sharp increases in food prices can have as great an impact on hunger and mortality as crop failures . . . [A S]tate that lets this happen has failed to live up to its obligation to protect [its most vulnerable citizens’] right to food from the actions of other enterprises and individuals.”³⁴

Notably, the irresponsible, unaccountable,³⁵ and inhumane (as well as unlawful)³⁶ Israeli segregation of Palestinians and expropriation or confiscation of their private property in the Gaza

³³ Anna E. Chadwick, *Commodity Derivatives, Contract Law, and Food Security*, 9 *TRANSNAT’L LEGAL THEORY* 371, 372 (2018). Instead, it is not fully demonstrated that increased prices have resulted in riots and eventually led to the Arab Spring; regrettably, academic literature is often miscited to that effect by other scholars who cite previous works superficially. See Lander & Vetharianam reporting that “the violence that stemmed from the Arab Spring also took place in the context of rapid surges in the cost of basic commodities, including food,” despite the fact that its supporting source (Van Weezel) endeavoured to question exactly the pertinence of such link, as “to add some nuances to the current consensus in the literature, that higher food prices are strongly associated with civil unrest.” Brian Lander & Rebecca Vetharianam Richards, *Addressing Hunger and Starvation in Situations of Armed Conflict - Laying the Foundations for Peace*, 17 *J. INT’L CRIM. JUST.* 675, 686-87; see also Stijn van Weezel, *Food Imports, International Prices, and Violence in Africa*, 68 *OXFORD ECON. PAPERS* 758, 760 (2016). For a sample of literature linking this inflation to the riots, see *contra* Matias E. Margulis, *The World Trade Organization Between Law and Politics: Negotiating a Solution for Public Stockholding for Food Security Purposes*, 9 *TRANSNAT’L LEGAL THEORY* 343, 351 n.33 (2018).

³⁴ *FOOD & AGRIC. ORG., THE RIGHT TO FOOD GUIDELINES: INFORMATION PAPERS AND CASE STUDIES*, 11 (2006), <http://www.fao.org/3/a-a0511e.pdf> [<https://perma.cc/CK9B-B8J8>].

³⁵ But this will hopefully turn for the better soon. See Jeff D. Handmaker & Alaa Tartir, *ICC and Palestine Symposium: The (Non) Effects of Oslo on Rights and Status*, *OPINIO JURIS* (Feb. 6, 2020), <http://opiniojuris.org/2020/02/06/icc-and-palestine-symposium-the-non-effects-of-oslo-on-rights-and-status/> [<https://perma.cc/G2MT-ZPLN>].

³⁶ See Gilles Giacca & Ellen Nohle, *Positive Obligations of the Occupying Power: Economic, Social and Cultural Rights in the Occupied Palestinian Territories*, *HUM. RTS. L. REV.* 491, 515 (2019); see also Winston P. Nagan & Aitza M. Haddad, *The Legal and Policy Implications of the Possibility of Palestinian Statehood*, *U.C. DAVIS J. INT’L L. & POL’Y* 343, 379, 399, 433 (2012). *Contra* Barak Medina, *The Role of the Legislature in Determining Legitimate Responses to Security Threats: The Case of Israel*, in *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* 445, 447 (Aharon Barak et al. eds, 2013).

Strip,³⁷ where IHRL continues to apply³⁸ and the complexity on the ground recursively revives discussions on a brand-new *ius post bellum* to be codified,³⁹ has deprived entire generations of children of a balanced diet,⁴⁰ leading to hidden hunger⁴¹ and related physical and mental deficiencies.⁴² “The idea is to put the Palestinians on a diet, but not to make them die of hunger,” the businessman and legal advisor to Israel’s Ministry of Defense, Dov Weissglas, shamelessly remarked;⁴³ this will cut fertility rates and

³⁷ Shelly Aviv Yeini, *The Law Enforcement Paradigm Under the Laws of Armed Conflict: Conceptualizing Yesh Din v. IDF Chief of Staff*, 10 HARV. NAT’L SEC. J. 461, 464-65; see also HOWARD-HASSMANN, *supra* note 6, at 149.

³⁸ See KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* 193 (2011).

³⁹ Roxana Vatanparast, *Waging Peace: Ambiguities, Contradictions, and Problems of a Jus Post Bellum Legal Framework*, in *JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS* 142, 148 (Carsten Stahn, Jennifer Easterday & Jens Iverson eds., 2014).

⁴⁰ See Jean Ziegler (Special Rapporteur on the Right to Food), *Report Submitted by the Special Rapporteur on the Right to Food*, ¶ 56, U.N. Doc. E/CN.4/2003/54 (Jan. 10, 2003).

⁴¹ “Around 80% of Gazans are dependent on humanitarian aid, mainly food items. Since the blockade, abject poverty has tripled, necessitating a shift in diet from protein-rich to low-cost, high-carbohydrate foods. This shift in diet has triggered concern about the incidence of vitamin and mineral deficiencies.” SEADA HUSSEIN ADEM, *PALESTINE AND THE INTERNATIONAL CRIMINAL COURT* 30 n.144 (2019).

⁴² In the Occupied Territories, “the Palestinians are suffering in the main from micronutrient deficiencies – what the World Health Organisation calls the ‘hidden hunger.’ It may be less dramatic than the protein-energy malnutrition . . . but, on the scale that it is found among the Palestinians, it is just as serious. Micronutrient deficient children fail to grow and develop normally; their cognition is damaged, often severely and irreversibly; and their immune systems are compromised. In both adults and children, mental and physical capacities are impaired. In extreme cases blindness and death result.” Peter Hansen, *Hungry in Gaza*, GUARDIAN (Mar. 4, 2003), <https://www.theguardian.com/world/2003/mar/05/israel.guardiananalysispage> [<https://perma.cc/M5VD-PUZP>]. Scholarly publications have confirmed that a “long history of dispossession and episodes of lower and higher intensity violence” (including unlawful food-deprivation due to spatial surveillance and psychological subjugation, as illustrated in the present analysis) has indeed jeopardized children’s mental health in Palestine; and yet, “[r]ather than considering social suffering an illness that needs to be ‘cured’ it is the issue of collective and cumulative exposure to Israeli aggression and the international communities condoning of it, that needs to be addressed”. Yoke Rabaia, Mahasin F. Saleh & Rita Giacaman, *Sick or Sad? Supporting Palestinian Children Living in Conditions of Chronic Political Violence*, 28 CHILD. & SOC’Y 172, 174, 178 (2014).

⁴³ EVE SPANGLER, *UNDERSTANDING ISRAEL/PALESTINE: RACE, NATION, AND HUMAN RIGHTS IN THE CONFLICT* 187 (2015). Similar threshold-centred narratives have been shaping the Israeli handling of Palestinians’ water-consumption needs. See, e.g., Mia Tamarin, *The Human(ised) Right to Water and Its Limits: The Case of Israel-Palestine*, 6

the redundancy of “masses of economically superfluous young men,” then-Harvard ‘scholar’ Martin Seth Kramer proudly added.⁴⁴ Whatever the reasons, the geopolitical interests at play, and corollary excuses, there can be no doubts about Israel’s responsibilities:

[I]n 1996, 10.6 percent of children under five were stunted, or too short for their age: in 2002 this figure had increased to 16.1 percent, but it decreased to 11.8 percent in 2007. The 2002 figure is two years after the beginning of the second *intifada*, when Israel was particularly exigent in controlling borders. Similarly, the percentage of children under five who were wasted, or underweight, increased from 3.6 in 1996 to 9.4 in 2002, but declined to 1.8 in 2007. A 2007 study of the village of Beit Haroun in Gaza found that more than half the population went without fruit, vegetables, fish, and meat on most days.⁴⁵

And again, “the publicly released maps for the Gaza Strip ... show that 178 km² of the 358 km² within the borders is under cultivation. Using multi-spectral satellite imagery, one can see that it is actually less than 100 km². Much of this was subsequently compromised during the 2018–19 Great Return March demonstrations,”⁴⁶ where 189 Palestinian fatalities were certified by an independent UN investigation and condemned as excessive and unjustified use of lethal force, while no fatality was registered on the conflict-escalating Israeli side.⁴⁷

Gaza has been living for decades under a Kafkian,

INT’L J. WATER GOV. 135, 141-2 (2018).

⁴⁴ M.J. Rosenberg, *Is Harvard Prof Advocating Palestinian Genocide?*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/harvard-prof-urges-popula_b_472191 [<https://perma.cc/9V8G-CRM5>]. Tellingly, Dr. Kramer is an influential and politically active Israeli citizen. Stephen Martin Walt, *Kramer Versus Kramer*, FOREIGN POL’Y (Feb. 28, 2010), <https://foreignpolicy.com/2010/02/28/kramer-versus-kramer/> [<https://perma.cc/8S79-FN8V>]; MAX BLUMENTHAL, GOLIATH: LIFE AND LOATHING IN GREATER ISRAEL 91 (2013); see also Patrick Williams, *Postcolonialism and Orientalism*, in POSTCOLONIALISM AND ISLAM: THEORY, LITERATURE, CULTURE, SOCIETY AND FILM 48, 52 (Geoffrey Nash et al. eds., 2013) (providing academic commentary on Dr. Kramer’s controversial statement).

⁴⁵ HOWARD-HASSMANN, *supra* note 6, at 118.

⁴⁶ Alexander H. Hay et al., *Reconstructing Infrastructure for Resilient Essential Services During and Following Protracted Conflict: A Conceptual Framework*, 101 INT’L REV. RED CROSS 1001, 1017 (2019).

⁴⁷ See Human Rights Council, Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, A/HRC/40/74, ¶¶ 90, 93 (Feb. 25, 2019).

dispossessive, permanent state of exception where not only “individual military officials [*sic*] can determine what foods will be available to families . . . and make judgments about the quality of care that a child might expect from a relative in Gaza versus a parent in the West Bank,”⁴⁸ but such a judgement is a quantitative-only assessment based on abstract governmental calculations over supposedly *survival*-ensuring caloric needs.⁴⁹ This is glaringly incorrect:

nutrient requirements are individually determined and depend on, among other things, the sex and age of each individual. It is therefore difficult to generalize consumption and nutrition data across populations and the data cannot simply be aggregated at household or national levels as has been done with dietary energy intake in the past [. . .]. Such simplification ignores dietary quality. In the past, energy intake was simply used against referenced standards and thresholds established against standard deviations above or below the norm. Moreover, energy intake is only one requirement for sound nutrition. [. . .] Our expanded knowledge of the link between short-term shocks and long-term development has aroused widespread interest in how people build resilience to adversity.⁵⁰

Critically, “[w]hile calorie adequacy may ensure protein adequacy (though not protein quality), it most often fails to quench the hidden hunger”.⁵¹

Israeli legislators routinely frame any domestic and

⁴⁸ Sari Bashi, *Controlling Perimeters, Controlling Lives: Israel and Gaza*, 7 LAW & ETHICS HUM. RTS. 243, 263 (2013).

⁴⁹ *Id.* at 259 n. 42. Calculating dietary needs in such a robotised manner comes as an alienating distortion of the bureaucratic ‘culture of auditing’ that increasingly features in human-rights governmentality. On this culture of ‘micromanagement’ and its too often concealed mishandling. See, e.g., David McGrogan, *The Population and the Individual: The Human Rights Audit as the Governmentalization of Global Human Rights Governance*, 16 INT’L J. CONST. L. 1073, 1097 (2018) (“One of the dangers posed by human rights auditing is that it will come to constitute human rights work practiced *as of right* on subject populations, who in essence become managed—measured, monitored, and assessed—using exactly the same sort of processes that typically result in expressions of power that deny individuals their rights. The “techniques of rule,” that is, are not shifted by the development of human rights auditing. They are in fact reinforced.”).

⁵⁰ Sheryl L. Hendriks, *The Food Security Continuum: A Novel Tool for Understanding Food Insecurity as a Range of Experiences*, 7 FOOD SEC. 609, 611 (2015).

⁵¹ Mahtab Sohrab Bamji et al., *Nutritionally Sensitive Agriculture—An Approach to Reducing Hidden Hunger*, EUR. J. CLINICAL NUTRITION 1, 2 (2020).

international policy in military-security lexicon, with any ensuing impact being left to second-class consideration.⁵² For example, they have turned a blind eye on the fact that the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)⁵³ applies if not to Gaza, which is isolated but not directly controlled by Israel, at least to the occupied territories of the West Bank,⁵⁴ as reaffirmed by the International Court of Justice.⁵⁵ There, Palestinians are not starved by employing the most traditional (and overtly condemned) warfare methods, but brought to the most extreme edge of starvation by means of induced water shortage,⁵⁶ trade restrictions, punitive waiting times, physical barriers, checkpoints, missing judicial review, income waste, destruction of cultivated soil by the settlers,⁵⁷ and surveillance techniques impairing their capability to feed themselves adequately. Indeed, ‘capability’ is defined as “an individual’s *potential* for performance of actions or achievement of desired outcomes through the intentional exercise of deliberate and *autonomous* activity,”⁵⁸ and it is a context-sensitive parameter

⁵² See *The Traditional Security Concept*, 40 ADELPHI PAPERS 9, 13 (2000)

⁵³ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁵⁴ See Committee on Economic, Social and Cultural Rights, *Concluding Observations: Israel*, ¶¶ 15, 31, U.N. Doc. E/C.12/1/Add.90 (May 23, 2003).

⁵⁵ See Diana Kearney, *Food Deprivations as Crimes Against Humanity*, 46 N.Y.U. J. INT’L L. & POLS. 253, 277–78 (2013).

⁵⁶ See Bruce Mitchell, *Innovations and Challenges Related to Resource and Environmental Management*, in SPATIAL DIVERSITY AND DYNAMICS IN RESOURCES AND URBAN DEVELOPMENT 113, 122 (Ashok K. Dutt et al. eds., 2015). In this piece, water shortage is not mentioned as an independent phenomenon, but rather, for its direct bearing on the affliction of micronutrients deficiency, when coupled with the trade, movement and market restrictions unlawfully imposed by the Israeli on the Palestinians.

The negative consequences of water shortages for food production and other economic activities, and the possibility that such shortages could lead to regional conflict or wars, were the triggers for the concept of ‘virtual water.’ Virtual water was conceived . . . to allow water-scarce countries to reduce problems by importing food *requiring significant water inputs*. By adopting a virtual water strategy, and importing the foodstuffs requiring high amounts of water input, governments in water-stressed or water-deprived countries could meet food security needs despite a limited water endowment. (emphasis added).

Id.

⁵⁷ See Tariq Dana, *Localising the Economy as a Resistance Response: A Contribution to the “Resistance Economy” Debate in the Occupied Palestinian Territories*, 15 J. PEACEBUILDING & DEV. 192, 199 (2020).

⁵⁸ Paul B. Thompson, *From World Hunger to Food Sovereignty: Food Ethics and*

whose intercourse with resources varies constantly, depending on daily activities, phase of living, weather conditions, and countless more variables.⁵⁹ Notwithstanding this, it is in Gaza that the repercussions of Israeli policies are felt more dramatically. Israel's heavily-criticized economic siege inflicts "scarcity, pain, and humiliation on the civilian population,"⁶⁰ and contravenes the customary principle that (naval) blockades cannot be implemented to prevent foodstuffs from reaching civilians.⁶¹ Its enforcement through law as legalised biopolitics aligns with a trend of blockades as liberal constructions of meta-warfare in West-derived modernity.⁶² "Is Gaza an experimental lab for the production, maintenance, and profitability of biopolitical debilitation?"⁶³ Deplorably, this sounds like a rhetorical question.

In Palestine and beyond, hidden hunger is thus a crucial threat to the growth of individuals and the development of society,⁶⁴ with appreciable impact on countries' GDP,⁶⁵ even where absolute poverty fades, hidden hunger still soars.⁶⁶ Disability-Adjusted Life Years ("DALYs") metrics have been designed by social scientists

Human Development, 11 J. GLOB. ETHICS 336, 336 (2015) (emphasis added).

⁵⁹ See JENNIFER PRAH RUGER, *HEALTH AND SOCIAL JUSTICE* 59 (2009).

⁶⁰ ORNA BEN-NAFTALI ET AL., *THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY* 350 (2018). For a recount of similar — but not as extreme — dynamics at play in the occupied West Bank, see Aeyal Gross, *Litigating the Right to Health Under Occupation: Between Bureaucracy and Humanitarianism*, 27 MINN. J. INT'L L. 421, 443–48 (2018).

⁶¹ See Martin David Fink, *Contemporary Views on the Lawfulness of Naval Blockades*, 1 AEGEAN REV. L. SEA & MARITIME L. 191, 200–01 (2011).

⁶² See Nicholas J. T. Mulder & Boyd van Dijk, *Why Did Starvation Not Become the Paradigmatic War Crime in International Law?*, in *SITUATING CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF A DIFFERENT LAW* (Kevin Jon Heller & Ingo Venzke eds., forthcoming 2021), available at https://www.academia.edu/40699604/Why_Did_Starvation_Not_Become_the_Paradigmatic_War_Crime_in_International_Law_Forthcoming_in_Kevin_Jon_Heller_and_Ingo_Venzke_eds_Contingency_and_the_Course_of_International_Law_Oxford_University_Press_ [<https://perma.cc/5S3N-RBN3>].

⁶³ Jasbir K. Puar, *The 'Right' to Maim: Disablement and Inhumanist Biopolitics in Palestine*, 14 BORDERLANDS 1, 17 (2015).

⁶⁴ See Robin M. Houston, *Hidden Hunger: A Global Challenge Facing Our Interdependent World*, 5 J. WILDERNESS MED. 146, 149–50 (1994).

⁶⁵ See U.N. DEP'T OF ECON. & SOC. AFFAIRS, *supra* note 27, at 88–91; see also Alexander J. Stein and Matin Qaim, *The Human and Economic Cost of Hidden Hunger*, 28 FOOD & NUTRITION BULL. 125, 131 (2007).

⁶⁶ See SUSTAINABILITY CHALLENGES IN THE AGROFOOD SECTOR 12 (Rajeev Bhat ed., 2017).

and nutritionists to evidence that whilst quantitative forms of hunger have fallen drastically in recent decades because of general improvements in life conditions, hidden hunger is still widespread due to inequal resource distribution, and it decreases globally at a disturbingly lower rate.⁶⁷ To exemplify, in South-East Asia, “despite recent progress . . . in terms of economic growth, agricultural output and exports, poverty reduction and even some indicators of improved child nutrition, the region’s burden of micronutrient deficiencies has improved little for several decades”.⁶⁸ Hidden hunger is by no means confined to the Global South,⁶⁹ yet it hits harder when combined with subjugation, governmental unsuitability and space-control policies which call into question international law ‘templates.’ Despite this, exiguous attention has been dedicated thereto at the U.N. level,⁷⁰ as well as

⁶⁷ See Theda Gödecke et al., *The Global Burden of Chronic and Hidden Hunger: Trends and Determinants*, 17 GLOB. FOOD SEC. 21, 26–28 (2018); see also Julie C. Ruel-Bergeron et al., *Global Update and Trends of Hidden Hunger, 1995-2011: The Hidden Hunger Index*, 10 PLOS ONE 1, 6 (2015); Tyler J. Titcomb & Sherry A. Tanumihardjo, *Global Concerns with B Vitamin Statuses: Biofortification, Fortification, Hidden Hunger, Interactions, and Toxicity*, 18 COMPREHENSIVE REV. IN FOOD SCI. & FOOD SAFETY 1968, 1968–69 (2019).

⁶⁸ Kassandra L. Harding et al., *Hidden Hunger in South Asia: A Review of Recent Trends and Persistent Challenges*, 21 PUB. HEALTH NUTRITION 785, 785 (2018).

⁶⁹ See SUSTAINING GLOBAL FOOD SECURITY: THE NEXUS OF SCIENCE AND POLICY 499 (Robert Zeigler ed., 2019). According to the United Nations, “[t]his is part of the global ‘nutrition transition’, which is seeing a rise in consumption of energy-dense yet nutrient-poor foods.” U.N. Secretary-General, *Interim Report of the Special Rapporteur on the Right to Food*, ¶ I(A)(9), U.N. Doc. A/71/282 (Aug. 3, 2016).

⁷⁰ See U.N. International Human Rights Instruments, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, ¶ 20, U.N. Doc. HRI/MC/2006/7 (May 11, 2006) (stressing quantitative data – like the “minimum level of dietary energy consumption” – whilst making no mention of qualitative issues other than for food not to be poisoned or adulterated). Destaw A. Yigzaw, *Hunger and the Law: Rethinking the Right to Food*, 8 n.31, 9 n.34 (2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962391 [<https://perma.cc/GQM6-Y9TB>]. Therefore, the problem lies with what performance indicators focus on, and not with how they present their findings (quantitatively, *i.e.*, with numbers and indices, or qualitatively, *i.e.*, narratively). Quantitative international indexes are acceptable or even preferable, insofar as they quantify both the calory-intake (*i.e.*, ‘quantity’) and nutrient-variety (*i.e.*, ‘quality’) of food. For another example of shortsightedly quantitative indicator, *i.e.*, the one chosen for the United Nations Development Programme (UNDP) Human Development Report (HDR), see Alexandra Homolar, *Human Security Benchmarks: Governing Human Wellbeing at a Distance*, 41 REV. INT’L STUD. 843, 849–50 (2015). Regrettably, while this indicator is tentatively framed in human-security terms, it fails to acknowledge and address the full spectrum of hunger phenomena as outlined in the present analysis. *Id.*

multilaterally more generally;⁷¹ the U.N. Security Council (“UNSC”) recently turned to famine as a security rather than developmental matter,⁷² but they did not bring hidden hunger to the table. Virtually no engagement with this concept has been paid by *legal* academics, either. Whilst there are dozens of books that at least tangentially explore the multidimensionality of hidden hunger from the perspectives of medicine, economics, criminology, political science, sociology, international relations, biotechnology, development studies, urban planning, demography, and so forth,⁷³ the legal implications of this phenomenon to date are *carefully overlooked* by most international publicists. In addressing hunger as a full-spectrum dimension of human security, lawyers should then embed themselves in critical attitudes producing “situated knowledge . . . rather than representing a detached striving for a virtuosic solo.”⁷⁴ Only one single (although seminal) study has

⁷¹ Resoundingly, the negotiations towards the 2012 Food Aid Convention focused on donors’ obligations with respect to minimal monetary value or quantity-weight of food supply, rather than concurrently setting obligations related to such food’s actual nutritional provision; the Convention takes a holistic approach in that it does refer to adequacy of food provision, yet it remains vague on the operationalisation of said approach. See Annamaria La Chimia, *Food Security and the Right to Food: Finding Balance in the 2012 Food Assistance Convention*, 65 INT’L & COMP. L.Q. 99, 115–20 (2016). Therefore, there would be no surprise if in a survey on World Food Program’s aid delivery, “quality issues emerged as the most important limitation, raised in nearly all operations visited for [the] evaluation. These included delayed or incomplete distributions, inappropriate types of food, lack of food diversity and low-quality, expired or rotten food. Many interviewees linked these problems to WFP’s perceived prioritizing of quantity over quality.” See STEETS ET AL., EVALUATION OF WFP POLICIES ON HUMANITARIAN PRINCIPLES AND ACCESS IN HUMANITARIAN CONTEXTS 7 (U.N. WORLD FOOD PROGRAMME 2018), <https://docs.wfp.org/api/documents/WFP-0000072044/download/> [<https://perma.cc/TU3N-FZNP>].

⁷² See Salvatore Zappalà, *Conflict Related Hunger, ‘Starvation Crimes’ and UN Security Council Resolution 2417 (2018)*, 17 J. INT’L CRIM. JUST. 881, 886 (2019).

⁷³ See generally Simone Hutter, *Starvation in Armed Conflicts: An Analysis Based on the Right to Food*, 17 J. INT’L CRIM. JUST. 723 (2019); ABHIJIT V. BANERJEE & ESTHER DUFLO, POOR ECONOMICS: A RADICAL RETHINKING OF THE WAY TO FIGHT GLOBAL POVERTY (2012); BRUCE CURRIE-ALDER ET AL., INTERNATIONAL DEVELOPMENT: IDEAS, EXPERIENCE, AND PROSPECTS (1st ed. 2014); JOHN COGGON & SWATI GOLA, GLOBAL HEALTH AND INTERNATIONAL COMMUNITY: ETHICAL, POLITICAL AND REGULATORY CHALLENGES (2013); HIDDEN HUNGER: STRATEGIES TO IMPROVE NUTRITION QUALITY (Hans Konrad Biesalski & Regina Birner eds., 2018). See, e.g., Richard David Semba, *The Rise and Fall of Protein Malnutrition in Global Health*, 69 ANNALS OF NUTRITION & METABOLISM 79, 79–88 (2016).

⁷⁴ Jonathan Luke Austin et al., *Doing and Mediating Critique: An Invitation to Practice Companionship*, 50 SEC. DIALOGUE 3, 7 (2019).

been conducted on the matter through the lenses of IHL or IHRL, remedying the lacuna that facing food security “crises often attract more attention than do widespread and persistent vulnerabilities.”⁷⁵ The study concerns the Gaza puzzle introduced *supra*, with an implicit accent on the engineering of ‘pretended humanitarianism’ as spectacle:

Food-power mechanisms [can be] used to manipulate food transfers as a means of warfare, punishment, and humiliation of civilian populations . . . [F]or a population “on the verge of humanitarian disaster,” . . . the part is not played because their harms are not visible, and the spectators, be they the courts of law or the courts of public opinion, are not as alert to the harm as they would be if those who suffered “looked” their part. Thus, the deliberation of whether or not “hunger” exists in Gaza that was conducted, for example, by the Turkel Commission missed the “hidden hunger” The accepted international law understanding of the right to food . . . rejects the “minimum standard” approach manifested in the Israeli Red Lines Document and inherent to the Turkel Commission’s position on the matter, namely that Israel has met its duty towards the population in Gaza if conditions of starvation have not arisen.⁷⁶

The RTF also stands as a precondition for achieving the fulfilment of the right to health:⁷⁷ besides the most visible manifestations of malnutrition per se, poor diet is an underlying factor in noncommunicable diseases,⁷⁸ particularly for those whose immune system was weakened because of the hunger-disease spiral

⁷⁵ Aeyal Gross, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 242 (2017).

⁷⁶ Aeyal Gross & Tamar Feldman, “*We Didn’t Want to Hear the Word ‘Calories’*”: *Rethinking Food Security, Food Power, and Food Sovereignty—Lessons from the Gaza Closure*, 33 *BERKELEY J. INT’L L.* 379, 383 (2015). One relevant highlight is that “contrary to popular perception, even those who appear overfed might actually be suffering from hidden hunger.” Yigzaw, *supra* note 24, at 661 n.24.

⁷⁷ See, e.g., Athanasia ‘Sia’ Spiliopoulou Åkermark, *Human Rights, Globalisation, Trade and Development*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK* 373, 380 (Catarina Krause et al. eds., 2012); Brigit C. A. Toebes, *International Health Law: An Emerging Field of Public International Law*, 55 *INDIAN J. INT’L L.* 299, 308–18 (2015).

⁷⁸ See Emilie K. Aguirre, *The Importance of the Right to Food for Achieving Global Health*, 9 *GLOB. HEALTH GOVERNANCE* 164, 167 (2015); Committee on Economic, Social and Cultural Rights, General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (arts. 15 (1) (b), (2), (3) & (4) of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/25, ¶ 66 (Apr. 30, 2020).

effect.⁷⁹ It is equally accepted, more generally, that human rights are interrelated and interdependent;⁸⁰ this is a principle underpinning one of the main lines of reasoning employed to counter the argument that economic, social, and cultural rights represent policy benchmarks more than provisions creating obligations (contrary to civil and political ones).⁸¹ If that was the case, the RTF, for example, would be considered too costly⁸² and idealistic for accomplishing its progressive realisation and full justiciability.⁸³ Instead, States enjoy a certain margin of appreciation about the specific *conduct* to adopt as to attain socio-economic rights,⁸⁴ but not necessarily about its *timing*,⁸⁵ so that they shall immediately fulfil their ‘minimum core’ duties:⁸⁶ “a progressively realized obligation to protect people’s resource base

⁷⁹ See Ana Ayala & Benjamin Mason Meier, *A Human Rights Approach to the Health Implications of Food and Nutrition Insecurity*, 38 PUB. HEALTH REV. 1, 3 (2017).

⁸⁰ See Gillian MacNaughton & Mariah McGill, *The Office of the United Nations High Commissioner for Human Rights: Mapping the Evolution of the Right to Health*, in HUMAN RIGHTS IN GLOBAL HEALTH: RIGHTS-BASED GOVERNANCE FOR A GLOBALIZING WORLD 463, 476–77 (Benjamin Mason Meier & Lawrence Oglethorpe Gostin eds., 2018); see also HOWARD-HASSMANN, *supra* note 6, at 180–96.

⁸¹ Eibe H. Riedel, *Economic, Social and Cultural Rights*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK, *supra* note 77, at 136 (Catarina Krause et al. eds., 2012); cf. Schmid, *supra* note 3, at 526 n.7.

⁸² Riedel, *supra* note 81, at 138.

⁸³ *Id.* at 139.

⁸⁴ See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 917 (2005).

⁸⁵ See also Katharine G. Young, *Waiting for Rights: Progressive Realization and Lost Time*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 654, 665–78 (Katharine G. Young ed., 2019).

⁸⁶ See Pierre Thielbörger, *The “Essence” of International Human Rights*, 20 GER. L. J. 924, 935 (2019). Elaborating on this, the idea we propound entails a radical paradigm-reversal as far as timing is concerned: from our perspective, ‘minimum core’ is *not* identified with acute hunger, followed by progressive improvements in chronic (hidden) hunger; contrariwise, it concerns a minimum nutritional attainment which should trigger neither state of hunger at any single point in time, that is, from the very outset as well. Phrased differently: for us, fighting hidden hunger is not the second and secondary phase of the progressive obligation that comes after acute hunger has been completely eradicated (which will likely never happen), but rather, it is a necessary component of the core of the obligation that needs to be satisfied up to an elementary standard from the very beginning. Indeed, in our view (as defended in what follows), hidden hunger is not *less severe* than the acute one, but just a *qualitatively different, equally dangerous, and mostly simultaneous manifestation* of complex interdependency between malnutrition, poverty, neglect, dispossession, and repression.

for food requires immediate steps to be taken, including the adoption of legislative measures.”⁸⁷ On top of that, in legal and practical terms, it must be admitted that “[w]ithout the right to an adequate standard of living, . . . civil and political rights would . . . be rendered meaningless.”⁸⁸ In fact, neither the three landmark systems (1950 European Convention on Human Rights, 1969 American Convention on Human Rights,⁸⁹ 1981 African Charter on Human and Peoples’ Rights) nor the 2004 Arab Charter on Human Rights contain stand-alone provisions about the RTF; further, the RTF is only mentioned in passing by the embryonic ASEAN Intergovernmental Commission on Human Rights⁹⁰ (as well as by several domestic Constitutions and ordinary legislation around the planet⁹¹). The interplay between the right to food and that to health is beneficial for addressing hidden hunger, as the right to health “embraces . . . conditions in which people can [live] a healthy life, and extends to the underlying determinants of health, such as food *and nutrition*.”⁹² Contrariwise, it must be noticed that, as strange as it sounds, the incorporation of the RTF into the one to life may jeopardise the justiciability of the causes of hidden hunger. This surfaces in regional human rights arrangements, where the denial of access to food can be heard before the relevant courts as a

⁸⁷ Hutter, *supra* note 73, at 741.

⁸⁸ Riedel, *supra* note 81, at 137.

⁸⁹ Except for the 1998 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, also known as “Protocol of San Salvador,” art. 12, which is not directly enforceable. See Oswaldo R. Ruiz-Chiriboga, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties: Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System*, 31 NETH. Q. HUM. RTS. 159, 173 (2013).

⁹⁰ See ASEAN Human Rights Declaration, Ass’n of Se. Asian Nations [ASEAN], art. 28 (Nov. 18, 2012).

⁹¹ See BANTEKAS & OETTE, *supra* note 2, at 441; see also , INT’L DEV. L. ORG., REALIZING THE RIGHT TO FOOD: LEGAL STRATEGIES AND APPROACHES: EXECUTIVE SUMMARY 5 (2014), https://www.idlo.int/sites/default/files/pdfs/publications/Realizing%20the%20Right%20to%20Food_Legal%20Strategies%20and%20Approaches_executive-summary.pdf [<https://perma.cc/B5VK-G4YZ>]; JACQUELINE HANOMAN, HUNGER AND POVERTY IN SOUTH AFRICA: THE HIDDEN FACES OF FOOD INSECURITY 10, 26–27 (2018); Nadia C. S. Lambek & Priscilla Claeys, *Institutionalizing a Fully Realized Right to Food: Progress, Limitations, and Lessons Learned from Emerging Alternative Policy Models*, 40 VT. L. REV. 743, 753–59 (2016) .

⁹² Isabella Rae, *Women and the Right to Food: International Law and State Practice*, FOOD & AGRIC. ORG. 17–18 (2008), <http://www.oda-alc.org/documentos/1352638973.pdf> [<https://perma.cc/P58R-PNAP>] (emphasis added).

corollary of the violation of the right to life, but only when such denial amounts to ‘common’ starvation whose severity would lead to death in the short run,⁹³ or when the “destruction of subsistence food supply”⁹⁴ is at stake. Recent developments may challenge this assumption, yet their implications are all to be demonstrated, given their possibly overambitious scope: the U.N. Human Rights Committee stipulated that the right to life is violated whenever citizens, regardless of their eventual death, are prevented from living with dignity, for example in conditions of hunger *or malnutrition*.⁹⁵ The call for a dignified life (*‘vida digna’*), for a beyond-survival life potentially worth living, that somehow overcomes the blank-letter demarcations between rights, is increasingly formulated by the Inter-American Commission on Human Rights too (especially in the context of the protection of the living environment⁹⁶), with mixed results.⁹⁷ On another note, in

⁹³ See Christian Courtis, *The Right to Food as a Justiciable Right: Challenges and Strategies*, in 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, *supra* note 14, at 329 (2007). A tiny leeway is bestowed by the reconceptualization of the right to life as something more than the mere contrary of death, allowing for considerations revolving on the *dignity* of existence. See African Commission on Human and Peoples’ Rights, *General Comment No. 3: The Right to Life (Article 4)*, ¶ 36, (Nov. 18, 2015); Villagrán Morales et al. v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999). For a juridical-philosophical critique of ‘human dignity,’ see Philippe-André Rodriguez, *Human Dignity as an Essentially Contested Concept*, 28 CAMBRIDGE REV. INT’L AFF. 743, 751 (2015) (pontificating whether dignity belongs to the private sphere of any individual, or it is about a ‘core’ of entitlements which should be scrutinised and enforced by external forces whenever the subjects are unable or unwilling to do them justice. Moreover, is ‘human dignity’ also a collective entitlement, something superior that transcends the simple sum of all individuals’ rights and duties?).

⁹⁴ Ekkehard Strauss, *Monitoring and Fact Finding by UN Human Rights Mechanisms*, in THE INTERNATIONAL POLITICS OF HUMAN RIGHTS: RALLYING TO THE R2P CAUSE? 79 (Mónica Serrano & Thomas G. Weiss eds., 2014).

⁹⁵ See U.N. Human Rights Committee, *General Comment No. 36: The Right to Life (Article 6)*, ¶ 26, CCPR/C/GC/36 (Oct. 30, 2018). For another scholarly examination of this General Comment touching upon the right to food, see Mona Rishmawi, *Protecting the Right to Life in Protracted Conflicts: The Existence and Dignity Dimensions of General Comment 36*, 101 INT’L REV. RED CROSS 1149, 1162–67 (2019).

⁹⁶ Interestingly, human rights to a “healthy environment” and the like can be traced in more than a hundred Constitutions around the globe. See BURNS H. WESTON & DAVID BOLLIER, GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS 320–28 (2013).

⁹⁷ See Thomas M. Antkowiak, *A “Dignified Life” and the Resurgence of Social Rights*, 18 NW. J. HUM. RTS. 1, 24 (2020); see also ISAAC DE PAZ GONZÁLEZ, THE SOCIAL RIGHTS JURISPRUDENCE IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS: SHADOW AND LIGHT IN INTERNATIONAL HUMAN RIGHTS 127 (2018); Louis J. Kotzé & Evadne Grant,

limited and ‘niche’ circumstances, the denial of access to food can also amount to inhuman and degrading treatment rather than a violation of the right to life; this occurs when to be at stake is the quality rather than the quantity of food. In *Stanev*, before the European Court of Human Rights (“ECtHR”), the applicant “was forced to live in a psychiatric institution in unsanitary conditions and with insufficient *and poor-quality* food.”⁹⁸ The Grand Chamber declared to be considerably concerned⁹⁹ at the scarce variety of nutrients intake allowed by the food-provision system under scrutiny.¹⁰⁰ Less urgent, but still worthy of consideration, is the “cultural convenience of food and respect for the value-system of the habitual diet,”¹⁰¹ which might help furthering our dismissal for caloric-only understandings of food provision and consumption. Indeed, beyond-survival eating also stands as a symbolic ritual, which certain indigenous communities might even experience as a transformative act of sacredness in symbiosis with their lands.¹⁰²

Self-evidently, “the lack of access to food during armed conflicts exacts a heavy toll on human life and often results from

Environmental Rights in the Global South, in RESOURCE HANDBOOK ON LAW, ENVIRONMENT AND THE GLOBAL SOUTH 86, 107–08 (Philippe Cullet & Sujith Koonan eds., 2019); Alexandra R. Harrington, *Life as We Know It: The Expansion of the Right to Life Under the Jurisprudence of the Inter-American Court of Human Rights*, 35 LOY. L.A. INT’L & COMP. L. REV. 313, 337–38 (2013); Alexandra V. Huneus, *Human Rights Between Jurisprudence and Social Science*, 28 LEIDEN J. INT’L L. 255, 262–63 (2015); Naiara Posenato, *La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali [The jurisprudence of the Inter-American Court on the rights to life and property of indigenous and tribal peoples]*, DPCE ONLINE 139, 154 (2018), <http://www.dpceonline.it/index.php/dpceonline/article/view/489/472> [<https://perma.cc/6CZM-BHNU>]. See generally Mary Beloff & Laura Clérico, *Derecho a condiciones de existencia digna y situación de vulnerabilidad en la jurisprudencia de la Corte Interamericana [The Right to dignified living conditions and the situation of vulnerability in the decisions of the Inter-American Court]*, 14 ESTUDIOS CONSTITUCIONALES [CONST. STUD.] 139 (2016).

⁹⁸ Ramanujam et al., *supra* note 18, at 10.

⁹⁹ *Stanev v. Bulgaria*, 2012-I Eur. Ct. H.R. 81, 140.

¹⁰⁰ See *id.* at 110.

¹⁰¹ Adriana Fillol Mazo, *The Protection of Access to Food for Civilians under International Humanitarian Law: Acts Constituting War Crimes*, 14 AGE HUM. RTS. J. 181, 198 at 37 (2020).

¹⁰² Lindsey Carol Pointer, *Justice Performed: The Normative, Transformative, and Proleptic Dimensions of the Restorative Justice Ritual* 97–98 (2019) (unpublished PhD Thesis at Victoria University of Wellington), https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/8581/thesis_access.pdf?sequence=1 [<https://perma.cc/Y23W-HUNH>].

adverse human agency.”¹⁰³ This goes uncontested in conventional wars,¹⁰⁴ unfolding remarkable ties (or, at times, substantive overlap) between the state responsibility under IHRL and the individual responsibility under ICL.¹⁰⁵ On the opposite side of the spectrum, low-intensity conflicts, whether national or international, are lengthy in nature as well as exhausting for the involved populations, and more controversially addressed by international law.¹⁰⁶ Some of these conflicts are protracted for so long that they become a structural condition of said populations’ entire existence, spanning across multiple generations, up to transforming the ‘anthropology’ of certain societal dynamics in the most severe scenarios.¹⁰⁷ As an anxiety-depleting mechanism that indirectly leads to protracting conflicts, humans tend to comfort themselves with convincements of decency-in-continuity that superficially defuse the call for revolutionary agency (and thus urgency) which would otherwise be naturally embedded in their perilous life conditions.¹⁰⁸ In those contexts, the gist of the problem is not necessarily a lack of food per se, as it generally is in conventional warfare, but rather the impossibility to access *proper* aliments.¹⁰⁹

¹⁰³ EVELYNE SCHMID, TAKING ECONOMIC, SOCIAL, AND CULTURAL RIGHTS SERIOUSLY IN INTERNATIONAL CRIMINAL LAW 166 (2015).

¹⁰⁴ See, e.g., FOOD & AGRIC. ORG., SOWING THE SEEDS OF PEACE FOR FOOD SECURITY: DISENTANGLING THE NEXUS BETWEEN CONFLICT, FOOD SECURITY, AND PEACE (Cindy Holleman et al. eds., 2017), <http://www.fao.org/3/a-i7821e.pdf> [<https://perma.cc/ZA23-T3SV>].

¹⁰⁵ See Schmid, *supra* note 3, at 204.

¹⁰⁶ See generally Dustin A. Lewis, *The Notion of “Protracted Armed Conflict” in the Rome Statute and the Termination of Armed Conflicts Under International Law: An Analysis of Select Issues*, 101 INT’L REV. RED CROSS 1091 (2019).

¹⁰⁷ See, e.g., John P. Cann, *Low-Intensity Conflict, Insurgency, Terrorism and Revolutionary War*, in PALGRAVE ADVANCES IN MODERN MILITARY HISTORY 107, 117 (Matthew Hughes & William James Philpott eds., 2006); Teddy Atim, *Looking Beyond Conflict: The Long-Term Impact of Suffering War Crimes on Recovery in Post-Conflict Northern Uganda* (2018) (Ph.D. dissertation, Wageningen University) (on file with the Wageningen University & Research Library); Maya Kahanoff, *Collective Trauma, Recognition and Reconciliation in the Israeli-Palestinian Conflict*, in RECOGNITION AS KEY FOR RECONCILIATION: ISRAEL, PALESTINE, AND BEYOND 59 (Yoram Meital & Paula M. Rayman eds., 2018); L. C. Green, *Low-Intensity Conflict and the Law*, 3 ILSA J. INT’L & COMPAR. L. 493, 493–521 (1997); PAUL EDWARD FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* 30–31 (2003).

¹⁰⁸ See Felix Berenskötter, *Anxiety, Time, and Agency*, 12 INT’L THEORY 273, 284 (2020).

¹⁰⁹ See, e.g., Koen Vlassenroot, Salomé Ntububa & Timothy Raeymackers, *Food*

Among other causes, hidden hunger manifests itself prominently when populations “are forced to survive on inadequate diets, eating almost the same thing every day,”¹¹⁰ which is a typical condition in countries under embargo or food rationing and cities under siege, or where most food sources are contaminated¹¹¹ (e.g. as a spillover effect of conflicts, when factories are retrofitted for armament production and civilian infrastructure remains unattended). The fourth Geneva Convention prohibits sanctions from interfering with the provision of food relief, but if those sanctions are enacted by the UNSC, the latter is not directly bound by IHL.¹¹² As for States instead, do they retain the duty to ‘offset’ their internal consequences of a war backdrop with a more proactive engagement with human rights, for instance by providing balanced and healthy food (or proactively encouraging external actors, like NGOs and the deputed U.N. specialised agencies, to do so on their behalf, in terms of humanitarian assistance)? The U.N. Committee on Social, Economic and Cultural Rights answered in the positive, as not only “States have a core obligation to take the necessary action to mitigate and alleviate hunger . . . even in times of natural or other disasters,”¹¹³ but more demandingly, “whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to *adequate* food by the means at their disposal, States have the obligation to [fulfil] that right directly.”¹¹⁴ ‘Adequacy’ is formulated in qualitative terms too: “[d]ietary needs implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance,”¹¹⁵ that is, “sufficient macronutrients and micronutrients.”¹¹⁶

Security Responses to the Protracted Crisis Context of the Democratic Republic of the Congo, FOOD & AGRIC. ORG. 12 (Sept. 23, 2003), <http://www.fao.org/3/a-ag307e.pdf> [<https://perma.cc/JA7D-AZHF>] (stating that, in the DRC, “[t]he availability of financial assets [was] not sufficient to obtain high-quality food, which in turn [led] to shifts in food patterns to the advantage of cheap but less nutritious products”).

¹¹⁰ Yigzaw, *supra* note 24, at 661 n.24.

¹¹¹ See Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT’L L. 341, 370 n.189 (2010).

¹¹² GARY WILSON, *THE UNITED NATIONS AND COLLECTIVE SECURITY* 89 (2014).

¹¹³ G.A. Res. 217 (III) A, *supra* note 10, ¶ 6.

¹¹⁴ *Id.* ¶ 15 (emphasis added).

¹¹⁵ *Id.* ¶ 9 (emphasis omitted).

¹¹⁶ Susan Randolph & Shareen Hertel, *The Right to Food: A Global Perspective*, in *THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW* 21, 25 (Lanse

A strikingly similar situation is replicated in peacetime, when dictatorial regimes exercise such a wearing control over the 'citizenry' that the latter's capability of accessing the necessary food resources is impaired; in this sense, lack of food acquires a significant legal standing, dissimilar to the one originating e.g. from living conditions induced by a protracted famine. Hidden hunger, more specifically, becomes a deceitful means of collective subjugation. Once this stage is reached, one might wonder if governments can be held accountable, that is to say, whether States' crafting of situations causing hidden hunger represents a violation of States' obligation not to interfere with citizens' access to the right nutrients, and if so, to what extent. "It is about shifting the burden of responsibility from the draught . . . to human beings . . . It is about challenging the international community's tolerance of hunger."¹¹⁷ Out of the awareness that the discrepancy between quantity and quality we call 'hidden hunger,' as a widespread and globalised phenomenon of contemporary times, is not an unavoidable consequence of 'raw-material' shortage but rather often a by-product of transnational food governance dynamics of waste and profit whose legal roots have been aptly portrayed by scholars,¹¹⁸ this piece will not examine corporate(-dependent) liabilities;¹¹⁹ instead, it is dedicated to purely State-driven causes which are culpably triggered or negligently tolerated.

III.R2P: Novelty, Limits, and Potentialities

The responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities . . . would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.¹²⁰

Minkler ed., 2013).

¹¹⁷ Yigzaw, *supra* note 70, at 6–7.

¹¹⁸ See, e.g., Matthew C. Canfield, *Compromised Collaborations: Food, Fuel, and Power in Transnational Food Security Governance*, in 9 *TRANSNAT'L LEGAL THEORY* 272, 272–73 (2018); Tomaso Ferrando, *Financialisation of the Transnational Food Chain: From Threat to Leverage Point?*, in 9 *TRANSNAT'L LEGAL THEORY* 316, 316 (2018).

¹¹⁹ On these liabilities, see generally Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 *COLUM. J. TRANSNAT'L L.* 691, 711–71 (2006).

¹²⁰ U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 10(b), U.N.

There is little doubt that the U.N. Charter prioritises the principles of non-intervention¹²¹ and of (formalistic) sovereign equality of States,¹²² understood as a means to preserve their territorial integrity and political independence,¹²³ over the instances of humanitarian protection: not only does it strictly regulate how to proceed in the event of international conflicts,¹²⁴ but also, and more meaningfully, it remains silent on how to respond to occurrences of domestic conflict. In other words, the “Charter’s core commitment to national sovereignty seemed an insuperable obstacle to international intervention in conflicts that took place within the boundaries of a State.”¹²⁵ This was restated in subsequent U.N. documents.¹²⁶ Nevertheless, the most intriguing case of interaction between the RTF and military intervention before the adoption of the R2P framework is the one related to the oppression of the Kurdish minority in Iraq, following Iraq’s defeat in the (First) Persian Gulf War.¹²⁷ Since international humanitarian agencies were not permitted to enter the territory to protect civilians (whose lives were at risk, and who were starving), the United States’ “administration announced that it would commence dropping food . . . in partnership with France and the United Kingdom” and, “when it appeared as if the aid effort was being substantially compromised . . . President Bush announced unilaterally that U.S. troops would enter Northern Iraq.”¹²⁸ All of this, notwithstanding the lack of international authorisation to intervene that way:¹²⁹ it

Doc. A/63/677 (Jan. 12, 2009). See generally Auriane Botte, *Redefining the Responsibility to Protect Concept as a Response to International Crimes*, 19 INT’L J. HUM. RTS. 1029 (2015) (discussing the relationship between these four international crimes and the R2P genesis and application).

¹²¹ U.N. Charter art. 2, ¶ 4.

¹²² See also Hans Köchler, *The United Nations Organization and Global Power Politics: The Antagonism Between Power and Law and the Future of World Order*, 5 CHINESE J. INT’L L. 323, 327, 336 (2006).

¹²³ See Spencer Zifcak, *The Responsibility to Protect*, in INTERNATIONAL LAW 484, 486 (Malcolm David Evans ed., 2018).

¹²⁴ U.N. Charter ch. VII.

¹²⁵ Zifcak, *supra* note 123, at 484.

¹²⁶ See, e.g., G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the UN (Oct. 24, 1970).

¹²⁷ See Zifcak, *supra* note 123, at 488.

¹²⁸ *Id.*

¹²⁹ See S.C. Res. 688 (Apr. 5, 1991) (peremptorily condemning Iraq’s behaviour

was a calculated political choice, not a (sense of) legal obligation.¹³⁰ Along similar lines, although under a broadly phrased UNSC mandate, U.S. troops invaded Somalia two years later and, despite failing the mission of facilitating a peace process, they successfully relieved a quarter million lives from likely death by starvation.¹³¹

In the aftermath of the genocides in Rwanda and Srebrenica, and by engaging in fierce debates over NATO's intervention in Kosovo,¹³² the attitude of the international community towards matters of 'compelling' humanitarian intervention started to change.¹³³ A progressivist, globalist rhetoric of fraternal human agency in history *ostensibly* abdicated to perfect formal equality of sovereignties, with the aim of sponsoring a XXI-century re-edition of Arendt's "right to have rights" . . . to enjoy human rights *as* civil rights protected by one's own [S]tate."¹³⁴ The International

against humanitarian agencies, yet not endorsing any foreign military intervention).

¹³⁰ See James Mayall, *Non-Intervention, Self-Determination and the New World Order*, in POLITICAL THEORY, INTERNATIONAL RELATIONS, AND THE ETHICS OF INTERVENTION, 167, 174–75 (Ian Forbes & Mark Hoffman eds., 1993).

[I]t would be imprudent in practice, and wrong in theory, to generalise from the international obligations towards the Kurds in favour of an international enforcement mechanism for human rights, wherever they are abused. It would be imprudent because, however desirable such enforcement might be, the system would be unlikely to attract either the degree of public support, or the resources, to make it credible. It would be wrong in theory because the obligation towards the Kurds does not arise merely from a general principle of human solidarity.

Id. at 174.

¹³¹ See Manfred Nowak et al., *R2P and the Prohibition of Torture*, in RESPONSIBILITY TO PROTECT (R2P): A NEW PARADIGM OF INTERNATIONAL LAW? 293, 298–99 (Peter Hilpold ed., 2015) see also MELISSA T. LABONTE, HUMAN RIGHTS AND HUMANITARIAN NORMS, STRATEGIC FRAMING, AND INTERVENTION: LESSONS FOR THE RESPONSIBILITY TO PROTECT 64–94 (2013).

¹³² See Dan Bulley, *The Politics of Ethical Foreign Policy: A Responsibility to Protect Whom?*, 16 EUR. J. INT'L REL. 441, 445–46 (2010).

¹³³ See Judith Large & Timothy D. Sisk, *Democracy, Conflict and Human Security: Pursuing Peace in the 21st Century*, INT'L INST. DEMOCRACY & ELECTORAL ASSISTANCE 16 (2006), <https://www.idea.int/sites/default/files/publications/democracy-conflict-and-human-security-handbook-volume-1.pdf> [<https://perma.cc/G2MK-6Y9S>]; see also Stephan Stetter, *The Legal Foundations of Normative Borders and Normative Orders: Individual and Human Rights and the Israel-Palestine-EU Triangle*, in FRAGMENTED BORDERS, INTERDEPENDENCE AND EXTERNAL RELATIONS: THE ISRAEL-PALESTINE-EUROPEAN UNION TRIANGLE 155, 160 (Raffaella A. Del Sarto ed., 2015); ANNETTE JANSEN, ANTI-GENOCIDE ACTIVISTS AND THE RESPONSIBILITY TO PROTECT 195 (2017).

¹³⁴ Ayça Çubukçu, *Thinking Against Humanity*, 5 LONDON REV. INT'L L. 251, 254 (2017).

Commission on Intervention and State Sovereignty emphasised, in its preparatory work leading to the 2005 Summit, the shifted focus in humanitarian intervention from traditional security to the new multi-layered paradigms of human security,¹³⁵ that is, “from territorial security, and security through armaments, to security through human development with *access to food* and employment” given that “the security of people against threats to life, health, livelihood, personal safety and human dignity . . . can be put at risk . . . by factors within a country, including ‘security’ forces.”¹³⁶ We cannot subscribe to the claim that human security necessarily “decentralizes security away from the State”;¹³⁷ all the contrary: human security compels States to ensure their citizens are safe not simply because their physical integrity is preserved from deadly military attacks, but because they need not fear for a decent existence tomorrow. This was a “distinctly African contribution to global human rights, with many African [S]tates possessing an historical tradition of reciprocal rights and obligations which bind sovereigns and subjects”, as retrievable from the African Union’s 2000 Constitutive Act.¹³⁸ The IHRL discourse tenaciously came into the picture,¹³⁹ insofar as it represented the leverage to ‘creep into the cracks’ of sovereign territoriality¹⁴⁰ and to uphold the moral supremacy of non-indifference.¹⁴¹ For example, the concepts of

¹³⁵ See ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], *Concepts and Dilemmas of State Building in Fragile Situations: From Fragility to Resilience*, 9 OECD J. ON DEV. 61, 69 (2009).

¹³⁶ INT’L COMM’N ON INTERVENTION AND ST. SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 15 (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/HNW2-Z34K>] (emphasis added).

¹³⁷ Alise Coen, *R2P, Global Governance, and the Syrian Refugee Crisis*, 19 INT’L J. HUM. RTS. 1044, 1046 (2015).

¹³⁸ SAMUEL JAMES WYATT, THE RESPONSIBILITY TO PROTECT AND A COSMOPOLITAN APPROACH TO HUMAN PROTECTION 182 (2019). *Contra* Natalie Zähringer & Malte Brosig, *Organised Hypocrisy in the African Union: The Responsibility to Protect as a Contested Norm*, 27 S. AFR. J. INT’L AFF. 1–23 (2020).

¹³⁹ Indeed, “the rationale for contemporary human rights is founded on the uneven distribution of power between the [S]tate and its citizens.” BANTEKAS & OETTE, *supra* note 2, at 655.

¹⁴⁰ Zifcak, *supra* note 123, at 490–91.

¹⁴¹ Krista Nadakavukaren Schefer & Thomas Cottier, *Responsibility to Protect (R2P) and the Emerging Principle of Common Concern*, 9 (Swiss Nat’l Ctr. of Competence in Rsch., Working Paper No. 29, 2012), https://www.wti.org/media/filer_public/9b/df/9bdf2080-37b0-460f-98bb-d63e418ad88a/responsibility_to_protect_and_common_co

'starvation' (illegal policy involving prolonged non-access to food) and 'hunger' (its physiological consequence) were accompanied and gradually displaced by the multispectral one of *food security*, which is concerned with fundamental dietary needs and minimal levels of trade freedom and purchasing power as to satisfy said needs.¹⁴² Following an eloquent endorsement by the U.N. Secretary-General's High-Level Panel on Threats, Challenges and Change,¹⁴³ in 2005 the World Leaders' Summit concluded that "[e]ach individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity,"¹⁴⁴ and that should a State manifestly fail to ensure such protection, the international community would be entitled to decide on a case-by-case basis whether to make recourse to any means deemed appropriate in order to prevent those listed atrocities from occurring.¹⁴⁵ This newly developed doctrine, articulated in three pillars,¹⁴⁶ rephrased as an obligation of result,¹⁴⁷

ncern_final.pdf [<https://perma.cc/2TNF-A2N8>]; see also Anne Orford, *Moral Internationalism and the Responsibility to Protect*, 24 EUR. J. INT'L L. 83, 104 (2013).

¹⁴² See Catherine Schittecatte, *Toward a More Inclusive Global Governance and Enhanced Human Security*, in A DECADE OF HUMAN SECURITY: GLOBAL GOVERNANCE AND NEW MULTILATERALISMS 129, 137–39 (David R. Black & Timothy M. Shaw eds., 2006).

¹⁴³ See Zifcak, *supra* note 123, at 492.

¹⁴⁴ G.A. Res. 60/1, U.N. GAOR, 60th Sess., U.N. Doc. A/60/L.1, ¶ 138 (Oct. 24, 2005).

¹⁴⁵ *Id.* ¶ 139.

¹⁴⁶ See Fiammetta Borgia, *The Responsibility to Protect Doctrine: Between Criticisms and Inconsistencies*, 2 J. ON USE OF FORCE & INT'L L. 223, 224–26 (2015).

¹⁴⁷ This is possibly the highest achievement of the R2P codification, although it is rarely analyzed in literature. With the R2P, when a State fails to provide security and widespread violations of human dignity are being executed, the international community reserves the right to intervene even militarily as to relieve the population's suffering. Previously, the obligation e.g. to prevent genocide was merely a conduct-based one, that is the say, the State was mandated to operate under prevention policies, regardless of the latter's eventual effectiveness; in the pre-R2P era, if a domestic genocide occurred nonetheless, the international community was not authorized to intervene (if not diplomatically) without the express consent of the host government. See, e.g., Carsten Stahn, *Syria and the Semantics of Intervention, Aggression and Punishment: On 'Red Lines' and 'Blurred Lines'*, 11 J. INT'L CRIM. JUST. 955, 964 (2013) (addressing the non-punitive dimension of R2P, in the context of R2P's focus on rescuing civilians from massive violations of their dignity and rights).

erga omnes,¹⁴⁸ and subsequently recognised by the UNSC,¹⁴⁹ cannot yet be understood as having the binding force of customary rules,¹⁵⁰ especially in view of the disagreement over the response to the ‘Arab Spring’ in Libya and Syria¹⁵¹ between key agents such as the US, China, Russia, India, Brazil, and the European Union.¹⁵² To be sure, the R2P had already failed its test prior to the Arab Spring, in Darfur, where despite “the creation of famine formed part of a criminal plan to take control over certain areas [...] through the commission of genocidal acts and various crimes against humanity,”¹⁵³ the R2P was employed as a chilling argument against intervention rather than as a catalysing factor.¹⁵⁴ The optimistic humanitarianism of just few years before backfired, annihilated by revamped concerns over “the militarisation of humanitarian aid as a

¹⁴⁸ See Hovhannes Nikoghosyan, *Government Failure, Atrocity Crimes and the Role of the International Criminal Court: Why Not Syria, but Libya*, 19 INT’L J. HUM. RTS. 1240, 1243-44 (2015).

¹⁴⁹ See Zifcak, *supra* note 123, at 495.

¹⁵⁰ See Marco Longobardo, *Genocide, Obligations Erga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence*, 19 INT’L J. HUM. RTS. 1199, 1203 (2015).

¹⁵¹ See Zifcak, *supra* note 123, at 500–5; see also Rebecca Barber, *Is Security Council Authorisation Really Necessary to Allow Cross-Border Humanitarian Assistance in Syria?*, EJIL:TALK! (Feb. 24, 2020), <https://www.ejiltalk.org/is-security-council-authorisation-really-necessary-to-allow-cross-border-humanitarian-assistance-in-syria> [<https://perma.cc/J74E-ASLA>] (discussing alternative legal options available in the Syrian dossier). Still on Syria, but with reference to the most recent Euro-American strikes in response to alleged chemical attacks by the al-Assad’s regime on the civilian population, see generally Agata Klęczkowska, *The Illegality of Humanitarian Intervention: The Case of the UK’s Legal Position Concerning the 2018 Strikes in Syria*, 35 UTRECHT J. INT’L & EUR. L. 35 (2020).

¹⁵² See Sankaralingam Pandiaraj, *Sovereignty as Responsibility: Reflections on the Legal Status of the Doctrine of Responsibility to Protect*, 15 CHINESE J. INT’L L. 795, 811–12 (2016); see also Zheng Chen & Hang Yin, *China and Russia in R2P Debates at the UN Security Council*, 96 INT’L AFFS. 787, 788 (2020); ANDREA S. KOLB, *THE UN SECURITY COUNCIL MEMBERS’ RESPONSIBILITY TO PROTECT: A LEGAL ANALYSIS* 365–68 (2017). See generally YANG RAZALI KASSIM, *THE GEOPOLITICS OF INTERVENTION: ASIA AND THE RESPONSIBILITY TO PROTECT* (2014).

¹⁵³ Randle C. DeFalco, *Conceptualizing Famine as a Subject of International Criminal Justice: Towards a Modality-Based Approach*, 38 U. PA. J. INT’L L. 1113, 1127 (2017).

¹⁵⁴ See Phil C. Orchard, *Regime-Induced Displacement and Decision-Making Within the United Nations Security Council: The Cases of Northern Iraq, Kosovo, and Darfur, in* PROTECTING THE DISPLACED: DEEPENING THE RESPONSIBILITY TO PROTECT 101, 121–2 (Sara E. Davies & Luke Glanville eds., 2010).

form of global governance.”¹⁵⁵ Then, the more pessimistic scholars argued that “[v]ictims of systemic human rights violations [we]re, therefore, prey to geopolitics, as they were prior to the establishment of R2P”.¹⁵⁶ In fairness, humanitarian aid had always been militarised and, consequently, politicised;¹⁵⁷ the R2P was simply an attempt at systematising its practice¹⁵⁸ whilst providing it with an authoritative legal mandate grounded in positive law. This attempt seemingly failed, but resuming to mere politics is no longer an option, either. That States “are free to make moral choices”¹⁵⁹ lawfully (or at least, like during the pre-R2P ‘political humanitarian’

¹⁵⁵ Kjersti Lohne & Kristin Bergtora Sandvik, *Bringing Law into the Political Sociology of Humanitarianism*, 4 OSLO L. REV. 4, 8 (2017).

¹⁵⁶ AIDAN HEHIR, HOLLOW NORMS AND THE RESPONSIBILITY TO PROTECT 11 (2019).

¹⁵⁷ See Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1305–11 (2010).

¹⁵⁸ *Contra* Emily Paddon Rhoads & Jennifer Welsh, *Close Cousins in Protection: The Evolution of Two Norms*, 95 INT'L AFFS. 597, 601–03 (2019). Their analysis is geopolitically insightful yet legally flawed. We disagree profoundly that R2P “was deliberately institutionalized at the 2005 [W]orld [S]ummit as a *political* rather than a legal principle” or “positioned as a reinforcer of established legal obligations related to atrocity crimes.” If it was institutionalized, that is exactly because politics was not deemed sufficient anymore. *Id.* at 601, 603. Moreover, the atrocity-crimes-related obligations the Authors are speaking about were anything but ‘established’ in terms of public international law that regulates the use of force between sovereigns; they were, in fact, simply criminal norms transposed at the international level, yet fundamentally concerning *individuals* (or at best, human rights norms, but still nothing to do with international security laws). Premised on these disagreements, we also cannot join the Authors in their argument that “[p]roponents of R2P did not seek to create new law, but rather to enhance compliance with [S]tates’ existing legal commitments.” If States now “invoke the morally charged concept of responsibility primarily as a means to summon up political will, rather than to establish a concrete plan of action,” that is again a shame for world politics—whose representatives ignore history of international relations as *magistra vitae* — and not the evidence of an R2P failure to deliver legal novelty per se. *Id.* See Jessica Almqvist, *Enforcing the Responsibility to Protect Through Solidarity Measures*, 19 INT'L J. HUM. RTS. 1002, 1008 (2015) (arguing that the R2P codified a legal route towards military intervention, and arguably broadened the scope of state failures to be redressed, which went further than the generic duties of cooperation in terminating breaches of humanitarian law which had already been established by both the International Court of Justice and the International Law Commission); see also Pinar Gözen Ercan, *Responsibility to Protect and Inter-State Crises: Why and How R2P Applies to the Case of Gaza*, 19 INT'L J. HUM. RTS. 1098, 1102 (2015) (discussing how, before the R2P was introduced, most States were already responsible for protecting their own citizens (more or less comprehensively), but from a legal standpoint they could not be sanctioned militarily for their failure to do so).

¹⁵⁹ DAVID CHANDLER, CONSTRUCTING GLOBAL CIVIL SOCIETY: MORALITY AND POWER IN INTERNATIONAL RELATIONS 59 (2004).

phase, *not definitely unlawfully*) has never been falser and more idealistic a statement.

IV. Fitting R2P's 'Crimes List' in the Burundian Civil Conflict

Political scientists define after-independence Burundi as a rebel-to-ruler post-war militarization society.¹⁶⁰ Recent Burundian history, shaped by the unabating ethnic-motivated conflict between Hutu and Tutsi groups¹⁶¹ and by the instability characterising Africa's Great Lakes region,¹⁶² can be sorted¹⁶³ into three periods: the civil war lasting approximately from 1993 to 2005, identifiable as non-international armed conflict ("NIAC");¹⁶⁴ the two claimed-lawful Pierre Nkurunziza's terms as president of the country; and the civil unrest erupted again in 2015 following Nkurunziza's decision to run for a third mandate,¹⁶⁵ despite Burundi's own constitutional provisions. The first period, characterised by dynamics comparable to those of the neighbouring Rwanda,¹⁶⁶ featured a continued alternation of Hutu and Tutsi regimes, such that it is virtually impossible to submit that one majoritarian party

¹⁶⁰ See, e.g., Andrea Purdeková, Filip Reyntjens & Nina Wilén, *Militarisation of Governance After Conflict: Beyond the Rebel-to-Ruler Frame – The Case of Rwanda*, 39 THIRD WORLD Q. 158, 160 (2018).

¹⁶¹ See Rowan Popplewell, *Civil Society, Hybridity and Peacebuilding in Burundi: Questioning Authenticity*, 40 THIRD WORLD Q. 129, 134 (2019).

¹⁶² See e.g., S.C. Res. 1653 (Jan. 27, 2006).

¹⁶³ 'Slightly' simplistic, yet hopefully, clearly enough for the purposes of the present analysis. Keeping these dates in mind is essential to appreciate the conflict-hunger relationship illustrated *infra*.

¹⁶⁴ For the application of the R2P principle to this first phase, see SUSAN C. BREAU, *THE RESPONSIBILITY TO PROTECT IN INTERNATIONAL LAW: AN EMERGING PARADIGM SHIFT* 221–24 (2016).

¹⁶⁵ See Rossalyn Warren, 'Fake News' Fuelled Civil War in Burundi. Now It's Being Used Again, *GUARDIAN* (Mar. 4, 2017), <https://www.theguardian.com/world/2017/feb/28/burundi-fake-news-fuelled-civil-war-used-again-resident-nkurunziza> [<https://perma.cc/498N-TYEE>]. President Nkurunziza died on June 8, 2020, possibly due to Covid-19. See David Pilling & Andres Schipani, *Coronavirus Stalks Burundi's Political Elite After President's Death*, *FIN. TIMES* (June 15, 2020), <https://www.ft.com/content/a232c62b-ded1-4dd4-8ca7-a5bb5214987f> [<https://perma.cc/6KF6-UJ26>].

¹⁶⁶ See Noel Twagiramungu, *Burundi: The Anatomy of Mass Violence Endgames, in HOW MASS ATROCITIES END: STUDIES FROM GUATEMALA, BURUNDI, INDONESIA, SUDAN, BOSNIA-HERZEGOVINA, AND IRAQ* 56, 74 (Bridget K. Conley-Zilkic ed., 2016); see also CHARLES T. 'CHUCK' CALL, *WHY PEACE FAILS: THE CAUSES AND PREVENTION OF CIVIL WAR RECURRENCE* 150–60 (2012).

committed crimes against the other minority party.¹⁶⁷ In other words, while crimes were committed, it is hard to assess which party they primarily belong to, as well as to univocally identify specific individuals to charge with those crimes.¹⁶⁸ However, both investigations become possible vis-à-vis the third period, when not only the repressive actions can be attributed to the choices of one precise person (Mr. Nkurunziza), but also, such repression is targeted against Tutsi rebels by the Hutu ruler.¹⁶⁹ Resultantly, the case at hand displays a minority persecuted by a majority, and criminal actions carried out in this framework can fall under the rubric of both genocide (“acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”)¹⁷⁰ and crimes against humanity (“acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”).¹⁷¹ Large-scale RTF violations are here at play,¹⁷² namely as “serious bodily or mental harm to members of the group”¹⁷³ in the case of genocide, or under the category of “extermination”¹⁷⁴ relevant for crimes against humanity. More specifically, ‘extermination’ includes the “intentional infliction of conditions of life, *inter alia* the deprivation of *access to food* and medicine, calculated to bring about the destruction of part of a population”¹⁷⁵ especially when such ‘conditions of life’ include an irreparably damaged natural environment, no longer reliable upon for sustenance.¹⁷⁶ The non-

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See* BREAU, *supra* note 164; *see also* Jeremy Maron, *What Led to the Genocide Against the Tutsi in Rwanda?*, CAN. MUSEUM FOR HUM. RTS, <https://humanrights.ca/story/what-led-to-the-genocide-against-the-tutsi-in-rwanda> [https://perma.cc/W7B6-5FNV] (last visited Oct. 7, 2020).

¹⁷⁰ Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2187 U.N.T.S. 38544.

¹⁷¹ *Id.* at art. 7(1).

¹⁷² *See also* Human Rights Council, Report of the Commission of Inquiry on Burundi, A/HRC/39/63, ¶¶ 68, 72 (Aug. 8, 2018).

¹⁷³ *Id.* art. 6(b).

¹⁷⁴ *Id.* art 7(1)(b).

¹⁷⁵ *Id.* art. 7(2)(b) (emphasis added).

¹⁷⁶ *See* Konstantin Kleine, *Will R2P Be Ready When Disaster Strikes? – The Rationale of the Responsibility to Protect in an Environmental Context*, 19 INT’L J. HUM. RTS. 1176, 1183–84 (2015).

international nature of the conflict precluded the possibility to invoke the war crime of starvation under the Rome Statute,¹⁷⁷ but if Burundi were still a party to the Statute,¹⁷⁸ invoking such crime would have been a viable option for future occurrences thanks to an amendment tabled in December 2019,¹⁷⁹ which extends the remit of this war crime to NIACs. Provided that most conflict-triggered famines pertain to NIACs and not international conflicts,¹⁸⁰ the

¹⁷⁷ See Rome Statute of the International Criminal Court, art. 8.2(b)(xxv), July 17, 1998, 2187 U.N.T.S. 38544 (“Other serious violations of the law and customs applicable in international armed conflict . . . namely . . . [i]ntentionally using starvation of civilians as a method of warfare.”) (emphasis added); see also Rogier J. Bartels, *The Classification of Armed Conflicts by International Criminal Courts and Tribunals*, 20 INT’L CRIM. L. REV. 595, 649 n.268 (2020); Catriona J. Murdoch & Wayne Jordash, *Clarifying the Contours of the Crime of Starvation*, EJIL:TALK! (June 27, 2019), <https://www.ejiltalk.org/clarifying-the-contours-of-the-crime-of-starvation/> [https://perma.cc/KV5P-55VD]. See generally Deidre Willmott, *Removing the Distinction Between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court*, 5 MELB. J. INT’L L. 196, 196–219 (2004) (discussing the detrimental limitations of the Rome Statute in differentiating between international and non-international armed conflict in addressing war crimes). Wisely, domestic jurisdictions prosecuting war crimes have already disappplied the anachronistic IAC-NIAC distinction. See Oona Anne Hathaway et al., *What is a War Crime?*, 44 YALE J. INT’L L. 53, 99 (2019).

¹⁷⁸ “Burundi deposited its instrument of ratification to the Rome Statute on 21 September 2004. Burundi withdrew from the Rome Statute, and the withdrawal took effect on 27 October 2017. The ICC may therefore exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Burundi or by its nationals from 1 December 2004 to 26 October 2017.” See *Burundi: Situation in the Republic of Burundi*, INT’L CRIM. CT. [ICC], <https://www.icc-cpi.int/burundi> [https://perma.cc/KB5T-633T] (last visited Dec. 7, 2020). On the political concerns subsumed under the decision by certain African jurisdictions to withdraw *en masse* from the Statute, see Olesya Dovgalyuk & Riccardo Vecellio Segate, *From Russia and Beyond: The ICC Global Standing, While Countries’ Resignation Is Getting Serious*, FILODIRITTO, 17-18 (Jan. 16, 2017), <https://www.filodiritto.com/sites/default/files/articles/documents/0000002222.pdf> [https://perma.cc/4EFV-Y64Q].

¹⁷⁹ Resolution ICC-ASP/18/Res.5 on amendments to article 8 of the Rome Statute of the International Criminal Court, adopted at the 9th plenary meeting, on 6 December 2019, by consensus. See Rogier J. Bartels, *Time to Fix the Rome Statute and Add the Crime of Starvation in Non-International Armed Conflicts!*, EJIL:TALK! (Dec. 3, 2019), <https://www.ejiltalk.org/time-to-fix-the-rome-statute-and-add-the-crime-of-starvation-in-non-international-armed-conflicts/> [https://perma.cc/ZJ3Q-JWDD]. Notably, this amendment will not automatically overwrite the obligations under the Statute for all ICC members; only those States which will have ratified this particular amendment will be bound by it, and not even *ipso tempore*. See Kevin Jon Heller, *The Rome Statute’s Flawed Amendment Regime — Starvation in NIAC Edition*, OPINIO JURIS (July 12, 2019), <http://opiniojuris.org/2019/12/07/the-rome-statutes-flawed-amendment-regime-starvation-in-niac-edition/> [https://perma.cc/9JJG-DE4H].

¹⁸⁰ For example, in a press conference on humanitarian crises, the UN Secretary-

amendment is a historical achievement. Notably, a few domestic courts and U.N. agencies already operated the same extension, by arguing that starving civilians as a method of warfare was a war crime in NIACs too, based on international customary law.¹⁸¹ In any case, starvation as a self-standing crime under the Rome Statute, including extensive phenomena of hidden hunger, can be traced back to “torture,”¹⁸² or to “other inhumane acts”¹⁸³ as a residual category of crimes against humanity.¹⁸⁴ As for international humanitarian law, it might well serve as an interpretative device to international criminal justices,¹⁸⁵ but it will not be scrutinised here: first, the definitions in international criminal law overlap more directly with the four listed criteria for assessing R2P violations;¹⁸⁶ second, the IHL threshold on starvation (pursuant to the 1977 Additional Protocol I to the Geneva Conventions), which is tailored to the core happening of the hostilities and does not account for their roots or legacy, is too high and mere-survival-oriented,¹⁸⁷ so much that no hidden-hunger phenomena could ever be encompassed.¹⁸⁸

General addressed four conflicts, the only international one being that in Yemen. U.N. Secretary-General, *Full Transcript of Secretary-General's Joint Press Conference on Humanitarian Crises in Nigeria, Somalia, South Sudan and Yemen* (Feb. 22, 2017), <https://www.un.org/sg/en/content/sg/press-encounter/2017-02-22/full-transcript-secretary-generals-joint-press-conference> [<https://perma.cc/A6VJ-XDXH>].

¹⁸¹ See Federica D'Alessandra & Matthew Gillett, *The War Crime of Starvation in Non-International Armed Conflict*, 17 J. INT'L CRIM. JUST. 815, 825 (2019).

¹⁸² Rome Statute of the International Criminal Court, art. 7(2)(e), July 17, 1998, 2187 U.N.T.S. 38544.

¹⁸³ *Id.* at art. 7(1)(k).

¹⁸⁴ Manuel J. Ventura, *Prosecuting Starvation Under International Criminal Law: Exploring the Legal Possibilities*, 17 J. INT'L CRIM. JUST. 781, 791–94 (2019).

¹⁸⁵ See, e.g., KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 364–73 (2004).

¹⁸⁶ Or three, if one considers that ethnic cleansing is not separately criminalised under ICL. The other three international crimes elicited to trigger R2P interventions are genocide, war crimes, and crimes against humanity.

¹⁸⁷ See Dapo Akande & Emanuela-Chiara Gillard, *Conflict Induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law*, 17 J. INT'L CRIM. JUST. 753, 760–61 (2019).

¹⁸⁸ Notwithstanding this, support might be retrieved from a doctrinal understanding of art. 54(1) of mentioned Protocol, as to encompass starvation “as a [...] weapon to annihilate or weaken the population[.]” See Claude Pilloud & Jean Simon Pictet, *Art. 54*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 § 2090 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) (emphasis added).

What is more, civil conflicts do not fit the (possibly obsolete) rationale of these IHL provisions, as the latter perpetuate a clear watershed between civilians and combatants, which is untenable amid irregular, non-traditional conflicts,¹⁸⁹ while the former are often traversed by ‘rebel,’ ‘terrorist,’ ‘mercenary,’ ‘partisan,’ or ‘paramilitary’ forces which IHL would not comprehend among lawful combatants.¹⁹⁰

Daily life in contemporary Burundi is destabilised by a tangle of land claims across families and tribes, owing to multi-phase internal displacement but also “resulting from grabbing [‘expropriation’] of public land by military and state representatives.”¹⁹¹ Indeed, this is a textbook example of what recent literature labels as ‘post-conflict authoritarian governance,’ whereby ‘frozen conflicts’ are not solved and peacefully ‘left behind’ but only trapped in a prolonged state of stand-by which alternates violent outbreaks with spatial coercion, movement restrictions, hyper-surveillance, top-down property redistribution, and more generally, illiberal military practices of conflict sectarian pseudo-management.¹⁹² Because economic rights encourage the developmental emancipation that jointly with full and free political standing, leads to self-determination,¹⁹³ conflicts—especially civil ones—are unlikely to reach a settlement if the fighters neglect the population’s nutritional needs. As for Burundi, since the revival of protracted low-intensity conflict grounded on ethnical hatred has been causing acts of genocide and crimes against humanity linked

¹⁸⁹ See *id.* at 764 (“[I]t is permissible/not prohibited to attack objects indispensable to the survival of the civilian population, such as crops for example, if in fact they are used exclusively by enemy armed forces.”).

¹⁹⁰ See Hutter, *supra* note 73, at 738–39.

¹⁹¹ Matthijs Van Leeuwen et al., *The ‘Local Turn’ and Notions of Conflict and Peacebuilding – Reflections on Local Peace Committees in Burundi and Eastern DR Congo*, 8 PEACEBUILDING 279, 286 (2020).

¹⁹² See David G. Lewis, John Heathershaw & Nick Megoran, *Illiberal Peace? Authoritarian Modes of Conflict Management*, 53 COOPERATION & CONFLICT 486, 489 (2018); see also David G. Lewis & Saniya Sagnayeva, *Corruption, Patronage and Illiberal Peace: Forging Political Settlement in Post-Conflict Kyrgyzstan*, 41 THIRD WORLD Q., 77, 80, 85–6, 89 (2019).

¹⁹³ See PATRICK MACKLEM, *THE SOVEREIGNTY OF HUMAN RIGHTS* 61 (2015). Remarkably, the African Commission on Human and Peoples’ Rights has asserted that the legal significance of development invests its double implications as a means and as an end in itself. See Simeon A. Igbinedion, *Finding Value for the Right to Development in International Law*, 19 AFR. HUM. RTS. L.J. 395, 404 (2019).

to the starvation of the ethnic minority concerned, which is being forced to flee the country¹⁹⁴ owing to violence and extreme hunger,¹⁹⁵ R2P might be legitimately invoked by the international community. Put differently, famine owing to natural calamity or other unforeseeable disasters cannot fall within the R2P remit, whilst state-provoked starvation *might be*, depending on the circumstances, such as the configuration of the relevant ongoing conflict.¹⁹⁶ The link between *insufficient* food and the likeness of civil conflicts erupting has been proven,¹⁹⁷ so that the intersection between insufficient and *inadequate* food triggers uncontrollable cycles of misery and brutality.¹⁹⁸ Legally speaking, however, complicity and indifference shall be distinguished.¹⁹⁹ Borrowing

¹⁹⁴ See Anna Dubuis, *Burundi's Last Civil War Killed 300,000. A New One Is Coming*, WORLD (Mar. 28, 2016), <https://www.pri.org/stories/2016-03-28/burundi-s-last-civil-war-killed-300000-new-one-coming> [<https://perma.cc/N8UH-NUNH>]; Schmid, *supra* note 3, at 533 (discussing the implications of state-sponsored creation of severe living conditions that may satisfy the definition of a war crime).

¹⁹⁵ See LAURIE FIELDS DE ROSE ET AL., WHO'S HUNGRY? AND HOW DO WE KNOW? FOOD SHORTAGE, POVERTY, AND DEPRIVATION 168 (1998).

In the 1990s in sub-Saharan Africa, food shortage prevailed in cases of active conflict, such as Angola, southern Sudan, and Somalia – where all sides in the conflicts used food and hunger as political tools – and in Rwanda, Burundi, and, to a lesser extent, Kenya – where those driven by violence from their homes faced *both immediate and longer-term* food shortages because they could not return to plant their crops.

Id. (emphasis added).

¹⁹⁶ See Schmid, *supra* note 3, at 533.

¹⁹⁷ See Henk-Jan Brinkman & Cullen S. Hendrix, *Occasional Paper No. 24: Food Insecurity and Violent Conflict: Causes, Consequences, and Addressing the Challenges*, WORLD FOOD PROGRAMME, 5–6, 12–14 (July 2011), https://documents.wfp.org/stellent/groups/public/documents/newsroom/wfp238358.pdf?_ga=2.252583691.323270531.1600017816-1633554099.1600017816 [<https://perma.cc/T5UX-8HV2>]. See generally Henk-Jan Brinkman & Cullen S. Hendrix, *Food Insecurity and Conflict Dynamics: Causal Linkages and Complex Feedbacks*, 2 STABILITY, INT'L J. SEC. & DEV. 1 (2013).

¹⁹⁸ See Charles Patrick Martin-Shields & Wolfgang Stojetz, *Food Security and Conflict: Empirical Challenges and Future Opportunities for Research and Policy Making on Food Security and Conflict*, 119 WORLD DEV. 150, 155–56 (2018).

¹⁹⁹ “While omissions can indeed be purposive and intended to achieve certain sinister goals . . . a humanitarian intervention in such an instance would necessarily either be aimed at forcing the government to take action to help its suffering people or intended as punishment for failure to take appropriate action. Such a prescription is highly problematic . . . for two reasons. First, if people are suffering because their government failed to protect them . . . one must seriously question how probable it is that this government would be more likely to do so after it was attacked militarily or exactly how

from the horrific situation in Yemen,²⁰⁰ issues often arise due to the difficulties in asserting a causal nexus, given that “the *causal link* between action and outcome may not be clear enough to establish beyond reasonable doubt that remote military or political actors are responsible.”²⁰¹ Several reports would indirectly support such nexus, where they prove a scientific *correlation* between levels of hunger over time and political processes.²⁰² A large-sample study revealed that in the period 2008-2017, 54.6% was the projected percentage of stunted children in Burundi, which would have ranked it overall as the most hunger-prone country in Sub-Saharan Africa²⁰³ and probably worldwide; nevertheless, in order to identify the interfaces between conflict and hunger, one shall look closer at the timeline while following the evolution of both unrest and malnutrition. For instance, although the population of Burundi

this would help the people who are in dire need of assistance. Second, condoning military intervention against states whose people are made to suffer because of incompetent or otherwise indifferent leadership leads to the familiar problem of lowering the bar for military intervention, while also establishing yet another humanitarian pretext for war.” ERIC A. HEINZE, *WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION* 48–49 (2009). We disagree with the first argument when the problem is acute hunger, but it might have a holding when the problem is hidden hunger instead, because its protracted nature would call for long-term corrective actions de facto equating to military occupation with no expiration date. As explained in this analysis, hidden hunger is as serious as hunger’s acute manifestations, therefore our disagreement relates to matters of time and not to arguable ‘disproportions’ between the problem and the response thereto.

²⁰⁰ See Griffin Paul Jackson, *Starvation Is a Weapon*, SLATE (Sept. 12, 2019), <https://slate.com/news-and-politics/2019/09/starvation-war-crime-syria-yemen-icc.html> [<https://perma.cc/D4AS-XTA5>] (“Famines . . . are harder to pin to criminal behavior.”).

²⁰¹ Catriona J. Murdoch & Wayne Jordash, *Will Seven Million Starving Yemenis Ever Find Justice?*, AL JAZEERA (Oct. 2, 2017), <http://www.aljazeera.com/indepth/opinion/million-starving-yemenis-find-justice-171002080456552.html> [<https://perma.cc/4993-7FCG>] (emphasis added); cf. Jeffrey S. Bachman, *A ‘Synchronised Attack’ on Life: The Saudi-Led Coalition’s ‘Hidden and Holistic’ Genocide in Yemen and the Shared Responsibility of the US and UK*, 40 *THIRD WORLD Q.* 298, 298–310 (2019) (explaining possible links contributing to genocide). On the Yemeni crisis and its international legal implications, see generally Waseem Ahmad Qureshi, *The Crisis in Yemen: Armed Conflict and International Law*, 45 *N.C. J. INT’L L.* 227 (2020).

²⁰² See, e.g., Martin-Shields & Stojetz, *supra* note 198, at 154–60 (explaining links between political processes and food insecurity).

²⁰³ See Michael Ekholuenetale et al., *Socioeconomic Inequalities in Hidden Hunger, Undernutrition, and Overweight Among Under-Five Children in 35 Sub-Saharan Africa Countries*, 95 *J. EGYPTIAN PUB. HEALTH ASS’N*, 1, 4 (2020).

seven years ago was still the most starving on earth²⁰⁴ and Burundi witnessed the world-highest increase in child-hunger rate from 1990-2000,²⁰⁵ the peace transition reversed the trend²⁰⁶ and placed the country on the right track (as measured by the Global Hunger Index (GHI), which is “more closely associated with hidden hunger than FAO’s undernourishment indicator” as it “shows statistically significant correlations with measures of hidden hunger”).²⁰⁷ The Burundian government even joined the global Scaling Up Nutrition initiative in 2013 and drafted a technical nutrition strategic plan in 2014.²⁰⁸ It was too fragile an improvement, however, to be able to survive another setback into violence:²⁰⁹ policymakers should not

²⁰⁴ See INT’L FOOD POL’Y RES. INS., WELTHUNGERHILFE & CONCERN WORLDWIDE, 2014 GLOBAL HUNGER INDEX: THE CHALLENGE OF HIDDEN HUNGER 16 (2014), <https://www.concernusa.org/content/uploads/2015/03/2014GHI.pdf> [<https://perma.cc/8Q4Z-AKEA>] [hereinafter 2014 GLOBAL HUNGER INDEX]; cf. Ellen Messer & Marc J. Cohen, *FCND Discussion Paper No. 206: Conflict, Food Insecurity, and Globalization*, INT’L FOOD POL’Y RES. INS., 6 (May 2016), <http://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/37127/filename/37128.pdf> [<https://perma.cc/Z5RU-3VRH>]; *id.* at 12, n. 6 (showing Burundi’s food insecurity in 2002-2003 and explaining the role of food insecurity in Burundi and other countries).

²⁰⁵ See J. Craig Jenkins, Stephen J. Scanlan & Lindsey Peterson, *Military Famine, Human Rights, and Child Hunger: A Cross-National Analysis, 1990-2000*, 51 J. CONFLICT RESOL., 823, 828 (2007).

²⁰⁶ See 2014 GLOBAL HUNGER INDEX, *supra* note 204, at 14; *id.* at 41, 44 (providing data underlying the calculations of the 1990, 1995, 2000, 2005, and 2014 global hunger index scores).

²⁰⁷ 2014 GLOBAL HUNGER INDEX, *supra* note 204, at 15; cf. Sumithra Muthayya et al., *The Global Hidden Hunger Indices and Maps: An Advocacy Tool for Action*, 8 PLOS ONE 1, 5 fig. 2 (2013) (depicting hidden hunger index across the world).

²⁰⁸ See Emmanuel Nene Odjidja, *2030 Countdown to Combating Malnutrition in Burundi: Comparison of Proactive Approaches for Case Detection and Enrolment into Treatment*, INT’L HEALTH 1, 2 (2020).

²⁰⁹ For the latest downturns to violence, see Rick Noack, *The U.N. Just Appealed for More Humanitarian Funds Than Ever Before. Here’s Why.*, WASH. POST (Dec. 1, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/12/01/the-u-n-just-appealed-for-more-humanitarian-funds-than-ever-before-heres-why/> [<https://perma.cc/F8CM-PQ6J>]. Compare Elsa Buchanan, *Burundi Opposition Claims Government Is Using Hunger as a ‘Weapon of Mass Destruction,’* INT’L BUS. TIMES, <http://www.ibtimes.co.uk/burundi-opposition-claims-government-using-hunger-weapon-mass-destruction-1619166> [<https://perma.cc/DC5X-KTEY>] (last updated Apr. 28, 2017), with Klaus Kraemer, *Trends Show Where to Focus on Hidden Hunger*, HUFFPOST, https://www.huffingtonpost.com/dr-klaus-kraemer/trends-show-where-to-focu_b_9082752.html [<https://perma.cc/F2ZF-F3VE>] (last updated Dec. 6, 2017), and Hannah McNeish, *Wasting Away in Burundi*, AL JAZEERA (Feb. 21, 2015), <http://www.aljazeera.com/indepth/features/2015/02/wasting-burundi->

be caught off-guard about “patterns of political violence that are costly and often repetitive . . . [with] low-income countries plagued by *long-term* malnutrition, low life expectancy and high infant mortality.”²¹⁰ When conflicts ‘go silent’ without ending, hunger does not end, either: it ‘goes silent’ too, transiting to a more structural and less traceable form, which is indeed *hidden hunger* and hits civilians indiscriminately.

Moreover, with specific reference to gross violations of the RTF actively committed in order to reach genocidal or exterminating goals, one additional element must be taken in due account: the intentionality of the crime, which is the most unsurmountable challenge to any prosecutorial strategy in this field.²¹¹ Whilst the *actus reus* component of the crime may be relatively easy to prove, the criminal deliberateness of the conduct (*mens rea*) might prove difficult to establish with certainty.²¹² Proving the *mens rea* is even more demanding when attributing genocidal intentions, because this would require a *dolus specialis*; this difficulty is *a fortiori* relevant in the context of civil unrest outlined above – recrudesced after some years of roughly pacific coexistence between the Tutsi and the Hutu.²¹³ Remarkably, faced with situations of this kind as well as inconclusive evidence, international tribunals have shown a cautious degree of willingness to value contextual elements which, *as a whole*, can be deemed indicative of genocidal intent.²¹⁴

150218090629874.html [https://perma.cc/8PRM-YQKT], and Jonathan W. Rosen, *As Elections Approach, Burundians Fear a Return to War*, AL JAZEERA (Apr. 23, 2015), <http://america.aljazeera.com/articles/2015/4/23/as-elections-approach-burundians-fear-a-return-to-war.html> [https://perma.cc/7JQX-SYGR].

²¹⁰ Frank Haldemann & Akossia Rachele Kouassi, *Transitional Justice Without Economic, Social, and Cultural Rights?*, in CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES 498, 498 (Eibe H. Riedel, Gilles Giacca & Christophe Golay eds., 2014) (emphasis added).

²¹¹ See Wayne Jordash, Catriona J. Murdoch & Joe Holmes, *Strategies for Prosecuting Mass Starvation*, 17 J. INT’L CRIM. JUST. 849, 854, 864 (2019).

²¹² *Id.* at 853–54.

²¹³ *See id.* at 853–54, 864.

²¹⁴ See NASOUR KOURSAMI, THE ‘CONTEXTUAL ELEMENTS’ OF THE CRIME OF GENOCIDE 183–87 (2018). On situational appraisals concerning the crime of starvation more generally, see GLOB. RTS. COMPLIANCE & WORLD PEACE FOUND., THE CRIME OF STARVATION AND METHODS OF PROSECUTION AND ACCOUNTABILITY 16–19 (2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/Legal%20Paper%20Starvation.pdf> [https://perma.cc/3RNF-FPMM].

V. North Korea: (Hidden) Hunger as (Silent) Violence

Given the State party's obligation, under article 6 of the [ICCPR], to protect the life of its citizens and to take measures to reduce infant mortality and increase life expectancy, the Committee remains seriously concerned about the lack of measures by the State party to deal with the food and nutrition situation in the Democratic People's Republic of Korea and the lack of measures to address, in cooperation with the international community, the causes and consequences of the drought . . . which seriously affected the country's population in the 1990s.²¹⁵

The recent socio-economic history of the Korean peninsula somehow resembles that of the 'two Germanies' from WWII's aftermath through the 1990s. After the ceasefire and armistice that 'ended' the Korean War and still through the 1970s, although the whole peninsula was devastated, its Northern part recovered faster; South Korea was poorer, less industrialised, disadvantaged both geographically and agriculturally, and more aid-reliant compared to its Northern counterpart.²¹⁶ Less than half a century later, despite its infamously familistic crony conglomerates (*chaebols*), South Korea is a highly advanced, global technological powerhouse, a maturing democracy, and an aid donor, while almost the totality of households in North Korea suffer from either insufficient food or lack of variety thereof;²¹⁷ at the time of writing, according to the United Nations, less than one tenth of North Koreans enjoy acceptable food consumption.²¹⁸ How could this role-reversal happen so quickly? North Korea is often cited as an exemplification of (impending) 'failed State,'²¹⁹ as if its institution were not capable

²¹⁵ UN Human Rights Committee, *Concluding Observations of the Human Rights Committee on the Democratic People's Republic of Korea*, ¶ 12 U.N. Doc. CCPR/CO/72/PRK, (July 26, 2001).

²¹⁶ Joo-Ho Song & Tae-Jin Kwon, *Food Security in the Republic of Korea and the Democratic People's Republic of Korea: Why the Difference?*, in *FOOD INSECURITY IN ASIA: WHY INSTITUTIONS MATTER* 139, 140 (Zhang-Tue Zhou & Guanghua Wan eds., 2017).

²¹⁷ *See id.* at 163–64.

²¹⁸ *See* Tomás Ojea Quintana (Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea), *Rep. on the Situation of Human Rights in the Democratic People's Republic of Korea*, ¶ III(A)(7), U.N. Doc. A/HRC/43/58 (Feb. 25, 2020).

²¹⁹ *See, e.g.*, John Van Benthuyzen, *In-Between Anarchy and Interdependence: From State Death to Fragile and Failing States*, 36 *THIRD WORLD Q.* 22, 31–32 (2015) ("Clearly North Korea is a fragile state, indicated by its steady economic deterioration, and a

of directing the country's fate, but this label shall be rejected insofar as its dictatorial regime proves to be the attested cause of this State's misfortunes.²²⁰ In fact, "[t]he secretive and autocratic North Korean regime has been one of the most brutal human rights violators for the last six decades,"²²¹ as part of a broader policy design which is anything but irrational in light of the regime's priority of self-preservation.²²² If one compares it to the unrestrained, hyperconfident revolutionary zeal which had blindfolded 'Democratic' Kampuchea's decision-making in Cambodia,²²³ similarities are astounding. North Korea's extremised, hyper-isolationist form of autarchy did not deliver on its promises, and "has been loath to accept the demands of other governments or NGOs concerning the production, distribution, and accountability of its food system."²²⁴ Food deprivation never happens in a vacuum, and the responsibilities of the State in its external and internal affairs shall be appraised holistically, in an integrated and cross-functional fashion: "a right to food audit should not be limited to examining policies and programs and should include the legal structures behind food production."²²⁵ In 'nourishing' terms, the Democratic People's Republic of Korea's ("DPRK") responsibilities for human rights violations mainly lie in three policies: 1) the sluggish, negligent, or even obstructed dispensation of international (food) aid, the acceptance of which burns political capital²²⁶ but shall be

candidate for future state failure").

²²⁰ Charles T. 'Chuck' Call, *The Fallacy of the 'Failed State,'* 29 THIRD WORLD Q. 1491, 1504 (2008).

²²¹ BANTEKAS & OETTE, *supra* note 2, at 185. See generally Roberta Cohen, *Human Rights in North Korea: Addressing the Challenges*, 22 INT'L J. KOR. UNIFICATION STUD. 29, 29–62 (2013) (discussing the grave human rights abuses present in North Korea and the diverse approaches needed to solve the problem).

²²² See Andrei Yamamoto, *Unpacking the Ontological Foundation of North Korea's Ambivalent Foreign Policy: Brinkmanship as Rationality*, 11 ASIAN POL. & POL'Y 356, 359–60 (2019).

²²³ See MAARTJE WEERDESTIJN, *THE RATIONALITY OF DICTATORS: TOWARDS A MORE EFFECTIVE IMPLEMENTATION OF THE RESPONSIBILITY TO PROTECT* 262–63 (2017).

²²⁴ John Feffer, *North Korea and the International Politics of Famine*, 4 ASIA-PAC. J. 1, 14 (2006).

²²⁵ See Kirsteen Shields, *Methods of Monitoring the Right to Food*, in RESEARCH METHODS IN HUMAN RIGHTS: A HANDBOOK 333, 348 (Bård A. Andreassen et al. eds., 2017).

²²⁶ See VIRGINIE GRZELCZYK, *NORTH KOREA'S NEW DIPLOMACY: CHALLENGING POLITICAL ISOLATION IN THE TWENTY-FIRST CENTURY* 205 (2018); Dong Jin Kim, *Aid to*

approved nonetheless; 2) the collectivised exploitation of cultivable soil;²²⁷ and 3) the exasperated restrictions to the free movements of people and goods,²²⁸ whose lifting is often contingent upon bribing officials²²⁹ – indeed, “people who live in authoritarian regimes can buy private space through the payment of bribes”.²³⁰ To this list, one may add the military overspending,²³¹ the indiscriminately

the Enemy: Linking Development and Peacebuilding on the Korean Peninsula, 29 PAC. REV. 473, 481–4 (2016); see also Mika Aaltola, *Emergency Food Aid as a Means of Political Persuasion in the North Korean Famine*, 20 THIRD WORLD Q. 371, 375 (1999).

The act of donating food to starving people is overwhelmingly perceived as an honourable act of kindness; at the same time, however, the act of international gift-giving does not stop when the donated food is eaten but extends from humanitarian actions to the realm of international politics in a form of expected reciprocity. Many contemporary researchers tend not to take gift-giving practices at their face value but seek to understand the pattern of gift-giving against some latent economic, social or political interests. . . . Although large-scale food aid is often donated by governments which perceive themselves as existing in anarchic conditions dominated by self-help and maximisation of relative capabilities, the act of gift-giving does contain altruistic, moral and humanitarian suggestions amid connotations more suitable for political persuasion and power politics.

Id. at 373.

²²⁷ See also KAMER DARON ACEMOĞLU & JAMES ALAN ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 73 (2012).

²²⁸ See INT'L FED'N HUM. RTS. [FIDH], *MISERY AND TERROR: SYSTEMATIC VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN NORTH KOREA* 10 (2003), <https://www.fidh.org/en/region/asia/north-korea/MISERY-AND-TERROR-Systematic> [<https://perma.cc/LD46-7RCT>]; STEPHAN HAGGARD & MARCUS NOLAND, *FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM* 169–70 (2009). The problem with the third policy lies in its extent, as its contrary (a total deregulation of the supply chains and financialization of the commodities' exchange price and trade, in accordance with the neoliberal economic approach) has already proven to be detrimental to a fair distribution of nutritional resources at the global level.

²²⁹ See JUSTIN V. HASTINGS, *A MOST ENTERPRISING COUNTRY: NORTH KOREA IN THE GLOBAL ECONOMY* 92 (2016); OFFICE OF THE U.N. HIGH COMM'R HUM. RTS., *THE PRICE IS RIGHTS: THE VIOLATION OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA* 2 (2019), https://www.ohchr.org/Documents/Countries/KP/ThePriceIsRights_EN.pdf [<https://perma.cc/LAW5-NF6C>]; Sang-Hun Choe, *Fleeing North Korea is Becoming Harder*, N.Y. TIMES (Jan. 4, 2013), <https://www.nytimes.com/2013/01/05/world/asia/crackdowns-make-fleeing-north-korea-harder.html> [<https://perma.cc/9FJW-PKWM>]; Soo-Am Kim, et al., *Relations Between Corruption and Human Rights in North Korea*, KOR. INST. NAT'L UNIFICATION 29–30 (2013), <http://repo.kinu.or.kr/bitstream/2015.oak/2239/1/0001458992.pdf> [<https://perma.cc/FAQ7-R5GB>].

²³⁰ Philip M. Nichols, *The Good Bribe*, 49 U.C. DAVIS L. REV. 647, 675 (2015).

²³¹ See Serena Timmoneri, *Responsibility to Protect and 'Peacetime Atrocities': The*

aggressive and centrally planned (*i.e.*, compelled on farmers) fertilisation of the soil which degraded the nutritional value of agricultural products over extensive contaminated lands,²³² as well as—mirroring Palestine’s vicious cycle—restrictions to people’s movements²³³ internationally, but also domestically.²³⁴ Not satisfied with starving its own citizens, the North Korean regime disregards its PIL obligation²³⁵ to, for instance, release passports and smoothen the opening of ‘humanitarian’ corridors as to let North Koreans escape famine (either temporarily or permanently) through lawful emigration, provided third States are willing to welcome them as either refugees or ‘economic migrants.’²³⁶ These policies combined have been defined as the ‘silent violence’

Case of North Korea, 19 INT’L J. HUM. RTS. 1290, 1297 (2015).

²³² See Christine Ahn, *Famine and the Future of Food Security in North Korea*, INST. FOOD & DEV. POL’Y, 5–8 (May 2005), <https://foodfirst.org/wp-content/uploads/2013/12/PB11-Famine-in-North-Korea-Christine-Ahn.pdf> [<https://perma.cc/VQ4G-U2D6>].

²³³ See AMNESTY INT’L, *STARVED OF RIGHTS: HUMAN RIGHTS AND THE FOOD CRISIS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA (NORTH KOREA)* 16 (2004), <https://www.Amnesty.Org/Download/Documents/96000/Asa240032004en.pdf> [<https://perma.Cc/4auj-Z3sh>].

²³⁴ See Timmoneri, *supra* note 231, at 1294 (describing how “forced internal resettlement is routine” and access to Pyongyang is “tightly restricted”).

²³⁵ This obligation stems from art. 12(2) ICCPR; the DPRK ratified the ICCPR in 1981 to then attempt to withdraw from it in 1997, yet said treaty does not provide for withdrawal options, therefore the other state parties still consider the DPRK to be a member. The vague qualifications to art. 12(2) stated in art. 12(3)—“those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others”—are nonetheless qualified, in turn, by the same art. 12(3) in that they shall be “consistent with the other rights recognized in the [...] Covenant”. Among the latter, that to life (art. 6(1)) and, most relevantly for hidden hunger, that not to be subjected to degrading treatment (art. 7); furthermore, unqualifiedly, “[i]n no case may a people be deprived of its own means of subsistence” (art. 1(2)).

²³⁶ See generally Jiyoung ‘Jay’ Song, *Twenty Years’ Evolution of North Korean Migration, 1994–2014: A Human Security Perspective*, 2 ASIA & PAC. POL’Y STUD. 399 (2015). See *China’s Repatriation of North Korean Refugees: Hearing Before the Cong.-Executive Comm’n on China*, 112th Cong. 5 (2012) (transcript available at https://chrissmith.house.gov/uploadedfiles/2012.03.05_chinas_repatriation_of_north_korean_refugees.pdf [<https://perma.cc/6SGX-HEKU>]); Stephy Kwan, *More Than an Ignorant Bystander: Chinese Accountability and the Repatriation of North Korean Defectors*, 26 INT’L J. KOR. UNIFICATION STUD. 95 (2017); Jeanyoung Jeannie Cho, *Systemizing the Fate of the Stateless North Korean Migrant: A Legal Guide to Preventing the Automatic Repatriation of North Korean Migrants in China*, 37 FORDHAM INT’L L.J. 175 (2013).

underlying interstitial mass starvation: top-down suicidal missions of “titanic social engineering [as] attempts at agro-economic transformation.”²³⁷ Another policy to be considered is what is termed as ‘penal starvation,’ which entails starving prisoners to death (by choice, indifference, and/or incompetence):

[t]he North Korean regime is responsible not only for famine, but also for a deliberate policy of subjecting its prisoners to starvation rations. . . . Food is allocated on the basis of productivity: the less a prisoner produces, the less he eats, resulting in a spiral downward as those deprived of even more food produce less and less. Many in the camps die from lack of food, while some are executed for foraging. Penal starvation does not cause death in the manner . . . in which malnutrition spreads over wide populations. Rather, it attacks a significant percentage of prisoners who cannot live on rations constantly below subsistence level, or whose food rations are even lower than the prescribed below-subsistence level because they do not work hard enough or have angered the authorities in some other way. Estimates of how many people are in the prison camps at any time vary, but most sources agree on about 200,000 every year.²³⁸

The convergence of all of these elements is culpably worsening a humanitarian disaster of catastrophic proportions, where not only about a million adults died and cannibalism resurged,²³⁹ but half of all children could not be fed correctly²⁴⁰ and *sixty percent* of them, just two decades ago, were stunted.²⁴¹ Indeed, “lack of access to food is almost never the result of a general scarcity of food. Instead, people are deprived of food because they have no opportunity to produce it, cannot earn a sufficient income to buy the food they need or are unable to work at all.”²⁴² Even when they produce it,

²³⁷ Bridget K. Conley & Alexander William Lowndes ‘Alex’ de Waal, *The Purposes of Starvation: Historical and Contemporary Uses*, 17 J. INT’L CRIM. JUST. 699, 719 (2019).

²³⁸ Rhoda E. Howard-Hassmann, *State-Induced Famine and Penal Starvation in North Korea*, 7 GENOCIDE STUD. & PREVENTION 147, 155 (2012).

²³⁹ *Id.* at 150–51.

²⁴⁰ See, e.g., KOR. BAR ASS’N, REPORT ON HUMAN RIGHTS IN NORTH KOREA 2014 147–48, 178 (2014), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=AD2E22D6-5542-421C-99B0-1AADE4142F2C> [<https://perma.cc/LJ33-8M5X>]; HOWARD-HASSMANN, *supra* note 6, at 64.

²⁴¹ HOWARD-HASSMANN, *supra* note 6, at 65.

²⁴² PRISCILLA CLAEYS, HUMAN RIGHTS AND THE FOOD SOVEREIGNTY MOVEMENT: RECLAIMING CONTROL 62 (2015).

corrupted redistribution policies and relational privileges within society make North Koreans' starvation a deliberate political act of disempowerment,²⁴³ enforced by a ruthless regime that "held rigidly to a self-destructive agricultural system."²⁴⁴ Those who are audacious enough try to access dark markets, which paved the foundation for higher rates of disloyalty towards the rulers.²⁴⁵

Two competing narratives seek to describe different States' approach to the problem of food production and distribution. The first, which is dominant and market-driven, is known as 'globalist neoliberal,' encoding "an emphasis on food production, technological solutions, privatisation, and strong corporate influence." The second, which is mostly communist, is known as 'food sovereignty,' placing "an emphasis on access to and distribution of food, local production, and strong opposition to the privatisation and corporatisation of the food system."²⁴⁶ Counterintuitively, perverse mechanism make the two narratives coincide in contemporary DPRK. *Prima facie*, one might be tempted to leverage on the communist,²⁴⁷ state-driven North

²⁴³ U.N. Human Rights Council, Report of the Special Rapporteur Mr. Marzuki Darusman on the Situation of Human Rights in the Democratic People's Republic of Korea, A/HRC/22/57, annex I ¶¶ 3, 6 (Feb. 1, 2013).

²⁴⁴ Donna Lee, The North Korean Famine and Food Shortage: The Problem, the Politics, and the Policy 13–14 (May 5, 2006) (unpublished Third Year Paper, Harvard Law School), <https://dash.harvard.edu/handle/1/8944674> [html://perma.cc/LP7A-GPP9].

²⁴⁵ See Jonathan R. Corrado, *Rise of the Disloyal: Increasing Resentment in North Korea*, 48 ASIAN AFF. 445, 455 (2017).

²⁴⁶ Anne Saab, *International Law and Feeding the World in Times of Climate Change*, 9 TRANSNAT'L LEGAL THEORY 288, 290 (2018).

²⁴⁷ Technically, that of North Korea is a socialist economic system, as enunciated in its Constitution itself. However, by way of simplicity and in order to emphasise the autarchic *rhetoric* of its 'developmental' trajectory vis-à-vis international markets, we have preferred to reiterate the rather inaccurate capitalist/communist dichotomy. On DPRK's 'constitutional' socialism see, for example, Barry K. Gills, *North Korea and the Crisis of Socialism: The Historical Ironies of National Division*, 13 THIRD WORLD Q. 107 (1992); Justine Guichard, *In the Name of the People: Disagreeing over Peoplehood in the North and South Korean Constitutions*, 4 ASIAN J.L. & SOC'Y 405, 417-27 (2017); Dae-Kyu Yoon, *The Constitution of North Korea: Its Changes and Implications*, 27 FORDHAM INT'L L.J. 1289 (2003); Bui Ngoc Son, *Globalization of Constitutional Identity*, 26 WASH. INT'L L.J. 463, 527-9 (2017); Patricia Goedde, *Beyond Sham: The North Korean Constitution*, 44 ASIAN PERSP. 1 (2020); Robert Weatherley & Jiyoung 'Jay' Song, *The Evolution of Human Rights Thinking in North Korea*, 24 J. COMMUNIST STUD. & TRANSITION POL. 272, 278-82 (2008); Albert Hung-ye Chen, *Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations*, 8 INT'L J. CONST. L. 849, 871-73 (2010); Gary Alexander Stradiotto & Sujian Guo, *Market*

Korean case to disprove the increasingly mainstreamed argument of all those who claim that food crises and shortages globe-wide mostly owe to West-modelled neoliberal market forces' "emphasis on privatisation, deregulation and, crucially, commodification."²⁴⁸ Nonetheless, said conclusion would be misleading insofar as the "profitable capital accumulation by transnational economic élites" is not absent in regimes like the North Korean one.²⁴⁹ It is hyper-concentrated in the hands of a few rulers and related population strata²⁵⁰ who employ propaganda-supported pseudo-egalitarian discourses to keep the (largely majoritarian) rest of the population underfed and underdeveloped.²⁵¹ These authoritarian 'leaders' thus have no interest in distributing across the citizens (by means of accountable policy implementation) all the benefits of their share of transnational capital-accumulation mechanisms which occur along globalised food supply-chains; North Korean 'leadership' prefers "to sacrifice the rights — and lives — of those it perceives as disloyal or class enemies,"²⁵² and more generally of all those who are not double-stranded with and 'useful to' the power-élite.²⁵³

Socialism in North Korea: A Comparative Perspective, 12 J. ASIA PAC. ECON. 188, 199-201 (2007).

²⁴⁸ Paul O'Connell, *The Death of Socio-Economic Rights*, 74 MOD. L. REV. 532, 535 (2011).

²⁴⁹ *Id.* at 536; see also Note by the President of the Security Council, S/2017/150, ¶¶ 210–55 (Feb. 27, 2017). See generally CTR. FOR ADVANCED DEF. [C4ADS] & 세종연구소[THE SEJONG INSTITUTE], *The Forex Effect: US Dollars, Overseas Networks, and Illicit North Korean Finance* (2017), <https://static1.squarespace.com/static/566ef8b4d8af107232d5358a/t/5a3292079140b73f73f92efd/1513263687907/The+Forex+Effect.pdf> [<https://perma.cc/QUH4-XDXB>]; Richard S. Tracey, *Using the PATRIOT Act to Turn North Korea's Dirty Money into a Bargaining Chip*, 3 STRATEGIC STUD. Q. 124 (2009).

²⁵⁰ See Haggard & Noland, *supra* note 228, at 56, 74.

²⁵¹ See John M. Friend, *A Cultural Neuroscience Perspective on North Korean Strategic Culture: Implications for Tailored Deterrence*, 37 POL. & LIFE SCI. 156, 161 (2018); Woo-Suk Jun, *A Study on the Incapacitation Mechanism Model of the Juchist and Marxist-Leninist Articles Against the Core Implementation Mechanism Model of the Fundamental Rights Articles in the North Korean Constitution: North Korea's Violations of Fundamental Rights and International Human Rights Treaties 128–31* (Mar. 13, 2014) (unpublished S.J.D. Thesis, University of Kansas) (on file with author).

²⁵² HUM. RTS. WATCH, *NORTH KOREA: A MATTER OF SURVIVAL: THE NORTH KOREAN GOVERNMENT'S CONTROL OF FOOD AND THE RISK OF HUNGER* 3 (2006), <https://www.hrw.org/reports/2006/northkorea0506/northkorea0506webwcover.pdf> [<https://perma.cc/9YRK-N37G>].

²⁵³ See ANDREĬ NIKOLAJEWITSCH LAN'KOV, *THE REAL NORTH KOREA: LIFE AND POLITICS IN THE FAILED STALINIST UTOPIA* 115 (2013); Boris Kondoch, *The Responsibility*

The country being factually in peace,²⁵⁴ no war crime can be attributed to its leaders; also, no specific group is targeted, which excludes the possibility to invoke genocide. With reference to the R2P, the only relevant attribution would be that for crimes against humanity,²⁵⁵ as civilians are violated arbitrarily.²⁵⁶ Above-mentioned precedents in Darfur regrettably set the rule that aid obstruction does not suffice for invoking the R2P,²⁵⁷ and North Korea was one of the six countries expressing open hostility at the principle before the UN.²⁵⁸ Strategic concerns also fall into the scheme, adding to the unfeasibility of the R2P option:

the international community, the US, China, and South Korea all agree that their first strategic priority is a stable North Korea that does not develop or use nuclear weapons. *No [S]tate or international organization has invoked the evolving principle of the responsibility to protect with regard to North Korea.* The preferred option appears to be to simply wait for change.²⁵⁹

Shifting from charges upon state representatives (mainly inspected in the case-study on Burundi) to those upon States themselves, the most comprehensive framework to be pointed to is

to Protect and Northeast Asia: The Case of North Korea, 24 KOR. J. DEF. ANALYSIS 433, 442 (2012).

²⁵⁴ Formalistically speaking, a peace treaty between the two Koreas has never been signed, therefore the two countries are technically belligerent parties still. However, we will adopt a factual perspective here, all the more considering that germinal gesture-politics of *détente* have been deployed in recent years. Wars which are factually ended but only accomplish a legal acknowledgement of this reality decades or even centuries later are usually known as ‘extended wars’ (or ‘perpetual wars’ when latent hostilities remain, resulting in occasional and minor outbreaks of military violence and strongly-worded ‘diplomatic’ confrontation – which is in itself an oxymoron).

²⁵⁵ Timmoneri, *supra* note 231, at 1293–95, 1300.

²⁵⁶ Howard-Hassmann, *supra* note 238, at 158–59.

²⁵⁷ Daniel Fiott & Marie Vincent, *The European Union, in AN INSTITUTIONAL APPROACH TO THE RESPONSIBILITY TO PROTECT* 199, 214–15 (Gentian Zyberi & Kevin T. Mason eds., 2013). This ‘rule’ does not fulfil the requirements of international customary law, therefore it could be easily neglected if only, as explained previously, the R2P itself was not ineligible as a legal custom.

²⁵⁸ ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* 20 n.90 (2011).

²⁵⁹ Howard-Hassmann, *supra* note 238, at 160 (emphasis added); *see also* Ido Kilovaty, *Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea: Green Light for Humanitarian Intervention*, 6 CRIEGHTON INT’L & COMP. L.J. 1, 22 (2015).

the ICESCR one,²⁶⁰ which calls upon States to “recognize the right of everyone to an adequate standard of living . . . including *adequate* food”²⁶¹ by “recognizing the fundamental right of everyone to be free from hunger.”²⁶² The Covenant further specifies that “the State may subject [the rights embodied thereof] only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”²⁶³ In the case under examination, neither the society is a democratic one (where the objectives of public welfare are more or less directly set by the citizens), nor the nature of the RTF shall be deemed compatible to any limitation promoting welfare objectives; therefore no limitation is applicable.

The danger of hidden hunger, “caused by eating food that is cheap and filling, but deficient in essential vitamins and micro-nutrients,”²⁶⁴ is always around the corner in dictatorial regimes, as they cause restrictions to the circulation of ‘educational wisdom’ related to food quality.²⁶⁵ The ICESCR confirms that States “shall take . . . measures which are needed to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge[, as for] everyone to . . . enjoy the benefits of scientific progress and its applications.”²⁶⁶ Thereby, a strict interconnection between the right of non-discrimination in accessing information and the right to *nutrient, healthy, and balanced* food can be verified,²⁶⁷ just like in Palestine, where all

²⁶⁰ To which the DPRK is a party (accession date: 14 Sept. 1981), in line with former USSR-satellite countries’ self-professed predilection for the endowment of economic rights (which, in practice, degenerated) over political ones at the UN level.

²⁶¹ ICESCR, *supra* note 53, art. 11(1) (emphasis added).

²⁶² *Id.* art. 11(2).

²⁶³ *Id.* art. 4.

²⁶⁴ Sven Söllner, *The ‘Breakthrough’ of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food*, 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 391, 401 n.19 (2007).

²⁶⁵ *See id.* at 401; *cf.* Eileen Kennedy et al., *Alleviating Hidden Hunger: Approaches That Work*, 45 IAEA BULL. 54, 59 (2003).

²⁶⁶ ICESCR, *supra* note 53, arts. 11.2(a), 15.1(b); *see also* Hans Morten Haugen, *Human Rights and Technology—A Conflictual Relationship? Assessing Private Research and the Right to Adequate Food*, 7 J. HUM. RTS. 224 (2008).

²⁶⁷ Söllner, *supra* note 264, at 401; Patrick Webb and Andrew L. Thorne-Lyman, *Entitlement Failure from a Food Quality Perspective: The Life and Death Role of Vitamins and Minerals in Humanitarian Crises*, in FOOD INSECURITY, VULNERABILITY AND HUMAN

authorised development stakeholders joined forces and translated the circulation of informational wisdom “into the Water Sector Working Group, a forum for information-sharing between the Palestinian Water Authority, donors, and international and local implementing agencies, including humanitarian actors.”²⁶⁸ International agencies, whose work is obstructed in the DPRK, usually play a central role in raising awareness about and socialising scientific standards.²⁶⁹ As food quality is intrinsically dependent on freedom of movement (of people and goods), prosperity awareness bears relevance as well:

[n]ews of the prosperity of China and South Korea filters into North Korea via returned refugees and via traders who smuggled videos and DVDs in from China. The more North Koreans encounter goods from the global marketplace and visitors from the rest of the world, the harder it is for the regime to trumpet its nonsensical propaganda about being the best country in the world.²⁷⁰

Furthermore, where post-harvest waste couples with endemic poverty, hidden hunger is the most automatic and immediate

RIGHTS FAILURE 243, 245 (Basudeb Guha-Khasnobis, Shabd S. Acharya & Benjamin G. Davis eds., 2007). See generally Kennedy et al., *supra* note 265 (discussing various methods to eliminate hunger through, among other things, increasing information access). The most recent research confirms that also in light of the growing world population, micronutrients deficiency cannot be eradicated unless all States gain access to relevant technologies and their citizens are properly informed and educated; ending malnutrition requires concerted, three-step efforts: biofortification (science), dietary interventions (education), and industrial food fortification (industry). Hence, the circulation—and possibly application—of international scientific wisdom and the access to related technologies and educational tools is of the essence, so that it should never be impaired or procrastinated on the part of state authorities. See Dominique Van Der Straeten et al., *Multiplying the Efficiency and Impact of Biofortification Through Metabolic Engineering*, 11 NATURE COMM. 1, 7 (2020). On biofortification techniques as applied to the curse of hidden hunger, see generally Priyanka Sharma, Poonam Aggarwal & Amarjeet Kaur, *Biofortification: A New Approach to Eradicate Hidden Hunger*, 33 FOOD REV. INT’L 1 (2017). Fortified aliments are promoted at the U.N. level, too. See Human Rights Council, Report Submitted by the Special Rapporteur (Mr. Olivier De Schutter) on the Right to Food, A/HRC/19/59, ¶¶ 19–21. (Dec. 26, 2011).

²⁶⁸ Edoardo Borgomeo, *Delivering Water Services During Protracted Armed Conflicts: How Development Agencies Can Overcome Barriers to Collaboration with Humanitarian Actors*, 101 INT’L REV. RED CROSS 1067, 1082 (2019).

²⁶⁹ See Nita Dalmiya & Werner Schultink, *Combating Hidden Hunger: The Role of International Agencies*, 24 FOOD & NUTRITION BULL. 69, 73–75 (2003).

²⁷⁰ Howard-Hassmann, *supra* note 238, at 160–61.

outcome.²⁷¹ “[L]osses occur[ring] within the post-harvest, processing and distribution stages of the food chain — likely as a result of poor management, refrigeration, and preservation practices during storage and transportation [produce disproportionately negative effects on] . . . micronutrient-rich commodities such as fruits, vegetables and animal products,”²⁷² and post-harvest losses in North Korea account for half of the total production.²⁷³ North Korea’s forced insulation from global supply chains, regardless of the latter’s own imperfections, is dramatically harming North Koreans’ ability to feed themselves correctly, and it is exacerbating hidden hunger throughout the country. The chronic anti-developmental characteristics of the malnutrition affecting DPRK’s society and its physiological repercussions on the population²⁷⁴ stand as ‘self-contained’ evidence that acute famine exacerbated by natural draughts has always been accompanied by long-term hidden hunger, caused by the culpable negligence or even the deliberate choice of North Korea’s dictators.

VI. Conclusions

In the broadest terms, “there is no thought of invoking even the most innocuous prescriptions of R2P to respond to massive starvation in the poor countries.”²⁷⁵ At this stage, the impracticability of any claim by the international community to enjoy a legally grounded power to intervene to counter hidden-hunger phenomena related to state leaders’ misconduct should emerge evidently. There are two main issues at stake: the first concerns the difficulty in objectively identifying one of the four R2P-relevant ‘listed crimes’ by establishing a *nexus* with the RTF violation due to a population’s hidden hunger with their related

²⁷¹ Nevin Stewart Scrimshaw, *The Consequences of Hidden Hunger for Individuals and Societies*, 15 FOOD & NUTRITION BULL. 1, 17 (1994).

²⁷² Hannah Ritchie, David S. Reay & Peter Doyle Higgins, *Quantifying, Projecting, and Addressing India’s Hidden Hunger*, 2 FRONTIERS IN SUSTAINABLE FOOD SYS. 1, 8 (2018).

²⁷³ MOHAMMAD U.H. JOARDDER & MAHADI HASAN MASUD, FOOD PRESERVATION IN DEVELOPING COUNTRIES: CHALLENGES AND SOLUTIONS 31 (2019).

²⁷⁴ See Haggard & Noland, *supra* note 228, at 195–97.

²⁷⁵ Avram Noam Chomsky, Statement by Professor Noam Chomsky to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect 5 (July 23, 2009) (transcript available at <https://www.un.org/en/ga/president/63/pdf/calendar/20090723-resptoprotect.pdf>) [<https://perma.cc/55WG-YY5V>].

mental element (when applicable); the second originates in the R2P focus on preventive (or at least *in medias res*) interventions²⁷⁶ rather than *post factum* ‘corrective’ interferences with actions which took place within a State. While the first hurdle can somehow be overcome, the second must confront itself with blurred field realities and hybrid legal-political vindications. In fact, hidden hunger being the long-term effect²⁷⁷ of deeply rooted and multidimensional shortages, setting a *hic et nunc* would be extremely challenging in any (wartime or peacetime) context. Furthermore, it can be argued that at least in times of war, the ‘ante-R2P’ regime would have been factually more efficient, because vaguer, and as such prone to unilateral humanitarianism; this has been demonstrated in multiple scenarios, the (unlawful, yet ethically justifiable?)²⁷⁸ U.S. resoluteness reported in Section III being one of them. This is where international politics and law more positively come together, in their common attempt to ensure that a minimum threshold in the protection of human rights is attained.

Conversely, *in insulated legal terms*, the R2P represents a considerably more permissive framework, shaped by a rough yet substantial departure from the ancient sternness of sovereignty. Consequently, and taking into consideration that hidden hunger remains less straightforwardly addressable within regional human rights protection systems,²⁷⁹ there would be reasonably optimistic prospects for the agreement and implementation of supplementary

²⁷⁶ See Zifcak, *supra* note 123, at 496–98.

²⁷⁷ See Schmid, *supra* note 3, at 532 (“[A] massacre by firearms or machetes is more likely to attract the attention of international criminal lawyers than the slow deaths of those willfully deprived of food[.]”). This is even more dramatically true for hidden hunger.

²⁷⁸ Or, phrased differently, ‘illegal but legitimate’ – a formula widely commented upon by scholars and practitioners, with reference to different contexts. See, e.g., JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 265 (3d ed. 2013); see also Michael Grant Ignatieff, *The Duty to Protect, Still Urgent*, N.Y. TIMES (Sept. 13, 2013), <http://www.nytimes.com/2013/09/14/opinion/the-duty-to-protect-still-urgent.html> [<https://perma.cc/XX3W-6RA8>]; Ian Hurd, *Bomb Syria, Even if It Is Illegal*, N.Y. TIMES (Aug. 27, 2013), <http://www.nytimes.com/2013/08/28/opinion/bomb-syria-even-if-it-is-illegal.html> [<https://perma.cc/5LCA-KJNB>]; Marko Milanović, *Illegal but Legitimate?*, EJIL:TALK! (Apr. 10, 2017), <https://www.ejiltalk.org/illegal-but-legitimate/> [<https://perma.cc/T7VT-XYAB>]; MICHAEL W. DOYLE, *THE QUESTION OF INTERVENTION: JOHN STUART MILL AND THE RESPONSIBILITY TO PROTECT* 122 (2015).

²⁷⁹ See e.g., BANTEKAS & OETTE, *supra* note 2, at 706–07 n.56. Even though, for example, the African Union’s power to penetrate into a Member State without the latter’s consent, is regarded by some as a regionalized reflection of the R2P doctrine—as mentioned *supra*.

measures at the international plane, in line with the change-gear inaugurated in New York City in 2005 that somehow institutionalised the “emerging global cosmopolitanism of human security.”²⁸⁰ However, perhaps unfortunately, the R2P clearly lacks political support as it stands now, thus *a fortiori* when expansions of its scope are contemplated.

To borrow from ‘peace literature,’ what we need in order to complexify our understanding of the right to food by freeing it from a starvation lexicon, is “a kind of framing knowledge (*savoir*), which is intimately linked to power and enables the more superficial, ‘surface’ knowledge of *connaissance* to make sense.”²⁸¹ *Connaissance* rests itself at the appearance level, content with assuming there is no hunger wherever some calories are provided and individuals *look* healthy;²⁸² *savoir* digs deeper through the structure of society, into the inner texture of power, and argues that hunger *does exist* whenever *quality* food is not freely accessible. This ‘hidden hunger’ concretises with someone’s ill-will; it materialises any time the rulers formulate a discourse of coercion that impairs economic freedom and societal development. This work has shown the way a discourse of coercion can conceal itself under the surface of allegedly different regimes, during wartime or peacetime alike, regardless of the legal applicability of the R2P framework as it ‘stands’ (does it?) today.

The present analysis, building on the two opposite yet specular case studies of Burundi and North Korea, also demonstrated that the well-intentioned agreement over a ‘responsibility to protect,’ if not understood against its whole spectrum of unwarranted implications, risks backfiring whenever a country’s failure does not (apparently) fulfil the paper-based criteria required for intervention. When no framework applies, States *politically* enjoy wider room for manoeuvre, yet as soon as a legal framework is put in place, such a room reduces significantly. With the R2P, “the U.N. projects itself as the legitimate guardian of human beings on a global scale, albeit

²⁸⁰ Carolyn Helen Filteau, Rights and Responsibilities: What Are the Prospects for the Responsibility to Protect in the International/Transnational Arena? 280 (Apr. 2015) (unpublished Ph.D. Thesis in Law, York University in Toronto), <http://digitalcommons.osgoode.yorku.ca/phd/7> [<https://perma.cc/6RJQ-CYAW>].

²⁸¹ David G. Lewis, *The Myopic Foucauldian Gaze: Discourse, Knowledge and the Authoritarian Peace*, 11 J. INTERVENTION & STATEBUILDING 21, 26 (2017).

²⁸² See KATE B. KLEIN, HUMANITARIANISM AND THE ANTHROPOLOGY OF HUNGER 8 (2013).

in *extreme* circumstances of [S]tate failure.”²⁸³ Whilst theoretically suitable for patent expressions of mass starvation and ‘quantitative’ hunger, the R2P framework as it is codified today thus seem ill-designed for addressing pervasive but ‘discrete’ manifestations of ‘qualitative’ hunger. Hidden hunger never manifests itself in *extreme* forms, yet it *extremely* impairs the health, freedom, and future of those who live under such conditions, as much as the growth, development, and emancipation of their countries and societies. As of today, not only have “[n]o major treaties [. . .] made affirmative references to R2P,”²⁸⁴ but pursuing simil-R2P interventions, as if R2P was never codified, seems politically too risky for any country to consider as an option. Someone empirically demonstrated that R2P is anything but shelved,²⁸⁵ yet besides its potential reach, in practice it has never proven to be of any added value in addressing hunger, even in the latter’s more ‘explicit’ manifestations.²⁸⁶

In conclusion, millions of children, stuck in between the previous lack of legal frameworks (as before the R2P) and the ambiguities of—and unachieved consensus on—the existing quasi-legal framework (the R2P itself), will continue to face a dark (if any) future at the hand of a subtle, unapparent, and very much avoidable condition named ‘hidden hunger.’ Was the *necessitas non habet legem*-phase less defined by law and formalistically constrained, and thus, paradoxically, more efficient in protecting them? More time and empirical research are needed to seal a definitive answer.²⁸⁷

²⁸³ Nicholas Tsagourias, *Cosmopolitan Legitimacy and UN Collective Security*, in *COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY* 129, 141 (Roland H. M. Pierik & Wouter G. Werner eds., 2010) (emphasis added).

²⁸⁴ Pandiaraj, *supra* note 152, at 813.

²⁸⁵ See generally Margaret ‘Maggie’ Powers, *Responsibility to Protect: Dead, Dying, or Thriving?*, 19 INT’L J. HUM. RTS. 1257–78 (2015) (analyzing how the R2P doctrine has continued to be utilized by the United Nations despite the post-Libya backlash).

²⁸⁶ For the two examples of Myanmar and Zimbabwe, see CRISTINA GABRIELA BADESCU, *HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS* 141–45 (2011).

²⁸⁷ Furthermore, while this essay has adopted a typical Westphalian approach to PIL doctrines, other emerging streams of literature conceptualise ‘food sovereignty’ as a jurisdictional interlude which overlaps with, dilutes, or even blatantly opposes the statual way of organising territory, assigning roles, apportioning responsibilities, and arranging for citizens’ nutrition. See, e.g., Merisa S. Thompson, Alasdair Cochrane & Justa Mayra Hopma, *Democratising Food: The Case for a Deliberative Approach*, 46 REV. INT’L STUD. 435, 439 (2020). See generally Daniele Conversi, *Sovereignty in a Changing World: From*

Certainly though, the extemporaneous politics of humanitarianism that was once free-riding and fluctuating upon particular interests and rhetorical preferences, and that once “received no further justification than the functionalist claim to be acting as executive agent of the international community,”²⁸⁸ has now been encoded and subjected to further forms of international politics, but pseudo-legalised—thus harder to overcome—ones. States are now obliged to elaborate well-rounded justifications for intervening. For the time being, (hidden) hunger seems to be the paradigmatic victim of this “emergence of ‘political limits’ in a new global space organized by a conception of sovereignty rooted in the principle of humanity”.²⁸⁹

Westphalia to Food Sovereignty, 13 GLOBALIZATIONS 484 (2016);

²⁸⁸ Anne Orford, *On International Legal Method*, 1 LONDON REV. INT'L L. 166, 196 (2013).

²⁸⁹ Emily Kidd White, *Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters*, 20 EUR. J. INT'L L. 545, 546 (2009).