

Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait

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INTRODUCTION

The Iraqi invasion of Kuwait in early August 1990 was a bold political move that sent shockwaves through the community of nations and triggered an international reaction which some have viewed as the dawn of a "New World Order." From the start, the United Nations (the "U.N.") was at the center of the reaction against this illegal use of force, condemning the invasion in unmitigated terms the same day it occurred.¹ The U.N. proved successful in channelling efforts which eventually resulted in the liberation of Kuwait.

My focus here is on the use of a food blockade by the U.N. Security Council against Iraq and occupied Kuwait. The use of starvation as a weapon is regulated by a number of international humanitarian norms, some conventional and others customary. In this article, I analyze the legal and factual background of the food blockade, and then assess its compliance with international humanitarian law. I conclude that the U.N., the members of the Security Council, and the countries that participated violated several mandatory humanitarian norms in enforcing the food blockade.

I. FACTUAL AND LEGAL BACKGROUND OF THE FOOD BLOCKADE

A. *Security Council Action*

Realizing that affirmative measures would be needed to indicate its resolve in dealing with Iraq's invasion of Kuwait, the U.N. adopted Resolution 661, imposing a comprehensive trade embargo against Iraq and occupied Kuwait, leaving out only medical supplies

1. S.C. Res. 660, U.N. Doc. S/RES/660, at 1 (1990).

and, "in humanitarian circumstances," foodstuffs.² Paragraph 4 of Resolution 661 further prohibited the transfer of any funds to and from Iraq or Kuwait, "except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs."³ Paragraph 6 created a Security Council committee to oversee the implementation of the sanctions and periodically report to the Council.⁴ Only two precedents exist in which the U.N. has resorted to the imposition of economic sanctions: a general embargo against Southern Rhodesia (now Zimbabwe) from 1966 to 1977, and an arms embargo against South Africa in 1977.⁵ Resolution 661, is patterned after the resolution imposing the Southern Rhodesia general embargo which contained similar exceptions regarding "supplies intended strictly for medical purposes . . . and, in special humanitarian circumstances, food-stuffs."⁶ In the days following Resolution 661, the United States deployed naval forces around the Persian Gulf

2. In paragraph 3 of the Resolution, the Security Council prohibited among other things:

(c) *The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products.*

S.C. Res. 661, U.N. Doc. S/RES/661, at 2 (1990) (emphasis added). The Resolution was adopted unanimously by all members of the Security Council, Cuba and Yemen abstaining. 29 I.L.M. 1323 (1990).

3. S.C. Res. 661, *supra* note 2, para. 4.

4. *Id.* para. 6.

5. *See Kuwait: The Crisis: Comprehensive Mandatory Sanctions Imposed by Kuwait*, 27(4) UN CHRON. 5 (1990). The League of Nations imposed economic sanctions against Italy in 1935 but, as was the case for the Rhodesian embargo, they proved ineffective, because they were not enforced by all countries. *See* John H. Spencer, *The Italian-Ethiopian Dispute and the League of Nations*, 31 AM. J. INT'L L. 614 (1937).

6. S.C. Res. 253, U.N. Doc. S/RES/253, at 1 (1968). *See* VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA 426-29, 459 (1990). *See also* Theodor Meron, *The Gulf Crisis in International and Foreign Relations Law: Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 AM. J. INT'L L. 104, 108 n.38 (1991).

Resolution 253 is more restrictive than Resolution 661 in that it permitted food exports to Rhodesia only "in special humanitarian circumstances," as opposed to "in humanitarian circumstances" in the newer text. The original draft of Resolution 661 contained the more restrictive version but was relaxed after some members of the Security Council protested against including food in the embargo. *See* Leonard Doyle, *Crisis in the Gulf: Indian Supply Ship Cleared to Break Blockade*, THE INDEPENDENT (London), Sept. 14, 1990, at 9.

to enforce the trade embargo, declaring that it would forcibly stop any vessel carrying anything but medical supplies, including food.⁷

In the subsequent meetings of the Security Council, there was debate about the inclusion of food in the blockade. Two members of the Security Council, Yemen and Cuba, called for the immediate lifting of the embargo as it applied to food, reasoning that humanitarian concerns should apply not only to foreigners in Iraq and Kuwait, but also to the civilian population of those two countries. The Council voted down such an amendment.⁸

In the third week of October, the Security Council adopted Resolution 665, transforming the economic embargo into a full-fledged blockade.⁹ The gist of the resolution is in numbered paragraph one, where the Council:

Calls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990).¹⁰

Member states were to coordinate their naval efforts through the U.N. Military Staff Committee, reactivated for the Persian Gulf War.¹¹ This general authorization to use force to implement an economic embargo was unprecedented in U.N. history. In the Southern Rhodesian embargo, there had been one resolution directing the

7. Michael Gelb, *U.S. Blockade of Iraq to Cover Everything but Medical Supplies*, REUTERS, Aug. 13, 1990, available in LEXIS, Nexis Library, Reuter File; *Kuwait: The Crisis: Comprehensive Mandatory Sanctions Imposed by Iraq*, *supra* note 5.

8. UNITED NATIONS, SECURITY COUNCIL, PROVISIONAL VERBATIM RECORD OF THE TWO THOUSAND NINE HUNDRED AND THIRTY-SEVENTH MEETING, U.N. Doc. S/PV.2937, at 4 (1990).

9. S.C. Res. 665, U.N. Doc. S/RES/665, at 1 (1990). Cuba and Yemen abstained from voting. 29 I.L.M. 1323.

10. S.C. Res. 665, *supra* note 9, para. 1.

11. *Id.* para. 4. The Committee, created by Article 47 of the U.N. Charter, is composed of the Joint Chiefs of Staff of the permanent members of the Security Council. See generally LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS—COMMENTARY AND DOCUMENTS 330-33 (3d ed. 1969).

British Royal Navy to intercept one particular ship from breaking the embargo, but no mandate at large to do so.¹²

Reports of food shortages, steep price increases in Iraq and Kuwait, and disagreement as to the meaning of the humanitarian exception in Resolution 661 threatened the Security Council's fragile consensus in favor of maintaining the food blockade.¹³ By September 1990, the United States yielded to pressure and renounced the total food blockade it had imposed since the adoption of Resolution 661.¹⁴

The Security Council met on September 13 to decide on the details for implementing the food blockade and, in particular, for evaluating when humanitarian circumstances arise. Resolution 666 emphasized that the Council itself was exclusively qualified to evaluate the existence of humanitarian circumstances in Iraq or Kuwait.¹⁵ It entrusted the Sanctions Committee of the Security Council to "keep the situation regarding foodstuffs in Iraq and Kuwait under constant review"¹⁶ and directed it to pay special attention to the needs of those liable to suffer most seriously from a food shortage, "such as children under 15 years of age, expectant mothers, maternity cases, the sick and the elderly."¹⁷ In case of need mandated by humanitarian circumstances, the Sanctions Committee was to report its decision to the Security Council, "bear[ing] in mind that foodstuffs should be provided through the United Nations in cooperation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries."¹⁸

12. S.C. Res. 221, U.N. Doc. S/RES/221, at 1 (1966). See also Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 454 (1991).

13. Leonard Doyle, *Crisis in the Gulf: Anxiety over the Effect of Sanctions on Civilians*, THE INDEPENDENT (London), Sept. 1, 1990, at 9; Leonard Doyle, *Crisis in the Gulf: US Yields on Total Food Embargo*, THE INDEPENDENT (London), Sept. 11, 1990, at 9; Doyle, *supra* note 6, at 9; John Baggaley, *U.S. Vows No Compromise; Food Fears Shake Iraq Trade Ban*, REUTERS, Sept. 7, 1990, available in LEXIS, Nexis Library, Reuter File; Anthony Goodman, *U.N. Council Sets Guidelines for Sending Food to Iraq, Kuwait*, REUTERS, Sept. 14, 1990, available in LEXIS, Nexis Library, Reuter File; *Djibouti Head Hedges Support of U.N. Sanctions on Iraq*, KYODO NEWS SERVICE, Sept. 10, 1990, available in WESTLAW, JAPANECON Database.

14. Doyle, *Crisis in the Gulf: US Yields on Total Food Embargo*, *supra* note 13, at 9; *Marching on Stomachs*, THE TIMES (London), Sept. 14, 1990.

15. S.C. Res. 666, U.N. Doc. S/RES/666, at 1 (1990).

16. *Id.* para. 1.

17. *Id.* para. 4.

18. *Id.* para. 6.

Once more there was division in the Security Council as Cuba and Yemen pushed to lift the food blockade against Iraq and Kuwait. Cuba put forward a proposal which would have declared that "access to basic foodstuffs and to adequate medical assistance is a fundamental human right to be protected under all circumstances," directing the Sanctions Committee to refrain from any action hindering such access.¹⁹ The Security Council voted down the Cuban proposal with only China, Cuba, and Yemen voting in favor, and proceeded to adopt Resolution 666 by a vote of thirteen to two (Cuba and Yemen opposed), marking the first non-unanimous votes in the Gulf crisis.²⁰

On September 25, the Security Council adopted Resolution 670 to expand the reach of the blockade to all means of transport, including aircraft.²¹ The blockade was thus sealed, and from then on, very little food reached Iraq and occupied Kuwait.

After the fighting had ended, in response to reports of various U.N. missions to Kuwait and Iraq during February and March 1991, the Security Council took note of the urgent humanitarian needs in Iraq and in effect suspended the food blockade on April 3, 1991.²² Since that date, a simple notification to the Sanctions Committee has permitted the sale and shipment to Iraq of foodstuffs, unless an objection is lodged with the Committee.²³

After eight months of blockade, including several weeks of intense bombing, the food situation in Iraq had taken a dramatic turn. Because of its lack of good faith in cooperating with the U.N. after

19. UNITED NATIONS, SECURITY COUNCIL, CUBA: REVISED DRAFT RESOLUTION, U.N. Doc. S/21742/Rev.1, at 1 (1990) [hereinafter CUBA: REVISED DRAFT RESOLUTION]. Cuba and Yemen were opposed to the food blockade because it affected the civilian population in Iraq and Kuwait rather than those responsible for the invasion of Kuwait. The position was expressed by Yemen in the strongest terms:

[Our] understanding of the provisions of resolution 661 (1990) is that we refuse to starve the weak and innocent in Iraq and Kuwait, including those of third countries, as a way to achieve political ends, since the use of such method is in contradiction to many international humanitarian agreement prohibiting them, for such inhumane actions make victims of innocent civilians who have no part in the conflict.

UNITED NATIONS, SECURITY COUNCIL, PROVISIONAL VERBATIM RECORD OF THE TWO THOUSAND NINE HUNDRED AND THIRTY-NINTH MEETING, U.N. Doc. S/PV.2939, at 11 (1990).

20. 29 I.L.M. 1323.

21. S.C. Res. 670, U.N. Doc. S/RES/670, at 2 (1990). Cuba voted against the Resolution. 29 I.L.M. 1323.

22. S.C. Res. 687, U.N. Doc. S/RES/687, at 1 (1991). Cuba voted against, while Ecuador and Yemen abstained. 30 I.L.M. 846.

23. S.C. Res. 687, *supra* note 22, para. 20.

the end of the armed conflict with coalition forces, Iraq continues to be subject to economic sanctions. The food blockade, however, clearly seems to be a thing of the past and, in view of the dramatic food situation in Iraq, there have not been any suggestions that it be reinstated. On the contrary, Iraq has been allowed to sell oil in order to buy food with which to combat the mounting famine in the country.²⁴

B. Effect of the Food Blockade on Iraq and Kuwait

The specific impact of the food blockade is difficult to ascertain with any degree of precision for two reasons. First, there was a dearth of objective sources as to the availability of food in Iraq before the end of the conflict, given that there were few independent observers allowed in or out of Iraq and Kuwait save the foreigners detained there. Reports by the government of Iraq must be taken with a great degree of circumspection given their low reliability. Widely known facts such as the content of government rations or market prices were more reliable since they were objectively verifiable. Second, because of the devastation wrought by the intensive bombing of the country by coalition forces, it is difficult to distinguish the food shortages due to the food blockade from those caused by the bombing. The best approach combines an analysis of Iraqi and Kuwaiti pre-war self-sustenance with all verifiable information made available during and immediately after the conflict.

1. Degree of Food Autonomy

Both Iraq and Kuwait were heavily dependent on food imports before the embargo. Iraq imported between seventy-five percent to eighty percent of all calories consumed in the country, while Kuwait needed to import up to ninety-six percent of its total food consumption.²⁵ The main food suppliers to Iraq, most importantly the United States, took an active part in the conflict by contributing troops to the coalition forces in the gulf.²⁶ In accordance with Resolution 661, all

24. S.C. Res. 706, U.N. Doc. S/RES/706, at 1 (1991). Paul Lewis, *U.N. Permits Iraq Limited Oil Sale for Civilian Needs*, N.Y. TIMES, Sept. 20, 1991, at A1; Patrick Cockburn, *Prince Sadruddin Urges Action to Avert Iraqi Famine*, THE INDEPENDENT (London), July 13, 1991, at 14.

25. Susan Epstein, *Iraq's Food and Agricultural Situation During the Embargo and the War*, 91-199 CONG. RES. SERV. REP., Feb. 26, 1991, at 5.

26. The most important exporters to Iraq were the United States, the E.E.C., Turkey, Canada and Australia. *Id.* at 6-7.

outstanding contracts for food exports to Iraq were suspended at the start of the embargo, including important grain shipments from Australia and Canada.²⁷ The Iraqi caloric intake before the blockade consisted of forty percent bread (made with wheat, eighty-two percent imported), thirty percent rice (eighty-two percent imported), cooking oil (ninety-five percent imported), and sugar (ninety-three percent imported).²⁸

It was estimated by coalition military experts and confirmed by Western diplomats in Baghdad that the United Nations blockade was nearing complete efficacy, and that very little slipped through to Iraq or Kuwait after the beginning of August 1990.²⁹

Because the Sanctions Committee of the Security Council always met *in camera* and never officially released its decisions, it is difficult to know precisely how much food was allowed to reach Iraq and Kuwait in compliance with the humanitarian "loophole."³⁰ In the first phase of the blockade, before Resolution 666 provided guidelines, the Sanctions Committee approved no shipments of food. The United States took the lead and imposed its interpretation of the exception, concluding that no humanitarian circumstances existed in Iraq or Kuwait at the time. Its policy was to block any shipment containing goods other than medical supplies.³¹

Resolution 666 officially gave the Sanctions Committee evaluative authority on September 13, and it seems that all countries

27. *Marching on Stomachs*, *supra* note 14.

28. Epstein, *supra* note 25, at 2, 5.

29. *Are There Holes in the Fence?*, THE DAILY TELEGRAPH (London), Oct. 12, 1990, at 21.

30. *Marching on Stomachs*, *supra* note 14. All attempts to obtain information through the Office of the Political and Security Council Affairs of the U.N., and the missions to the U.N. of Austria, Canada, Cuba, Finland and Yemen yielded no concrete result.

31. Gelb, *supra* note 7. For instance, the United States refused permission for relief food shipments by India and the Philippines despite reports that these countries' nationals in Iraq and Kuwait were not adequately supplied. *Persian Gulf is Crisis Around the World*, UPI, Aug. 20, 1990, available in LEXIS, Nexis Library, UPI File; Baggaley, *supra* note 13.

In accordance with the governing statute, the International Emergency Economic Powers Act, 50 U.S.C. § 1702(b)(2) (1977), there were exceptions to the United States blockade for "donations of articles intended to relieve human suffering, such as food." Exec. Order No. 12,722, 3 C.F.R. 294 (1990), reprinted in 50 U.S.C. § 1701 (Supp. II 1990) (dealing with Iraq), and Exec. Order No. 12,725, 3 C.F.R. 299 (1990), reprinted in 50 U.S.C. § 1701 (Supp. II 1990) (dealing with Kuwait). The question of the compliance of the blockade enforced by the United States with municipal law is beyond the scope of this article.

abided by its decisions.³² It granted free passage on the next day to an Indian ship carrying food primarily for Indian and other foreign nationals trapped in Iraq and Kuwait. Reports by U.N. officials in October that “a significant number of foreign nationals in Iraq and Kuwait were . . . near starvation” were played down by U.S. diplomats, who held that further shipments unnecessary until further notice.³³ In early December, a number of shipments, mostly for children, were reported to have reached Iraq and Kuwait. Turkey declared at that time that no humanitarian food shipments had crossed its border since the beginning of the blockade.³⁴ Two ships carrying food relief consignments, apparently organized by North African organizations, were intercepted by coalition naval forces on December 31 and January 5 because they had not been approved by the Sanctions Committee.³⁵ The Sanctions Committee, and in particular its British and American members, took a restrictive view of the humanitarian exception, demanding “clear evidence” collected by an international organization before any shipment was approved. Absent such concrete documentation, the Sanctions Committee denied shipments, including a 200-ton powdered milk consignment from Bulgaria.³⁶

32. See, e.g., UNITED NATIONS, SECURITY COUNCIL, NOTE VERBALE DATED 20 SEPTEMBER 1990 FROM THE PERMANENT MISSION OF TURKEY TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, U.N. Doc. S/21806, at 1 (1990) (announcing that Turkey would not allow food shipments through until the Sanctions Committee had found the existence of humanitarian circumstances); UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 17 DECEMBER 1990 FROM THE PERMANENT REPRESENTATIVE OF THE ISLAMIC REPUBLIC OF IRAN TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, U.N. Doc. S/22010, at 1 (1990) (reporting that Iran had arrested, as of November 17, 1990, 430 people who tried to smuggle food into Iraq). The most important exception was Jordan, which did not initially close its border to Iraq. Blockade of the port of Aqaba by coalition naval forces all but sealed that leak. *Are There Holes in the Fence?*, *supra* note 29, at 21.

33. Leonard Doyle & Michael Sheridan, *Kuwait Captives 'Near Starvation'*, THE INDEPENDENT (London), Oct. 3, 1990, at 12. Vietnam and Sri Lanka were therefore refused permission to send food to their nationals in Iraq and Kuwait. *Id.*

34. *Iraq Presses U.N. Chief Over Food, Medicine*, REUTERS, Dec. 4, 1990, available in LEXIS, Nexis Library, Reuter File.

35. See UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 31 DECEMBER 1990 FROM THE CHARGE D'AFFAIRES A.I. OF THE PERMANENT MISSION OF IRAQ TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, U.N. Doc. S/22038, at 1 (1990); *Iraq Protests to U.N. About Western Blockade of 'Peace Ship'*, REUTERS, Dec. 31, 1990, available in LEXIS, Nexis Library, Reuter File; *Iraqi 'Peace Boat' Stops in Tunis en Route to Iraq*, REUTERS, Jan. 5, 1991, available in LEXIS, Nexis Library, Reuter File.

36. Leonard Doyle, *Crisis in the Gulf: Food Aid Linked to Care of PoWs*, THE INDEPENDENT (London), Jan. 31, 1991, at 3. Reports of “urgent humanitarian need” in Iraq by the Iranian Red Crescent Society were apparently considered unsatisfactory. Additionally, Britain insisted that on-site verification by the International Committee of the Red Cross of good treatment of PoWs (numbering a few dozen at most) was a pre-condition to any food

Efforts by the Iraqi leadership to augment local food production through an increase in cultivated acreage failed largely due to time constraints and the side-effects of the war. In fact, the harvest yielded less than hoped and was actually smaller than in previous years.³⁷ If Iraq did stockpile some commodities before invading Kuwait, their precise nature and importance have defied the analysis of western experts. Estimates at the inception of the embargo of how long Iraq and Kuwait could last on their reserves varied from two to eight months, depending on the daily caloric content of the rations.³⁸

Iraq's exports were also devastated by the blockade. Before the invasion of Kuwait, oil shipments accounted for ninety-five percent of all Iraqi exports, generating revenues of approximately ten million dollars a day. The naval blockade as well as the decision by Turkey and Saudi Arabia to sever the oil pipelines crossing their territories meant that Iraqi exports were brought to a complete standstill.³⁹

2. Impact of the Food Blockade

The food blockade on Iraq and Kuwait had the effect of dramatically pushing up the market price of foodstuffs, increasing government regulation, and limiting the flow of food.

Food prices on the open market are a reliable indicator of the scarcity and demand for that commodity. By the end of the first month of the blockade, food prices had already doubled. This increase continued over the following months until prices reached levels beyond the means of most Iraqis and Kuwaitis:

The pre-embargo price of a 60 kilogram bag of sugar was the equivalent of \$32 and by November 1990, it had skyrocketed to \$580 (using official exchange rates). Bread prices have risen from an equivalent of 6 cents per loaf to well over 30 cents. Egg prices have jumped from the equivalent of \$10 to \$12 for thirty eggs a year ago to \$24 or more at the end of December, and a kilogram (2.2 lb.)

shipment. *Id.*

37. Leonard Doyle, *Iraq Facing Famine if UN Sanctions Stay*, THE INDEPENDENT (London), July 3, 1991, at 10. The Kurdish rebellion, which commenced after the end of the ground war with coalition forces, also played a large part in the failure of the year's crop. *Id.* at 9; Cockburn, *supra* note 24.

38. Susan Ellicott, *Food Prices Rise as Iraq Begins to Feel Bite from Embargo*, THE TIMES (London), Aug. 28, 1990; *Hunger and the Butcher's Bill*, ECONOMIST, Sept. 8, 1990, at 45.

39. *Hunger and the Butcher's Bill*, *supra* note 38.

of tea previously sold for approximately \$4.00 was \$45.00 by the end of 1990.⁴⁰

These prices are put in perspective when compared to the average monthly salary in Iraq of approximately forty-two dollars.⁴¹ The situation with respect to fruits, vegetables, and meat appears to have been less dramatic because of sufficient local production.

Within a few weeks of the imposition of the food blockade, the Iraqi government increased its control of food distribution by thirty percent to forty percent, according to some estimates.⁴² The rationing imposed at the beginning of September was already stricter than the program imposed by Great Britain during the Second World War.⁴³ Even many rationed staples were in short supply by the month of November. For instance, the powdered milk rations were restricted to children under twelve months. The WHO-UNICEF reports that the allotted rations were less than half of the nutritional needs of infants and a third of that of pregnant women.⁴⁴

By the end of January, the food situation in Iraq had grown bleak. The intense air war launched by the coalition forces at the end of the deadline set by Resolution 678 worsened the effect of the

40. Epstein, *supra* note 25, at 10; *see also* Bill Gertz, *Cuba, Libya Ignore Sanction*, WASH. TIMES, Aug. 30, 1990, at A1. *See generally* Peter Wallensteen, *Scarce Goods as Political Weapons: The Case of Food*, 13 J. PEACE RES. 277, 278 (1976) ("The price tends to reflect the potential utility of the goods [sic] as a weapon, as it indicates the importance attached to it. If the consumer is prepared to pay a high price in monetary terms, he might also be prepared to pay a high price in political concessions.").

41. Christopher Lockwood, *The Gulf: Blockade Causing Deaths, Says Iraq*, THE DAILY TELEGRAPH (London), Oct. 19, 1990, at 8. The average salary is higher in urban areas, approximating \$300 a month. WHO-UNICEF, SPECIAL MISSION TO IRAQ (FEBRUARY 1991), U.N. Doc. S/22328 (1991), at 7-8. Of course, the war caused many individuals to lose part or all of their income.

42. Gertz, *supra* note 40, at A1 (quoting an unnamed United States administration official).

43. Under the rationing program, each Iraqi was to receive 13.2 lb. of flour, 3.3 lb. of rice, 2.2 lb. of sugar, 3.5 oz. of tea and slightly over 1 lb. of oil each month. *Hunger and the Butcher's Bill*, *supra* note 38, at 45. The journalist expresses his surprise that meat is not included in the rationed goods. This may be explained by the fact that meat is not an important part of the Iraqi diet, *see* Epstein, *supra* note 25, at 2, and because of a shortage of animal feed, mostly imported, leading to the need to slaughter much livestock and sell it as meat. *Id.* at 9.

44. WHO-UNICEF, *supra* note 41, at 9; *see* Lockwood, *supra* note 41, at 8. Western doctors working in a Baghdad hospital confirmed that the number of malnourished children admitted had increased. In early December, the Iraqi news agency blamed the blockade for the deaths of over 2000 children under the age of five, although such numbers could not be independently verified. *Id.*; *Turkey to Send Medical Supplies to Iraq*, REUTERS, Dec. 5, 1990, available in LEXIS, Nexis Library, Reuter File.

blockade. By February, there were little food stocks left in Kuwait; in Iraq, stocks of vegetable oil, sugar and tea were depleted. Wheat flour, rice and meat were in short supply, while fruits and vegetables were still available at higher prices.⁴⁵ Government rations in January had been reduced to thirty-nine percent of pre-sanctions levels.⁴⁶

A month after receiving an invitation from the government of Iraq to assess its food needs, a WHO-UNICEF mission visited Iraq and reported that as of mid-February, shortages fell particularly hard on children under the age of five, pregnant women, and maternity cases. The report also concluded that rations supplemented by prohibitively priced market food could at most offer the minimum daily calories needed. It called for immediate shipment of infant formula, predicting outright malnutrition for one to three year-olds in the near future.⁴⁷

On March 1, alarmed by stories of critical humanitarian needs in Iraq and Kuwait, the United Nations Secretary-General decided to send a fact-finding mission to the two countries. Its report of the "near-apocalyptic" situation prompted the Security Council to immediately adopt Resolution 687 lifting the food blockade.⁴⁸ The *U.N. Post-Crisis Report* confirmed that stocks of the most important food staples were either critically low or had been exhausted. Rations had dwindled not only in quantity but also in quality, to the point of causing health problems. Hyperinflation meant that the little food available on the market was out of reach for most Iraqis, whose income had diminished or vanished altogether in the wake of the conflict. The air war had disrupted the distribution of food by both government and private individuals, particularly affecting the more remote regions of Iraq. Finding the existence of "severe hardship" and warning of potential widespread famine, the U.N. Post-Crisis Report recommended the immediate lifting of the food sanctions and emergency shipment of major quantities of basic foodstuffs.⁴⁹

45. Epstein, *supra* note 25, at 8-9. Coalition bombing cut off electrical supply to much of the country, causing serious losses of perishable foodstuffs, in particular meat. *Id.*

46. UNITED NATIONS, SECURITY COUNCIL, REPORT TO THE SECRETARY-GENERAL ON HUMANITARIAN NEEDS IN KUWAIT AND IRAQ IN THE IMMEDIATE POST-CRISIS ENVIRONMENT BY A MISSION TO THE AREA LED BY MR. MARTTI AHTISAARI, UNDER-SECRETARY-GENERAL FOR ADMINISTRATION AND MANAGEMENT, U.N. Doc. S/22366, at 6 (1991) [hereinafter U.N. POST-CRISIS REPORT].

47. WHO-UNICEF, *supra* note 41, at 10-12.

48. U.N. POST-CRISIS REPORT, *supra* note 46, at 5.

49. *Id.* at 6-7.

II. REGULATION OF CIVILIAN STARVATION AS A METHOD OF WARFARE

Armed conflicts involve an array of methods used to defeat the enemy, from direct attacks against enemy military positions to indirect psychological manipulation of the adverse civilian population. Anything of value, concrete or abstract, can be turned into a weapon. As food is one of the essentials of any form of life, starvation is a prime candidate as a method of warfare and, indeed, has periodically been used as such for centuries. Starvation describes both a state, mostly passive, and an action, whereby the deprivation of food is deliberately produced. The second meaning is the one relevant to humanitarian law, which seeks to prohibit a behavior by belligerents rather than to eradicate the social evil that famine represents.⁵⁰

There are two ways to induce starvation in the enemy civilian population. The first is to destroy all objects indispensable for the survival of that population within an area. Such objects include foodstuffs, crops, livestock, and drinking water installations.⁵¹ There is a legal distinction between destructions of objects in enemy-controlled territory and similar destructions in territory controlled by the destroying forces (scorched earth tactics); the effects, however,

50. Mudge defines starvation in the following way:

Human starvation is an effect, the condition or process of perishing from insufficient food intake, a state of extreme malnutrition, which may be caused either by physical inability to eat or insufficient food supplies. Numerous factors may, as noted below, be the cause of a food shortage. Yet, despite the fact that human starvation is the effect of numerous possible causes, the noun "starvation" and the verb "to starve" are popularly and correctly used in an active, transitive sense.

George A. Mudge, *Starvation as a Means of Warfare*, 4 INT'L LAW. 228, 236 (1970); see also Esbjörn Rosenblad, *Starvation as a Method of Warfare—Conditions for Regulation by Convention*, 7 INT'L LAW. 252 (1971).

The active sense of "starvation" when used to describe a means of warfare is discussed by Meyrowitz, who points out that "starvation" in Article 54(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 27 [hereinafter Protocol I] was incorrectly translated in French by "famine." The author argues that the substantive "affamement" should have been used to render in French the action requirement of Article 54(1). The substitute word suggested by Meyrowitz is, however, extremely obscure and was probably unknown to the drafters of Protocol I. Henri Meyrowitz, *Le Protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime*, 89 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 243, 276-77 (1985).

51. The list is drawn from Article 54(2) of Protocol I, *supra* note 50, 1125 U.N.T.S. at 27.

are the same with respect to the ensuing civilian starvation.⁵² The second way to produce starvation is to cut off a population from its supply of food by blockade, siege, or destruction of the distribution infrastructure. It is this particular method which was used against Iraq and which will be explored here.

It must be emphasized that the practice under consideration embodies solely the starvation of the civilian population. The legality of starving enemy combatants is not put into question. On the contrary, it will be taken for granted that such a method of warfare is legitimate under current international law. Further, the use of starvation tactics in domestic conflicts will not detain us here, except insofar as it provides examples of the use of civilian starvation.

Civilian starvation as a method of warfare was expressly prohibited for the first time in the Protocols.⁵³ International humanitarian law did address the problem of civilian starvation before that date, most directly in the 1949 Fourth Geneva Convention.⁵⁴ The relevance of both these instruments to the U.N. food blockade against Iraq and Kuwait is analyzed in the following section.

A. *The 1949 Fourth Geneva Convention*

The 1949 Geneva Conventions⁵⁵ represented a landmark in the development of international humanitarian law. In the last forty years, they have achieved the status of virtually universal treaties, given the fact that at the time of the Iraqi invasion of Kuwait more states were party to the 1949 Geneva Conventions than belonged to

52. Rosenblad considers them two different ways by which starvation is caused. ESBJÖRN ROSENBLAD, *INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT* 103 (1979).

53. Protocol I, *supra* note 50, art. 54, 1125 U.N.T.S. at 27, and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977, art. 14, 1125 U.N.T.S. 609, 615 [hereinafter Protocol II] [jointly referred to as the Protocols].

54. Geneva Convention Relative to the Protection of Civilians Persons in Time of War, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Fourth Geneva Convention].

55. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; 1949 Fourth Geneva Convention, *supra* note 54 [hereinafter collectively 1949 Geneva Conventions].

the U.N.⁵⁶ All states involved in any manner in the Persian Gulf War, including Iraq and Kuwait, have ratified the Conventions. In addition, the International Court of Justice has recently stated that many of the provisions of the Conventions have ripened into customary law.⁵⁷

The 1949 Fourth Geneva Convention establishes two distinct regimes for the treatment of food destined for enemy (Article 23) and occupied (Articles 55 and 59) territories.

1. Relief for Enemy Territory

During the Second World War, the Red Cross performed relief operations to bring essential foodstuffs to certain areas cut off from their normal source of supply.⁵⁸ Each operation had to be approved by agreement with the power controlling access to the area. Further, it was impossible to bring such relief to the civilian population of the belligerents themselves. Article 23 was included in the convention to provide a legal basis for such missions in the future.⁵⁹

Unlike the original provision put forward by the Red Cross at the Geneva conference, the text of Article 23 of the 1949 Fourth Geneva Convention suffers from many defects, including convoluted and generally unclear prose.⁶⁰ The humanitarian impact of the

56. On January 1, 1991, 164 states were party to the 1949 Geneva Conventions while only 159 belonged to the United Nations. *Status of Four Geneva Conventions and Additional Protocols I and II*, ICRC Doc. DDM/JUR 91/51 CPS/5 (Jan. 14, 1991) [hereinafter *Status of Four Geneva Conventions*].

57. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 113-14 (June 27); see also THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 27 (1989); Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 44 (1989); Theodor Meron, *The Geneva Convention as Customary Law*, 81 AM. J. INT'L L. 348 (1987).

58. INTERNATIONAL COMMITTEE OF THE RED CROSS, 2 REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR (September 1, 1939—June 30, 1947) 366-78 (1948) [hereinafter I.C.R.C. REPORT ON ITS ACTIVITIES]; JEAN PICTET, COMMENTARY ON THE IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 178-79 (1958).

59. PICTET, *supra* note 58, at 179.

60. It states:

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

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition

provision is limited by several factors. The civilian population as a whole does not benefit from the exception, which is aimed only at the most vulnerable segments of that population. As such, Article 23 does not strictly reflect the principle of distinction between combatants and civilians.⁶¹ Also, the Red Cross draft was modified by adding "essential" before the word "foodstuffs." Only that which is minimally sufficient to assure the normal growth and health of children under fifteen, pregnant mothers, or maternity cases will be allowed through.⁶² The foodstuffs need not necessarily consist of relief shipments; food imports bought by the blockaded belligerent for its vulnerable civilians receive no different treatment under Article 23.⁶³

The most significant limitation on the provision are the three conditions set in paragraph 2, subjecting free passage to the lack of fears by the blockading power of providing some sort of advantage to the enemy. Despite the argument that these fears must be substantiated by serious factual elements, the discretion accorded the blockading power dilutes to nearly nothing the obligatory content of the duty to let foodstuffs through the siege or blockade. In particular, condition (c) is drafted with such vague wording, referring to a fear of direct or indirect impact on both the enemy's economy and military effort, that any unwilling blockading party is sure to remain within the boundaries of the provision, whatever the situation in the

that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefitted thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

1949 Fourth Geneva Convention, *supra* note 54, art. 23, 6 U.S.T. at 3533-36, 75 U.N.T.S. at 302.

61. ROSENBLAD, *supra* note 52, at 113-14.

62. PICTET, *supra* note 58, at 180, 182 ("Such consignments will be hardly sufficient to meet the most urgent needs and relieve the most pitiable distress.").

63. *Id.* at 181 (contrasting Article 23 with the text of Article 59 of the 1949 Fourth Geneva Convention, which mentions only "relief").

blockaded area.⁶⁴ At the time, the Soviet Union protested this watering down of the rule, calling the end result “nothing more than a collection of fine phrases.”⁶⁵ This weakening was necessary to get the approval of naval powers such as Great Britain and the United States, which at one point even sought to have Article 23 as an optional clause.⁶⁶ In the end, a general right of free passage is still proclaimed by Article 23, albeit only as a “clearly worded moral obligation.”⁶⁷

The normative content of Article 23 appears minimal. The obligation to allow free passage of foodstuffs would be breached only by the most blatant bad faith refusal despite evident needs of the civilian population and cooperation by the blockaded government. Nevertheless, some have argued that the initial position adopted by the United States during the first month of the blockade of Iraq and Kuwait did not comply with this provision.⁶⁸ Given the fact that the civilian population’s need was at that time limited, such a conclusion appears to rest on a broader interpretation of Article 23.

2. Relief for Occupied Territory

Articles 55 and 59 of the 1949 Fourth Geneva Convention establish a regime destined to protect the civilian population in occupied territory. Article 55 establishes the principle that the power occupying a territory takes on the responsibility of insuring its supply of food and medicines.⁶⁹ Contrary to Article 23, this provision accords protection to the civilian population as a whole, without any

64. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE 1949 GENEVA CONVENTIONS OF 12 AUGUST 1949, at 827 (1987) [hereinafter I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS]; PICTET, *supra* note 58, at 182-83; ROSENBLAD, *supra* note 52, at 114; Mudge, *supra* note 50, at 253.

65. 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 763 (remark by Mr. Morosov, representative for the Soviet Union) [hereinafter FINAL RECORD].

66. PICTET, *supra* note 58, at 183. The United States proposed an amendment reading: “The Contracting Parties shall endeavor to allow the free passage,” which would have removed any obligatory content to the norm. 3 FINAL RECORD, *supra* note 65, at 113.

67. 3 FINAL RECORD, *supra* note 65, at 103.

68. Meron, *supra* note 6, at 108.

69. It states:

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

1949 Fourth Geneva Convention, *supra* note 54, art. 55, para. 1, 6 U.S.T. at 3553-54, 75 U.N.T.S. at 322.

distinction between “useless mouths” and “able bodies.”⁷⁰ If there is insufficient food in the territory, the occupying power must import it, even from the enemy if necessary. The occupier’s duty, however, is limited by “the means available to it.”⁷¹ In the Persian Gulf conflict, Iraq could produce less than twenty-five percent of the food needs of its own population. It could not be reasonably expected to supply without any imports the foodstuffs required by Kuwait, itself dependent on imports for ninety-six percent of its food consumption.⁷² The only means available to Iraq to comply with Article 55 were therefore deficient almost from the start of the blockade.

If, as was the case in the Gulf War, the occupying power is itself the object of a blockade and does not produce enough to feed the area it invaded, then relief must be organized for the occupied territory in accordance with Article 59 of the 1949 Fourth Geneva Convention.⁷³ This provision is also the fruit of the experiences of the Red Cross during the Second World War. From the beginning of the war until after its end, the Red Cross encountered great difficulty in relief operations to various areas under occupation where the civilian population was deprived of sufficient foodstuffs, mostly because of the blockading powers’ reluctance to allow any food to reach the adverse party.⁷⁴ Article 59 aimed at preventing the

70. PICTET, *supra* note 58, at 310.

71. 1949 Fourth Geneva Convention, *supra* note 54, art. 55, para. 1, 6 U.S.T. at 3553-54, 75 U.N.T.S. at 322.

72. *See supra* text accompanying note 25.

73. Article 59 provides:

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the rights to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

1949 Fourth Geneva Convention, *supra* note 54, art. 59, 6 U.S.T. at 3556, 75 U.N.T.S. at 326.

74. The Germans agreed immediately to allow relief, at the condition that it be distributed by the German Red Cross, with representatives of the donors present to supervise local distribution. On the other hand, the British navicert permits system, without which

occurrence of such a situation again by instituting a distinctive legal status for relief shipments to occupied territory in times of war. It imposes first an absolute obligation upon the occupying power to accept the food consignments if the population in the occupied area is inadequately supplied. Need by the "whole or part" of the population implies not only that shortages in small localized areas can trigger this obligation, but also that the special needs of particular segments of the population, for instance children or foreign nationals, can require the occupier to accept food shipments. In addition to consenting to these, the occupying power has an obligation to facilitate the relief with all the means at its disposal, including help with transportation, distribution, and storage.⁷⁵

The consignments considered by Article 59 consist strictly of donations. Contrary to food shipments under Article 23, these cannot consist of imports by the occupying country. If the latter is in a position to import enough food to satisfy the need of the civilians under its control, it is obligated to do so under Article 55 of the convention. Article 59 envisages a situation of total blockade against an enemy which cannot rely on its own production to feed the whole civilian population under its control. This is precisely the situation in which Iraq found itself with respect to Kuwait after the imposition of the U.N. blockade.

The key to Article 59 of the 1949 Fourth Geneva Convention lies in paragraph three, directed at the blockading powers. It states that all belligerents "shall permit the free passage of these consignments and shall guarantee their protection."⁷⁶ This has the effect of instituting a special legal status for relief schemes with respect to the law of naval blockade.⁷⁷ There is a clear obligation imposed on the blockading power to let the relief shipments pass. It can set specific

ships were liable to be seized and, in the extreme, sunk, did not include an exception for humanitarian relief shipments. Negotiations with the Allies were particularly difficult from 1940 to 1943. Even in Greece, where relief missions were granted limited free passage, the drafting of an agreement proved arduous because of Allied demands. I.C.R.C. REPORT ON ITS ACTIVITIES, *supra* note 58, at 371-73, 450-79; PICTET, *supra* note 58, at 319-20 (citing C.I.C.R., RAPPORT FINAL DE LA COMMISSION DE GESTION POUR LES SECOURS EN GRECE SOUS LES AUSPICES DU COMITE INTERNATIONAL DE LA CROIX-ROUGE (1949)).

75. PICTET, *supra* note 58, at 320.

76. The 1949 Fourth Geneva Convention, *supra* note 54, art. 59, para. 3, 6 U.S.T. at 3556, 75 U.N.T.S. at 326.

77. PICTET, *supra* note 58, at 322 ("The principle of free passage, as set forth in this clause, means that relief consignments for the population of an occupied territory must be allowed to pass through the blockade; they cannot under any circumstances be declared war contraband or be seized as such by those enforcing the blockade.").

times and routes and search the vessels to ensure that solely food-stuffs and other essential supplies are being sent. Only a very limited discretion is recognized by the text of the provision, entitling the blockader to demand evidence so as to be "reasonably satisfied" that the consignments will in fact go to the benefitted population, and not to the enemy. Although Article 59 does not state that the transit power can demand that local distribution be made under a neutral power or humanitarian organization, as is the case under Article 23, such a scheme should satisfy the demands of reasonable satisfaction. Absent from Article 59 is the vague wording found in Article 23 granting the blockading power near-absolute discretion to refuse free passage if there are fears that the food consignments could have some secondary impact on the enemy's war effort or economy. The limited discretion granted in Article 59 can in no case be used to deny or unduly delay free passage of food consignments.⁷⁸

Under Article 59, relief schemes may be organized and carried out by "States or by impartial humanitarian organizations such as the International Committee of the Red Cross."⁷⁹ Neutrality is the dominant characteristic here. The right of neutral states or impartial humanitarian organizations to relieve the population of occupied territory is not conditioned on any prior permission or approval by anyone. In particular, it would be inconsistent with the framework for relief set up by Article 59 if the blockading power had a veto over the evaluation of the needs of the benefitted population.⁸⁰

In the case of Iraq, according to Resolution 661, all food shipments required certification "for humanitarian circumstances" by the U.N. Sanctions Committee before they were allowed to break the blockade. Such a mandatory role by an international organization in the evaluation of the civilian population's need in occupied territory is foreign to the relief scheme established by Article 59. It appears particularly unreasonable in the case of the United Nations with respect to the Persian Gulf war since that organization itself decreed the imposition of the food blockade. The U.N. and coalition forces could lawfully halt any food relief consignments from states or

78. *Id.* at 322-23.

79. The 1949 Fourth Geneva Convention, *supra* note 54, art. 59, para. 2, 6 U.S.T. at 3556, 75 U.N.T.S. at 326.

80. As we will see, the situation is different with respect to enemy territory, at least under Protocol I, where Article 70 does give the blockading power a relative degree of discretion to evaluate the population's need. *See infra* text accompanying notes 120-131. This is justified by the greater interest of the blockading power in controlling its enemy's war effort, and this difference is also underlined by the distinct regimes set up by Articles 23 and 59 of the 1949 Fourth Geneva Convention.

organization whose neutrality or impartiality could be put to doubt, but they could not impose, as they did, a blanket prohibition on all shipments not previously approved by the U.N. Sanctions Committee.

Resolution 666 directs the Sanctions Committee to keep in mind, when allowing shipments of food for humanitarian reasons, that "foodstuffs should be provided through the United Nations," in cooperation with the Red Cross or other such organizations.⁸¹ Such restrictions, and in particular the mandatory role of the U.N. in the relief operations, do not accord with Article 59, under which relief actions may be undertaken either by States or impartial humanitarian organizations. Attempts by the governments of the Philippines and India to organize shipments to their nationals trapped in Kuwait without adequate food should not have been stopped or unduly delayed because of the blockade.⁸² Particularized relief for groups of nationals in occupied territory is in compliance with Article 59, which speaks of inadequate supplies for the population in whole or in part. The U.N. itself can hardly be regarded as an "impartial" organization with respect to the Persian Gulf conflict given its role in imposing the food blockade against Iraq and occupied Kuwait. On the other hand, the requirement that humanitarian agencies supervise the local distribution of food would not offend Geneva Law because Article 59 entitles the blockading power to demand to be "reasonably satisfied" that the food will benefit civilians and not the occupying power.

More generally, the scheme established by Security Council Resolutions 661 and 666 with respect to foodstuffs did not distinguish between Iraq and Kuwait. This is surprising because the Security Council appears to have fashioned its conduct according to the requirements of the 1949 Fourth Geneva Convention, in which relief shipments to occupied and enemy territory are given clearly distinct treatments. In Resolution 662, the U.N. forcefully rejected the claim by Iraq that it had annexed Kuwait in a "comprehensive and eternal merger," thereby underlining the status of Kuwait as occupied territory.⁸³

The U.N. response to the invasion of Kuwait by Iraq therefore fell short of the demands imposed by the 1949 Fourth Geneva

81. S.C. Res. 666, *supra* note 15, para. 6.

82. *See Persian Gulf is Crisis Around the World, supra* note 31; Baggaley, *supra* note 13. The Indian ship was allowed to proceed by the Sanctions Committee on Sept. 14, 1990. Goodman, *supra* note 13.

83. S.C. Res. 662, U.N. Doc. S/RES/662, at 1 (1990).

Convention with respect to fulfilling essential needs of the civilian population in occupied territory.

B. Protocol I

Both Protocols contain direct prohibitions of civilian starvation as a method of warfare, applicable in international⁸⁴ and non-international⁸⁵ armed conflicts. The two instruments also direct belligerents to undertake relief efforts should the civilian population be insufficiently provided with foodstuffs.⁸⁶ Because of the international character of the Persian Gulf War, Protocol I will be the main focus of our analysis. Before coming to that analysis, some remarks must be made with respect to the applicability of Protocol I to the Gulf conflict.

1. Applicability

Many states participating in the Persian Gulf War were not party to Protocol I, including Iraq, the United States, Great Britain and France. On the other hand, more than two-thirds of the belligerent states had acceded to the Convention before the conflict, including Belgium, Italy, Kuwait, the Netherlands, Norway and Saudi Arabia.⁸⁷ Since Iraq is not a party to the Convention, which applies only between parties, Protocol I had no direct application in that conflict.⁸⁸

The matter does not end there, however. The fact that one belligerent has not acceded to the Convention does not necessarily

84. Protocol I, *supra* note 50, art. 54(1), 1125 U.N.T.S. at 27.

85. Protocol II, *supra* note 53, art. 14, 1125 U.N.T.S. at 615.

86. Protocol I, *supra* note 50, art. 70, 1125 U.N.T.S. at 35-36; Protocol II, *supra* note 53, art. 18, 1125 U.N.T.S. at 616.

87. Thirty-eight nations in all participated in the hostilities. Eric Schmitt & Michael Gordon, *After the War; Tensions Bedeviled Allies All the Way to Kuwait*, N.Y. TIMES, Mar. 24, 1991, at 18; *More than 1.3 Million Troops Battle for Kuwait*, REUTERS, Feb. 24, 1991, available in LEXIS, Nexis Library, Reuter File. The following participants were from nations party to Protocol I: Argentina, Bahrain, Bangladesh, Belgium, Bulgaria, Canada (from Oct. 20, 1990), Czechoslovakia, Denmark, Greece, Hungary, Italy, Kuwait, The Netherlands, New Zealand, Niger, Norway, Qatar, Romania, Saudi Arabia, Senegal, Sierra Leone, South Korea, Spain, Sweden, Syria and the United Arab Emirates. The following were the belligerents not party to Protocol I: Australia (until June 21, 1991), Egypt, France, Iraq, Morocco, Pakistan, the Philippines, Poland, Singapore, Turkey, the United Kingdom and the United States. See *Status of Four Geneva Conventions*, *supra* note 56. It is worth noting that Australia (from June 21, 1991), China, Germany (from Feb. 14, 1991), Nigeria and the Soviet Union are also party to Protocol I, while India is not. *Id.*

88. Protocol I, *supra* note 50, art. 96(1), 1125 U.N.T.S. at 46.

allow all belligerents to disregard their obligations under that treaty. Three implications may arise. First, some provisions of the Convention may have ripened into customary law, so that they would be applicable in all situations to any belligerent, whether or not it had formally agreed to be bound by Protocol I. The assessment of the progression of particular norms into customary international humanitarian law will be analyzed in a later section of the present study.⁸⁹

Second, Protocol I continues to apply as to relations between states party to that treaty, even though the conflict may include non-parties.⁹⁰ This rule is different from the one used in earlier humanitarian instruments, for example the 1907 Hague Convention (IV),⁹¹ which stated that the Conventions would apply only if all belligerents were party to the Convention. This *clausa si omnes* was discarded in later instruments in favor of a relative application.⁹² The twenty-six state-parties which participated in the Gulf conflict were therefore obligated to comply with Protocol I at least between themselves, a fact of little practical significance in that context since all were allies.

Third, parties to the Convention have obligations beyond their relationships with other belligerents during an armed conflict. Article 1(1) of Protocol I rejected the notion of absolute reciprocity, making the accession to the Convention a unilateral undertaking by each state: "The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances."⁹³ This provision reproduces common Article 1 of the 1949 Geneva Conventions.⁹⁴ This unilateral character is confirmed by Article 60 paragraph 5 of the 1969 Vienna Convention of the Law of Treaties, which singles out humanitarian law as an exception to the general rule that

89. See discussion *infra* part III.B.2.

90. Protocol I, *supra* note 50, art. 96(2), 1125 U.N.T.S. at 46 ("When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations.").

91. Law and Customs of War on Land (Hague IV), Oct. 18, 1907, art. 2, 36 Stat. 2277, 2290, 205 Consol. T.S. 277, 284.

92. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 1086.

93. Protocol I, *supra* note 50, art. 1(1), 1125 U.N.T.S. at 7; see also I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 37-38; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 43 (1982).

94. The 1949 Geneva Conventions, *supra* note 55, art. 1, 6 U.S.T. at 3518, 75 U.N.T.S. at 322.

non-compliance by another party may relieve a state from its obligations under a treaty.⁹⁵

The duty to “ensure respect” is wider than mere respect by the party’s own armed forces in time of conflict. It entails an obligation on parties to discourage violations by all means at their disposal, be they political, legal or diplomatic, official or unofficial. This applies even if the state party is not itself a belligerent, or if other belligerents have not acceded to Protocol I. This obligation *erga omnes* is explained by the fact that each party has an interest in universal compliance with the provisions of all international humanitarian norms.⁹⁶ This provision is completed by Article 89 of Protocol I, which directs parties to the Convention to act through the U.N. in case of serious violation of the Protocol.⁹⁷

During the Persian Gulf War, the U.N. Security Council, acting through resolutions, imposed many coercive measures. This was, at all relevant times of that conflict, one privileged forum in which states party to Protocol I should have ensured that the convention was fully implemented. Seven of the fifteen members of the Security Council were party to Protocol I.⁹⁸ In particular, they had a duty to do everything in their power to see that the food blockade complied with Protocol I provisions dealing with civilian starvation.⁹⁹

There are some questions as to whether enforcement action taken by the Security Council under Chapter VII of the U.N. Charter can disregard certain norms of international law. Even if the suspension of some norms is permissible under the U.N. Charter, international humanitarian norms must be adhered to at all times, and thereby limit

95. BOTHE ET AL., *supra* note 93, at 314-15; Luigi Condorelli & Laurence Boisson de Chazournes, *Quelques remarques à propos de l'obligation des Etats de «respecter et faire respecter» le droit international humanitaire «en toutes circonstances», in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET*, at 17, 21 (C. Swinarski ed., 1984).

96. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 104; I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 35-37; MERON, *supra* note 57, at 31; PICTET, *supra* note 58, at 18; Condorelli & Boisson de Chazournes, *supra* note 95. This interpretation is in conformity with para. 9 of the preamble of Resolution XXIII adopted by the International Conference on Human Rights on May 12, 1968, U.N. Doc. A/Conf. 32/41 (1968) (“Noting that States parties to the Red Cross Geneva Convention sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.”).

97. Protocol I, *supra* note 50, art. 89, 1125 U.N.T.S. at 43.

98. Canada became a party to the Protocols only on Nov. 20, 1990; that is, after the passing of Resolutions 661 and 666. *Status of Four Geneva Conventions*, *supra* note 56.

99. Protocol I, *supra* note 50, art. 54, 1125 U.N.T.S. at 27.

the legitimate coercive measures available to the U.N.¹⁰⁰ This is true inasmuch as the measures do not stem directly from the U.N. Charter itself, imposing obligations overriding any other instrument.¹⁰¹ In any case, the violations here are not at the implementation stage of U.N. enforcement measures, but rather at the stage of conception. There is nothing in the U.N. Charter relieving states of their international obligations in the performance of discretionary decision-making acts such as the drafting and voting of Security Council resolutions. On the contrary, these are channels ideally suited for ensuring that states comply with humanitarian norms. On the other hand, a consequence of Article 103 of the U.N. Charter is that once the resolutions had been adopted by the Security Council, member states had an obligation to comply with them.

Resolutions 661 and 666 as drafted constituted a violation of Protocol I. In view of such a violation, the states party to Protocol I having voted in favor of these measures, including China, Finland, Romania and the Soviet Union, violated their obligation to "ensure respect" under the Convention. Parties with a veto power in the Security Council, China and the Soviet Union, would be further at fault for not having vetoed the illegal measures. Only Cuba and Yemen abstained from voting in favor of Resolution 661 and voted against Resolution 666, ostensibly because of their opinion that the food blockade violated international humanitarian law.¹⁰² China did vote in favor of a Cuban proposal affirming the fundamental character of the right to food in all circumstances, but the proposed resolution was defeated and Resolution 666 adopted instead, China voting in favor.¹⁰³ So direct is the character of such violations that it tramples not only the duty to "ensure respect," but also the duty to "respect."

Finally, there are a number of countries who participated in the Persian Gulf conflict who were signatories but not parties to Protocol I. While signature clearly does not impose obligations on a state in the way that ratification does, there is a positive duty for signatories not to "defeat the object and purpose" of the treaty. This obligation was codified in Article 18 of the 1969 Vienna Convention on the Law

100. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 37.

101. U.N. CHARTER art. 103.

102. *See supra* text accompanying notes 2, 13-15.

103. CUBA: REVISED DRAFT RESOLUTION, *supra* note 19.

of Treaties.¹⁰⁴ This is especially applicable if signature occurred after a lengthy negotiation between parties not in a position to impose its terms. This holds true only for the period between signature and ratification, however, so that if a state makes a clear declaration of its intent not to ratify the convention, its obligation becomes extinct.¹⁰⁵

The fact that Protocol I is not directly applicable to the Convention does not deprive that instrument of an important impact on the legality of the blockade imposed by the U.N. Protocol I therefore demands a closer analysis at this point.

2. Article 54

Article 54 of Protocol I contains the first explicit prohibition of starvation of the civilian population as a means of warfare.¹⁰⁶ There was no general prohibition of civilian starvation in the original Red Cross draft, which simply prohibited attacks on objects indispensable to civilian survival.¹⁰⁷ Paragraph one was added at the

104. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336; see Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263 (1980).

105. Rogoff, *supra* note 103, at 273-275. This was the position of the United States, which had announced that it did not intend to ratify Protocol I. Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess. (1987) [hereinafter President Reagan's Letter of Transmittal].

106. Article 54 provides in its three first paragraphs:

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
 - (a) as sustenance solely for the members of its armed forces; or
 - (b) if not as sustenance, then in direct support for military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

Protocol I, *supra* note 50, art. 54, 1125 U.N.T.S. at 27. The last two paragraphs of the provision provide that the objects shall not be the target of reprisals and a limited exception allowing scorched earth tactics in some situations. *Id.*

107. United Nations, 1 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-77* 16 (1978) [hereinafter 1977 *Official Records*]. The Red Cross draft, proposed amendments, and minutes of meetings at the Geneva conference concerning article

conference through an amendment put forward by Great Britain and Belgium. Although much discussed, it was eventually adopted without any changes and inserted in the final text of the Protocol.¹⁰⁸ As noted by the rapporteur for the committee responsible for Article 54, the first paragraph represents a statement of principle, whose scope is defined by the precise applications in the following paragraphs.¹⁰⁹ That these flow directly from the general prohibition of civilian starvation appears clearly from the text of the corresponding provision in Protocol II, where the statement of principle is followed by the words: "It is therefore prohibited . . ."¹¹⁰ The remainder of the provision deals with the protection of indispensable objects, including foodstuffs, but their essence is the prohibition of civilian starvation.¹¹¹

Article 54(1) prohibits civilian starvation as a "method of warfare." This implies that the starvation is not accidental but the result of a willful tactic or policy aiming at depriving the civilian population of sufficient foodstuffs. The mere use of the military advantage gained by a famine not caused intentionally by a belligerent is not prohibited under Article 54(1).¹¹² Measures taken which amplify the effect of the famine are, however, illegal.¹¹³

It is irrelevant whether or not the ultimate aim of the method of warfare is the killing of civilians through starvation. This is made clear by the interplay of the words "purpose" and "motives" in paragraph 2, in which "purpose" refers to the primary or immediate intended effect of the tactic, and "motive" to any ulterior aim. For example, a starvation strategy aimed not at killing civilians but at making them move or provoking civil unrest is prohibited. This holds true whether the starvation is imposed through a series of

54 have been collated in 3 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTION 227-58 (1980).

108. Compare 3 1977 *Official Records*, *supra* note 107, at 218 with 1 1977 *Official Records*, *supra* note 107, at 148.

109. 15 1977 *Official Records*, *supra* note 108, at 279.

110. Protocol II, *supra* note 53, art. 14, 1125 U.N.T.S. at 615. See also I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 655. Similarly, in the amendment by Britain and Belgium by which paragraph 1 was added, paragraph 2 began with the word "consequently." 3 1977 *Official Records*, *supra* note 107, at 218.

111. Interestingly enough, Meyrowitz reverses the argument, saying that the suppression of the adverb "consequently" from the beginning of paragraph 2 of the British-Belgian proposal has given birth to an autonomous and general prohibition in paragraph 1. Meyrowitz, *supra* note 50, at 278.

112. But see *infra* part III.B.2.b (discussing the impact of Article 70 of Protocol I).

113. Meyrowitz, *supra* note 50, at 277.

attacks on indispensable objects (paragraph 2), or by cutting off the population from its food supply (paragraph 1).¹¹⁴ What is prohibited is civilian starvation in general, not merely particular methods of implementing it. Unlike other provisions of Protocol I, Article 54(1) does not refer to “attacks” or any other specific military operation. It embodies a prohibition even more general than that of Article 54(2), which lists a series of terms (“attack, destroy, remove or render useless”) expanding the prohibition to most situations.

The prohibition against attacks on civilian objects is not conditioned on them having the possible effect, in the circumstances, of starving the civilian population. Civilian objects are protected from direct attacks “for the specific purpose of denying them for their sustenance value”¹¹⁵ even if there is no de facto effect on the civilian population’s food supply. Under paragraph 2, the governing factor is intent, not effect, although the latter may nevertheless be relevant to assess intent. The provision provides absolute protection against intentional attacks on indispensable objects motivated by their sustenance value. Further, paragraph 3(b) prohibits the destruction of objects used in direct support of military action if this destruction would have as an effect (“which may be expected”) to starve the civilian population. In that case, there is no necessary requirement of a specific intent to induce starvation in order to trigger the prohibition. The tactic need not be directed at the objects because of their sustenance value in order for it to be considered illegal. Mere effects are sufficient. The intent requirement under Article 54 is therefore either a specific intent to starve the civilian population¹¹⁶ or a constructive intent when the action has such a predictable effect.¹¹⁷

114. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 653.

The term starvation is generally understood by everyone. To use it as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies. It is clear that activities conducted for this purpose would be incompatible with the general principle of protecting the population. (emphasis added) (footnote omitted).

See also Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, in HUMANITARIAN LAWS OF ARMED CONFLICT—CHALLENGES AHEAD 151-52 (A.J. Delissen & G.J. Tanja eds., 1991); Elmar Rauch, *Le droit contemporain de la guerre maritime: Quelques problèmes créés par le Protocole additionnel I de 1977*, 89 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 958, 967 (1985).

115. Protocol I, *supra* note 50, art. 54(2), 1125 U.N.T.S. at 27.

116. *Id.*

117. *Id.* art. 54(3)(b), 1125 U.N.T.S. at 27. This is fully consonant with other provisions of Protocol I. For example, Article 35 prohibits the use of weapons which “are intended, or may be expected” to cause severe damage to the environment. *Contra* Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law*

In a situation where the belligerent cuts off the population from its only source of food, it can hardly be argued that the predictable effect is not civilian starvation, whether specifically intended or not.

The prohibition against the use of civilian starvation as a method of warfare was designed to have a scope wide enough to protect the civilian population even if the primary target of the tactic has a dual military and civilian nature. This transpires from the specific application in paragraph 2, where the destruction of objects indispensable to the survival of the civilian population is illegal even in cases where those objects are also used by the adverse party ("to the civilian population *or to the adverse party*").¹¹⁸ Moreover, the rule also states that objects used "solely for the members of its armed forces" may be attacked for their sustenance value.¹¹⁹ This limits the possible recourse to military necessity to justify attacks on indispensable objects used by civilians.¹²⁰ This expanded protection from starvation tactics for non-combatants is fully compatible with the prohibition against indiscriminate attack, codified in Article 51(4) of Protocol I.¹²¹

It follows that a starvation tactic or policy implemented not by attacks but by disruption of the enemy's food supply lines would be illegal if the food were destined for both civilians and combatants. Such is usually the case in sieges and blockades.¹²² There is one

and Under Protocol I, 1 AM. U. J. INT'L L. & POL'Y 117, 133 (1986) (for whom specific intent is required, although he does not seem to address the impact of paragraph 3(b)).

118. Protocol I, *supra* note 50, art. 54(2), 1125 U.N.T.S. at 27.

119. *Id.* art. 54(3)(a), 1125 U.N.T.S. at 27.

120. This creates an exception to the general principle of proportionality of Protocol I requiring that there be a reasonable relationship between collateral civilian damages and concrete and direct military advantage resulting from the use of a given method of warfare. *Id.* arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b), 1125 U.N.T.S. at 26, 29. Under Article 54(2), the destruction for their sustenance value of dual civilian-military objects producing a concrete and direct military advantage is not justifiable. If, on the other hand, the attack is aimed at the dual objects because they are used in direct support of military action, the rule of proportionality is still applicable to a point. Whenever the civilian population can be expected to be left without adequate food or water or be forced to move, however, Article 54(3)(b) prohibits the attack no matter how important the anticipated concrete and direct military advantage. At that point, the prohibition of civilian starvation trumps the balancing in favor of the civilian population.

121. See HANS BLIX, MEANS AND METHODS OF COMBAT—INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 135, 143 (1988); Allen, *supra* note 57, at 62-66.

122. Blockade is considered here generally, without special reference to naval blockades. The impact of Article 54 on the law of naval warfare is discussed in ELMAR RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS FOR THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE (Veröffentlichungen

exception: when food shipments are stopped not for their sustenance value but because they are used in direct support of military action.¹²³ This was the case, for example, with German fat imports during World War II, because fats were being used to make explosives.¹²⁴ In such a situation, the specific intent needed to trigger the prohibition would not be present. This exception could not, however, be extended to cover practically every kind of foodstuffs, as was done during World War II. As seen above, if a tactic not specifically directed against food or object for their sustenance value has the effect, "which may be expected," of eventually starving the civilian population, then Article 54(3)(b) is violated.¹²⁵

This brings us to the legality of sieges and blockades generally, in view of the humanitarian principle declared by Article 54. These strategies are not, per se, illegal, even if they include the interruption of food shipments to the besieged area. What is illegal, ab initio, is not food blockades, but civilian starvation as a method of warfare. The two do not necessarily coincide.¹²⁶ As pointed out by one commentator, circumstances will dictate if a siege or blockade runs counter to the prohibition codified in Article 54:

Where a country literally cannot produce sufficient food provisions, despite the allocation of resources to food production, to prevent starvation without additional imported food, and where food imports are effectively blockaded thus causing food shortages and human starvation, it is

des Instituts für Internationales Recht and der Universität Kiel No. 90, 1984); Thomas D. Jones, *The International Law of Maritime Blockade—A Measure of Economic Interdiction*, 26 HOW. L.J. 759, 776-777 (1983); Meyrowitz, *supra* note 50; Rauch, *supra* note 114; Elmar Rauch, *Discussion Paper on the Law of Naval Warfare*, 26 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 31 (1987).

123. Protocol I, *supra* note 50, art. 54(3)(b), 1125 U.N.T.S. at 27.

124. See WILLIAM BEVERIDGE, *BLOCKADE AND THE CIVILIAN POPULATION* 8-10 (Oxford Pamphlet on World Affairs No. 24, 1939); RAUCH, *supra* note 122, at 89.

125. One commentator states:

[N]aval blockades of the kind enforced by the Entente Powers and the Allied Powers in World Wars I and II and briefly described above would be in violation of Protocol I. *Any blockade of the ports and coasts of an enemy, whose civilian population is not adequately provided with food would be a breach of the new law of armed conflict.*

See RAUCH, *supra* note 122, at 93 (emphasis added); see also Allen, *supra* note 57, at 7-8, 62 (declaring that the four-month siege by Amal Shiite Moslems of several Palestinian refugee camps in Beirut in 1987, with the aim of forcing retreat, was a violation of Article 54); Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 152 n.228 (1985).

126. Meyrowitz, *supra* note 50, at 276-77.

hard to question that such a blockade constitutes "starvation" in the sense of an active "means of war."¹²⁷

A conclusion as to the legality of the tactic cannot be based solely upon the besieger's conduct. The besieged's resources must also be considered.

It is sometimes argued that blockades or sieges do not necessarily aim at civilian starvation but at the depletion of the enemy's food supplies, necessary to sustain hostilities, in order to provoke its surrender.¹²⁸ At the same time, however, it is agreed that food shortages affect civilians first and combatants last, meaning that the siege or blockade will starve civilians, and civilians only, well before it has a perceptible military effect.¹²⁹ It follows that the real object of the blockade is, in fact, the civilian population.¹³⁰ A blockade violates Article 54 as soon as it produces food shortages, because civilian starvation, as mentioned above, is illegal *ab initio*.

This in turn shapes the obligation of the besieging or blockading commander regarding the protection of the civilian population in the encircled area. Previously, even under Articles 17 and 23 of the 1949 Fourth Geneva Convention, it was considered an extreme but legal measure for the besieger to force the civilians back into the besieged area.¹³¹ Commentators generally agree that this rule has now been altered by the general principle against the use of civilian starvation as a method of warfare, and that the besieger is obliged to let the civilian population out.¹³² The alternative is to let in consignments of foodstuffs destined for the civilian population, in

127. Mudge, *supra* note 50, at 237.

128. 14 1977 *Official Records*, *supra* note 107, at 145 (remark by Mr. Blix, representative for Sweden); I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 654; Meyrowitz, *supra* note 50, at 278.

129. 15 1977 *Official Records*, *supra* note 107, at 261; I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 654; Meyrowitz, *supra* note 50 at 271-72.

130. Meyrowitz, *supra* note 50, at 272 ("[L]a population civile du pays objet de la Hungerblockade.").

131. BEVERIDGE, *supra* note 124, at 6; *see also* 2 L. OPPENHEIM, INTERNATIONAL LAW 419 (H. Lauterpacht ed., 7th ed. 1955); Dinstein, *supra* note 114, at 146-47.

132. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 654; BOTHE ET AL., *supra* note 93, at 338; Meyrowitz, *supra* note 50, at 278 (insisting that only in exceptional cases will the obligation cover civilians other than wounded, sick, infirm, aged persons, children and maternity cases). Such a position seems contrary to both the principle of distinction between combatants and civilians and the general prohibition of Article 54, which does not allow the starvation of any particular class of civilians.

quantities sufficient to prevent food shortages. In the case of a blockade affecting larger areas, this would be the only solution.¹³³

During the Persian Gulf War, foodstuffs were inserted in the U.N. blockade list because of their sustenance value to the civilian population.¹³⁴ The fact that the U.N. did not desire the outbreak of widespread famine amongst the civilian population is irrelevant if the actions taken pursuant to the Security Council resolution had the effect of producing food shortages in Iraq and Kuwait. Further, that the U.N. would hope to create civil unrest within Iraq is not a valid justification of the resort to civilian starvation as a method of warfare. The use of that weapon is illegal *ab initio*, whatever the ulterior or secondary motives of the blockading belligerent. This is clearly illustrated by Article 54(2) of Protocol I.

As noted in Part II, the effects of the eight month food blockade on Iraq and Kuwait were very serious. The two countries are dependent on food imports for, seventy-five to eighty percent and ninety-six percent, respectively, of the populations' caloric consumption. Predictably, shortages arose despite strict rationing by the Iraqi government. Food shipments allowed to break the blockade under the "humanitarian exception" were insufficient to fill the basic needs of the civilian population in the two countries. After eight months of blockade, the most important food staples in Iraq either had been exhausted or were critically low. Even if foodstuffs had been blocked by the U.N. not for its sustenance value but because they were utilized in direct support for military action, something never asserted by the U.N., the effect was to produce severe shortages in Iraq and Kuwait, which constitutes a method of warfare prohibited by Article 54(1) of Protocol I.

More generally, the prohibition against using starvation of civilians as a weapon forbids the classification of foodstuffs as war contraband. The only exceptions are food used as sustenance by enemy combatants and food used in direct support of military action if no shortage will result for the civilian population. The treatment of food in Resolutions 661 and 666 does not conform to these restrictions. The food blockade imposed by the Security Council and enforced by the coalition forces was therefore in violation of the

133. In such a situation, the blockading power could condition free passage for foodstuffs on local distribution by a protecting power or impartial humanitarian organization, to insure that the food will benefit the civilian population.

134. See Leonard Doyle, *Crisis in the Gulf: US Yields on Total Food Embargo*, *supra* note 13, at 9.

general prohibition of using civilian starvation as a method of warfare.

It must be stressed that the very resort to civilian starvation as a method of warfare, not merely its possible consequence of famine amongst civilians, violates Article 54. The latter situation is addressed by another provision, Article 70, of Protocol I.

3. Article 70

Section II of Part IV of Protocol I, containing Articles 68 to 71, shares with Article 54 a concern for the well-being of the civilian population and, in particular, its adequate access to foodstuffs. Their purposes, however, are quite different. While Article 54 aims at preventing the occurrence of civilian starvation through the prohibition of its use as weapon, Articles 68 to 71 seek to reduce the scope of a disaster, whether man-made or not. The section is essentially complementary to the provisions of the 1949 Fourth Geneva Convention dealing with relief for civilian populations, and those provisions are explicitly affirmed by Articles 68 and 69 of Protocol I.¹³⁵ Relief for non-combatants in occupied territory is left unchanged by Protocol I, with the exception of additional protection granted to relief personnel by Article 71. Relief in non-occupied territory, including that of the enemy, was, on the other hand, completely overhauled by the adoption of Article 70.

Article 70 has its origins in the relief provisions of the 1949 Fourth Geneva Convention, Resolution 2675 of the U.N. General Assembly, and Resolution XXVI of the XXIst International Conference of the Red Cross.¹³⁶ Although it does not deal with methods of warfare, its drafting was extensively influenced by the general prohibition of civilian starvation found in Article 54.¹³⁷ Generally speaking, it replaces the unsatisfactory regime set up by Article 23 of the 1949 Fourth Geneva Convention to impose tighter obligations on all parties concerned with the relief actions.

Article 70 states that if the civilian population of a territory, other than an occupied territory, is insufficiently provided with the

135. The 1949 Fourth Geneva Convention, *supra* note 54, arts. 23, 55, 59, 60, 61, 62, 6 U.S.T. at 3532, 3552, 3556; 75 U.N.T.S. at 302, 322, 326.

136. 12 1977 *Official Records*, *supra* note 107, at 311. The original Red Cross draft, proposed amendments, and minutes of committee meetings are collated in 4 LEVIE, *supra* note 107, at 9-25.

137. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 820; BOTHE ET AL., *supra* note 93, at 338.

essentials of life, including foodstuffs, relief actions “shall be undertaken, subject to the agreement of the Parties concerned in such relief actions.”¹³⁸ This wording is vague with respect to both the target and the intensity of the obligation to relieve a civilian population. In the original Red Cross draft, the parties to the conflict were clearly identified as those under a duty to undertake relief efforts.¹³⁹ The version eventually adopted widens the scope of parties under obligation to include those with food stocks in a position to help, those through whose territory the relief is likely to be transported, and the beneficiary of the relief actions.¹⁴⁰ As for the intensity of the obligation, the ambiguity owes to the clash of two opposing tendencies in the working group at the Geneva Conference with respect to the beneficiary of the relief. One considered that there should be a clear duty to accept relief in case of need, while the other thought

138. Article 70 states:

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.
2. The Parties to the conflict and each High Contracting Party shall [allow] and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
 - (a) Shall have the right to prescribe technical arrangements, including search, under which such passage is permitted;
 - (b) May make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
 - (c) Shall, in [no] way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.
4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.
5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief action referred to in paragraph 1.

Protocol I, *supra* note 50, art. 70, 1125 U.N.T.S. at 35.

139. 1 1977 *Official Records*, *supra* note 107, at 20 (“the parties to the conflict shall agree to and facilitate”).

140. Rauch, *supra* note 114, at 90; Allen, *supra* note 57, at 71.

that a state had the prime responsibility to care for its people and should be free to decide to accept relief or not.¹⁴¹ Under the wording finally adopted, it appears that the parties do have a certain discretion to refuse the relief, but that such refusal can only be based on valid reasons, and not arbitrary or capricious ones.¹⁴²

The intensity of the blockading power's obligation to grant free passage to relief consignments is an even more critical question, since it is usually the more reluctant to renounce a total blockade. The passive form found in paragraph 1 is one indication that there exists a clear duty to allow the relief through. The wording of paragraph 2 ("shall allow") reinforces the obligatory content of the provision, directing the parties to the conflict and all transit powers not only to allow but also to facilitate relief actions. On the other hand, the subjection of relief action to an agreement between the parties in paragraph 1 cannot be overlooked. The conjunction of these various elements signifies that, in principle, the blockading power must agree to grant free passage to relief shipments. It can refuse only if there are compelling reasons.

Acceptable reasons to refuse free passage are found in the remainder of Article 70 and in other provisions of Protocol I. The blockading power can refuse if there does not exist a real need for relief or if the shipments are being made strictly for political motives, and are therefore not humanitarian. All shipments destined for the civilian population in need should be regarded as humanitarian, despite any political overtones to the relief actions.¹⁴³ Under paragraph 3, the transit powers and parties to the conflict may impose a number of conditions on the granting of free passage. Most significant is the possibility of demanding that food consignments be

141. 12 1977 *Official Records*, *supra* note 107, at 333.

142. *Id.* (remark by Mr. Bothe of the Federal Republic of Germany); *see also* I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 819; BOTHE ET AL., *supra* note 93, at 434.

143. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 817-18. For example, in the Persian Gulf war there were a number of so-called "peace ships" sent by countries who approved of Iraq's invasion of Kuwait, and whose relief shipments were intended as a show of support. Such relief action would nevertheless be deemed humanitarian if there existed a real need among the civilians. *See* Cockburn, *supra* note 24, at 14. Of course, as discussed further, the blockading power may yet insist on the local supervision by a Protecting Power to ensure that relief are effectively distributed to the benefitted population.

distributed under the local supervision of a Protecting Power, agreed upon by both sides to the conflict.¹⁴⁴

The Protecting Power is to ensure not only that the consignments are not diverted to the military, but also that the priorities of distribution found in paragraph 1 are complied with. The priorities were introduced in Article 70 because, contrary to Article 23 of the 1949 Fourth Geneva Convention, it expands relief entitlement to the whole population, and not only to vulnerable segments such as children, expectant mothers, maternity cases, and nursing mothers. These priorities have both a humanitarian purpose—to relieve the segments of the civilian population who are usually the most affected by shortages—and a military purpose—to avoid granting the enemy an undue advantage by feeding its factory workers and others more closely linked to the war efforts.¹⁴⁵ The priorities apply to all relief actions and not only those locally supervised by a Protecting Power.

In addition, it has been suggested that imperative military necessity may legitimately justify the blockading country in refusing to grant free passage.¹⁴⁶ However, this concession to the demands of warfare is limited. In no case can refusal be due to a desire to deprive the civilian population of sufficient foodstuffs. The invalidity of such a motive is clearly stated by Article 54(1) of Protocol I.¹⁴⁷ One application of this limited exception concerns relief consignments containing goods which are shown to be used in direct support of military action. For instance, this was the case of fats during the British blockade of Germany in both World Wars. Such goods may selectively be denied free passage by the blockading power.

As can be seen, the discretion of the blockading power to refuse free passage is far from unfettered. The vague wording of Article 23 of the 1949 Fourth Geneva Convention, conditioning relief on the subjective evaluation of its eventual impact on the enemy's economy

144. Protocol I, *supra* note 50, art. 5, 1125 U.N.T.S. at 8 (appointment of Protecting Powers and of their substitutes). Impartial humanitarian organizations can also act in the same respect, as they could under Article 23 of the 1949 Fourth Geneva Convention. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 824-25; Allen, *supra* note 57, at 73.

145. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 821-22; BOTHE ET AL., *supra* note 93, at 435; Allen, *supra* note 52, at 74. This priority actually codifies a practice already established by the Red Cross during World War II for the distribution of relief in occupied territory. I.C.R.C. REPORT ON ITS ACTIVITIES, *supra* note 58, at 383.

146. BOTHE ET AL., *supra* note 93, at 434.

147. *Id.* at 434-35.

or military effort, is totally discarded in the new provision.¹⁴⁸ If all the conditions are met and there exists a real need for relief amongst the civilian population, Article 70 taken, as a whole imposes a clear obligation on the blockading power to agree to and facilitate relief actions.¹⁴⁹

Pursuant to Article 70, the origins of food shortages are irrelevant to the obligation to encourage and facilitate relief. In the Persian Gulf context, this implies that food shortages could have been due not only to the blockade but also to the lack of machinery, equipment, fertilizers, spare parts, or the departure of foreign laborers. In the later part of the conflict, the intense air war launched by the coalition forces had a devastating effect on food supply in Iraq, preventing normal agricultural activity, disrupting food distribution to more remote centers, and destroying electrical plants, thereby triggering the loss of all perishable food items. The *United Nations Post-Crisis Report* which prompted an end to the food blockade found that critical shortages existed and that massive food shipments were needed to avoid a famine.¹⁵⁰ The report also pointed out several other humanitarian needs in Iraq, such as water purification, sanitation, and health, which warranted urgent relief consignments under Article 70 of Protocol I.¹⁵¹

The scheme set up by Resolution 661 with respect to the food blockade and its humanitarian exception was incomplete because it did not specify who was responsible for evaluating the humanitarian needs in Iraq and Kuwait, and according to what criteria they were to evaluate. In effect, it set an arbitrary qualification to an absolute ban on food.¹⁵² The approval of guidelines for the Sanctions

148. I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 827.

149. *Id.* at 844-45; BOTHE ET AL., *supra* note 93, at 433-34; Allen, *supra* note 57, at 70-71; Meyrowitz, *supra* note 50, at 281-82. *Contra* RAUCH, *supra* note 122, at 92, which argues that the wording of the provision, making relief subject to an agreement, implies an unrestricted discretion to refuse free passage. One response to this argument is that, in international humanitarian documents, absolute discretion is usually translated by "shall endeavor to," as in Article 17 of the 1949 Fourth Geneva Convention, and not "shall be undertaken" and "shall allow and facilitate rapid and unimpeded passage." Rauch's position overlooks the firm tone of these passage to give meaning only to the subjection to an agreement. The better interpretation is the one proposed by the writers cited herein, who reconciled both aspects by recognizing the limited discretion discussed in the present section.

150. U.N. POST-CRISIS REPORT, *supra* note 46, at 7. *See also* WHO-UNICEF, *supra* note 41.

151. U.N. POST-CRISIS REPORT, *supra* note 46, at 8-10.

152. Indeed, under that loose framework, the United States imposed its restrictive interpretation to deny free passage to relief shipments organized by the governments of India and the Philippines for their own nationals trapped in Iraq and Kuwait. *Persian Gulf is*

Committee through the adoption of Resolution 666 represented a positive step towards compliance with Article 70 of Protocol I. Under Article 70, the blockading power is entitled to verify that there really exists a humanitarian need amongst the enemy civilian population. Resolution 666 directs the Sanctions Committee to "keep the situation regarding foodstuffs in Iraq and Kuwait under constant review."¹⁵³ Iraq did not cooperate with the U.N. in this respect. In a formal reply to Resolution 666, Iraq rejected having a hostile organization monitor its real food needs,¹⁵⁴ and it refused for months to let a U.N. mission come to Iraq to assess the humanitarian situation.¹⁵⁵ It can be questioned whether the information already available to the U.N. was insufficient to allow it to assess humanitarian needs without a formal fact-finding mission to Iraq. This illustrates the difficulty of conditioning relief on a belligerent's subjective evaluation of the enemy's needs.¹⁵⁶

Resolution 666 required the Sanctions Committee, in evaluating humanitarian needs for foodstuffs in Iraq and Kuwait, to pay special heed to vulnerable segments of the population, such as children under fifteen, expectant mothers, maternity cases, the sick, and the elderly.¹⁵⁷ These categories mirror those of protected civilians in Article 23 of the 1949 Fourth Geneva Convention. On the contrary, Article 70 grants protection to the civilian population as a whole, and not only to its most vulnerable members. Nevertheless, as a matter of fact, these are the groups liable to suffer first, and indeed they did suffer the most in Iraq. The Resolution effectively complies with Article 70 in this respect.

Crisis Around the World, UPI, Aug. 20, 1990, available in LEXIS, Nexis Library, UPI File (request denied to the Philippines); Baggaley, *supra* note 13 (arguing that the United States and other Western nations were wrong in their evaluation of humanitarian needs in Iraq and Kuwait).

153. Resolution 666, *supra* note 15, para. 1.

154. LETTER DATED 19 SEPTEMBER 1990 FROM THE PERMANENT REPRESENTATIVE OF IRAQ TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, U.N. Doc. S/21790, at 2 (1990) [hereinafter LETTER DATED 19 SEPTEMBER 1990].

155. Doyle, *Crisis in the Gulf: US Yields on Total Food Embargo*, *supra* note 13, at 9.

156. The ambivalence of the U.N.'s situation was documented by the press at the time: The fact that Iraq is holding up the U.N. investigation of humanitarian needs happens to suit the U.S. and most members of the U.N. Security Council. These countries are reluctant to cause suffering among the civilian population and especially among foreign national trapped by the conflict, but want the sanctions to hurt. 'The sanctions weapon when applied to food is a double-edged sword,' one diplomat commented. 'We want Iraq to hurt, but cannot be seen to use famine to bring the country down.'

Id.

157. Resolution 666, *supra* note 15, para. 4.

As permitted by Article 70, the U.N. demanded in Resolution 666 that any food shipment to Iraq be distributed in Iraq and Kuwait under the local supervision of either the International Committee of the Red Cross or other appropriate humanitarian agencies. Iraq rejected any role for the International Committee of the Red Cross but expressed its willingness to collaborate with national Red Cross Societies through the Iraqi Red Crescent Society.¹⁵⁸ The shipments allowed through by the Sanctions Committee appear to have targeted foreign nationals trapped in Iraq and Kuwait. For instance, an Indian ship was the first permitted to break the blockade in mid-September to provide food relief for Indians and other foreigners in Iraq and Kuwait, to be distributed under the local supervision of the Indian Red Cross.¹⁵⁹ Any distinction by the U.N. between the humanitarian needs of foreign nationals and the civilian population of Iraq would be highly objectionable under Article 70 of Protocol I, unless it were founded on information that only the foreign segment of the civilian population had humanitarian needs.¹⁶⁰

Although the workings of the Sanctions Committee are kept beyond public scrutiny, there are accounts that the Committee ignored independent and even U.N. reports of food shortages as early as November 1990. Influenced by Britain and the United States, the Committee insisted on documented evidence of humanitarian need by an international organization before approving any relief shipment. Iraq refused to allow international organizations to visit until mid-January, at which time it invited U.N. bodies to come and verify its needs. It took over two months for the process to result in permis-

158. LETTER DATED 19 SEPTEMBER 1990, *supra* note 154, at 3.

159. Anthony Goodman, *U.N. Council Sets Guidelines for Sending Food to Iraq, Kuwait*, Reuters, Sept. 14, 1990, available in LEXIS, Nexis Library, Reuter File; *Iraq to Allow India to Distribute Food to Its Refugees*, Reuters, Sept. 18, 1990, available in LEXIS, Nexis Library, Reuter File; Leonard Doyle & Michael Sheridan, *Kuwait Captives Near Starvation*, THE INDEPENDENT (London), Oct. 3, 1990, at 12. News reports do not mention any important shipments of food at any time during the blockade, and U.N. documents do not include a precise report by the Sanctions Committee on its approval rate of humanitarian food consignments given free passage.

160. Indeed there was some information to the effect that foreign nationals from Third World countries did not receive food ration cards in Iraq. Maamoun Youssef, *Iraq Tightens Food Rationing in Face of U.N. Embargo*, Reuters, Sept. 14, 1990, available in LEXIS, Nexis Library, Reuters File; *Sanctions: Food for Some*, ECONOMIST, Sept. 22, 1990. These political moves by the Iraqi leadership, which obviously constitute violations of humanitarian law, do not necessarily deny the existence of needs of the Iraqi civilian population. Nevertheless, there were suggestions that if any of the food allowed through by permission of the Sanctions Committee reached Iraqis, the U.N. would block further shipments. *Id.*

sion for food to reach Iraq.¹⁶¹ The reluctance of the U.N. to allow large-scale food consignments to Iraq, despite serious shortages in that country, fell short of the demanding obligation to "allow and facilitate rapid and unimpeded passage"¹⁶² found in Article 70.

III. CUSTOMARY HUMANITARIAN LAW AND CIVILIAN STARVATION

More than two-thirds of the countries which participated directly in the Gulf War conflict were parties to Protocol I. Neither the United States nor Iraq have acceded to that Convention, however, meaning that most of its substantive provisions were not directly applicable to the conflict. The applicability of conventional obligations to organs of the U.N. also raises serious questions.¹⁶³ Customary humanitarian norms bind all belligerents at all times, irrespective of the treaties to which they are party, including the U.N.¹⁶⁴ Therefore, only a customary prohibition of the kind found in Article 54 of Protocol I could fully extend the protection of the ban on the use of starvation as a weapon to the civilians embroiled in the Gulf conflict. This section attempts to ascertain the existence of such a customary prohibition as well as its corollary duty to agree to and facilitate relief actions in favor of the civilian population.

Before examining the customary status of these norms, I will first explore the justification of civilian starvation with respect to general principles of international humanitarian law. This is rendered necessary by the generalized assumption that civilian starvation remains an acceptable method of warfare according to general principles of the laws of war.

161. U.N. POST-CRISIS REPORT, *supra* note 46; WHO-UNICEF, *supra* note 41; *Iraq Says Over 4,000 Have Died Because of Food Embargo*, Reuters, Jan. 23, 1991, available in LEXIS, Nexis Library, Reuter File.

162. Protocol I, *supra* note 50, art. 70(2), 1125 U.N.T.S. at 35-36.

163. See generally MICHAEL BOTHE, LE DROIT DE LA GUERRE ET LES NATIONS UNIES: A PROPOS DES INCIDENTS ARMÉS AU CONGO (1967); FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR (1966); Dietrich Schindler, *United Nations Forces and International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET, *supra* note 95, at 521; Paul De Visscher, *Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies*, in 54:1 *Annuaire de l'Institut de Droit International* 1 (1971).

164. See BOTHE, *supra* note 162, at 197-206; SEYERSTED, *supra* note 162, at 201-04, 314, 395; Schindler, *supra* note 162, at 526-27.

A. *Attempted Justification of Civilian Starvation*

1. Justification

The arguments invoked before and after the World Wars in support of blockades and sieges which produced civilian starvation are identical. They refer to difficulties of distinction, the concept of total war, and the role of the besieged or blockaded government.

The difficulties of distinction primarily refer to the fact that when a shipment of food destined for the adverse country is intercepted, it is impossible to determine whether the food will be used by civilians or by the military. In times of war, military food needs are of an overriding importance and, through requisitions and rationing, government can be said to control all the foodstuffs in the country.¹⁶⁵ Even if the food is indeed distributed to civilians, an equivalent amount of resources will be freed for the military. No distinction should be made between the civilian and military utility of foodstuffs since it cannot but help the war effort of the enemy.¹⁶⁶ A secondary difficulty concerns those foodstuffs which may be processed into weapons or ammunition. For example, fats contain glycerine which may be used to make propellant or explosives. It is very difficult to distinguish food destined for human consumption from that which will be turned into armament.¹⁶⁷

165. BEVERIDGE, *supra* note 124, at 14 ("In totalitarian war the essential foodstuffs of every belligerent country become a single store, owned or controlled by the central government, directed to serve the military or civilian population as best may serve the single purpose of success in war."). See also RAUCH, *supra* note 122, at 97 (Foreign Office communique); ROSENBLAD, *supra* note 52, at 112-13; Lester Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 AM. J. INT'L L. 680, 688-89 (citing the diplomatic note of Feb. 10, 1915, from Sir Edward Grey, British Foreign Secretary, to the United States Government, in which Great Britain expressed similar views).

166. See Meyrowitz, *supra* note 50, at 270.

167. BEVERIDGE, *supra* note 124, at 8-10. Prime Minister Winston Churchill thus justified the British food blockade in 1940:

There have been many proposals founded in the highest motives that food should be allowed to pass the blockade for the relief of these populations. I regret that we must refuse these requests. Many of these valuable foods are essential to the manufacture of vital war materials. Fats are used to make explosives. Potatoes make the alcohol for motor spirit. The plastic material now so largely used in the construction of aircraft are made of milk. If the Germans use these commodities to help them to bomb our women and children rather than to feed the populations who produce them, we may be sure imported food would go the same way, directly or indirectly, or be employed to relieve the enemy of the responsibilities he has so wantonly assumed.

Quoted in RAUCH, *supra* note 122, at 89.

The corollary to the point that anything will help the war effort of the enemy is that in total war, everything and everyone is part of the effort. There is a direct link between a country's ability to fight and the productivity of non-combatants at the rear, working in factories and government offices. Practically no activity producing some commodity of service can be regarded as totally disconnected from the war.¹⁶⁸ Accordingly, there are no peaceful people in times of war except those who are "useless mouths," such as children too young to work, the sick, and the elderly.¹⁶⁹ Only those belonging to this very limited group are entitled to be spared the harshness of starvation.

The last argument invoked to justify the legality of civilian starvation centers on the role played by the besieged government. It is argued that the state must choose between cannons or butter. If children and the sick start dying from starvation, it is because the government has chosen to feed its armies in the field rather than its civilian population. The country imposing the blockade therefore cannot be blamed for civilian deaths, as it cannot be expected to feed the enemy's civilians if their government refuses to do so. One commentator adopted this argument in 1939 to justify both the 1915-19 blockade of Germany and the one then just declared.¹⁷⁰ Civilian deaths are thus not a consequence of the blockade but of the blockaded government's stubbornness in refusing to surrender.

2. Critique

These arguments supporting the legality of civilian starvation as a method of warfare clash with two fundamental principles of international humanitarian law: distinction and proportionality.

To argue, as do defenders of the military usage of civilian starvation, that the enlistment of the population as a whole of a

168. George G. Wilson, *Food Supplies and Belligerents*, 24 AM. J. INT'L L. 365, 365 (1930) ("It was difficult to determine whether women working in munitions factories behind the lines were more essential or the men at the front."). This was echoed in the words of German Chancellor von Bethmann-Hollweg to his people during World War I: "We at home have no other—absolutely no other—task but to produce cannon, ammunition, and food, and to distribute victuals with justice." N.Y. TIMES, Feb. 28, 1917 (quoted in Mudge, *supra* note 50, at 241).

169. BEVERIDGE, *supra* note 124, at 12.

170. *Id.* at 26-27 ("If the civilian population of Germany or any part of it goes short of essential food in this war, that will be the decision of the Nazi Party, because the government diverts so much their total resources of man-power and foreign exchange and food-supplies to making and using munitions as to starve their own women and children. . . . But that will be their decision, not a necessary consequence of the British blockade.").

belligerent country in a total war implies that civilians are as essential to the war effort as combatants at the front, clashes head on with the principle of distinction.¹⁷¹ The distinction between civilians and combatants lies at the very heart of international humanitarian law. To deny the reality and validity of this fundamental tenet is to undermine a considerable portion of the advances made in humanitarian law in the last century. To a large extent, it is to deny the rule of international law itself. To allege that civilians and combatants are one and the same also has the effect of condoning indiscriminate attacks on enemy or occupied territory, prohibited by humanitarian law under the principle of distinction.¹⁷² The argument appears incompatible with the body of law to which it pretends to belong and, as such, it is completely unacceptable.¹⁷³

The principle of proportionality requires that there be a reasonable relationship between collateral civilian damages and concrete and direct military advantage resulting from use of the method of warfare.¹⁷⁴ Civilian starvation raises several acute problems with respect to this rule. First and foremost is the reality that seldom reaches the pages of scholarly writings on the subject: the object of cutting off food supplies during a siege or blockade is to kill civilians. It is often remarked that children, the sick, the elderly and the poor are the first ones to feel the effect of food shortages.¹⁷⁵ Combatants are generally better fed than civilians and are the last to

171. For instance, the British Foreign Secretary replied to a protest of the United States against the inclusion of foodstuffs in the blockade of Germany in early 1915 that "[t]he reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears." U.S. Foreign Relations, 1915 Supp., at 332 (*reprinted in* Nurick, *supra* note 165, at 689).

172. See Protocol I, *supra* note 50, art. 51(4), 1125 U.N.T.S. at 26; see also I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 619-23; BOTHE ET AL., *supra* note 93, at 304-08.

173. See Christopher J. Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT—CHALLENGES AHEAD, *supra* note 114, at 110; Meyrowitz, *supra* note 50, at 269; Nurick, *supra* note 165, at 689.

174. Protocol I, *supra* note 50, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b), 1125 U.N.T.S. at 26, 29.

175. For instance in Iraq, during the Persian Gulf war, a special U.N. mission found that orphans, handicapped and the elderly suffered particularly. U.N. POST-CRISIS REPORT, *supra* note 46, at 11; Cockburn, *Prince Sadruddin Urges Action to Avert Iraqi Famine*, *supra* note 24, at 14. See also HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 69 (1986); Mudge, *supra* note 50, at 229; Wallenstein, *supra* note 40, at 281.

feel hunger.¹⁷⁶ However, “[m]ost often, the authors’ reflection stops at the point where the problem arises: when the food blockade kills civilians and only civilians.”¹⁷⁷ The aim of the food blockade is to undermine the enemy’s will to fight through an attack on the weakest and least protected segment of its population. If no civilians die, the weapon will be ineffective. To achieve any noticeable impact, civilian losses must be important, if not staggering. Biafra provides an example of this ineluctable causal link. Disproportionate civilian impact is therefore a built-in mechanism of the civilian starvation weapon, making its compatibility with the principle of proportionality highly questionable.

The second problem is that the overall capacity of civilian starvation to bring about a commensurate military advantage appears far from certain. There is debate about the weapon’s efficiency, with contradictory examples such as Leningrad on the one side and Biafra on the other.¹⁷⁸ When the vagueness of the discernable military advantage is measured against the requirement that it be “direct” and “concrete,”¹⁷⁹ further doubt is cast on the proportionality of this method of warfare. In the case of the Persian Gulf war, no discernable military advantage appears to have accrued from the food blockade against Iraq and Kuwait, despite the effectiveness of that blockade.

In evaluating the proportional character of a weapon, only the foreseeable impact on civilians is relevant. The difficulty of such prediction is illustrated by the example of food blockades or sieges, where the extent of the besieged’s resistance determines to a large extent the measure of civilian casualties. The apologists of civilian

176. For example, Africa Watch reported recently that in a besieged city in Ethiopia the local militia received rations nine times larger than those distributed to civilians in the town. Africa Watch, *Ethiopia: 200 Days in the Death of Asmara—Starvation as a Weapon and Violation of the Humanitarian Laws of War*, NEWS FROM AFR. WATCH, Sept. 20, 1990 [hereinafter Africa Watch, *Ethiopia: 200 Days in the Death of Asmara*].

177. Meyrowitz, *supra* note 50, at 271-72 (“Le plus souvent, la réflexion des auteurs s’arrête au point où le problème commence à se poser: lorsque la *Hungerblockade* tue des personnes civiles, et ne tue qu’elles.”).

178. ROSENBLAD, *supra* note 52, at 104. *But see* LEVIE, *supra* note 175, at 69-70 (referring to “Operation Starvation,” the U.S. blockade of Japan during World War II). The later use of atomic weapons in that conflict renders difficult a clear assessment of the military effectiveness of civilian starvation as a method of warfare; ELMER B. POTTER & CHESTER W. NIMITZ, *THE GREAT SEA WAR* 423 (1960) (“Before Japan could be invaded, before the atomic bombs were dropped, the Japanese were making surrender overtures, starved into defeat.”).

179. Protocol I, *supra* note 50, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b), 1125 U.N.T.S. at 26, 29.

starvation have twisted into the argument that the responsibility for civilian losses thereby lies with the besieged. In particular, they argue, totalitarian governments such as the Nazi regime typically disregard the needs of civilians to feed instead the war machine. This argument confuses the justification for civilian starvation with its purpose. Civilian starvation would be a proportionate method of warfare if the besieged surrendered immediately. Such a response seems somewhat unlikely, however, whatever the system of government in the besieged place or blockaded country. If the government is popularly elected and controlled, the war is conducted at the will of the people, who will therefore accept its consequences.¹⁸⁰ On the other hand, a more totalitarian regime, having imposed a war on its people without their necessary consent, will probably not shy away from imposing on them the consequences of its unilateral decision. Such a government usually will utilize the blockade to underscore the evil nature of the enemy's attack on babies and the sick.¹⁸¹ Far from supporting the use of a blockade against a population under totalitarian rule, the population's lack of consent to both its government and the war militates against making it the object of a food blockade. A food blockade would seem more justifiable against a democratic regime given that the decision to go to war would be the decision "of the people themselves." In reality, the argument is fallacious for any system of government.

Once the besieged government, whatever its form, has accepted the ineluctability of civilian losses, the starvation weapon produces no military advantage to speak of, since the enemy's capacity to fight is only minimally affected. Such a reaction appears to have occurred

180. Writing two months after the start of World War II, Beveridge held this as an important distinction between Nazi Germany and Britain:

Moreover, a British Government, in so far as they had to call upon the British population for sacrifices to maintain the military front, could ask for greater sacrifices without losing support; their decisions are those of the people themselves. . . . Once this point is made clear to the British people, and once fair play to all is guaranteed by rationing, there will be no difficulty in securing from them acceptance of almost any restriction whatever upon their personal comforts, and everything but the barest necessities. They will demand guns rather than butter.

BEVERIDGE, *supra* note 124, at 28.

181. On Nov. 15, 1939, the *Daily Herald* in Britain published an article entitled War on Babies, *cited in* RAUCH, *supra* note 122, at 88. The same was used in the Persian Gulf war, where the Iraqi newspaper *al-Thawra* qualified the blockade as a "racist plot to exterminate Arabs": "The starvation plot against the Iraqi people, and denial of their right to obtain medicine and depriving their children of milk, aims at destroying the Arab nation," (*quoted in* Baggaley, *supra* note 13).

in all cases of civilian starvation, including the Persian Gulf War.¹⁸² As thoughtfully put by one commentator, the civilian population during a food blockade is the passive common element of two variable legal and social equations: (i) how directly the blockade is aimed at the civilian population, and (ii) what kind of relation exists between the population and its government.¹⁸³ It is possible that, in some cases, a certain degree of blame may be ascribed to the besieged government for exposing its population to unnecessary hardship, such as when a government uses the starvation of its own civilian population for tactical or political gains. Wherever the blame may lie, the illegality of the method of warfare remains.

The attempted justification of civilian starvation as a method of warfare according to general principles of humanitarian law falls considerably short of resounding success. The arguments put forward are either unacceptable or incapable of grounding its validity. There is therefore no valid justification under international humanitarian principles for civilian starvation as a weapon.

B. *A Customary Prohibition of Civilian Starvation*

Establishing the normative content of customary international law presents a difficult challenge. Custom relies on content as well as context, on actions as well as words, with all the imprecisions and uncertainty inherent in each of these elements. The way to determine if a rule has ripened into custom has not yet been definitively laid out

182. Iraq responded to the blockade by saying it would never cause its retreat from Kuwait, "even if we have to eat mud." *Hunger and the Butcher's Bill*, *supra* note 38. The besieged commander had a similar reaction in Leningrad: "One condition for the survival of the City was the placid calculation by its leaders that approximately one-third of the population must succumb: so-called 'dependents'—non-employable persons other than children—were put in a rationing class where they could hardly be expected to survive." JAN O. OLSON, *LENINGRAD* 252 (1970), *quoted in* Rosenblad, *supra* note 50, at 256. Biafran leaders also responded in the like to the starvation of their people: "Biafrans would prefer to fight out their cause starving, rather than be fed by hands that also slaughter them. Biafrans would like to die as hungry, lean and neat human beings rather than as fattened cows on an abattoir prepared by the very farmers who fattened them." Mudge, *supra* note 50, at 230, n.9 (quoting a press release dated June 26, 1968, from the New York Office of the Special Representative of the Government of the Republic of Biafra).

183. Meyrowitz, *supra* note 50, at 272-74. In other words, the effect and legality of the food blockade will depend not only on how directly the civilian population is targeted by the besieger, but also on the reaction of the besieged government to the starvation of its own people. A government's reaction is likely to be influenced by its relationship with its people, whether it has been democratically elected or enjoys no popular support. Most often, the civilian population plays a purely passive role, being the besieger's target and having no control over the nature of its relationship with its own government.

by scholarly, judicial or conventional interpretation. On the contrary, there are a multitude of formulas proposed, with no general agreement as to their details. Nonetheless, there is consensus on the customary status of certain norms, such as the 1948 Genocide Convention or the 1949 Geneva Conventions.¹⁸⁴ Because a clarification of that body of law lies clearly beyond the scope of this paper, I will simply map out the core requirements for a treaty rule to become customary and then apply these requirements to the prohibition of civilian starvation as a weapon and the duty to agree to and facilitate famine relief operations.

1. Elements of Customary Law

One reason for the disparity in the proposed methods for assessing the customary status of a norm is that any such method must tackle vastly different substantive rules, applied in variable circumstances by states for motives ranging from purely emotional to directly coercive. Generally speaking, in order to establish the existence of a customary obligation, there must be evidence of (i) *opinio juris*, an acceptance that the norm is an international legal obligation, and (ii) state practice compatible with the norm. A decision as to the character of a rule may be arrived at by considering the totality of elements falling under both of these headings. No one aspect of either state practice or *opinio juris* carries with it the clout sufficient to establish the customary status of a rule. On the contrary, as noted by one scholar, the answer will come only from an observation of "the flow of behaviours and the flow of words."¹⁸⁵

a. *Opinio Juris*

Opinio juris is not found in the specific declaration by a country's leader as to the obligatory nature of a rule. Customary law does not depend on the specific assent of each state to a particular norm, although official positions are taken into consideration.¹⁸⁶ Rather, *opinio juris* stems from the aggregate of all actions and statements of the world community.

184. See Allen, *supra* note 57, at 16.

185. Myres M. McDougal, *Law and Minimum World Public Order: Armed Conflict in a Larger Context*, 3 U.C.L.A. PAC. BASIN L.J. 21, 22 (1984).

186. For example the United States, upon President Reagan's decision not to ratify Protocol I, set out to decide which of its provisions were customary, desirable and undesirable. The aim was to influence other states to agree with the United States' assessment of which provisions "merit" becoming customary, and therefore create a body of *opinio juris*. See MERON, *supra* note 57, at 68.

Not all rules are liable to evolve to customary status. Their nature and content will dictate if they can become customary. In the case of a rule already embodied in an international instrument, the norm must have a clearly identifiable policy content capable of engendering a general rule of law. For a customary norm to evolve from a treaty, the treaty provisions must require that the signatories comply with a clear and complete obligation. For instance, Article 17 of the 1949 Fourth Geneva Convention, which states that in case of siege belligerents "shall endeavour" to agree to let out civilians, does not impose such an obligation. Because it is merely hortatory, this requirement could not evolve as such into custom. The International Court of Justice adopted this position clearly in the *North Sea Continental Shelf Cases* when it stated that rules must potentially be of a "fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law."¹⁸⁷ In addition, requiring clear policy content means that treaty provisions drafted in a complicated manner with a profusion of details will not be liable to achieve customary status. Customary international law generally consists of very broad and general principles rather than precise rules. If, however, the underlying policy transpires clearly from the treaty provision so that it can be generalized, that policy alone may generate a customary obligation.¹⁸⁸ Furthermore, the policy must be compatible with community interests, humanitarian purposes and general customary principles of humanitarian law.¹⁸⁹

Opinio juris can be found in a variety of actions and instruments. The most important is treaty law. There is constant interaction between treaty and customary law, each influencing the other. When a convention has been assented to by a great number of states, it achieves a universality testifying to its obligatory content.¹⁹⁰ Such is the case of the 1949 Geneva Conventions, to which practical-

187. *North Sea Continental Shelf Cases* (F.R.G. v. Den., F.R.G. v. Neth.) 1969 I.C.J. 3, 41 (Feb. 20); see also Allen, *supra* note 57, at 78; Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 U.C.L.A. PAC. BASIN L.J. 55, 64 (1984); McDougal, *supra* note 185, at 23; L.R. Penna, *Customary International Law and Protocol I: An Analysis of Some Provisions*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET, *supra* note 95, at 204.

188. See Cassese, *supra* note 187; Solf, *supra* note 117, at 123-24.

189. See Allen, *supra* note 57, at 80-81.

190. Some state practice may nevertheless be required before the norms become customary. *North Sea Continental Shelf Cases* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20); Oscar Schachter, *Entangled Treaty and Custom*, in INTERNATIONAL LAW IN A TIME OF PERPLEXITY 717, 724-25 (Y. Dinstein ed., 1988).

ly all nations have adhered.¹⁹¹ The International Court of Justice in the *Nicaragua* opinion said that customary law continues to exist and evolve even if, as with the 1949 Geneva Conventions, conventional law has the same normative content and applies in all cases. Customary law may later progress while the conventional law is not updated.¹⁹² The number and identity of countries having ratified a convention are determinative of its weight as *opinio juris*. Signature of a treaty, even without later ratification, implies a degree of obligation not to defeat the purposes and policies in the treaty, and is therefore relevant to *opinio juris*. Similarly, the unanimity with which a provision is adopted can be a measure of its customary status at the time. Of course, this can bind only countries present at the conference who did not voice any objections to the proposed treaty rule.¹⁹³

Resolutions by international organizations are another source of *opinio juris*. In this respect, the General Assembly of the U.N. occupies a special place. It is a global forum in which the opinions of all states on a particular matter can be instantly collected. There is debate as to the precise weight to be accorded to a General Assembly resolution, but it is agreed that it contributes significantly to the progression of a norm to customary status, particularly if the resolution is adopted by consensus or a strong majority.¹⁹⁴ Some have gone as far as saying that such a resolution could be the equivalent of treaty-making because states should be held to their

191. The exceptions are Bhutan, Brunei, Myanmar, the Maldives and Nauru. *Status of Four Geneva Conventions*, *supra* note 56, at 402.

192. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 96 (June 27). One author distinguishes five different ways in which international instruments adhered to by a great number of states can relate to customary law: (i) the treaty is evidence of a pre-existing custom; (ii) the treaty codifies and develops customs; (iii) it supplements customs, for example by enunciating rules of application; (iv) the treaty embodies customary law developed at the international conference where the convention is adopted; and (v) the convention at its inception did not represent customs but generated later progress in customary law, for example the prohibition of mass civilian deportation in Article 49 of the 1949 Fourth Geneva Convention. Cassese, *supra* note 187, at 58-68. See also MERON, *supra* note 57, at 48; Schachter, *supra* note 190, at 718; Louis B. Sohn, *Unratified Treaties as a Source of Customary Law*, in *REALISM IN LAW-MAKING: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN* 231, 236-46 (A. Bos & H. Siblesz eds., 1986).

193. See Allen, *supra* note 57, at 78; see also Cassese, *supra* note 187, at 58-68; Penna, *supra* note 187, at 208 (referring to the I.C.J. decision in the *Namibia Advisory Opinion*, 1971 I.C.J. 3, 47 (June 21) where the court found *opinio juris* in the fact that the treaty provision was adopted unanimously).

194. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS* (1986).

votes, but that is a view not widely shared.¹⁹⁵ *Opinio juris* can also be found in resolutions of other international and regional organizations, such as the International Committee for the Red Cross, the European Economic Community, or the Organization of American States, to name but a few. Not only the resolutions themselves, but all interventions made and positions taken by states in the context of such organizations are relevant to the determination.¹⁹⁶

Opinio juris can also be found in judicial decisions of municipal courts, recitals in treaties and other instruments, municipal legislation, statements from officials, press releases, etc.¹⁹⁷ Public opinion constitutes a powerful instrument of change in international humanitarian law. It is not, however, *opinio juris* except inasmuch as it influences the conduct of governments.¹⁹⁸

b. *State Practice*

A norm becomes customary only when state practice is already consonant with it. Practice plays a role similar to *opinio juris* in that it expresses a state's view of the obligatory content of the norm. For states there must be, for the norm to accede to customary status, general compliance with the rule. Universality, however, is not required.¹⁹⁹

The relevant practice is that found in situations not governed by treaty. Where the treaty applies, all state behavior will be presumed to relate to the treaty rule rather than to a parallel customary norm. In such a situation, according to the International Court of Justice, "no inference can be drawn as to the existence of a rule of customary international law" from the practice of states that are party to the treaty.²⁰⁰ When a treaty has achieved near-universal participation, as have the 1949 Geneva Conventions, little state practice relevant to the establishment of a custom can take place. This creates a paradox

195. Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 2 HUM. RTS. J. 557, 559 (1969). Others have warned against such a strict interpretation because it would deter many states from voting in favour of aspirational norms, whose principle they may support but whose implementation is not yet desirable. Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116, 119 (1987); see also Schachter, *supra* note 190, at 730.

196. MERON, *supra* note 57, at 42; Penna, *supra* note 187, at 207-08.

197. Penna, *supra* note 187, at 207-08.

198. See Allen, *supra* note 57, at 43 (giving the example of the siege of Palestinian camps in Beirut which were loosened after world public opinion decried the practice).

199. Penna, *supra* note 187, at 205.

200. North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth), 1969 I.C.J. 3, 43 (Feb. 20).

(the “Baxter paradox,” named after the judge who noted its existence) in that very little state practice is available to establish the ripening of such a treaty rule into universal custom. As a way of breaking free of this paradox, one author suggests that some state practice could be demonstrated to be relevant not to a state’s treaty obligation, but rather to the parallel customary rule.²⁰¹ However, it is difficult to differentiate the customary source of state practice from a similar treaty rule binding on states party to the treaty. A more helpful explanation is rather that the “Baxter Paradox” creates a situation in which greater reliance must be placed on *opinio juris* elements such as the number of parties to the treaty. The progression of a norm to customary status is a global process, and a lack of relevant evidence concerning one aspect simply calls for greater reliance on other aspects of the process.

With respect to state practice, international humanitarian law raises particular problems owing to the very nature and field of application of that body of law. Applicable exclusively in times of armed conflict, humanitarian law is of exceptional use. On the other hand, international human rights influence the day-to-day practice of states. For example, starvation of civilians occurs less often than infringements on the freedom of expression. The sparseness of state practice means that the requirement of state compliance with a rule in order to establish its customary character will not be as stringent as in the case of humanitarian norms. Because during wartime, the state has an ambitious purpose clashing with many other interests, occurrences of practice contrary to the rule are not considered fatal to the rule’s status as custom. There must be a certain degree of compliance, however, as there is a measure of difference between sporadic breaches of the norm and “massive, grave and persistent” violations.²⁰² Also, the manner in which other states and the violator react is important. Rarely will a country admit that it is breaking international customary law. It will usually deny that any violation has taken place, in law or in fact. Therefore the strength of other states’ condemnations of the breach also plays a role in affirming the obligatory content of the norm.²⁰³

201. MERON, *supra* note 57, at 50-53.

202. *Id.* at 44, 58; *see* Allen, *supra* note 57, at 20-21; Schachter, *supra* note 190, at 734-35. Even recurrent violations are not necessarily irreconcilable with the existence of a customary norm, as demonstrated by the protection against torture. MERON, *supra* note 57, at 50-53 (citing the United Nations Special Rapporteur, *Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/1988/17, at 23 (1988)).

203. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 98 (June 27); MERON, *supra* note 57, at 59-60.

Breaches of a norm are usually more visible than compliance with it, particularly when the rule takes the form of a prohibited conduct. Care must therefore be taken not to overestimate instances of disregard for the rule. With respect to humanitarian norms, military field manuals are a good indication of regular practice since it is expected that they will be enforced at all times.²⁰⁴

Finally, there is no minimum period of state compliance with a norm that is required for the norm to become customary. In the *High Command* case, the Nuremberg International Military Tribunal considered that the 1929 Geneva Convention Relative to the Treatment of Prisoners of War had passed into custom only a decade after its inception, and therefore that during the war it applied between the Soviet Union and Germany, despite the fact that the former was not a party.²⁰⁵ The shorter the period, however, the more probative must the state practice be.

2. Customary Status of Protocol I Provisions

We now apply these criteria in order to assess the customary character of the prohibition of civilian starvation in Article 54 and the duty to agree to and facilitate relief in Article 70 of Protocol I.

a. Article 54

The general policy embodied in Article 54 of Protocol I is clear and direct: starvation of civilians as a method of warfare is prohibited. The norm is, to take again the words of the International Court of Justice, of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Paragraph 2 and 3 detail the immediate implications of this rule, offering the destruction of objects indispensable to the civilian population as examples of the manner in which this prohibited result could be attained.²⁰⁶ It has been argued that there is ambiguity as to exactly which objects are protected, since the list in paragraph two is not exhaustive.²⁰⁷ It is agreed here that the detailed list of protected objects may not be customary because of the difficulty involved in generalizing that list. On the other hand, the principle is clear that

204. MERON, *supra* note 57, at 124.

205. United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL 491 (1950).

206. Not considered here are the customary status of paragraphs 4 (reprisals) and 5 (scorched earth tactics). They raise different questions which are beyond the scope of the present study.

207. Roberts, *supra* note 125, at 155.

illegal starvation may be brought about not only by direct actions on foodstuffs, such as siege or destruction of food stocks, but also by indirect attacks, including attacks on targets of a dual military and civilian nature because of their sustenance value.²⁰⁸ The language in Article 54 contains no vague subjective elements allowing the dilution of this policy.

The prohibition of civilian starvation appears to be a logical extension of various fundamental principles of customary international humanitarian law, such as the principles of humanity, distinction, military necessity and prohibition of indiscriminate attacks. Since the prohibition of direct attacks on civilians is firmly accepted as customary, it seems only consistent that an indirect way of achieving the same result, such as civilian starvation, should be prohibited as well.²⁰⁹ A customary prohibition of civilian starvation also comports with the demands of military necessity by allowing the destruction of objects necessary for the sustenance of the enemy combatants and even, in certain cases, of otherwise protected civilian objects if they are used in direct support of military action.²¹⁰ Prohibiting civilian starvation therefore is not an unrealistic aspiration incapable of ever being complied with in a real life setting. As discussed in the previous section, it is rather the justification of civilian starvation as a method of warfare which cannot be reconciled with general principles of international humanitarian law. Article 17 of the *Lieber Code*, permitting a belligerent to "starve the hostile belligerent, armed or unarmed," is no longer reflective of customary law today, nor was it immediately prior to the inception of the Protocols.²¹¹

The fact that the prohibition of civilian starvation has been included in two international conventions is of critical importance to the evaluation of its accession to customary status. The Protocols are meant to testify to the immense progress in humanitarian law since the 1949 Geneva Conventions. It does not replace but rather updates

208. See Cassese, *supra* note 187, at 91-92.

209. See MERON, *supra* note 57, at 69-70; Cassese, *supra* note 187, at 84; Solf, *supra* note 117, at 129.

210. Allen, *supra* note 57, at 81-82; Cassese, *supra* note 187, at 91-92.

211. U.S. DEP'T OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDER NO. 100 (1863) [hereinafter *Lieber Code*]. See Allen, *supra* note 57, at 33-35. But see BOTHE ET AL., *supra* note 93, at 336; Roberts, *supra* note 117, at 115.

the older, now customary, conventions.²¹² As of October 1991, 105 countries were party to Protocol I, while 91 were party to Protocol II.²¹³ This represents a considerable number of adherents to the treaties when compared with, for example, the International Covenant on Civil and Political Rights,²¹⁴ which has 92 parties, or the International Covenant on Economic, Social and Cultural Rights,²¹⁵ which has 97.²¹⁶ The parties include major powers such as Australia, Canada, China, Germany, Nigeria, and the Soviet Union. France and the Philippines have ratified only Protocol II, which also contains a prohibition of civilian starvation.²¹⁷ Similarly, the United States has indicated it would ratify Protocol II but not Protocol I.²¹⁸ Since a government denouncing the use of starvation as a weapon against its own civilians normally should feel the same with respect to foreigners, ratifications of Protocol II constitute a measure of *opinio juris* relevant to Article 54 of Protocol I.²¹⁹ It must be noted that other important countries are not party to either convention, including

212. To refer to Cassese's five categories of relations between the treaty and pre-existing customary law, the Protocols' prohibition on civilian starvation (Article 54 of Protocol I and Article 14 of Protocol II) codifies and develops custom rather than innovate beyond its boundaries. See *supra* text accompanying note 188.

213. *Status of Four Geneva Conventions*, *supra* note 56; 2(23) DEP'T STATE DISPATCH, June 10, 1991; 2(36) DEP'T STATE DISPATCH, Sept. 9, 1991.

214. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

215. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

216. *Multilateral Treaties Deposited with the Secretary-General, Status as of December 1990*, U.N. Doc. ST/LEG/SER.E/9, at 120, 130 (1991).

217. Protocol II, *supra* note 53, art. 14, 1125 U.N.T.S. at 615. Article 14 is a simplified version of Article 54 of Protocol I, still preserving the essence of the latter. See also I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 1456; BOTHE ET AL., *supra* note 93, at 680.

218. President's Reagan's Letter of Transmittal, *supra* note 105. See also *The Sixth American Red Cross—Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 426 (1987) (stating the United States position that it "supports the principle that starvation of civilians not be used as a method of warfare") [hereinafter *American Red Cross*].

219. Governments have historically been more willing to recognize a state's authority to mistreat its own people than to do the same to foreigners. However, the reverse will not necessarily be true, and Protocol I ratifications would not have the same *opinio juris* weight in favour of a Protocol II rule. The same is also apparent in the 1949 Fourth Geneva Convention, where a state had a duty to accept relief consignments in favour of occupied territory (Article 59) but not in favour of its own population (Article 23). As a consequence, state practice complying with the prohibition of civilian starvation in non-international conflict will be more probative than violations of that prohibition in establishing the customary nature of Article 54 in international conflicts.

Egypt, India, Iran, Iraq, Israel, Japan, and the United Kingdom. A total of 60 countries, including Egypt, Iran, and the United Kingdom, have signed both treaties, which indicates a certain degree of assent to their content.²²⁰

During the long conference which led to the convention, there at every stage was consensus and approval at every stage expressed in favor of the principle stated in Article 54 of Protocol I. This does not mean that the provision was overlooked. On the contrary, it was adopted "after considerable discussion" and many amendments were made to define its scope as precisely as possible.²²¹ Nevertheless, there were no objections to its adoption in the working group, the committee or the plenary session.²²² Such unanimity in a conference where vastly different interests were present testifies to the provision's proximity to customary rules.²²³

The existence of human rights to food and to life also constitute *opinio juris* in favor of a customary prohibition of civilian starvation as a weapon.²²⁴ The General Assembly affirmed that food should not be used as an instrument of political pressure.²²⁵ It had previ-

220. For instance, the United States military studied the accords closely before signing: "To avoid the imposition of unrealistic restraints upon its armed forces, the Protocols were the subject of detailed review by the Department of Defense and the Joint Chiefs of Staff prior to their signatures. . . ." W. Hays Parks, *The 1977 Protocols to the Geneva Convention of 1949*, NAVAL WAR C. REV., Fall 1978, at 17, 25. The motives for the discrepancy between the United States' decision to sign (under Carter) but not to ratify (under Reagan) Protocol I appear to be more political than military. See President Reagan's Letter of Transmittal, *supra* text accompanying note 105.

221. 15 1977 *Official Records*, *supra* note 107, at 347 (Report of the working group); 15 1977 *Official Records*, *supra* note 107, at 261 (Report of Committee III).

222. See the deliberations over Article 54, *reprinted in* 3 LEVIE, *supra* note 107, at 227-258.

223. Allen, *supra* note 57, at 83; see also Cassese, *supra* note 187, at 93.

224. The right to food and the correlative right to be protected against hunger are embodied in Article 11 of the International Covenant on Social, Economic and Political Rights, *supra* note 215, 993 U.N.T.S. at 3. On the right to food, see generally ASSIA BENSALAH-ALAOUI, *LA SÉCURITÉ ALIMENTAIRE MONDIALE* (1989); U.N. CENTRE FOR HUMAN RIGHTS, *RIGHT TO ADEQUATE FOOD AS A HUMAN RIGHT*, U. N. Sales No. E-89.XIV.2 (1989); Philip Alston, *International Law and the Right to Food*, in *THE RIGHT TO FOOD* 9 (P. Alston & K. Tomasevski eds., 1984). On the relevance of human rights to customary international law, see ARISTIDIS S. CALOGEROPOULOS-STRATIS, *DROIT HUMAINITAIRE ET DROITS DE L'HOMME: LA PROTECTION DE LA PERSONNE EN PÉRIODE DE CONFLIT ARMÉ* (1980); see also MERON, *supra* note 57, at 57.

225. G.A. Res. 185, U.N. GAOR, 36th Sess., Supp. No. 51, at 118, U.N. Doc. A/36/51 (1981).

ously stated in that fundamental human rights shall apply in times of armed conflicts as fully as in times of peace.²²⁶

As with many rules of international humanitarian law, there is little state practice to illustrate violation or compliance with the norm. Instances of civilian starvation during the Second World War are no longer relevant because of the intervening substantial development in humanitarian law. Later examples include the Egyptian blockade of Israel, which included foodstuffs, and the Vietminh siege of French forces in Dien Bien Phu, which was directed exclusively against combatants.²²⁷ One of the most blatant violations of this norm occurred in the Biafra war of secession from 1967 to 1970, in which the Nigerian government implemented an overt strategy of civilian starvation. The government went as far as stating that such a method of warfare was legitimate.²²⁸ In that case, both besieger and besieged had come to accept the death of a large number of civilians as a necessary effect of the war and, indeed, many died of starvation before Biafra capitulated in January, 1970.²²⁹ The magnitude of the violation was matched by that of the condemnation, which indicated moral indignation, particularly in the West, at the result of the use of a blockade aimed at starvation.²³⁰

More recently, after the inception of the Protocols, the Israeli Defense Force cut off water and food supplies to Beirut shortly after

226. G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1970).

227. See Simcha Dinitz, *The Legal Aspects of the Egyptian Blockade of the Suez Canal*, 45 GEO. L.J. 169 (1957). The blockade of Israel had a limited impact with respect to food and did not create starvation in that country.

228. One official stated that "starvation is a legitimate weapon of war." Lloyd Garrison, *The 'Point of no Return' for the Biafrans*, N.Y. TIMES, Sept. 8, 1968, § 6 (Magazine), at 102, quoted in Mudge, *supra* note 50, at 236.

229. See Mudge, *supra* note 50, at 267.

230. The following letter to the editor of The New York Times by Professor Arthur A. Leff of Yale Law School is symptomatic of public reaction:

I don't know much about the relevant law. My colleagues here, who do, say that it's no insurmountable hindrance, but I don't care much about international law, Biafra or Nigeria. Babies are dying in Biafra. . . .

We still have food for export. Let's get it to them any way we can, dropping it from the skies, unloading it from armed ships, blasting it in with cannons if that will work. I can't believe there is much political cost in feeding babies, but if there is, let's pay it; if we're going to be hated, that's the loveliest of grounds.

Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death.

Letter to the Editor, N.Y. TIMES, Oct. 4, 1968, at 46, quoted in Mudge, *supra* note 50, at 228.

its invasion of Lebanon. Once again, however, this was only partial and temporary.²³¹ In early 1987, Amal Shiite Moslem forces besieged several Palestinian camps for four months, to the point where starving inhabitants began eating rats. In the face of international condemnation, the sieges were eventually lifted.²³²

In the summer of 1987, Sri Lanka blockaded the Jaffna Peninsula, controlled by Tamil rebels, causing severe food shortages. The Indian government organized relief operations in favor of the civilian population, for both political and humanitarian reasons.²³³ Finally, the central government of Ethiopia has used the famine affecting that country from 1984 to 1988 as a weapon in its fight against Eritrean separatist forces. In an attempt to starve its opponents into submission, the government cut off food relief and expelled aid workers from the areas controlled by the separatist forces.²³⁴ It is important to note that none of these states were party to the Protocols, and therefore that these events constitute practices directly relevant to the establishment of a customary norm.²³⁵

231. This fact is mentioned in *Customary Law and Additional Protocol I to the Geneva Convention on the Protection of War Victims: Future Directions in Light of the United States Decision not to Ratify*, 81 AM. SOC'Y INT'L L. PROC. 26, 40 (1987) [hereinafter *Future Directions*].

232. *Eating Rats in Beirut*, WASH. POST, Feb. 14, 1987, at A22. For a short description of the siege and newspaper references, see Allen, *supra* note 57, at 7-8 & n.22-27.

233. *Id.* at 5-6; Dharendra P. Verma, *Humanitarian Assistance to the Tamils in Sri Lanka*, in ASSISTING THE VICTIMS OF ARMED CONFLICTS AND OTHER DISASTERS 139-45 (F. Kalshoven ed., 1989).

234. See Africa Watch, *Evil Days: 30 Years of War and Famine in Ethiopia*, AFR. WATCH REP., Sept. 1991, 175-93 (1991) [hereinafter Africa Watch, *Evil Days*]; see also Jean E. Zeiler, Note, *Genocide Convention; Intentional Starvation; Ethiopian Famine in Eritrean War for Independence*, 19 GA. J. INT'L & COMP. L. 589 (1989); Africa Watch, *Ethiopia: 200 Days in the Death of Asmara*, *supra* note 176; Africa Watch, *Ethiopia: Human Rights Crisis as Center Crumbles—Killings, Detentions, Forcible Conscripted and Obstruction of Relief*, NEWS FROM AFR. WATCH, Apr. 30, 1991 [hereinafter Africa Watch, *Ethiopia: Human Rights Crisis*].

235. It could be argued that the most dramatic practice in this respect is the imposition by the U.N. Security Council of a food blockade against Iraq and Kuwait. Since it is precisely the legality of the U.N.'s action which is here under scrutiny, however, taking it into consideration would be tantamount to a degree of self-justification. In any case, contrary practice undermines customary law only if it is accompanied by consonant *opinio juris*. Schachter, *supra* note 190, at 733. During the discussion of the Gulf war resolutions, no state asserted that starving Iraqi and Kuwaiti civilians was a legitimate means. On the contrary, the validity of that principle of the prohibition of civilian starvation was ostensibly maintained through the inclusion of the "humanitarian exception" to the blockade. If anything, the Persian Gulf resolutions constitute *opinio juris* (but not state practice) in favour of the existence of a customary norm similar to Article 54 of Protocol I.

On the positive side, while military field manuals do not expressly prohibit civilian starvation as a weapon, they no longer contain provisions similar to Article 17 of the *Lieber Code*, which described civilian as a legitimate method of warfare.²³⁶ The disappearance of this rule is, in itself, a significant change. It is of course futile to list conflicts where civilian starvation was not used as a weapon.

In the end, contrary state practice falls very short of massive and persistent disregard for the norm. Nearly all of these occurrences have been in non-international armed conflicts, so they are not persuasively relevant to a prohibition in international armed conflicts.²³⁷ Further, the use of starvation has usually drawn sharp international condemnation. Therefore, state practice satisfies the more limited requirements applicable to a humanitarian law restraint of the kind under examination here. There is important *opinio juris* suggesting the legitimacy of a prohibition of civilian starvation in customary humanitarian law, which is in all aspects compatible with general customary principles of that body of law. In the only in-depth study of this question, at a time when only 60 states had ratified Protocol I, one commentator concluded that Article 54 had reached customary status.²³⁸ I come to a similar conclusion, finding that the general prohibition of civilian starvation codified in Article 54 now binds all states irrespective of whether they have ratified the 1949 Geneva Conventions or the Protocols.²³⁹

b. Article 70

The general policy embodied in Article 70 of Protocol I states that, if there exists a need in the civilian population, "relief actions . . . shall be undertaken." It specifies one vital implication of this duty, imposed at large, by directing that all parties to the

236. For the present day successor to the *Lieber Code*, see the U.S. DEPT. OF THE ARMY FIELD MANUAL, F.M. 27-10, THE LAW OF LAND WARFARE (1956).

237. See *supra* note 235.

238. Allen, *supra* note 57, at 85.

239. The following authors find that Article 54 of Protocol I has become customary law: *American Red Cross*, *supra* note 218, at 426 (Matheson), 528 (Fenrick); Cassese, *supra* note 187, at 93; *Future Directions*, *supra*, note 231, at 30 (Parks), 34 (Gasser); Greenwood, *supra* note 173, at 221-222; Penna, *supra* note 187, at 221-222; Elmar Rauch, *Discussion Paper on the Law of Naval Warfare*, *supra* note 122, at 58. But see the following authors finding that Article 54 has not become customary law: *American Red Cross*, *supra* note 218, at 531 (Bennet); *Future Directions*, *supra* note 231, at 42 (Carnahan); Roberts, *supra* note 125, at 153; Solf, *supra* note 117, at 133, 135. Of the latter, Roberts is the only one to my knowledge who considers the principle of Article 54 to be undesirable, as opposed to others for whom it is desirable but not yet customary.

convention, belligerents or not, "shall allow and facilitate rapid and unimpeded passage of all relief." This language, unlike Article 23 of the 1949 Fourth Geneva Convention, is neither simply hortatory nor too vague and discretionary to generate a clear and complete obligation. On the contrary, it provides a generalizable rule.

The provision conditions this duty on the reaching of an agreement between the parties (Article 70(1)), leaves the blockading countries some discretion to refuse free passage if relief is not humanitarian or impartial, or if it is not needed (Article 70(2)), and allows transit powers to set technical details and demand neutral local supervision (Article 70(3)). These discretionary provisions should not be confused with a negation of a clear obligation. On the contrary, they are essential concessions to military necessity, without which the duty to allow free passage would be out of touch with the demands of armed conflicts. The same is true of the priorities established in favor of the most vulnerable segments of the civilian population (Article 70(1)). The result is a common sense balancing of these conflicting interests, establishing clear but workable obligations.²⁴⁰

The duty to allow food relief to be distributed to the civilian population of even the adverse party is consistent with generally accepted principles of international humanitarian law. Having accepted the premise that civilian starvation itself is prohibited, there is little valid justification for refusing the free passage of food destined for civilians. Arguments similar to those which were included in Article 23 of the 1949 Fourth Geneva Convention, such as the secondary impact on the enemy's war effort and economy, are irreconcilable with a strict prohibition of indiscriminate measures and the principle of proportionality. It is not disputed that the denial of free passage for food consignments disproportionately affects the civilian population's most vulnerable elements, that is, children, pregnant women, the sick, and the elderly. The military and able civilians typically are given priority in the distribution of food.²⁴¹ The conditions in Article 70 successfully tailor the rule so that it comports with both the humanity and military necessity aspects of humanitarian law.

With respect to relief and the prohibition of civilian starvation, the weight of the Protocols as *opinio juris* is in many ways similar. Article 18(2) of Protocol II retains the basic principle that, if the

240. Allen, *supra* note 57, at 81-83.

241. This was explicit, for example, during the blockades of Leningrad, Biafra and Iraq. Rosenblad, *supra* note 50, at 256.

civilian population is insufficiently provided with food, "relief actions . . . shall be undertaken," although it does not include the elaborate scheme found in Protocol I.²⁴² Ratification of Protocol II therefore constitutes a measure of *opinio juris* with respect to Article 70 of Protocol I.²⁴³ Ratification of Protocol I by 103 countries represents a critical measure of *opinio juris* speaking in favor of the generally accepted character of the obligation to agree to relief actions. As was the case with Article 54, Article 70 was adopted by consensus at every stage of the Geneva conference. There were long discussions and even divisions in the working group as to the desirability of imposing a duty to accept relief on the blockaded belligerent.²⁴⁴ In the end, however, all concurred and there have been no reservations by any states with respect to Article 70 of Protocol I. The adoption of the provision by consensus and the lack of reservations indicate that the general obligation to allow and facilitate food relief in non-occupied territory was the object of wide consensus amongst nations in 1977.

A customary humanitarian norm mandating the undertaking of relief actions and free passage of relief is in accord with international human rights law. The General Assembly of the United Nations proclaimed as much with the adoption of Resolution 2675.²⁴⁵ This Resolution and the Red Cross resolution mentioned therein are two of the sources at the heart of Article 70 of Protocol I.²⁴⁶

State practice relevant to relief action has generally occurred in situations where civilian starvation is used as a method of warfare. Practically all of these involve non-international armed conflicts, in

242. See generally I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 64, at 1478-81; BOTHE ET AL., *supra* note 93, at 686-97. The question of the customary character of Article 18(2) of Protocol II is not addressed here.

243. Because the rule in Protocol II represent only a part of the principle embodied in Article 70 of Protocol I, however, the evidentiary weight of these ratifications is not as high as was the case with Article 54.

244. 12 1977 *Official Records*, *supra* note 107, at 333 (report of working group B).

245. The General Assembly stated that:

The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principle for International Humanitarian Relief for the Civilian Population in Disaster Situation, as laid down in Resolution XXVI adopted by the Twenty-first International Conference of the Red Cross, shall apply in situation of armed conflict, and all parties to a conflict should make every effort to facilitate this application.

G.A. Res. 2675, *supra* note 226, para. 8.

246. See Penna, *supra* note 187, at 222-23.

which questions of relief possess an added dimension not present in international conflict. Relief for the civilian population, even when provided through an impartial humanitarian organization such as the International Committee of the Red Cross, is often equated by governments with foreign interference aimed to help the rebellion they are trying to quell. These fears are not devoid of factual foundations, as relief has indeed been used in the past to covertly help popular uprisings. This led to heated debates during the Geneva conference about the content of the relief provision with regards to non-international conflicts, Article 18(2) of Protocol II.²⁴⁷ With respect to international conflicts the probative value of contrary state practice involving non-international conflicts is therefore quite low. Nevertheless, since this is the only recent state practice available for examination, a summary look is warranted here.

In the Biafra conflict, the Red Cross aggressively sought to bring in relief for the starving civilian population. There was continuous disagreement amongst the Red Cross, Nigeria, and Biafra about the channel to be used to get food through to the civilians. Despite this, nearly 2000 humanitarian flights landed in Biafra. It must be noted that because Nigeria's refusal was largely based on a desire to inspect each shipment before it got to Biafran territory, it would probably be justified even under Article 70 of Protocol I. Condemnation of both sides for not arriving at an agreement was universal.²⁴⁸ Even in the siege of Palestinian camps in Beirut in 1987, where the besieging force was not an organized government but Amal Shiite Moslem Militia, international pressure bent the resolve to cut off the camps completely, and some food relief was granted free passage.²⁴⁹ That same year, in Sri Lanka, the government turned back food shipments sent from India to aid the civilian population blockaded in the Jaffna peninsula. The Indian government responded by airlifting 25 tons of food and dropping it directly in rebel-held territory, over Sri Lanka's vehement protest. The Indian and Sri Lankan governments finally came to an agreement to allow food consignments in subject to inspection and local supervision of the distribution by the Sri Lankan and Indian Red Cross Societies as well as the government of Sri Lanka.²⁵⁰ In Ethiopia, the initial violation was both a blockade of normal trade routes and the illegal seizure and diversion of international food aid by the central government, so that Article 70 was

247. See BOTHE ET AL., *supra* note 93, at 694.

248. Mudge, *supra* note 50, at 255-64.

249. See Allen, *supra* note 57, at 7.

250. *Id.* at 6; Verma, *supra* note 233, at 142-43.

violated. Relief continued to arrive to various parts of the country by channels approved by either the government or the rebels. Each side appeared to allow relief to reach only the territory it controlled and, in contrast, attempted to block relief to the population living in areas in enemy hands.²⁵¹

There is little state practice directly relevant to a duty to allow and facilitate relief in an international armed conflict. The practice in non-international armed conflicts, despite a historically greater reluctance of belligerents to feel bound to allow food aid, shows that humanitarian concerns are taken into account and that relief consignments are given free passage, although much pressure and negotiation is often required. This combines with important *opinio juris* coming from the ratification of Protocol I by 103 states, as well as from Article 59 of the 1949 Fourth Geneva Convention, establishing for occupied territory a duty similar to Article 70 of Protocol I. It is therefore reasonable to conclude that there exists a customary obligation to allow and facilitate the free passage of relief food consignments, even if intended for the civilian population of the enemy.

CONCLUSION

The customary character of Articles 54 and 70 of the Protocols implies that the measures taken by the United Nations were in violation of peremptory norms of international law. Even more troubling than this formal finding of violation, with its theoretical rather than practical consequences, is the apparent casualness with which the United Nations resorted to the food weapon. The majority of the Security Council appeared to have attached little importance to the fact that children under the age of five, pregnant women, the sick, and the elderly would suffer the brunt of such a measure. A definitive judgement on civilian starvation had already been passed by the international community with the adoption, and later general acceptance, of the provisions of various Geneva conventions. The understandable outrage at the blatant disregard by Iraq of the most basic international norms should not have transformed the United Nations into a mere conduit for an uncontrolled response by powerful states. As the embodiment of the rule of international law, the U.N.

251. For example, both the central government and rebel forces attacked relief convoys going in territory not under their control every times they got the chance. They also arrested several truck drivers operating U.N. relief trucks. Africa Watch, *Evil Days*, *supra* note 234, at 187-88; Africa Watch, *Ethiopia: Human Rights Crisis*, *supra* note 234, at 18-19.

should attempt to channel world indignation through legitimate action limited exclusively to the vast array of legal measures envisaged by the U.N. Charter. Far from dragging its feet, the U.N. should be in this respect at the forefront of the enforcement of all norms of international humanitarian law.

