
INTERNATIONAL LAW STUDIES

Published Since 1895

Can We Starve the Civilians?
Exploring the Dichotomy between the
Traditional Law of Maritime Blockade
and Humanitarian Initiatives

Phillip J. Dren

95 INT'L L. STUD. 302 (2019)

Volume 95



2019

Published by the Stockton Center for International Law

ISSN 2375-2831

Can We Starve the Civilians?
Exploring the Dichotomy between the
Traditional Law of Maritime Blockade
and Humanitarian Initiatives

*Phillip J. Dren**

CONTENTS

I.	Introduction.....	303
II.	The Law and Practice of Blockade in the Twentieth Century	306
	A. The Protection of Civilians.....	311
	B. Additional Protocol I	313
III.	Humanitarian Assistance and Customary Law in Blockade	317
IV.	Conclusion	320

* Associate Professor, Australian National University College of Law. Author, *The Law of Maritime Blockade: Past, Present and Future* (Oxford University Press, 2018).

The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

In spite of its apparent benign nature, maritime blockade has evolved over the past century to become one of the deadliest methods of warfare that modern militaries can employ. From the catastrophic Hunger Blockade that was imposed against Germany in the final years of World War I,¹ to the humanitarian disaster caused by the U.N. sanctions regime against Iraq,² and the contemporary tragedy that is Yemen,³ history has demonstrated that when vulnerable States are cut off from access to foodstuffs and other forms of humanitarian assistance, the civilian populations can be subjected to severe suffering in the form of starvation and disease.⁴

The origins of the law of blockade are found in siege warfare, a strategy that is characterized by the “deliberate infliction of extreme deprivation.”⁵ From the sieges of the early Peloponnesian conflicts of the fifth century BCE through the siege of Dubrovnik in 1991,⁶ naval forces have played a vital role in helping ground forces by engaging in seaward sieges, conducting naval bombardment, and preventing besieged localities from replenishment by sea.

Because the early practice of blockades was directly linked to siege, blockades rarely interfered with maritime traffic outside of the immediate cordoned area.⁷ However, the growing importance of maritime trade and

1. *Spotlights on History: The Blockade of Germany*, THE NATIONAL ARCHIVES: THE FIRST WORLD WAR, <http://www.nationalarchives.gov.uk/pathways/firstworldwar/spotlights/blockade.htm> (last visited Sept. 13, 2019).

2. S.C. Res. 678 (Nov. 29, 1990).

3. See Phillip J. Drew, *Blockade? A Legal Assessment of the Maritime Interdiction of Yemen's Ports*, 24 JOURNAL OF CONFLICT AND SECURITY LAW 35 (2019).

4. See George Alfred Mudge, *Starvation as a Means of Warfare*, 4 INTERNATIONAL LAWYER 228, 237 (1970)

Where a country literally cannot produce sufficient food provisions, despite the allocation of available 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 . . . such a blockade can be regarded as ‘starvation’ in the sense of an active ‘means of war.’

5. Sean Watts, *Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions*, 95 INTERNATIONAL LAW STUDIES 1, 4 (2019).

6. See, e.g., Srdja Pavlovic, *Reckoning: The 1991 Siege of Dubrovnik and the Consequences of the “War for Peace”*, 5 SPACES OF IDENTITY 55 (2005).

7. Michael N. Schmitt, *Aerial Blockades in Historical, Legal, and Practical Perspective*, 2 JOURNAL OF LEGAL STUDIES (UNITED STATES AIR FORCE ACADEMY) 21, 24 (1991).

advancements in naval technology during the Renaissance necessitated significant changes in doctrines and strategies. Recognizing that maritime commerce had become a critical component of security for many countries and principalities, naval powers began to develop new strategies for isolating enemies and disrupting their trade. It was because of this changing environment that the tactic of seaward sieges began a transformation to the new form of maritime warfare known as blockade.

Historians generally agree that the Dutch blockade against Flemish ports in 1584 was the first modern blockade.⁸ By *placaat* (proclamation), the Dutch sovereign announced that all Flanders ports under the control of Spain were “under siege from the sea . . . [and] that no commerce would be allowed entry.”⁹ Further, the Dutch would treat any merchants undertaking to “carry to the Spaniards provisions or any other goods whatsoever” as enemies and their vessels and cargoes would be subject to seizure.¹⁰ The Dutch blockade signaled a departure from seaward sieges in three particular ways: first, the blockade extended to an entire coastline rather than just a besieged city; second, it did not include the bombardment of the coastline; and, third, it served as notice to mariners that the Dutch Navy was prepared to seize all goods (no matter their nature, purpose, or use) from neutrals attempting to trade in the Flanders area.¹¹ Although many of the characteristics of early blockade were abandoned when the Dutch implemented their new strategy, the one element of siege warfare that survived was the requirement that no goods or vessels whatsoever would be permitted to pass through a blockade.

Although the new practice was initially criticized as a violation of neutral rights and the freedom of the seas, other European naval powers soon copied the model of blockade developed by the Dutch. However, even as its use became increasingly common, the rules surrounding the application of blockade remained underdeveloped, causing significant consternation among neutral countries. The main aspect of blockade that consistently frustrated neutrals was the notion of “paper blockades,” the practice of declaring

8. PHILLIP DREW, THE LAW OF MARITIME BLOCKADE: PAST, PRESENT, AND FUTURE 37 (2017) (citing Thomas David Jones, *The International Law of Blockade—A Measure of Naval Economic Interdiction*, 26 HOWARD LAW JOURNAL 759, 765 (1983).

9. JOHN WESTLAKE, THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 325 (1914).

10. JOHN WESTLAKE, INTERNATIONAL LAW: PART TWO—WAR 170 (1907).

11. DREW, *supra* note 8, at 38–39.

blockades in areas where the blockading forces did not, or could not, dedicate enough naval resources to impose their will.¹² Disaffection with this practice was such that it became one of the four main topics addressed in the world's first multilateral treaty on the law of warfare, the Paris Declaration of 1856.¹³ This Declaration included the requirement that, "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."¹⁴

While the codification of the requirement for effectiveness served to temporarily pacify some of the neutrals' resistance to the concept of blockade in the mid-1800s, its adoption as the centerpiece of blockade law would have unintended consequences that the plenipotentiaries to the Congress of Paris could not have foreseen in 1856.

One of the effects of the Industrial Revolution of the eighteenth and nineteenth centuries was the mass migration of rural populations to urban centers.¹⁵ Rapid urban expansion, "accompanied by an equally dramatic expansion of the population overall,"¹⁶ required a massive expansion of agricultural production. An important side effect of the dependence on intensive agricultural practices was that the supply of fertilizers became critical to ensuring that farms could produce enough food to keep the populations of cities fed. Further, in some countries, traditional food-producing farms had been converted to cash crops required for textiles and the manufacture of other commercial goods. These changes left many of Europe's economies reliant on the importation of food and fertilizers to sustain their populations.

The blockade of the Confederate States by the Union Navy during the American Civil War was the first significant blockade imposed against an agricultural economy that had been transformed from subsistence farming to one of cash crops, mostly cotton, tobacco, and sugarcane. At the beginning of the Civil War in 1861, Confederate States were almost entirely reliant on imports for their food supply. By the end of the first year of the war, "dairy products, such as butter and cheese, which had been imported from

12. CARL J. KULSRUD, *MARITIME NEUTRALITY TO 1780: A HISTORY OF THE MAIN PRINCIPLES GOVERNING NEUTRALITY AND BELLIGERENCY TO 1780*, at 238–43 (2000).

13. Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1, 15 MARTENS NOUVEAU RECUEIL (ser. 1) 791, *reprinted in THE LAWS OF ARMED CONFLICTS* 1055 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

14. *Id.* ¶ 4.

15. Remi Jedwab, Luc Christiaensen & Marina Gindelsky, *Demography, Urbanization and Development: Rural Push, Urban Pull and . . . Urban Push?*, 98 JOURNAL OF URBAN ECONOMICS 6, 6–7 (2017).

16. *Id.* at 7.

New England; citrus fruits, dates, pineapples, and vegetables, which had been imported from Bermuda and the Caribbean Islands [had become] scarce.”¹⁷ Many residents living in Southern cities were already beginning to feel the effects of starvation.¹⁸ Ultimately, by the closing days of the war in 1865, starvation had become a primary factor “in breaking the will of the civilian population, the soldiers, and their commanding officers to continue the war. The military effect of the food shortage was that it encouraged the South to surrender.”¹⁹

The blockade of the South proved that a blockade could be extremely effective against vulnerable economies. In particular, a blockade could play a significant role in defeating an enemy if it could: (a) deprive the enemy of the material necessary for it to wage effective warfare; (b) cut off the supply of foodstuffs and other necessary commodities so as to render the war intolerable to the enemy’s people; and (c) through the application of consistent pressure, render the enemy unable to sustain the economic strain that the cost of war imposes.²⁰

As demonstrated during the blockade of Germany during World War II some fifty years later, the lesson that “at some point civilian starvation will produce a military effect; at some point the government of the starved population will capitulate and sue for peace,”²¹ would again prove true. The consequences for the German population were disastrous.

II. THE LAW AND PRACTICE OF BLOCKADE IN THE TWENTIETH CENTURY

The dawn of the twentieth century bore witness to incredible changes for the world’s major economies. Having become heavily reliant on imported goods to keep their industries running and their people fed, European powers began to invest extraordinary amounts of money and resources in their navies. The era of the battleship had arrived, and with it, the naval powers were able to project their influence and to control the sea lines of communi-

17. Michael O. Varhola, *Squeezing the South into Submission*, NEW YORK TIMES: OPINIONATOR (Aug. 14, 2011), <https://opinionator.blogs.nytimes.com/2011/08/14/squeezing-the-south-into-submission/>.

18. Mary Elizabeth Massey, *The Food and Drink Shortage on the Confederate Homefront*, 26 NORTH CAROLINA HISTORICAL REVIEW 306, 313–15 (1949).

19. Mudge, *supra* note 4, at 240.

20. L.A. Altherly-Jones, *The Military Effects of Attacks on Commerce*, in 1 PROBLEMS OF THE WAR: PAPERS READ BEFORE THE SOCIETY IN THE YEAR 1916, at 91, 94 (1916).

21. Mudge, *supra* note 4, at 244.

cation that were vital to their respective economies. Accompanying this massive expansion was the concern that should war break out, the paucity of law surrounding naval warfare, and, most importantly, neutral trade, could result in widespread disruption of maritime commerce. In response to these concerns, the issues of blockade, contraband, neutrality, and prize courts were high priorities for the 1907 Peace Conference in The Hague.

The debates during the Peace Conference confirmed there was substantial disagreement about the rules respecting the interdiction of neutral maritime trade during war and the mechanisms under which prize law should be adjudicated.²² Because of the complexity of the issues, it was decided that the most contentious topics of naval warfare would be addressed in a meeting subsequent to the Peace Conference. With a goal of resolving the outstanding issues from the Peace Conference, the principal naval powers met in London in 1908 and 1909. In terms of the development of international law, the London process was quite remarkable. During four months of meetings and negotiations, the delegates achieved resolution on several of the most challenging issues; ultimately creating the document widely referred to as the London Declaration.²³ In spite of the good will shown by the Parties to the negotiations, the Declaration encountered significant opposition in the United Kingdom. In response to declining support in the House of Commons, suspicion and mistrust toward European powers, and a belief that a war with Germany was looming, on December 12, 1911, the House of Lords refused to ratify The Naval Prize Bill.²⁴ Parliament's failure to ratify the Bill was ultimately fatal to the Declaration of London. As a consequence, the one and only attempt to codify blockade in the modern era failed. But, even though the Declaration never came into force, many of its provisions have been recognized as customary international law.

As was the case with virtually all international treaties negotiated during the first half of the twentieth century, the issue of the protection of civilians during armed conflict was not addressed in the London process.²⁵ Indeed,

22. James L. Tryon, *The International Prize Court and Code*, 20 YALE LAW JOURNAL 604, 604–05 (1911).

23. Declaration Concerning the Laws of Naval War, Feb. 26, 1909, 208 Consol. T.S. 338, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 13, at 1113 (never entered into force).

24. United Kingdom House of Lords Debates (House of Lords 1911) 895.

25. *But see, e.g.*, MARCO SASSÖLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE 8 (noting that “[s]ome rules contained in the Hague Regulations adopted in 1899 and revised in 1907 protected

the focus of the Declaration's blockade provisions was on the five operational criteria for the establishment of a blockade: (1) it must be effective; (2) it must be declared either by the blockading Power or by the naval authorities acting in its name; (3) it must be notified to belligerent and neutral States; (4) it must be applied impartially to the ships of all nations; and (5) it must not bar access to the ports or coastlines of neutral States.²⁶

In many respects, the blockade provisions of the London Declaration did little more than amplify the statement on effectiveness made in the Declaration of Paris.²⁷ Importantly, the London Declaration reemphasized the concept that a blockade was an operation in which a belligerent naval force prevents all vessels (enemy, neutral, and friendly) from entering or exiting specified ports or coastal areas belonging to, occupied by, or under the control of, the enemy.²⁸ To that end, the law of blockade, as set out and practiced in the twentieth century, made no allowance for humanitarian assistance. Similarly, the law of contraband paid little attention to the plight of civilians,²⁹ providing that foodstuffs could, "without notice, be treated as contraband of war, under the name of conditional contraband."³⁰

The first significant test of twentieth-century blockade law occurred during World War I. Although the belligerent naval powers, at the behest of neutral States, originally affirmed their intention to abide by the provisions

civilians in occupied territories," but conceding "[c]ivilians threatened by attacks or bombardments . . . were covered only very summarily in 1899 and 1907 . . .").

26. Declaration Concerning the Laws of Naval War, *supra* note 23, arts. 3, 5, 8, 11, 18.

27. Declaration Respecting Maritime Law, *supra* note 13, ¶ 4.

28. DREW, *supra* note 8, at 10.

29. The relationship between blockade law and the law of contraband is one of the most misunderstood aspects of the law regulating maritime operations, as many authors and practitioners fail to understand that two separate and incompatible bodies of law govern blockade and contraband, respectively. As Douglas Guilfoyle notes, under the law of naval warfare a belligerent may take a "range of [interdiction] measures against neutral shipping. It may forbid all commerce with specified ports or coastlines (blockade). It may prohibit certain listed goods from being shipped to the enemy (contraband)." See Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, 81 BRITISH YEARBOOK OF INTERNATIONAL LAW 171, 194 (2011). It cannot, however, do both simultaneously. Thus, any discussion of contraband in the context of blockade is incorrect.

30. Declaration Concerning the Laws of Naval War, *supra* note 23, art. 24. It should also be noted that articles serving exclusively to aid the sick and wounded were included as items that could not be declared as contraband. They could, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned if they were destined for enemy forces.

of the London Declaration,³¹ the German declaration of unlimited mine warfare destroyed all pretexts of a limited naval war.³² In response, the United Kingdom began a series of escalatory maneuvers and ultimately instituted a full blockade against Germany.³³ The Hunger Blockade, as it has come to be known, lasted until the signing of the Treaty of Versailles in July 1919, during which time Germany suffered its worst famine since the Thirty Years War.³⁴

Twenty years after the signing of the Treaty of Versailles, the European powers again found themselves embroiled in conflict. As was the case in World War I, the naval conflict of World War II escalated quickly, with the belligerents attempting to cut each other off from maritime commerce.³⁵ Neither side could assert naval superiority and the battle for domination of the Atlantic Ocean became the longest campaign of the war. Although the Germans came remarkably close to completely cutting off the United Kingdom from its essential maritime supply routes,³⁶ its inability to prevent re-

31. See, e.g., Almeric FitzRoy, *The King's Most Excellent Majesty in Council*, LONDON GAZETTE, Aug. 25, 1914, at 6681–82, <https://babel.hathitrust.org/cgi/pt?id=uc1.d0000608190;view=1up;seq=651>; *The Secretary of State to the Ambassador in Great Britain (Page) (Aug. 10, 1914)*, in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1914, SUPPLEMENT, THE WORLD WAR (Joseph V. Fuller ed., 1928), <https://history.state.gov/historicaldocuments/frus1914Supp/d705>.

32. *Ambassador in Germany (Gerard) to the Secretary of State (Aug. 7, 1914)*, in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1914, SUPPLEMENT, THE WORLD WAR (Joseph V. Fuller ed., 1928), <https://history.state.gov/historicaldocuments/frus1914Supp/d704>.

33. See Almeric FitzRoy, *The King's Most Excellent Majesty in Council*, SUPPLEMENT TO THE LONDON GAZETTE, July 8, 1916, at 6821–22, <https://www.thegazette.co.uk/London/issue/29657/supplement/1>.

34. While historians continue to debate the humanitarian toll of the blockade, the British government estimated that approximately 763,000 wartime deaths in Germany can be attributed to starvation caused by the five-year economic strangulation of the country. As compared to the combat losses of Germany, estimated at approximately 1.74 million persons, the effects of the blockade are clearly remarkable. Placed in perspective, the 1915–19 blockade of Germany was responsible for the deaths of more German civilians than was the Allied strategic bombing campaign of World War II. For a fuller discussion, see DREW, *supra* note 8, at 46–51.

35. *Id.* at 51. Of note, during the interwar years Germany diversified its trading practices to reduce its dependence on maritime trade and immunize its economy from the effects of blockade. Aided by the development of rail networks, improved highways, and policies aimed at increasing food production, Germany ensured that it could satisfy its requirements from continental sources.

36. See, e.g., *The Battle of the Atlantic: The Grimmiest Period*, VETERANS AFFAIRS CANADA, <https://www.veterans.gc.ca/eng/remembrance/history/second-world-war/battle-atlantic/publication> (last updated Feb. 14, 2019).

supply from North America allowed the U.K. to survive the war without suffering severe food shortages.³⁷

Although numerous blockades were imposed during conflicts in the latter half of the twentieth century, most of them were small in size and short in duration. That trend, however, changed with the U.N. sanctions enacted against Iraq in response to its invasion of Kuwait in 1990. Passed unanimously by the U.N. Security Council on August 6, 1990, Security Council Resolution 661 authorized the banning of all imports and exports of goods to and from Iraq.³⁸ Although it was a sanctions regime by law, the interdiction action resembled a blockade in all its facets, with the exception that in humanitarian circumstances supplies intended strictly for medical purposes and foodstuffs were permissible.³⁹ In 1991, sanctions against Iraq were continued through Security Council Resolution 687.⁴⁰ These sanctions were strictly and effectively enforced and remained in place until the conclusion of the Second Gulf War in 2003.

With its infrastructure decimated by the Gulf War and an economy that was highly dependent on oil exports for revenue, Iraq was particularly vulnerable to the effects of this sanctions regime. As was the case with Germany in World War I, Iraq's ability to feed its population was dependent not only on the importation of foodstuffs, but also on the external supply of fertilizers and farm machinery.⁴¹ With these items subjected to sanctions, Iraq faced an immediate humanitarian crisis.

The lessons from the Hunger Blockade apparently did not affect the Security Council as it contemplated the continuation of sanctions against Iraq

37. Sujay Kulshrestha, *Wartime Rationing During World War II and the Effect of Public Opinion in Great Britain and Austria*, 2 INQUIRIES JOURNAL 1, 1 (2010), <http://www.inquiriesjournal.com/articles/339/wartime-rationing-during-world-war-ii-and-the-effect-of-public-opinion-in-great-britain-and-austria>.

38. S.C. Res. 661, ¶¶ 3–4 (Aug. 6, 1990).

39. *Id.* ¶ 3.

40. S.C. Res. 678 (Nov. 29, 1990).

41. Much of Iraq is non-arable desert. As a result, the country relies heavily on imported foodstuffs to feed its population. When the U.N. blockade was imposed, virtually all imports of food were halted. While immediate government rationing helped to fend off mass starvation, the meager diet imposed on the majority of Iraq's citizenry was barely sufficient to meet basic nutritional needs. See, e.g., Abbas Alnasrawi, *Iraq: Economic Sanctions and Consequences, 1990–2000*, 22 THIRD WORLD QUARTERLY 205, 209 (2001) (“The blockade had an immediate impact on food availability in Iraq, since the country's dependence on imported food was 70%–80% of total caloric intake. The blockade-caused food shortages resulted in sharp increases in food prices ranging from 200% to 1800% between August and November 1990.”).

in April 1991. In 1998, a Parliamentary Research Paper produced by the U.K. House of Commons reported that “[s]ince the imposition of economic sanctions on Iraq in 1990, the humanitarian situation in Iraq has deteriorated significantly . . . there are some 960,000 chronically malnourished children in Iraq, representing a rise of 72% since 1991.”⁴² The following year, the U.N. International Children’s Emergency Fund reported, “under-5 mortality more than doubled from 56 deaths per 1000 live births (1984-1989) to 131 deaths per 1000 live births (1994–99).”⁴³ Likewise, the report found that infant mortality, “defined as the death of children in their first year—increased from 47 per 1000 live births to 108 per 1000 live births within the same time frame.”⁴⁴ Moreover, a 2007 House of Lords report reviewed the effects of the Iraq sanctions, concluding, “It is predictable that sanctions which inflict high economic costs on a country run by a ruthless government are likely to result in severe suffering among the general population even if there are humanitarian exemptions and relief programmes.”⁴⁵

A. *The Protection of Civilians*

In their *Commentary of the Additional Protocols*, Sandoz, Swinarski, and Zimmermann write:

It should be emphasized that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians. Unfortunately it is a well-known fact that all too often civilians, and above all children, suffer most as a result.⁴⁶

According to the traditional law of blockade, a blockading force must “exclude all transit into and out of a defined area or location.”⁴⁷ There are no

42. TOM DODD & TIM YOUNGS, INTERNATIONAL AFFAIRS AND DEFENCE SECTION, HOUSE OF COMMONS LIBRARY RESEARCH PAPER 98/28: THE IRAQ CRISIS 9 (1998).

43. *Iraq Surveys Show ‘Humanitarian Emergency’*, NEWSLINE (Aug. 12, 1999), <https://www.unicef.org/newsline/99pr29.htm>.

44. *Id.*

45. SELECT COMMITTEE ON ECONOMIC AFFAIRS, HOUSE OF LORDS, 1 THE IMPACT OF ECONOMIC SANCTIONS 20, ¶ 46 (2007).

46. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 2095 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

47. Schmitt, *supra* note 7, at 44.

exceptions for any vessels. Accordingly, the traditional law of blockade, which is based almost entirely on customary international law, makes no provision for the relief of civilians. Therefore, to determine if an obligation to allow the passage of humanitarian relief exists in contemporary blockade law, it is necessary to examine conventional law to see whether it has modified or otherwise moderated the operation of the customary law.

Prior to the World War II, there were virtually no protections for civilians in the law of armed conflict. It was not until 1949 that partial protection against the starvation of civilians was recognized by Article 23 of the Fourth Geneva Convention (GC IV).⁴⁸ In part, Article 23 provides,

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.⁴⁹

Although Article 23 provides considerable protections, it is not without restriction, as the Article also states:

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 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 enemy⁵⁰

Thus, the party that is responsible for controlling access to a locality has the power to decide whether relief will be permitted. As Yoram Dinstein has argued, “There is patently no requirement of letting through supplies of food and clothing to the civilian population in its totality.”⁵¹

48. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 23, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

49. *Id.* (emphasis added).

50. *Id.*; see also 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1139 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

51. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 260 (3d ed. 2016). *But see, e.g.*, Michael Bothe, *Legal Expert Opinion on The Right to Provide and Receive Humanitarian Assistance in Occupied Territories*, NORWEGIAN

B. Additional Protocol I

The decades following World War II bore witness to unprecedented growth in the sphere of public international law. One of the crowning achievements in this era was the adoption of the two Protocols Additional to the Geneva Conventions of 1949,⁵² and, most importantly for the protection of civilians, Part IV of Additional Protocol I (AP I). Making up one-third of the operational provisions of the Protocol, Part IV (Articles 48–79) addresses the principles of distinction,⁵³ proportionality,⁵⁴ and precautions,⁵⁵ and sets out rules regarding relief actions,⁵⁶ as well as the protection of objects indispensable to the survival of the civilian population.⁵⁷

In response to the conflict-induced famines that devastated Eastern Europe in World War II and the severe suffering of civilian populations subjected to siege warfare, the negotiating teams for the Additional Protocols worked to address the issue of the starvation of civilians. Article 54 of AP I was the result. In part, the Article provides:

1. Starvation of civilians as a method of warfare is prohibited; and
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.⁵⁸

Although it would appear that Article 54 prohibits starvation of civilians in all situations, there are several arguments that support the notion that it

REFUGEE COUNCIL (July 15, 2015), <https://www.nrc.no/resources/legal-opinions/the-right-to-provide-and-receive-humanitarian-assistance-in-occupied-territories/>.

52. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

53. AP I, *supra* note 52, art. 48.

54. *Id.* art. 57(2)(a)(iii).

55. *Id.* art. 57(2)(a)(ii).

56. *Id.* art. 70.

57. *Id.* art. 54.

58. *Id.*

does not apply to blockade. The first such contention is found in the wording of paragraph one, which prescribes that the Article only applies if starvation of civilians is used as a method of warfare. Under this interpretation, because starvation is a side effect rather than the purpose of a blockade, the Article does not apply. Moreover, during the negotiations of Part IV, several States, including the United Kingdom and France, made a specific effort to ensure that the provisions of Article 54 would not apply to blockade.⁵⁹ This intention is specifically stated in Article 49(3), which provides:

The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on *land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air*.⁶⁰

The drafters' determination to ensure that blockade did not fall under the umbrella of Article 54(1) was reflected in a Committee III Report that stated, "The fact that the paragraph does not change the law of naval blockade is made clear by article [49]."⁶¹ While the wording of Article 49(3) has been the subject of numerous debates, it is notable that the authors of the *Commentary on the Additional Protocols* have concluded that the drafters of the Protocol intended to exempt blockade from the starvation provisions.⁶²

As one looks deeper into Article 54, it may appear that paragraph two might apply to blockade. On close examination, however, it becomes clear that the provision speaks only to attacking, destroying, or rendering useless objects that are already in the possession or locale of the civilian population.⁶³ It does not allude to the deprivation of certain items, nor does it address preventing delivery of essential commodities such as foodstuffs. In this manner, it is apparent that the focus of Article 54(2) is the prohibition against employing a scorched earth strategy, a contention supported by the final paragraph of Article 54, which states:

59. See *infra* notes 72–73 and accompanying text.

60. API, *supra* note 52, art. 49(3) (emphasis added).

61. 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1979), at 279 (1978).

62. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 46, ¶ 2092 (noting that this exemption "appears to be correct").

63. API, *supra* note 52, art. 54(2).

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.⁶⁴

The second provision of AP I that appears to provide humanitarian relief to populations subjected to a blockade is Article 70, which states:

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 [food and medical supplies], 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.⁶⁵

Unlike Article 23 of GC IV, which mandates that parties are obligated only to provide relief to children under 15, expectant mothers, and maternity cases,⁶⁶ Article 70 makes no distinctions between classes of civilians. Rather, the Article reflects the “philosophical concept of the equality of human beings, which is actually a basic consequence of the principle of humanity.”⁶⁷

Whereas it might appear that Article 70 would, by virtue of the phrase “the civilian population of any territory under the control of a Party to the conflict, other than occupied territory,”⁶⁸ obligate blockading forces to permit the passage of food and medical supplies, there are two factors that mitigate against this conclusion. The first is the wording of the Article, which provides that relief actions are conditional on the agreement of the parties. Although the *Commentary* notes that this provision does not grant parties “absolute and unlimited freedom to refuse their agreement to relief actions,”⁶⁹ the Protocol does not provide guidance as to what constitutes a valid reason for refusing relief.

The second restriction on the applicability of Article 70 is that like Article 54, it runs into the restriction in Article 49(3) suggesting that Part IV of AP

64. *Id.* art. 54(5).

65. *Id.* art. 70(1).

66. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 23, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

67. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 46, ¶ 2800.

68. AP I, *supra* note 52, art. 70.

69. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 46, ¶ 2805.

I does not apply to maritime blockade.⁷⁰ In the negotiations surrounding AP I, there was significant opposition to the extension of Article 70 to blockade.⁷¹ Evidence of the strong opposition that some States have taken with respect to the application of Article 70 is found in the reservations that the United Kingdom and France have made to AP I. The U.K. reservation states, “It is the understanding of the United Kingdom that this Article does not affect the existing rules of naval warfare regarding naval blockade, submarine warfare or mine warfare.”⁷² Likewise, the French reservation provides, “The Government of the French Republic considers that Article 70 on relief actions has no implication on the existing rules in the field of naval war with regard to maritime blockade, submarine warfare, or mine warfare.”⁷³

There are valid arguments to support the proposition that there are no obligations under conventional law that require blockading forces to allow the passage of relief. Indeed, it can be concluded that, at most, any conventional protections afforded to civilians during blockade are subject to the condition that the parties to the conflict have discretion over whether or not to permit humanitarian access and assistance. The *Swedish International Humanitarian Law Manual* sums up the fundamental problem by noting:

Certain states have maintained that the prohibition against starvation shall apply without exception which would also mean its application against blockade in naval warfare. Other states have claimed that this method of warfare is the province of the international law of naval warfare, which,

70. See *supra* notes 59–62 and accompanying text.

71. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 46, ¶ 1895

In general the delegates at the Diplomatic Conference were guided by a concern not to undertake a revision of the rules applicable to armed conflict at sea That is why the words ‘on land’ were retained [in Article 49(3)] and a second sentence clearly indicating that the Protocol did not change international law in such situations was added.

72. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, United Kingdom and Great Britain and Northern Ireland, Declaration and Reservations, ¶ p, July 2, 2002 [hereinafter U.K. Reservation]. This document is available under the States parties listing of the Protocol on the ICRC website. See INTERNATIONAL COMMITTEE OF THE RED CROSS, TREATIES, STATES PARTIES, AND COMMENTARIES, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>.

73. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, France, ¶ 17, April 11, 2001 [hereinafter French Declaration]. This document is available under the States parties listing of the Protocol on the ICRC website. See INTERNATIONAL COMMITTEE OF THE RED CROSS, TREATIES, STATES PARTIES, AND COMMENTARIES, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>.

according to Article 49:3, shall not be affected by the new rules of Additional Protocol I. There is thus no consensus that the prohibition of starvation shall be considered to include maritime blockade.⁷⁴

With that in mind, an examination of customary law relating to the provision of relief in times of blockade is warranted.

III. HUMANITARIAN ASSISTANCE AND CUSTOMARY LAW IN BLOCKADE

One of the outstanding issues in contemporary blockade law is the question of whether and to what extent a blockading force must provide humanitarian assistance to a civilian population facing starvation. This issue was brought to the forefront in the 1990s, principally because of the disastrous effects the U.N. sanctions had on the Iraqi people following Iraq's invasion of Kuwait.⁷⁵ In part, the suffering of the Iraqi people renewed efforts to incorporate protections for civilians during blockade.

The fact that contemporary international humanitarian law might allow for the unfettered starvation of civilians by means of blockade has been described as untenable,⁷⁶ with scholars such as Wolff Heintschel von Heinegg arguing that "if the establishment of a blockade causes the civilian population to be inadequately provided with food and other objects essential for their survival, the blockading party must provide for free passage of such essential supplies."⁷⁷

With a goal of bringing the law of blockade into alignment with contemporary international humanitarian law, the drafters of the *San Remo Manual on International Law Applicable to Conflicts at Sea* incorporated protections for civilians by building the language of proportionality into the blockade provisions.⁷⁸ They also included a prohibition against blockades that have the

74. MINISTRY OF DEFENCE, INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICT WITH REFERENCE TO THE SWEDISH TOTAL DEFENCE SYSTEM § 3.2.1.5 (1991).

75. It is accepted that the sanctions regime imposed in Iraq was not strictly speaking a blockade. It was, however, enforced with the same effect and results of a blockade. See discussion in DREW, *supra* note 8, at 58–60.

76. Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 475, 555 (Dieter Fleck ed., 2d ed. 2013).

77. *Id.*

78. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 179 (Louise Doswald Beck ed., 1995).

“sole purpose of starving the civilian population or denying it other objects essential for its survival.”⁷⁹

The drafters of the *San Remo Manual* are commended for recognizing and addressing the issue of starvation in blockade. When the working group experts gathered in 1992, the prevailing attitude in the international community was that blockade had been unaffected by the adoption of AP I. This attitude left the drafters in a dilemma; they could either accept the status quo, thus conceding that the starvation of civilians was an acceptable consequence of blockade, or they could attempt to influence customary law by making requirements for the protection of civilians during blockades. In deciding in favor of the latter, the *San Remo Manual* drafters signaled a commitment to address the exclusion of blockade from the provisions protecting civilians from starvation by the drafters of AP I. Their solution was to include the following rules in Articles 102 and 103 of the *San Remo Manual*:

102. The declaration or establishment of a blockade is prohibited if:

- (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

- (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.⁸⁰

The inclusion of Articles 102 and 103 in the *San Remo Manual* was a bold move that promised to invite backlash from legal positivists. It was, however, the correct decision, demonstrating a principled, reasonable, and responsible

79. *Id.*

80. *Id.* at 27.

approach that keeps with the spirit of AP I “to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.”⁸¹

Although their efforts were clearly *lex ferenda*, over the past two and a half decades, the *San Remo Manual* provisions on blockade have gained wide support from several States that have incorporated these rules into their military manuals.⁸² The fact that there appears to be widespread *opinio juris* in favor of the humanitarian aspects of blockade (at least by many Western States), indicates a broader trend to extend humanitarian protection to blockade. However, *opinio juris* cannot conclusively answer whether customary law has progressed, as general State practice must also be present.⁸³

As the International Law Commission has recently affirmed, “Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist.”⁸⁴ It is here that the prospect of the crystallization of the humanitarian initiatives for blockade falls somewhat short, principally because there have, to date, been no blockade operations in which the humanitarian provisions have been respected. If anything, the interdiction operations implemented in conflicts such as Iraq, Gaza, and Yemen⁸⁵ suggest that thus far respect and concern for civilians has not played a major role in maritime interdiction operations.⁸⁶

81. AP I, *supra* note 52, pmbl.

82. *See, e.g.*, DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 564 (2016); UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 13.74 (2004).

83. International Law Commission, Report of the International Law Commission: Seventieth Session, U.N. Doc. A/73/10, at 119 (2018) (“To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).”).

84. *Id.* at 125.

85. It is accepted that the Yemen interdiction operation is not a blockade. However, it is submitted that the complete dismissal of the requirements for humanitarian access and assistance by the Saudi-led coalition is indicative of the current obligations with respect to the protection of civilians in maritime interdiction operations. *See* Drew, *supra* note 3.

86. For a discussion, see DREW, *supra* note 8, at 55–62.

IV. CONCLUSION

[I]t is to be hoped that the rules relating to blockades will be clarified as part of a future revision of certain aspects of the laws of war at sea, a revision for which there is a great need. Such a re-examination should make it possible to duly take into account the principles put forward in the Protocol which prohibit starvation as a method of warfare.⁸⁷

Professor Wolff Heintschel von Heinegg's contention that it is untenable to support an interpretation of AP I Article 49(3) that permits blockades to deliberately starve civilian populations⁸⁸ finds strong support as *opinio juris*, especially within the *San Remo Manual* and a variety of Western military manuals.⁸⁹ However, statements contained in the Working Group papers for AP I and reservations such as those registered by the United Kingdom and France,⁹⁰ combined with the lack of humanitarian practice by States that have engaged in blockade and blockade-type operations, suggest that some States are quite willing to do so if it will assist in the war effort and render the war intolerable to the enemy's civilian population. For example, Dov Weisglass, senior advisor to Israeli Prime Minister Ehud Olmert stated in 2006 that the goal of the Israeli blockade against Palestine was "to put the Palestinians on a diet, but not to make them die of hunger."⁹¹

While in the early 1970s there was little to no corporate memory of the devastating effects of past hunger blockades, the ensuing decades have provided the world with numerous examples of blockade and blockade-type operations that have had catastrophic effect. Whether it is Yemen, Gaza, or Iraq, the fact that civilians have been targeted as part of a naval interdiction strategy is undeniable.

Starvation is inhumane. There can be no reason or justification for the intentional starvation of civilian populations in armed conflict, whether

87. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 46, ¶ 2093.

88. Heintschel von Heinegg, *supra* note 76, at 555.

89. *See, e.g., supra* note 34 and accompanying text; *see also* U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 7.7.2.5 (2017); CHIEF OF THE GENERAL STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ¶ 851 (2001).

90. U.K. Reservation, *supra* note 72; French Reservation, *supra* note 73.

91. Conal Urquhart, *Gaza on Brink of Implosion as Aid Cut-Off Starts to Bite*, GUARDIAN (Apr. 15, 2006), <https://www.theguardian.com/world/2006/apr/16/israel>.

through siege, scorched earth strategies, or blockade. The notion that innocent people can be allowed to starve because another State has deliberately blocked humanitarian aid from reaching them defies the very purposes and principles of international humanitarian law.

Despite the efforts of the authors of the *San Remo Manual*, and the willingness of various States to incorporate its humanitarian provisions into their military manuals, it is not possible to conclude that the humanitarian initiatives outlined in the *Manual* have crystalized into customary international law. States are responsible for the creation of international law, but thus far, few have taken meaningful steps towards bringing the law of maritime blockade into the twenty-first century. Instead, many States appear content to abrogate their responsibilities in favor of embracing soft law initiatives that they subsequently incorporate into their military manuals. While the adoption of such concepts is progress, the reality is that these initiatives do not have the same authority as governmental statements or action.

In the current political environment, it is unlikely that States could reach a broad international agreement on a renewed law of blockade. As such, a strong stated commitment by likeminded governments to “take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life or injury to civilians”⁹² during blockades and other forms of naval interdiction operations would be a positive development. Further, by ensuring that their own operations accord with the principles of humanitarianism, and refusing to support States or coalitions that violate those principles,⁹³ States can influence the development of customary law in a positive manner. Until that occurs, the law with respect to humanitarian initiatives will remain unsettled and States may engage in the deliberate starvation of civilians with little or no concern that they will be held accountable for their actions.

92. API, *supra* note 52, art. 57(2)(a)(ii).

93. The International Law Commission stated, “inaction may count as practice . . . [however] only deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate.” International Law Commission, *supra* note 83, at 133.