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## Encirclement, Deprivation, and Humanity: Revising the *San Remo Manual* Provisions on Blockade

*Tom Dannenbaum*

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## I. INTRODUCTION

In 2017, U.N. Under-Secretary-General for Humanitarian Affairs Stephen O'Brien told the Security Council, "we are facing the largest humanitarian crisis since the creation of the United Nations . . . more than 20 million people across four countries [Somalia, Yemen, South Sudan, and Nigeria] face starvation and famine."<sup>1</sup> All four crises were produced by armed conflict, and, in particular, the resurgent use of starvation as a method of warfare.<sup>2</sup> At the heart of perhaps the most devastating was the Saudi- and Emirati-led coalition's de facto naval blockade of Yemen.<sup>3</sup> U.N. humanitarian coordinator Lise Grande warned in late 2018 that the country was facing the world's worst famine in a century.<sup>4</sup> Even as food was allowed in, the

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1. Associated Press, *World Faces Worst Humanitarian Crisis since 1945, says UN Official*, GUARDIAN (Mar. 10, 2017), <https://www.theguardian.com/world/2017/mar/11/world-faces-worst-humanitarian-crisis-since-1945-says-un-official>. Alex de Waal describes O'Brien's framing as "hyperbolic" but agreed that "2017 marks a critical turning point, a moment at which famine could return." ALEX DE WAAL, *MASS STARVATION: THE HISTORY AND FUTURE OF FAMINE* 179 (2018). On the role of armed conflict, and particularly the use of starvation as a method of warfare, in precipitating these crises, see FOOD SECURITY INFORMATION NETWORK, 2018 GLOBAL REPORT ON FOOD CRISES (2018), [https://docs.wfp.org/api/documents/WFP-0000069227/download/?\\_ga=2.155628472.2098461776.1600107968-1595877267.1600107968](https://docs.wfp.org/api/documents/WFP-0000069227/download/?_ga=2.155628472.2098461776.1600107968-1595877267.1600107968) [hereinafter 2018 GLOBAL REPORT ON FOOD CRISES]; U.N. Secretary-General's Joint Press Conference on Humanitarian Crises in Nigeria, Somalia, South Sudan, and Yemen (Feb. 22, 2017), <https://www.un.org/sg/en/content/sg/press-encounter/2017-02-22/full-transcript-secretary-generals-joint-press-conference>.

2. 2018 GLOBAL REPORT ON FOOD CRISES, *supra* note 1; U.N. Secretary-General's Joint Press Conference, *supra* note 1. On the resurgence of famine as a consequence of deliberate policy, see DE WAAL, *MASS STARVATION*. *supra* note 1, at 6–7. For earlier iterations of the claim that famine is caused by political choices, see ALEX DE WAAL, *FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA* 7 (1997); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 160, 175 (1999); David Marcus, *Famine Crimes in International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 245, 245 (2003).

3. It is not clear whether or for how long the naval encirclement of Yemen has qualified as a blockade in the strict sense, because there is ambiguity regarding whether the concept exists in non-international armed conflicts, enforcement has occurred within Yemen's territorial sea, and for the most part the preclusion of ingress and egress has not been comprehensive. Martin D. Fink, *Naval Blockade and the Humanitarian Crisis in Yemen*, 64 NETHERLANDS INTERNATIONAL LAW REVIEW 291, 297–303 (2017).

4. Hannah Summers, *Yemen on Brink of 'World's Worst Famine in 100 Years' if War Continues*, GUARDIAN (Oct. 15, 2018), <https://www.theguardian.com/global-development/2018/oct/15/yemen-on-brink-worst-famine-100-years-un>.

blockade limited the quantity, delayed, and otherwise impeded its delivery, caused dramatic spikes in prices, and devastated the economy and thus the capacity of most people in the country to pay those prices.<sup>5</sup> A few months after Grande's warning, World Food Programme spokesperson Herve Verhoosel claimed that approximately ten million Yemenis were "one step away from famine."<sup>6</sup> Aid operations delayed devastation on that scale, but the consequence of the longstanding deprivation is that the population is now uniquely vulnerable to the gravest ravages of the COVID-19 pandemic.<sup>7</sup> Recent cuts to essential aid have further exacerbated the crisis.<sup>8</sup>

In the last century, the law of armed conflict and other relevant regimes have transitioned from permitting the starvation of the civilian population in war with little restraint, to weakly regulating it, subsequently prohibiting it, and ultimately classifying the starvation of the civilian population as a war crime and a core object of concern for the U.N. Security Council.<sup>9</sup> Despite its recent resurgence in practice, as a matter of law, the starvation of civilians has gone from being accepted as a purportedly humane method of warfare to a being condemned as gravely wrongful and identified as a reason for global scrutiny and action. Nonetheless, the boundaries of many of these legal developments have yet to be tested or clearly defined. The nature and scope of their applicability to naval blockades in particular remain the subject of debate and confusion.

A unique opportunity exists to bring clarity to this issue. Under the auspices of the Institute for International Humanitarian Law, an international group of experts has started to deliberate on an update to the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. The original *Manual*

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5. Group of Eminent International and Regional Experts on Yemen, *Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014*, ¶¶ 768–71, U.N. Doc. A/HRC/42/CRP.1\* (Sept. 3, 2019) [hereinafter Group of Experts on Yemen]; Jane Ferguson, *Is Intentional Starvation the Future of War?*, NEW YORKER (July 11, 2018), <https://www.newyorker.com/news/news-desk/is-yemen-intentional-starvation-the-future-of-war>.

6. *10 Million Yemenis 'One Step Away from Famine,' UN Food Agency Calls for 'Unhindered Access' To Frontline Regions*, UN NEWS (Mar. 26, 2019), <https://news.un.org/en/story/2019/03/1035501>.

7. Richard Stone, *Yemen Was Facing the World's Worst Humanitarian Crisis. Then the Coronavirus Hit*, SCIENCE (May 28, 2020), <https://www.sciencemag.org/news/2020/05/yemen-was-facing-worlds-worst-humanitarian-crisis-then-coronavirus-hit>.

8. Vivian Yee, *Yemen Aid Falls Short, Threatening Food and Health Programs*, NEW YORK TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/world/middleeast/yemen-saudi-united-nations-aid.html>.

9. See Part II *infra*.

was adopted in 1994, after six years of similar expert discussions and consultations, and published with a formal “Explanation” the following year.<sup>10</sup> Much like later efforts to restate the customary international law applicable to air warfare and cyber warfare, it provides an important first port of call for any lawyer working in a domain covered only incompletely by existing treaty law.<sup>11</sup> An effort to develop an analogous text for military operations in space is ongoing.<sup>12</sup>

Much of the discussion in the update process is likely to focus on addressing the profound technological change that has occurred in the quarter-century since the publication of the first edition. Developments in the realms of cyberspace, machine learning, and vessel and weapon system autonomy raise legal questions that were beyond the comprehension of the original drafters. There are questions that must be confronted as the new group of experts contemplates how to articulate the principles and commentaries upon which legal advisers, scholars, and analysts will draw when evaluating naval conflicts in the coming years and decades.

However, at least as important are the more fundamental tasks of interrogating the original rules on their own terms and adapting the text to normative developments in the period since publication. If pursued rigorously, revisions arising from these latter projects may well eclipse those responding to technological change. To that end, this article engages in a reevaluation of the San Remo rules on the deprivation of objects essential to survival, which are included in the *Manual’s* framework for the regulation of blockade warfare. The San Remo rules go beyond previous articulations of the law of blockade in identifying humanitarian restrictions on the practice. However, the fact of those restrictions obscures a surprisingly permissive posture on starvation blockades. It is a posture that is objectionable both on its own terms and in light of legal and normative developments since the *Manual’s* adoption. In advocating significantly tighter humanitarian constraints, this

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10. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SRM].

11. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter HPCR MANUAL]; TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013); TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt gen. ed., 2017).

12. On the effort to draft the Woomera Manual on the International Law of Military Space Operations, see *The Woomera Manual*, UNIVERSITY OF ADELAIDE, <https://law.adelaide.edu.au/woomera/> (last visited Jan. 25, 2021).

article responds directly to recent efforts on the pages of this Journal to defend the legality of intentional starvation in blockades and other encirclements.<sup>13</sup> At a moment when the proscription of such tactics is tightening, it is vital that this progress is recognized in the *San Remo* update.

The argument proceeds in five Parts. Part II provides a brief history of the trajectory of international humanitarian law (IHL) on encirclement, the deprivation of essentials, and humanitarian access. Part III exposes the weaknesses and contradictions in the key humanitarian provisions on the law of blockade, as articulated in the *San Remo Manual*. Part IV identifies the legal and policy arguments offered in favor of a permissive law of blockade—perhaps one even more permissive than that articulated in the original edition of the *San Remo Manual*. Part V rebuts those arguments, presenting the legal and moral case for strengthening the humanitarian restrictions on blockades in the revised edition. Part VI identifies two macro trends that demand the detailed attention of those charged with updating the *Manual*, both on the specific issue of blockades, but also across the *Manual* as a whole, namely: the expansion of IHL rules applicable to non-international armed conflicts (NIACs) and the now widespread recognition of the applicability of international human rights law (IHRL) in armed conflict.

## II. A BRIEF HISTORY OF THE LAW OF ENCIRCLEMENT, DEPRIVATION, AND HUMANITARIAN ACCESS

For much of the modern history of war, starvation tactics were deemed to be a necessary and thus permissible method of warfare.<sup>14</sup> Hugo Grotius and Emer de Vattel both considered and affirmed the use of hunger as a weapon in their writings in the seventeenth and eighteenth centuries, respectively.<sup>15</sup> In the nineteenth century, one of the landmark codification efforts in this

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13. Sean Watts, *Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions*, 94 INTERNATIONAL LAW STUDIES 1 (2019); Phillip J. Drew, *Can We Starve the Civilians? Exploring the Dichotomy between the Traditional Law of Maritime Blockade and Humanitarian Initiatives*, 95 INTERNATIONAL LAW STUDIES 302 (2019).

14. Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 1, 31 (1989); Nicholas Mulder & Boyd van Dijk, *Why Did Starvation Not Become the Paradigmatic War Crime in International Law?*, in CONTINGENCY AND THE COURSE OF INTERNATIONAL LAW (Kevin Jon Heller & Ingo Venzke eds., forthcoming).

15. 2 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE ch. 2, ¶ 10 (1625); 2 EMER DE VATTEL, LAW OF NATIONS ¶ 112 (1758).

realm was Francis Lieber's U.S. General Orders No. 100, drafted on the request of Abraham Lincoln as a framework for regulating both sides of the American Civil War.<sup>16</sup> On the question of the use of hunger as a weapon, Lieber did not equivocate. Starvation, including of civilians, was permissible because it could facilitate victory. Article 17 of the Code provides, "it is lawful to starve the hostile belligerent, *armed or unarmed*, so that it leads to the speedier subjection of the enemy."<sup>17</sup> Article 18 clarifies the claimed importance of including civilians as targets for hunger: "When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender."<sup>18</sup>

It was not until several decades after Lieber's endeavor that States negotiated the first significant multilateral treaties governing the conduct of hostilities at the Hague Conferences of 1899 and 1907. The Hague Regulations were attached first to Convention II of 1899<sup>19</sup> and then, in their updated form, to Convention IV of 1907.<sup>20</sup> Although neither version replicates Lieber's overt approval of starvation tactics, the Regulations' silence on the issue is itself significant. Starvation is not identified in Article 23 of either treaty as a method of war that is "especially prohibited."<sup>21</sup> Article 25 of each prohibits only attack or bombardment (in the 1907 version "by whatever means") of *undefended* localities.<sup>22</sup> And Article 27 provides that in sieges and bombardments of defended localities, a besieging party must take all necessary steps to spare "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and

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16. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863 [hereinafter General Orders No. 100]. For a comprehensive overview of the code and its relationship to the law of war, see JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012).

17. General Orders No. 100, *supra* note 16, art. 17 (emphasis added).

18. *Id.* art. 18.

19. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter Hague Regulations 1899].

20. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations 1907].

21. Hague Regulations 1899, *supra* note 19, art. 23; Hague Regulations 1907, *supra* note 20, art. 23.

22. Hague Regulations 1899, *supra* note 19, art. 25; Hague Regulations 1907, *supra* note 20, art. 25.



wounded are collected, provided they are not being used at the time for military purposes.”<sup>23</sup> Starvation and other forms of deprivation by encirclement are left unregulated—a silence that would echo through the courtrooms of Nuremberg forty years later.

Not long after the Second Hague Conference, and inspired in significant part by its Twelfth Convention (on the creation of an International Prize Court), the British government convened a conference of ten naval powers in London to agree what became the non-binding London Declaration Concerning the Laws of Naval War (1909).<sup>24</sup> In the first twenty-one articles, the Declaration went far beyond the laconic assertion of an efficacy requirement in the 1856 Paris Declaration Respecting Maritime Law to elaborate and crystallize many of the key features of blockade law that remain applicable today.<sup>25</sup> These include the principles and derivative rules of efficacy, impartiality, notification, enforcement, and neutrality.<sup>26</sup> Notably, however, the framework included no provisions protecting the encircled civilian population against the potentially severe deprivation that follows from a comprehensive blockade. Under the understanding of the law articulated in the London Declaration, the infliction of mass starvation remained very much within the blockading party’s authority.

The possible illegality of such methods started to percolate in significant form in the aftermath of World War I. The parties to the Paris Peace Conference set up a Commission on Responsibility of the Authors of the War and on Enforcement of Penalties to investigate the issue of war crimes responsibility during the Great War. In its 1919 report, the Commission listed “deliberate starvation of civilians” as a violation to which criminal liability

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23. Hague Regulations 1899, *supra* note 19, art. 27; Hague Regulations 1907, *supra* note 20, art. 27.

24. Declaration Concerning the Laws of Maritime War, Feb. 26, 1909, 208 Consol. T.S. 338, *reprinted in* THE DECLARATION OF LONDON, FEBRUARY 26, 1909, at 112 (James B. Scott ed., 1919) [hereinafter Declaration of London].

25. Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1, 15 MARTENS NOUVEAU RECUEIL (ser. 1) 791, *reprinted in* 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 89 (1907) [hereinafter Paris Declaration].

26. Declaration of London, *supra* note 24, arts. 1–21.

could attach.<sup>27</sup> However, efforts to establish a system of international criminal accountability after World War I failed, and the Commission's proposal regarding starvation was never enacted.<sup>28</sup>

There was also a dark irony in the inclusion of starvation in the list. As Nicholas Mulder and Boyd van Dijk recount, "To pressure the Dutch government to extradite the exiled Kaiser" for alleged crimes committed during the Great War (the very subject of the Commission's work), "British foreign secretary Arthur Balfour . . . suggested imposing a blockade of the Netherlands, accepting that the neutral country might have to be starved into submission" to secure the transfer.<sup>29</sup> Balfour's proposal was not implemented, but restraint in that respect was not for squeamishness as to the consequences. The Allies had engaged in a comprehensive naval blockade of Germany, Austria-Hungary, the Ottoman Empire, and Bulgaria during the war and had "caused hundreds of thousands of deaths" and contributed to a "major social, economic, and health crisis" by maintaining the blockade after the armistice in order to pressure Germany to sign the final Peace Treaty.<sup>30</sup>

After the war, economic blockades were championed as a mechanism for preventing armed conflict.<sup>31</sup> Although preliminary efforts were made through the League of Nations to conceive of regulations that would limit their effects on civilian populations, the only constraint agreed upon was that the interception of food supplies would be used only after other means of conflict resolution had been exhausted.<sup>32</sup> In the law of armed conflict, no changes were made to the existing treaty regime. When World War II erupted, the tactic was seen by all parties as very much on the table. The Nazis distinguished themselves in using starvation not just as a method of war, but also as a central component of their system of genocidal extermina-

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27. Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference* (Mar. 29, 1919), reprinted in 14 AMERICAN JOURNAL OF INTERNATIONAL LAW 95, 114 (1920).

28. On the efforts to pursue criminal justice for alleged German perpetrators after World War I, see GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* ch. 3 (2002).

29. Mulder & van Dijk, *supra* note 14.

30. *Id.*

31. *Id.*

32. *Id.*

tion and persecution—the infamous “hunger plan” implemented to eliminate “useless eaters.”<sup>33</sup> However, every major power weaponized mass hunger in the conduct of hostilities, causing enormous suffering and death.<sup>34</sup>

In contrast to the failed efforts after the Great War, the Allies were successful in creating a system of criminal justice to be applied to their defeated adversaries after World War II.<sup>35</sup> The flagship of that effort was the International Military Tribunal (IMT) at Nuremberg, at which twenty-two of the most senior Nazi war criminals were tried before a judge each from France, Britain, the Soviet Union, and the United States.<sup>36</sup> Various acts of starvation were prosecuted successfully at the IMT as war crimes or crimes against humanity, but those instances involved the starvation of prisoners of war, populations in Nazi-occupied territory, the enslaved, and Jews subject to genocidal persecution.<sup>37</sup> When it came to starvation as a method of warfare, the results were very different.

The IMT was supplemented by military tribunals run individually by the occupying powers for the next tier of alleged perpetrators. These subsequent proceedings were run pursuant to Control Council Law No. 10, a regulation issued by the occupying powers as a collective and replicating much of what was in the London Charter (the IMT statute that had been drafted by the four powers in August 1945).<sup>38</sup> Included in Control Council Law No. 10 was an open-ended provision of criminal accountability for “atrocities or offenses against persons or property constituting violations of the laws or customs of war.”<sup>39</sup>

In the case against fourteen of the highest-ranking members of the Wehrmacht, some of whom had been members of the Nazi High Command, the American military tribunal was faced with the question of whether the siege of Leningrad from 1941 to 1944, in which over a million Russians died,

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33. DE WAAL, MASS STARVATION, *supra* note 1, at 101–5.

34. Mulder & van Dijk, *supra* note 14 (“Every major power during the Second World War sought to deprive enemy combatants and civilians of the necessary food supplies as a means of securing their eventual surrender.”); ARTHUR HERMAN, TO RULE THE WAVES 535, 545 (2004). On the role of food in World War II generally, see LIZZIE COLLINGHAM, THE TASTE OF WAR: WORLD WAR TWO AND THE BATTLE FOR FOOD (2011).

35. On the politics that led to that, see BASS, *supra* note 28, ch. 5.

36. 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411 (1948).

37. *See, e.g., id.* at 456, 472, 474, 478, 480, 482, 484, 495, 541–44.

38. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945), 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50 (1946), <https://avalon.law.yale.edu/imt/imt10.asp>.

39. *Id.* art. II(b).

met the legal threshold prescribed in Control Council Law No. 10.<sup>40</sup> The tribunal's ruling on that question has reverberated throughout subsequent work on the posture of the law of war vis-à-vis starvation. It cited the brand-new second edition of Charles Cheney Hyde's general treatise on international law for the following proposition:

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate.<sup>41</sup>

Famously, the tribunal then editorialized, "we might wish the law were otherwise but we must administer it as we find it."<sup>42</sup> In this phrase, the American judges of the High Command case expressed less comfort with the permissibility of starvation as a weapon of war than had earlier legal authorities, but insisted nonetheless that the existing legal resources were insufficient to underpin a more prohibitive interpretation. Given the morally infused and creative legal reasoning adopted at Nuremberg on other fronts, this unwillingness to interpret an open-ended provision to conform to the law for which the judges claimed to wish is striking. It ought to be considered alongside the fact that the absence of a prohibition of starvation tactics was a legal opening their home country had exploited during the conflict.<sup>43</sup> One of the intellectual architects of the Nuremberg doctrine of crimes against humanity, Hersch Lauterpacht, later reflected, "The practice of two world wars was based on the view that no such sacrosanctity attaches to the civilian population at large as to make illegal the effort to starve it alongside the military forces of the enemy as a means of inducing him to surrender."<sup>44</sup> It was a

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40. United States v. von Leeb et al. (The High Command Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 555, 563 (1949).

41. *Id.* at 563, citing 3 CHARLES CHENEY HYDE, INTERNATIONAL LAW 1802–3 (2d ed. 1945).

42. *Id.*

43. *See supra* note 34.

44. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 360, 374 (1952). On Lauterpacht's role prior to Nuremberg on the issue of crimes against humanity, see PHILIPPE SANDS, EAST WEST STREET 3, 113–15 (2016); more generally, *id.* pt. II.

method of warfare that the United States and Britain would prove reluctant to foreclose in the post-war era.<sup>45</sup>

The first opportunity for a recalibration of the law of war on this issue arose with the revisions to the Geneva Conventions, and particularly the addition of a Fourth Convention on civilian protection. On the issue of the starvation of occupied populations, the drafters of the Fourth Convention were able to agree on relatively robust provisions. Under Article 55, 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.”<sup>46</sup> This is supplemented by an unequivocal obligation in Article 59 to consent to and facilitate relief schemes (particularly of food, medical supplies, and clothing) for that population if it is “inadequately supplied.”<sup>47</sup>

The Convention is far weaker on the issue of siege starvation and hunger blockades. As one might expect of those negotiating a treaty in the Geneva law tradition, the angle from which the drafters approached this issue was one of humanitarian access, rather than the conduct of hostilities.<sup>48</sup> In the early stages of work on the new and updated conventions, the International Committee of the Red Cross (ICRC) had argued for certain robust civilian protections in siege and blockade starvation campaigns.<sup>49</sup> Although this approach drew British and American opposition,<sup>50</sup> it gained traction with a number of other States, including the Soviet Union.<sup>51</sup> In response to that

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45. Mulder & van Dijk, *supra* note 14.

46. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 55, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

47. *Id.* art. 59.

48. The distinction between so-called Hague law and Geneva law was never without conceptual difficulty. Even the first Geneva Convention in 1864 provided in Article 1 for the neutrality of hospitals—simultaneously a protection for the wounded and a rule governing the conduct of hostilities. Convention for the Amelioration of the Condition of the Wounded in the Armies in the Field art. 1, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377.

49. 3 COMMISSION OF GOVERNMENT EXPERTS FOR THE STUDY OF CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS (GENEVA APRIL 14–26, 1947): PRELIMINARY DOCUMENTS SUBMITTED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS: CONDITION AND PROTECTION OF CIVILIANS IN TIME OF WAR 27 (1947); INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS 15 (1947); OSCAR M. UHLER ET AL., COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 178 (1958).

50. Mulder & van Dijk, *supra* note 14.

51. *Id.*

groundswell, the British focused on “reshaping rather than rejecting the existing proposals” to regulate the protection of encircled and starving populations.<sup>52</sup>

A Norwegian drafter proposed a compromise that ultimately led to the provision codified in the Fourth Convention.<sup>53</sup> The finally agreed provision requires parties to allow medical and religious supplies through to adversary territory, only when those supplies are “intended only for civilians” and extends this requirement to “essential foodstuffs, clothing and tonics” only when those consignments are “intended for children under fifteen, expectant mothers and maternity cases.”<sup>54</sup> As such, it allows for the deliberate denial of food and clothing to the civilian population more broadly.

Moreover, even those limited obligations are subject to exception if the belligerent has “serious reasons for fearing” that the consignments may “be diverted from their destination,” that control over them “may not be effective,” or even that the relief consignments would provide a “definite military advantage” to the adversary by substituting for goods that would have been provided by the latter State.<sup>55</sup> This, of course, is a caveat so capacious as to “pull[] the rug from under even the qualified protection” of the core requirement,<sup>56</sup> diluting the “obligatory content” of the latter to “nearly nothing.”<sup>57</sup> At best, a non-occupying power’s duty under Geneva Convention IV to allow essential goods through to deprived civilians might be described as “somewhat nominal.”<sup>58</sup>

The Convention also touches obliquely on the practice (permitted explicitly in the Lieber Code) of driving fleeing civilians back into an encircled and starved area. Article 17 of Convention IV requires that the parties to the conflict “endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.”<sup>59</sup> Again, most civilians are excluded from this protection, and food is not

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52. *Id.*

53. *Id.*

54. GC IV, *supra* note 46, art. 23.

55. *Id.*

56. Marcus, *supra* note 2, at 266.

57. René Provost, *Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait*, 30 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 577, 592 (1992).

58. Lauterpacht, *supra* note 44, at 376.

59. GC IV, *supra* note 46, art. 17.

among the items to be let in. Moreover, the besieging party has only an obligation to endeavor to conclude such an agreement with the besieged party. There is no obligation to succeed, and no articulated obligation to allow civilians to exit in the absence of an agreement.

Ultimately, these provisions left the use of the starvation of civilians as a method of war very much intact.<sup>60</sup> Indeed, the requirements were sufficiently lenient for the 1956 U.S. Army law of war field manual to replicate the *High Command* rule and some of the language of the earlier Lieber Code. It provides,

It is within the discretion of the besieging commander whether he will permit noncombatants to leave and under what conditions. Thus, if a commander of a besieged place expels the noncombatants in order to lessen the logistical burden he has to bear, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender. Persons who attempt to leave or enter a besieged place without obtaining the necessary permission are liable to be fired upon, sent back, or detained.<sup>61</sup>

This posture was not formally reversed until the Department of Defense (DoD) issued its *Law of War Manual* in 2015 (revised in 2016), recognizing the illegality of forcing the return of civilians to besieged areas as a matter of customary international law.<sup>62</sup> The *Manual* derives this obligation from the general requirement to take precautionary measures to minimize civilian loss—a principle articulated in the 1977 update to Hague and Geneva law, the First Additional Protocol to the Geneva Conventions.<sup>63</sup>

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60. British Foreign Minister Michael Stewart, on the issue of Nigeria's policy of starving out the people (and insurgents) of Biafra: "We must accept that, in the whole history of warfare, any nation which has been in a position to starve its enemy out has done so." 786 Parl Deb HC (6th ser.) (1969) col. 953.

61. DEPARTMENT OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 44 (1956).

62. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 5.19.4.1 (rev. ed., Dec. 2016) [hereinafter U.S. DOD LAW OF WAR MANUAL].

63. *Id.* § 5.19.4.1. See also HEADQUARTERS, DEPARTMENT OF THE ARMY, HEADQUARTERS, UNITED STATES MARINE CORPS, FM 6-27/MCTP 11-10C, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE ¶ 2-1-2 (2019). In Additional Protocol I, this principle is codified in Article 57(2)(a)(ii), which provides that parties are to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." Protocol Additional to the Geneva Conventions of 12 August 1949, and

The amendment could equally have been rooted in a different rule developed in Additional Protocol I and its NIAC analogue, Additional Protocol II.<sup>64</sup> The codification of these treaties marked the moment when IHL switched from a regime under which starvation was permitted with only very light regulation to one in which it was the subject of a relatively comprehensive prohibition. The key IAC provision in Protocol I is Article 54, which is worth replicating in full here. It provides:

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 of 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.
4. These objects shall not be made the object of reprisals.
5. 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.<sup>65</sup>

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Relating to the Protection of Victims of International Armed Conflicts art. 57(2)(a)(ii), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Accepting the customary status of the prohibition of the starvation of civilians as a method of warfare, *see* U.S. DOD LAW OF WAR MANUAL, *supra* note 62, § 5.20.1.

64. AP I, *supra* note 63, art. 54; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 14, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

65. AP I, *supra* note 63, art. 54.



Debates as to the scope and reach of this prohibition are addressed in Parts IV and V. However, on its face, it is a robust ban, particularly when compared to the permissive regime that had preceded it.

The most obvious gap in the prohibition is the so-called “scorched earth” exception in paragraph five, whereby a party can derogate from the ban in a context of defensive emergency. However, derogation of that kind is available only during a very short temporal window (in the face of invasion, but where the territory remains in the scorching party’s control), applies only to the destruction of objects indispensable to civilian survival on the scorching party’s own sovereign territory, and is tenable only to the extent such action is required by defensive necessity. These conditions, which evoke the similarly narrow *levée en masse* exception to the requirements of privileged belligerency, tightly limit the reach of the exception and render it entirely inapplicable to sieges and naval blockades.<sup>66</sup> More significant, then, are the limits internal to the fundamental prohibition (as articulated in paragraphs one and two) and the core exceptions to it (as defined in paragraph three). These are discussed further in the ensuing Parts.

The scorched-earth exception notwithstanding, there is no restriction on the class or nationality of civilians protected by Article 54. Relatedly, a proposal by Pakistan to exclude a ban on starvation from Additional Protocol II on the grounds that it was inappropriate to limit the State’s use of such tactics in internal conflicts was unsuccessful.<sup>67</sup> Article 14 of Additional Protocol II, which was ultimately adopted by consensus, provides that even in NIACs,

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as

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66. On the *levée en masse* exception, see Convention (III) Relative to the Treatment of Prisoners of War art. 4(A)(6), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

67. Pakistan Statement, Doc. CDDH/427 (May 31, 1977), 4 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977), at 87 (1978) [hereinafter OFFICIAL RECORDS] (noting that there are seventeen volumes of these official records).

foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.<sup>68</sup>

In contrast to the IAC provision, which includes exceptions in paragraphs three and five, the ICRC *Commentary* describes Article 14 of Protocol II as “a rule from which no derogation may be made,” noting that a formulation “whereby it would have been possible to make an exception in case of imperative military necessity was not adopted.”<sup>69</sup> Derivative of that, the ICRC understands the customary starvation ban to be a rare instance in which the NIAC prohibition is more comprehensive than is its IAC counterpart.<sup>70</sup>

The key areas of interpretive debate of direct relevance to the issue of encirclement deprivation are addressed below. There are, however, two points of relatively broad interpretive consensus that are worth emphasizing before turning to the issue of humanitarian access. First, notwithstanding the ordinary meaning of the term, few understand the starvation ban to cover only the deprivation of food and water.<sup>71</sup> Rather, the prohibition extends to the severe deprivation of any goods essential to human survival, including items such as medical supplies or clothing.<sup>72</sup> Second, starvation is understood in law primarily as a process rather than an outcome.<sup>73</sup> In other words, the deprivation of essential items in a context in which that deprivation threatens

68. Reporting that the consensus adoption was grounded in humanitarian considerations, see Federica D’Alessandra & Matthew Gillett, *The War Crime of Starvation in Non-International Armed Conflict*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 815, 819 (2019).

69. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4795 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

70. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 54 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

71. For an exception, see Manuel J. Ventura, *Prosecuting Starvation under International Criminal Law: Exploring the Legal Possibilities*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 781, 789 (2019) (“The meaning of the word ‘starvation’ would be stretched beyond recognition if it were to encompass a well-fed person that is deprived of clothing.”).

72. Group of Experts on Yemen, *supra* note 5, ¶ 740; Dapo Akande & Emanuela-Chiara Gillard, *Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 753, 758–60 (2019); Knut Dörmann, *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 341, 388 (2003).

73. On the distinction, see, e.g., Bridget Conley & Alex de Waal, *The Purposes of Starvation*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 699, 700 (2019).

survival or impedes the capacity of persons to sustain life violates the starvation ban, whether or not victims die or suffer a particular level of malnourishment as a result of that deprivation.<sup>74</sup>

Supplementing this core prohibition are articles updating and revising the prior rules on humanitarian access to civilian populations in contexts other than belligerent occupation. Article 70 of Protocol I states that when the civilian population

is not adequately provided with [food, medical supplies, clothing, bedding, means of shelter, and other supplies essential to the survival of the civilian population], 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.<sup>75</sup>

It provides further that the parties to the conflict (and all other Additional Protocol I parties) “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.”<sup>76</sup>

The meaning of this provision, too, is debated, particularly with respect to the scope of State discretion in granting or denying consent to humanitarian offers. However, three significant shifts from Article 23 of Geneva Convention IV are immediately noticeable. First, Article 70 protects all civilians, not just specific subcategories. Second, it protects a broader range of humanitarian relief—namely, all supplies essential to civilian survival. Third, the provision does not include the loopholes that so diminish the force of the obligation in Article 23 of Convention IV. Instead, a party granting humanitarian access under Additional Protocol I is limited to imposing “technical arrangements, including search” and to making the passage of relief “conditional on the distribution of this assistance being made under the local supervision of a Protecting Power.”<sup>77</sup> Article 71 allows only temporary restrictions to agreed relief in cases of “imperative military necessity.”<sup>78</sup>

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74. Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 760–61; Group of Experts on Yemen, *supra* note 5, ¶ 741; International Criminal Court, Elements of Crimes 31, Doc. No. ICC-PIDS-LT-03-002/11\_Eng (2011) [hereinafter ICC Elements of Crimes].

75. AP I, *supra* note 63, art. 70(1).

76. *Id.* art. 70(2).

77. *Id.* art. 70(3).

78. *Id.* art. 71(3).

A final shift from Geneva Convention IV is worth noting briefly, although it implicates a debate explicated below regarding the discretion to deny humanitarian access.<sup>79</sup> Article 10 of Geneva Convention IV provides that the Convention presents “no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.”<sup>80</sup> Article 70 of Additional Protocol I differs from that provision both in its greater detail, but also in providing that relief actions “shall be undertaken” subject to the parties’ agreement, rather than merely that they “may be undertaken” subject to that consent.<sup>81</sup> Many take this subtle shift to indicate that State discretion regarding whether to allow humanitarian actors to access populations in need is limited in important respects.<sup>82</sup>

Overall, the apparent tightening of the rules of humanitarian access in Additional Protocol I is sufficient for some to argue that the weaknesses of the Geneva IV rules on humanitarian access were “remedied to a large extent” by the 1977 treaty.<sup>83</sup> With slightly different wording, Article 18 of Protocol II extends the same basic framework to NIACs, providing,

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.<sup>84</sup>

Of course, a crucial question regarding rules of the Additional Protocols is whether they or some variation on them, have customary status for the

79. See *infra* notes 203–211, 314–338 and accompanying text.

80. GC IV, *supra* note 46, art. 10 (replicated for combatants rendered *hors de combat* by wounds, sickness, shipwreck, or detention in common Article 9 of Geneva Conventions I, II, and III). Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 9, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 9, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; GC III, *supra* note 66, art. 9.

81. AP I, *supra* note 63, art. 70 (emphasis added).

82. See *infra* notes 315–338 and accompanying text.

83. Jelena Pejic, *The Right to Food in Situations of Armed Conflict: The Legal Framework*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 1097, 1103 (2011).

84. AP II, *supra* note 64, art. 18.

small but militarily significant minority of States that have not ratified the treaties.<sup>85</sup> In its landmark 2005 study of customary IHL, the ICRC found the relevant rules discussed above to be customarily binding on all States in both IACs and NIACs.<sup>86</sup> Various commentators have advanced arguments in favor of that position.<sup>87</sup> Some point to the consensus support for the starvation ban during Protocol I negotiations, including among those that did not go on to ratify the treaty as a whole.<sup>88</sup> It is also notable that a wide range of States incorporate the ban the use of starvation as a method of warfare into their military manuals.<sup>89</sup> Encirclements, such as blockades, have often included humanitarian corridors of one form or another in the decades since the Protocols were negotiated.<sup>90</sup> And on the occasions that starvation tactics have been used, they have been condemned.<sup>91</sup>

At the level of State action through international organizations, the U.N. General Assembly has rejected the deprivation of food as an instrument of pressure and condemned starvation in armed conflict on numerous occasions.<sup>92</sup> The Security Council has similarly condemned the “denial of humanitarian access,” identified “willfully impeding relief supply and access” as a

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85. Although one hundred and seventy-four States are bound by Protocol I in their mutual engagements, among the non-parties are a number of States that are of significant interest from a law of armed conflict perspective, including Eritrea, India, Indonesia, Israel, Pakistan, Somalia, Turkey, and the United States. In addition to lacking each of those States, Protocol II also lacks Iraq and Syria among its States parties.

86. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 70, rr. 53–55.

87. *See, e.g.*, Provost, *supra* note 57, at 628–38; DAPO AKANDE & EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT 95–96, 136 n.105 (2016). *But see* Salvatore Zappala, *Conflict Related Hunger, ‘Starvation Crimes’ and UN Security Council Resolution 2417*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 881, 899 (2019).

88. Provost, *supra* note 57, at 631.

89. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 53 (Jean-Marie Henckerts & Louise Doswald-Beck eds., 2005), [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53).

90. *See, e.g.*, Wolff Heintschel von Heinegg, *Blockade*, ¶¶ 20, 26, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oct. 2015), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252?rskey=6ktGAZ&result=1&prd=MPIL>; Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, 35 INTERNATIONAL REVIEW OF THE RED CROSS 583, 584 (1995). In some cases, the exceptions have been condemned as insufficient under existing customary law. *See, e.g.*, Provost, *supra* note 57, at 638.

91. D’Alessandra & Gillett, *supra* note 68, at 823; Provost, *supra* note 57, at 634.

92. For just a few examples over time, *see, e.g.*, G.A. Res. 185 (Dec. 17, 1981); G.A. Res. 48/88 (Dec. 20, 1993); G.A. Res. 49/10 (Nov. 3, 1994); G.A. Res. 49/196 (Dec. 23, 1994)

violation of IHL, and classified starvation as a threat to international peace and security that warrants outside intervention.<sup>93</sup> In 2018, the Council approved unanimously a resolution stating that it “strongly condemns the unlawful denial of humanitarian access and depriving civilians of objects indispensable to their survival, including willfully impeding relief supply and access for responses to conflict-induced food insecurity in situations of armed conflict,” noting that such actions “may constitute a violation of international humanitarian law.”<sup>94</sup> It further noted that the starvation of civilians as a method of warfare might constitute a war crime.<sup>95</sup>

As a non-party to the Protocols, it is notable that Israel’s government and High Court of Justice have relied on the customary status of the rules articulated in Articles 54 and 70 of Additional Protocol I to evaluate and permit (controversially) the State’s actions in controlling the fuel and electricity supply into Gaza.<sup>96</sup> Similarly, despite U.S. objections to the methodology of the ICRC study,<sup>97</sup> the country’s *Law of War Manual* recognizes the prohibition of starvation as a customary rule and clarifies (as noted above) that it understands the forced return of fleeing civilians back into a besieged area of starving people to be a violation of international law.<sup>98</sup> The *Manual* is more equivocal on whether “all of [the] particulars” of Article 54 of Protocol I reflect customary international law, but it accepts the core ban.<sup>99</sup>

On the issue of humanitarian relief, it is interesting that the U.S. DoD *Law of War Manual* focuses exclusively on the framework provided in Article 23 of Geneva Convention IV.<sup>100</sup> In contrast to many other provisions of the First Protocol, the customary credentials of which are either affirmed or rejected explicitly, Article 70 of Protocol I is not referenced directly a single

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93. *See, e.g.*, S.C. Res. 2139 (Feb. 25, 2014); S.C. Res. 733 (Jan. 23, 1992); S.C. Res. 761 (June 21, 1992).

94. S.C. Res 2417, ¶ 6 (May 24, 2018).

95. *Id.* p.mbl.

96. HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence ¶¶ 13–22 (2008), [http://www.hamoked.org/items/9862\\_eng.pdf](http://www.hamoked.org/items/9862_eng.pdf) (unofficial translation) (Isr.).

97. John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007).

98. U.S. DOD LAW OF WAR MANUAL, *supra* note 62, § 5.20.

99. *Id.* § 5.20.4.

100. *Id.* § 5.19.3.

time in the *Manual*.<sup>101</sup> In a prior review of Additional Protocol I by the Joint Chiefs of Staff, Article 70 was deemed acceptable only subject to the caveat that humanitarian access could be denied on the grounds of “imperative considerations of military necessity,” to preclude a “radical, if perhaps unintended, change in the customary law of siege and blockade warfare, which has always allowed the besieging and blockading power to cut off all supplies going to areas of enemy control.”<sup>102</sup> This issue is addressed further in the ensuing Parts.

A final development relevant both on its own terms as an additional feature of the starvation ban and in its implications for the customary status of the rules articulated in the Additional Protocols today is the criminalization of starvation as a method of warfare. Developments here postdate the publication of the *San Remo Manual*, and so are of particular relevance to the latter’s revision.

The ban on starvation as a method of warfare was omitted from the grave breaches provision of Additional Protocol I and absent from the statutes and jurisprudence of the ad hoc tribunals for the former Yugoslavia and Rwanda.<sup>103</sup> As at Nuremberg, and despite the scale of the deprivations inflicted in the sieges of Sarajevo and Srebrenica, starvation was prosecuted before the tribunals only when inflicted on detainees.<sup>104</sup> In line with that trend, neither of the International Law Commission’s 1994 and 1996 drafts

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101. There is a single indirect reference to Article 70 in the *Manual* as a whole, which occurs in a quote from a speech by a former Deputy Legal Adviser in a footnote that references that quote for its position on Article 54 (also mentioned), not Article 70. *Id.* at 317 n.724.

102. Memorandum from the Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, at 72–73, to Secretary of Defense (May 3, 1985), [https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Joint\\_Staff/1985\\_JCSM\\_152-85\\_Review\\_of\\_GC\\_AP\\_I.pdf](https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Joint_Staff/1985_JCSM_152-85_Review_of_GC_AP_I.pdf)

103. AP I, *supra* note 63, art. 85.

104. *See, e.g.*, Prosecutor v. Mladić, Case No. IT-09-92-T, Judgment, ¶¶ 1029, 1204, 1207, 1232, 1252, 1265, 1291, 1303–7, 3232, 3287–99, 3306, 3312, 3450–55 (Int’l Crim. for the former Yugoslavia Nov. 22, 2017). On the starvation conditions in Srebrenica and Sarajevo, see, e.g., *id.* ¶¶ 2330–36, 2389, 4557, 4599–606, 4845; Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1994), transmitted by Letter dated May 27, 1994 from the Secretary-General Addressed to the President of the Security Council, annex, ¶ 204, U.N. Doc. S/1994/674 (May 27, 1994).

of an international criminal code for a permanent court address the issue of starvation as a method of warfare.<sup>105</sup>

At this point, however, things began to change. In 1995, the U.N. General Assembly provided for a Preparatory Committee, open to all States, to establish what would become the International Criminal Court (ICC).<sup>106</sup> Shortly after the International Law Commission released its 1996 draft, the Preparatory Committee published its first compilation of proposals. Among them was “starving of the civilian population and prevention of humanitarian assistance from reaching them.”<sup>107</sup> The Preparatory Committee proposals went through several iterations before developing into the Rome Statute of today. During that process, a NIAC version of the crime was proposed.<sup>108</sup> However, it was dropped during final negotiations for reasons that remain hazy even for those who were at the Rome Conference, except to say that there was a general wariness of an excessive expansion of the war crimes code in NIACs.<sup>109</sup> Rogier Bartels suggests the omission of the NIAC war

105. International Law Commission, Report of the Working Group on a Draft Statute for an International Criminal Court, ¶ 5, U.N. Doc. A/CN.4/L.491/Rev.2 (1994); International Law Commission, Report on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, at 15 (1996) (Draft Code of Crimes Against the Peace and Security of Mankind, with commentaries). The only mention of starvation in the Commission’s commentaries is through the use of detainee starvation as an example to illuminate the concept of superior responsibility. *Id.* at 25 (“A military commander contributes directly to the commission of a crime when he orders his subordinate to carry out a criminal act, such as killing an unarmed civilian, or to refrain from performing an act which the subordinate has a duty to perform, such as refraining from providing food for prisoners of war which results in their starvation.”)

106. G.A. Res. 50/46, Establishment of an International Criminal Court (Dec. 11, 1995).

107. Michael Cottier & Emilia Richard, *Article 8(2)(b)(xxv)*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 508, 510 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016); 2 Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/51/22, at 61 (Compilation of Proposals), (1996).

108. Rogier Bartels, *Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future*, 48 ISRAEL LAW REVIEW 281, 297–98 (2015).

109. Panel on Starvation in Armed Conflicts (panelists: Federica D’Alessandra, Brian Lander, Matthias Lanz, and Charles Garraway), Geneva Academy (May 2, 2019), <https://www.youtube.com/watch?v=tmg7kAB27Qg>. Charles Garraway, who was at the Rome Conference, “my own belief is it fell just below the threshold, bearing in mind there were still States in Rome who were not prepared to accept any, any offenses [in NIACs] except perhaps common article 3.” *Id.* at 28:50; Matthias Lanz, having explored the travaux



crime was “an oversight, perhaps caused by the unfortunate placing of the proposed crime together with various versions of disproportionate use of force,” which were dropped due to the absence of proportionality from Additional Protocol II (an absence that was, of course, not replicated in the case of starvation and humanitarian access).<sup>110</sup>

The finally agreed IAC provision criminalizes “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.”<sup>111</sup> The provision has yet to be invoked or interpreted by any ICC authority, although this hardly makes it unique among Rome Statute provisions. In December 2019, following significant political mobilization, the Court’s Assembly of States Parties approved an amendment extending the war crime to NIACs, replicating the language of the IAC crime, except for the reference to the Geneva Conventions.<sup>112</sup> The Assembly was unanimous in approving the amendment, but the longer and more arduous task of ratification remains.<sup>113</sup>

The criminalization of starvation in the Rome Statute has been catalytic. Many States that are party to the ICC system replicate the Rome Statute framework in their domestic war crimes codes. For that reason, it is unsurprising that thus far, many States have incorporated only the IAC war

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in preparation for the 2018 Swiss proposal, “you find . . . no real information in the travaux préparatoires on why this happened, so I think . . . it was chaotic and there was a lot of politics involved is probably what comes closest to the truth. . . . We believe that [the NIAC draft provision] was [deleted from what became the final Statute as] part of a bigger package where tradeoffs were made.” *Id.* at 36:18. See also Cottier & Richard, *supra* note 107, at 510; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 285 (5th ed. 2017).

110. Bartels, *supra* note 108, at 298.

111. Rome Statute of the International Criminal Court art. 8(2)(b)(xxv), July 17, 1998, 2187 U.N.T.S. 90. (last amended November 29, 2010, depositary notification C.N.651.2010.TREATIES-8) [hereinafter ICC Statute].

112. Report of the Working Group on Amendments, Assembly of States Parties, Doc. No. ICC-ASP/18/32, app. I, art. 8(2)(e)(xix) (Dec. 3, 2019). The amendment had been proposed by Switzerland in a non-paper. Report of the Working Group on Amendments, Assembly of States Parties, Doc. No. ICC-ASP/17/35, annex IV (Nov. 29, 2018) [hereinafter Switzerland Non-paper].

113. In accordance with the Rome Statute’s amendment regime, the new provision will enter into force only for States Parties that go on to ratify it. ICC Statute, *supra* note 111, art. 121(5). At the time of publication, three States have ratified the amendment: Andorra, the Netherlands, and New Zealand.

crime.<sup>114</sup> Those hybrid tribunals that have replicated the ICC's war crimes code have also included an IAC war crime of starvation as a method of warfare.<sup>115</sup> More expansively, the (as yet not in force) Malabo Protocol for a supranational criminal justice chamber in the African Union system, the Group of Experts on Yemen, the Commission on Human Rights in South Sudan, and many States in their domestic criminal codes recognized starvation as a customary war crime with applicability in both IACs and NIACs before that change was made at the ICC.<sup>116</sup> The Commission on Human Rights in South Sudan has also advocated the incorporation of the NIAC starvation crime into the statute of the promised Hybrid Court for South

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114. Based on a search of the ICC legal tools database (legal-tools.org), and the ICRC's customary IHL study. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 89, r. 53, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53). States that have criminalized starvation as a method of warfare in IACs, but not NIACs (often due to a straight transposition of the ICC Statute provisions) include Australia, Burundi, Canada, Congo, France, Georgia, Ireland, Kenya, Latvia, Lesotho, Mali, Malta, Mauritius, New Zealand, Samoa, Slovenia, South Africa, Timor-Leste, Trinidad & Tobago, and the United Kingdom.

115. United Nations Transitional Authority in East Timor, Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction of Serious Criminal Offenses art. 6(1)(b)(xxv), June 6, 2000, <https://peacekeeping.un.org/sites/default/files/past/etimor/untaetR/Reg0015E.pdf>; Statute of the Iraqi Special Tribunal art. 13(b)(xxv), Dec. 10, 2003, *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 231 (2004); Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office art. 14(1)(b)(xxv), Kosovo, Aug. 3, 2015, <https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office>.

116. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights annex, arts. 28D(b)(xxvi), 28D(e)(xvi), June 27, 2014, A.U. Doc. No. STC/Legal/Min/7(l) Rev. I; Group of Experts on Yemen, *supra* note 5, ¶ 748; Commission on Human Rights in South Sudan, "There is nothing left for us": Starvation as a Method of Warfare in South Sudan, ¶¶ 35–38, U.N. Doc. A/HRC/45/CRP.3 (Oct. 5, 2020) [hereinafter Commission on Human Rights in South Sudan]. Based on a search of the ICC legal tools database (legal-tools.org), and the ICRC's customary IHL study. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 89, r. 53, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53). States codifying starvation as a war crime, regardless of conflict classification, include Belgium, Bosnia and Herzegovina, Croatia, Ethiopia, Norway, Rwanda, and Spain. States that provide explicitly that starvation can be perpetrated in a NIAC, include Azerbaijan, Cambodia, Germany, Kosovo, the Netherlands, Peru, Portugal, Philippines, South Korea, Switzerland, and Uruguay. *See also* D'Alessandra & Gillett, *supra* note 68, at 820 n.20 (also including Austria, North Macedonia, Romania, Serbia, and Sweden).

Sudan.<sup>117</sup> Cases remain few and far between, but the legislative trajectory is clear.<sup>118</sup>

The significance of these developments is not limited to war crimes law. The ICC starvation crimes are enshrined in the Rome Statute as “serious violations of the laws and customs applicable in [IACs or NIACs, respectively], within the established framework of international law.”<sup>119</sup> This language reflects a broader principle that the status of a particular act as a war crime depends on the prohibition of that action as a matter of IHL.<sup>120</sup> There are currently 123 States parties to the ICC. Two additional States were parties before withdrawing for reasons unrelated to the starvation crime.<sup>121</sup> Each of those 125 States, through ratification or accession, affirmed that the war crime of starvation as a method of warfare is rooted in an underlying IHL prohibition—one that applies without difficulty to the nationals of non-party States when they act on the territory of ICC States parties. Three of those States are not themselves party to the Additional Protocols.<sup>122</sup> At least three additional States that have recognized the war crime status of the practice in their domestic codes are party to neither the Protocols nor the Rome Statute.<sup>123</sup> Each lends additional support to the principle that starvation as a method of warfare is both illegal as a matter of customary IHL and a war crime for which individuals may be held accountable under international law.

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117. Commission on Human Rights in South Sudan, *supra* note 116, ¶¶ 43, 148(e). The Court is provided for in the Revitalised Agreement for the Resolution of Conflict in South Sudan, Sept. 12, 2018, <https://www.peaceagreements.org/viewmasterdocument/2112>.

118. The two exceptions typically invoked here are Public Prosecutor v. M.P. et al. and Special Prosecutor v. Col. Mengistu Hailamariam et al. Public Prosecutor v. M.P. et al., Case No. K. 74/96, Verdict (District Ct. Zadar, Croatia Apr. 24, 1997), <http://www.internationalcrimesdatabase.org/Case/1053>; Special Prosecutor v. Col. Mengistu Hailamariam et al., Criminal File No. 1/87, Judgment (Ethiopian Federal High Court Dec. 12, 2006).

119. ICC Statute, *supra* note 111, arts. 8(2)(b), 8(2)(e) (emphasis added).

120. Prosecutor v. Tadić; Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić* Interlocutory Appeal]; Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 755.

121. Agence France-Presse, *Burundi Becomes First Nation to Leave International Criminal Court*, GUARDIAN, (Oct. 27, 2017), <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>; *Duterte’s Statement on International Criminal Court Withdrawal*, RAPPLER.COM (Mar. 14, 2018), <https://www.rappler.com/nation/198171-full-text-philippines-rodriigo-duterte-statement-international-criminal-court-withdrawal>.

122. Andorra, Kiribati, and the Marshall Islands.

123. Azerbaijan, Iran, and Kosovo.

### III. THE *SAN REMO MANUAL* AND ITS HUMANITARIAN VULNERABILITIES

The core form of comprehensive encirclement deprivation in naval warfare is the blockade. It is unsurprising, then, that the *San Remo Manual* addresses the issues of starvation and humanitarian access in its blockade law framework. More surprising is the exclusivity of that incorporation. Whereas the *Manual on International Law Applicable to Air and Missile Warfare* includes both generally applicable provisions on starvation and humanitarian access and specific starvation rules within the framework governing air blockades,<sup>124</sup> the *San Remo Manual* does not address the issues of starvation or humanitarian access outside of the blockade context.<sup>125</sup> This is a significant omission. Severe deprivations can be inflicted on the civilian population via forms of naval warfare (and even naval encirclement) that do not qualify as blockades in the technical sense.<sup>126</sup> Indeed, questions have been raised about whether the law of blockade applies to the two most heavily scrutinized naval encirclement and deprivation operations in recent years—Israel on Gaza and the Saudi- and Emirati-led coalition on Yemen.<sup>127</sup> Whatever one makes of the status of those specific actions, it is remarkable both that the *Manual* is silent on the issue of starvation via naval methods other than blockade and that there is no explanation for that silence. The issue is particularly pertinent in NIACs, given that, on the dominant view, “blockade is a method of warfare recognized to apply in international armed conflicts only.”<sup>128</sup> But put that issue to one side. The deeper point of concern is that the San Remo blockade regime itself has significant humanitarian infirmities.

Having affirmed and clarified the customary status of the longstanding London Declaration rules on efficacy, publicity, specificity, universality, and

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124. The *HPCR Manual* more or less replicates the *San Remo Manual* on the law of blockade (with the small deviation noted below). *HPCR MANUAL*, *supra* note 11, rr. 157–59. However, it also provides general starvation rules. *Id.* rr. 97, 100–4.

125. Apart from the provisions on blockade, the only other rules of the *San Remo Manual* that are somewhat relevant are those protecting vessels engaged in humanitarian relief or carrying supplies to the survival of the civilian population from attack or capture. *SRM*, *supra* note 10, rr. 47, 136, 150.

126. Heintschel von Heinegg, *Blockade*, *supra* note 90, ¶ 57; Wolff Heintschel von Heinegg, *Blockades and Interdictions*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 925, 927 (Marc Weller ed. 2015).

127. *See infra* note 386.

128. Heintschel von Heinegg, *Blockades and Interdictions*, *supra* note 126, ¶ 25. *Cf. infra* notes 375–376, 386–387 and accompanying text.

respect for neutral States,<sup>129</sup> the *Manual's* key modernizing step was to introduce constraints relating to starvation and the deprivation of essential items into both the test for the legality of imposing a blockade (in paragraph 102) and the rules for managing a blockade once imposed (in paragraphs 103–4). These provisions represent the drafters' effort to incorporate the developments discussed in the previous Part. Indeed, the San Remo Explanation describes these rules as “affected by” and “drawn from” the Protocol I rules banning starvation and governing humanitarian access.<sup>130</sup>

### A. Prohibited Blockades

The *Manual* identifies two kinds of prohibited blockade. Pursuant to paragraph 102(a), it is illegal to declare or establish a blockade that “has the sole purpose of starving the civilian population or denying it other objects essential for its survival.”<sup>131</sup> Irrespective of the operation's purpose, paragraph 102(b) prohibits establishing or declaring a blockade in a context in which “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.”<sup>132</sup> These rules have been cited heavily in analyses of Israel's blockade of Gaza.<sup>133</sup> They are replicated with a small (though not insignificant)

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129. Namely: efficacy, declaration and notification, specification of temporal and geographic scope (as well as the time for neutral States' vessels to leave), non-restriction of access to neutral States' ports or coasts, impartiality with respect to vessels of all States, and proper declaration, notification, and specification of cessation, temporary lifting, re-establishment, extension, or other alteration. SRM, *supra* note 10, ¶¶ 93–101.

130. SRM, *supra* note 10, ¶¶ 102.1, 103.1.

131. *Id.* ¶ 102(a).

132. *Id.* ¶ 102(b).

133. Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, ¶ 50, U.N. Doc. A/HRC/15/21 (Sept. 27, 2010), [http://www2.ohchr.org/english/bodies/hr\\_council/docs/15session/A.HRC.15.21\\_en.pdf](http://www2.ohchr.org/english/bodies/hr_council/docs/15session/A.HRC.15.21_en.pdf) [hereinafter International Fact-Finding Mission]; Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, ¶ 157 (Sept. 2011), [https://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_2235.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2235.pdf) [hereinafter Palmer Report]; 1 JACOB TURKEL ET AL., THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, ¶ 61 (2011), [https://www.gov.il/BlobFolder/generalpage/downloads\\_eng1/en/ENG\\_turkel\\_eng\\_a.pdf](https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf) [hereinafter TURKEL COMMISSION REPORT].

change in the HPCR *Manual* on air and missile warfare.<sup>134</sup> They are referenced frequently in scholarly work and military manuals.<sup>135</sup> And yet, the constraints they impose are anemic.

In prohibiting only blockades with the *sole* purpose of starving the civilian population or depriving it of objects indispensable for its survival, subparagraph 102(a) sets the subjective threshold for State breach higher even than that required to establish direct individual criminal responsibility for genocide. For the latter, it is sufficient to show that the special genocidal intent (acting with a view to destroying a protected group in whole or in part) was *one* of the purposes driving an individual's wrongful conduct.<sup>136</sup> For the former, the starvation of the civilian population must be the *sole* purpose of the State action; even a blockade with the clear primary purpose of starving or depriving civilians of essentials would avoid violating 102(a), as long as at least one other secondary purpose could be established.<sup>137</sup> Thus, for example, even if one were to hold that the blockade of Yemen sought at various points to starve the civilian population as a method of warfare,<sup>138</sup> it would be enough to avoid violating 102(a) to show that the encirclement also sought to guarantee that supplies to enemy fighters were cut off completely or that enemy fighters were starved, or to divert the attention and resources of the blockaded adversary away from military projects.<sup>139</sup>

It is difficult to imagine a blockade that would fail the sole purpose test. It is even harder to imagine a blockade that could not be defended successfully against an allegation to that effect. Establishing a breach would require not just proving the existence of the wrongful purpose (itself a difficult task

134. HPCR MANUAL, *supra* note 11, r. 157. But note *infra* note 137.

135. Heintschel von Heinegg, *Blockade*, *supra* note 90, ¶ 51; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 70, r. 53.

136. Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Appeals Judgment, ¶ 53 (July 9, 2004) (establishing genocide requires only that “the proscribed acts were committed against the victims *because of* their membership in the protected group, but not *solely* because of such membership”).

137. Note the not insignificant shift in the HPCR *Manual*, which prohibits aerial blockades with the “sole *or primary* purpose” of starving civilians. HPCR MANUAL, *supra* note 11, r. 157(a) (emphasis added).

138. Along these lines, see Final Report of the Panel of Experts on Yemen, ¶ 190, U.N. Doc. S/2018/594 (Jan. 26, 2018) (“The blockade is essentially using the threat of starvation as a bargaining tool and an instrument of war.”).

139. *Cf.* Palmer Report, *supra* note 133, ¶ 77 (“it is evident that Israel had a military objective. The stated primary objective of the naval blockade was for security”). See also *id.* app. I, ¶¶ 33–34.

at the best of times),<sup>140</sup> but also proving the absence of any other purpose. Conversely, all that would be needed to defend against such a charge would be a plausible claim to at least one additional secondary purpose. The range of realistic scenarios in which such a legal defense would not be viable is sufficiently barren to render the rule in paragraph 102(a) a practical nullity.

Given that implication, the San Remo Explanation is strikingly laconic in accounting for the use of “sole” in 102(a). The Explanation simply indicates that the humanitarian protections provided in 102(b), 103, and 104 regulate blockades not driven by the sole purpose of starving civilians.<sup>141</sup> The mere fact of other rules, however, does not make sense of framing the primary prohibition so narrowly as to render it meaningless, particularly in the absence of any clear legal basis for that narrow framing.<sup>142</sup>

The consequence of recognizing paragraph 102(a) to be a practical nullity is that paragraph 102(b) becomes the *Manual's* only functional humanitarian prohibition on imposing a blockade. It prohibits blockades expected to cause damage to the civilian population that is excessive in relation to the concrete and direct military advantage anticipated. This draws directly on the language used to articulate the standard proportionality rule for attacks in Additional Protocol I.<sup>143</sup> Issues arise here concerning both the basis for this provision and its utility as a source of human protection.

Strikingly the Explanation says nothing about the basis for including a proportionality rule here, other than to note that it covers the gaps left by 102(a) regarding blockades that are not directed exclusively at starving the civilian population.<sup>144</sup> One explanation would be that the *Manual* considers the blockade to be a form of “attack,” such that *jus in bello* proportionality would apply as a matter of course.<sup>145</sup> Whether or not such an interpretation

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140. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Appeals Judgment, ¶ 40 (July 7, 2006).

141. SRM, *supra* note 10, ¶¶ 102.2–102.4.

142. Certainly, it is not derived from the rules on starvation in the Additional Protocols. *Cf. supra* note 64.

143. AP I, *supra* note 63, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).

144. SRM, *supra* note 10, ¶ 102.4.

145. On the notion that deprivation by encirclement (whether siege or blockade) may qualify as attacks, see Gloria Gaggioli, *Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?*, EJIL:TALK! (Jan. 30, 2019), <https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/>; Emanuela-Chiara Gillard, *Sieges, The Law Protecting Civilians* 8 (2019), <https://reader.chathamhouse.org/sieges-law-and-protecting-civil->

could be reconciled with the Protocol I definition of an “attack” as an “act[] of violence against the adversary,” such an approach would seem to raise issues of consistency internal to the *San Remo Manual* itself.<sup>146</sup> The *Manual* includes a general proportionality rule for attacks in paragraph 46(d), alongside several other rules for the protection of civilians in the course of attacks that are *not* replicated in the blockade provisions.<sup>147</sup> If the assumption underpinning the *Manual* is that blockades are attacks, this is a puzzling asymmetry.

Alternatively, one might reason that proportionality is a general principle of IHL applicable to all methods of warfare, whether or not they qualify as “attacks” in the technical sense.<sup>148</sup> If that is the *Manual*’s position, it is sufficiently important to warrant express articulation and justification. It would also raise questions regarding what distinguishes proportionality from other core targeting rules that might also be thought to be general principles of IHL, but which do not find direct articulation in the *Manual*’s blockade rules. The principle of distinction, for example, may have an even stronger claim to being a general principle of IHL than does proportionality, and yet it finds only partial incorporation in paragraph 102(a).<sup>149</sup> Whatever the explanation for the role of proportionality in 102(b), it is remarkable that the commentary declines to offer it. And yet, the uncertainty of its basis notwithstanding, it is also clear that the *Manual*’s invocation of proportionality has resonated in the interpretations and approaches of subsequent authorities.<sup>150</sup>

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ians (drawing on the standard articulated for cyber operations in the *Tallinn Manual*). TALLINN MANUAL 2.0, *supra* note 11, r. 92. Others have advocated a similarly broad understanding of “attack” in the contexts of cyber-warfare and cultural property protections. ICRC EXPERT MEETING, THE POTENTIAL HUMAN COST OF CYBER OPERATIONS, at 72–73 (Nov. 14–16, 2018), <https://www.icrc.org/en/download/file/97346/the-potential-human-cost-of-cyber-operations.pdf>; Eian Katz, Milena Sterio & Jonathan Worboys, “Attacks” Against Hospitals and Cultural Property: Broad in Time, Broad in Substance, ARTICLES OF WAR (Nov. 17, 2020), <https://lieber.westpoint.edu/attacks-against-hospitals-cultural-property-broad/>.

146. AP I, *supra* note 63, art. 49(1).

147. SRM, *supra* note 10, ¶ 46(d). See *infra* notes 152–154 and accompanying text.

148. Jan Kleffner, *Military Collaterals and Ius in Bello Proportionality*, 48 ISRAEL YEARBOOK ON HUMAN RIGHTS 43 (2018).

149. See, e.g., YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 12 (3d ed. 2016).

150. See, e.g., TURKEL COMMISSION REPORT, *supra* note 133, ¶ 88; Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, at 2, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006); 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 89, r. 53; U.S. DOD LAW OF WAR MANUAL, *supra* note 62, §§ 13.10.2.5, 5.20.2, 17.9.2.1.



Justification for its inclusion aside, the key substantive question regarding 102(b) is whether the proportionality principle introduces practically significant humanitarian limits into the law of blockade. There are three reasons to be skeptical of the presumption that it does. First, even in the contexts most hospitable to it, proportionality analysis suffers from systematic deficiencies relating to uncertainty, ambiguity, and subjectivity. Second, the parallel rules that mitigate those deficiencies in the targeting context are not incorporated into the San Remo framework for blockades. Third, the deficiencies of the proportionality rule in targeting are amplified when transposed to blockades, due to the scope and duration of the latter. Consider these in turn.

IHL proportionality is famously complicated to apply, even in standard targeting cases.<sup>151</sup> Challenges of *ex ante* measurement in contexts of uncertainty are layered onto the difficulty of aggregating across forms of civilian loss or military advantage, and debates about who and what counts and on what time horizon. More fundamentally, even when there is agreement about what counts in the calculation of civilian loss expected and military advantage anticipated, the process of evaluating those qualitatively different values in relation to one another is hamstrung by the lack of a universally accepted exchange rate or other basis for comparison.

Some of these complications are mitigated in the targeting context. Proportionality calculations are ordinarily part of an interdependent framework of targeting restrictions, including the rules of distinction, discrimination, and precautions. In a standard attack, the question of whether civilian loss is excessive in relation to military advantage arises only if the civilians were not the target, the attack was targeted exclusively against a discrete military objective, and all feasible precautions were taken to verify the relevant information and to ensure that the collateral civilian loss was avoided, or at least minimized. Put another way, proportionality ordinarily comes at the end of a decision tree that has multiple prior junctures at which civilian-protecting rules may preclude the attack irrespective of how the military advantage anticipated compares to the civilian loss expected.

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151. See, e.g., Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 48–50, 39 INTERNATIONAL LEGAL MATERIALS 1257 (2000); Janina Dill, *Assessing Proportionality*, INTERCROSS (Oct. 11, 2016), <https://intercrossblog.icrc.org/blog/r19aesa7v1kylcc5a4hbcwvfx8imus>.

The *San Remo Manual*, however, does not appear to extend that broader framework to blockades. It includes distinction, discrimination, proportionality, and precautions in its basic rules on the conduct of hostilities.<sup>152</sup> However, whereas proportionality is replicated in the specific regime for blockades, the other restrictions are not, except in the specific and limited forms of paragraphs 103 and 104 (discussed below), relating to certain aspects of minimizing civilian damage, and paragraph 102(a), with its extremely narrow prohibition on blockades implemented with the *sole* purpose of starving the civilian population. Interpreted in light of the principle *expressio unius est exclusio alterius*, the San Remo position appears to be that blockades are not restricted by the general rules of distinction, discrimination, or general precautions.<sup>153</sup> If that reading of the *Manual* is incorrect, the application of those principles to blockades should be clarified in the revision; the implications would be profound.<sup>154</sup>

Assuming that the *Manual's* rules on blockades are indeed exclusive, the combination of the nullity of 102(a) and the lack of a broader framework of complementary protections places enormous functional pressure on the capacity of proportionality to operate as an isolated and yet effective humanitarian constraint. The difficulty, however, is that proportionality's ordinary weaknesses in that regard are exacerbated by the nature of blockades. Targeting operations tend to be short in duration and scope, allowing for a relatively clear sense of the likely civilian loss and likely military advantage, with a contained degree of uncertainty in either direction. Such operations also occur sufficiently frequently to enable the iterated development of rough norms regarding what constitutes excessive loss in relation to what kind of anticipated advantage. Blockades do not fit that model. They are relatively rare and they can affect the entire population of the blockaded country or area for months or years. Moreover, their effects intersect with numerous other factors that will only become clear over time, including the policies of the encircled authority, environmental and climatic events, and population

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152. SRM, *supra* note 10, ¶¶ 38–46.

153. *Id.* ¶ 102.4 indicates that paragraph 102(b) covers proportionality and precautions, but this appears to conflate the rules, as 102(b) includes none of the elements of IHL precautions.

154. Supporting such a reading of the applicability of some of the general principles, one might point (for example) to paragraph 42, which forbids the employment of any “methods or means of warfare” which are indiscriminate. Blockades are clearly a method of warfare. They are also, however, almost inevitably indiscriminate.

movements.<sup>155</sup> All of this makes it far harder to evaluate with any precision the civilian loss expected or the military advantage anticipated from an encirclement method.

Even assuming that this epistemic challenge were overcome in a given case, the extraordinary scale of both the civilian loss expected in a blockade (including, potentially, mass starvation) and the military advantage anticipated from it (including, potentially, total victory in the war) would bear no relation to the scale of those factors in ordinary targeting operations, where iterated practice has arguably established some rough sense of how to appraise these values in relation to one another.<sup>156</sup> This is not to deny that various authorities have made, and will continue to make, assertions regarding whether a particular blockade is or is not proportionate in the civilian harm it inflicts. It is instead to call into question the degree to which such assertions are likely to garner the kind of consensus that would help to settle disputes.<sup>157</sup>

There is also a deeper normative question arising from the extended duration of blockades. How, if at all, should losses and damage already inflicted be incorporated into a proportionality assessment regarding whether to continue a blockade? The question becomes particularly pointed when that continuation would mean extending the encirclement beyond the point at which

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155. In the context of the Gaza blockade, disagreements have arisen even with respect to the question of whether to consider the blockade in isolation from or together with the Israeli closure of land access to the Gaza Strip. Russell Buchan, *The Palmer Report and the Legality of Israel's Naval Blockade of Gaza*, 61 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 264, 270–71 (2012); Magne Frostad, *Naval Blockade*, 9 ARCTIC REVIEW ON LAW AND POLITICS 195, 210 (2018); Palmer Report, *supra* note 133, ¶¶ 78–79.

156. For a relatively sanguine view of the determinacy of proportionality in ordinary operations, see EMANUELA-CHIARA GILLARD, PROPORTIONALITY IN THE CONDUCT OF HOSTILITIES: THE INCIDENTAL HARM SIDE OF THE ASSESSMENT ¶ 81 (Dec. 2018). Providing reasons for skepticism that proportionality can provide a clear restraint in even traditional targeting contexts, see Janina Dill, *Assessing Proportionality: An Unreasonable Demand on the Reasonable Commander?*, INTERCROSS (Oct. 11, 2016), <https://intercrossblog.icrc.org/blog/r19aesa7v1kylcc5a4hbcwvfx8imus>.

157. The issue of proportionality has come up in the context of the Gaza blockade, with divergent results. For finding the blockade compliant with proportionality, see TURKEL COMMISSION REPORT, *supra* note 133, ¶¶ 88–96; Palmer Report, *supra* note 133, ¶¶ 78–81. For finding the blockade to violate proportionality, see International Fact-Finding Mission, *supra* note 133, ¶¶ 51–54; TURKISH NATIONAL COMMISSION OF INQUIRY, REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010, at 68–74 (2011), <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf>.

success was anticipated in the original assessment.<sup>158</sup> One approach would consider past civilian casualties to be a form of sunk cost, such that a proportionality assessment regarding whether to continue would look only at future projected damage and advantage—what Seth Lazar calls the “prospective view.”<sup>159</sup> Another would deem the action (such as a blockade) disproportionate once it exceeds the civilian damage deemed disproportionate at the start of the operation, irrespective of whether continuing now would promise an advantage that far outweighs the civilian loss that is likely to be incurred going forward—what Lazar calls the “quota view.”<sup>160</sup> Lazar’s preferred third alternative—the “discount view”—would discount progressively (and asymptotically towards a lower limit) the weight of the legitimate reasons for continuing with the operation as the costs incurred rack up over time.<sup>161</sup> Fundamentally, it is simply not clear as a matter of law how the proportionality of long-term and uncertain operations of this kind should be assessed. Although this complication can come up in the context of proportionality in targeting, it features systematically in *jus ad bellum* proportionality and in what Noam Lubell and Amichai Cohen have identified recently as “strategic proportionality” issues in the *jus in bello*, including those arising in a blockade.<sup>162</sup> The lack of clarity on how to understand proportionality here adds further to the layers of ambiguity discussed above.

Ultimately, although there is procedural value in having decision makers confront the tradeoff between civilian loss and military advantage, the range of internal, structural, and contextual infirmities in the 102(b) rule are such that it is unlikely to do much to constrain the imposition of severe starvation conditions in a siege or blockade. Certainly, the heightened indeterminacy of the proportionality test in such situations weakens the capacity of the test to provide the focal point for mobilizing the political will necessary to confront a bad faith actor. As Wolff Heintschel von Heinegg puts it, proportionality in this context “will only in exceptional cases result in a generally accepted legal evaluation.”<sup>163</sup> The force of humanitarian protection in the San Remo framework thus shifts from the rules defining when it is lawful to impose a blockade to those defining the lawful management of a blockade.

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158. TURKEL COMMISSION REPORT, *supra* note 133, ¶ 96.

159. Seth Lazar, *Moral Sunk Costs*, 68 PHILOSOPHICAL QUARTERLY 844 (2018).

160. *Id.*

161. *Id.* at 848.

162. Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INTERNATIONAL LAW STUDIES 159 (2020).

163. Heintschel von Heinegg, *Blockades and Interdiction*, *supra* note 126, at 933.

*B. Humanitarian Constraints on the Management of Blockades*

In the latter category, paragraph 103 of the *Manual* provides that if the civilian population of the blockaded territory is inadequately supplied with food and other essential objects, the blockading party “must provide for free passage of such foodstuffs and other essential supplies,”<sup>164</sup> subject to the right to prescribe technical arrangements, including search, and to require that the distribution will occur under the supervision of a Protecting Power or an impartial humanitarian organization. Paragraph 104 provides that the blockading party “shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces,”<sup>165</sup> subject to its right to prescribe technical arrangements, including search.

These rules avoid both the eviscerating narrowness of paragraph 102(a) and the multilayered ambiguity of paragraph 102(b). Moreover, in contrast to some interpretations of Article 70 of Additional Protocol I, they deny the blockading party any discretion to refuse access when the encircled population is inadequately supplied.<sup>166</sup> Indeed, the authors of the Explanation extol paragraph 103 as a humanitarian advance on the treaty rule for precisely that reason.<sup>167</sup> One might even think that the requirements of paragraphs 103–4 of the *Manual* would preclude the infliction of starvation as the effect of a blockade, thereby safeguarding the civilian population from the permissiveness of paragraph 102.<sup>168</sup>

However, the shift from rules prohibiting the imposition or continuation of a blockade to rules regulating its management is significant. Even a blockade with humanitarian exceptions can cause mass starvation. Blockades deter market supply. Technical arrangements such as inspections increase significantly the price of those goods that make it through, just as the broader economic consequences of being cut off from the outside send entire populations into extreme poverty. Humanitarian relief is rarely sufficient to fill the gap. It is for these reasons that the Saudi- and Emirati-led blockade of

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164. SRM, *supra* note 10, ¶ 103.

165. SRM, *supra* note 10, ¶ 104.

166. *See infra* notes 205–211 and accompanying text.

167. SRM, *supra* note 10, ¶¶ 103.1–103.2.

168. For a related interpretation of Additional Protocol I, see, e.g., Gillard, *supra* note 145, at 11 (“Whatever position is adopted with regard to the scope of the prohibition of starvation . . . [i]f respected, [the rules on humanitarian access] will prevent starvation from occurring.”).

Yemen has brought the civilian population to the brink of famine, despite allowing the passage of food.<sup>169</sup>

Such mass starvation does not occur by surprise. It is a process that becomes increasingly obvious over time.<sup>170</sup> As Conley and de Waal put it, “No modern famine has unfolded in silence.”<sup>171</sup> Whatever the uncertainty regarding consequences at the beginning, at a certain point, continuing to impose a blockade entails inflicting starvation with near certainty. And yet, as long as there is a process for allowing essential objects through, this result could be accepted and even intended as a core purpose without falling afoul of the San Remo framework.

Further infirmities arise due to ambiguities regarding the implications of the blockading party’s right to impose technical arrangements when allowing the passage of relief supplies. Although similar issues arise in Articles 70 and 71 of Additional Protocol I, the problems may be particularly acute in the San Remo context, due to the aforementioned weakness of the prohibitions in paragraph 102.<sup>172</sup> Two ambiguities stand out. First, neither paragraphs 103 and 104 nor the attached explanations offer any guidance on how the blockading party may react if there are reasons to believe that goods permitted through would be used by hostile armed forces.<sup>173</sup> Second, there is little guidance regarding the point at which technical arrangements that impose severe delays or costs on those seeking to deliver the relief would become illegal.<sup>174</sup>

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169. Group of Experts on Yemen, *supra* note 5, ¶¶ 768–74, 795; Ferguson, *supra* note 5; Alex De Waal, *Mass Starvation Is a Crime—It’s Time We Treated It That Way*, BOSTON REVIEW (Jan. 14, 2019), <http://bostonreview.net/global-justice/alex-de-waal-mass-starvation-crime%E2%80%94its-time-we-treated-it-way>. Similar patterns were observed regarding the blockade of Iraq and Kuwait following the former’s invasion of the latter. Provost, *supra* note 57, at 586–88. The same issues can arise in siege warfare. Griffin Paul Jackson, *Starvation is a Weapon*, SLATE (Sept. 12, 2019), <https://slate.com/news-and-politics/2019/09/starvation-war-crime-syria-yemen-icc.html>. See also TURKISH NATIONAL COMMISSION OF INQUIRY, *supra* note 157, at 71.

170. On Yemen, see Fink, *supra* note 3, at 294.

171. Conley & de Waal, *supra* note 73, at 702.

172. AP I, *supra* note 63, arts. 70(3), 71(3).

173. The expectation that food and other essentials will be used by both combatants and civilians is likely to be well founded in most blockade or siege scenarios. KJ Riordan, *Sniping and Starvation: The Law of Armed Conflict and the Lessons of the Siege of Sarajevo*, 41 VICTORIA UNIVERSITY WELLINGTON LAW REVIEW 149, 171 (2010).

174. Discussing this issue in the broader IHL context, see Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR COLLEGE REVIEW 77, 86 (2000); Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 774.

On the first point (allowing or denying access), one reading would be that the blockading party “must” and “shall” allow access whenever the trigger conditions apply (inadequate supply to civilians, or to civilians and persons *hors de combat*, respectively), regardless of the consequences of allowing that supply.<sup>175</sup> After all, there is no explicit discretion to deny access in such circumstances. Another, however, might deem the blockading party’s right to impose technical arrangements and require supervision to be manifestations of a deeper underlying right to ensure that essentials are allowed through only if strictly humanitarian and destined exclusively for protected persons.<sup>176</sup> From that perspective, the fact that some of the goods will reach combatants would be enough to deny access unless the consequences of that denial would be disproportionate.<sup>177</sup> Proportionality may also seem to be a plausible rule for determining when the impact of technical arrangements would be too great to warrant their imposition. On either front, however, this would simply shift the work back to paragraph 102(b), with all of the difficulties discussed above.

In sum, despite introducing several layers of humanitarian constraint into the law of blockade, the San Remo framework remains surprisingly permissive, with potentially devastating consequences for the civilian population in the blockaded territory. It allows purposive mass starvation. The proportionality restraint is isolated from a broader framework of bright-line rules and

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175. TURKEL COMMISSION REPORT, *supra* note 133, ¶ 77 (defining paragraph 103 as “identical” to the absolute obligation in Article 59 of the Fourth Geneva Convention).

176. Heintschel von Heinegg, *Blockade*, *supra* note 90, ¶ 51 (“[T]he obligation to provide for free passage of relief consignments is not absolute in character because relief consignments could be abused for military or other harmful purposes.”); Palmer Report, *supra* note 133, ¶ 80 (“[I]t does not follow from this obligation that the naval blockade is per se unlawful or that Israel as the blockading power is required to simply let vessels carrying aid through the blockade. On the contrary, humanitarian missions must respect the security arrangements put in place by Israel. They must seek prior approval from Israel and make the necessary arrangements with it. This includes meeting certain conditions such as permitting Israel to search the humanitarian vessels in question.”).

177. Michael Schmitt, Kieran Tinkler & Durward Johnson, *The UN Yemen Report and Siege Warfare*, JUST SECURITY (Sept. 12, 2019), <https://www.justsecurity.org/66137/the-un-yemen-report-and-siege-warfare/>. Relatedly, see Riordan, *supra* note 173, at 176–77 (“Unless there are serious reasons to believe that they will be misused, the commander must allow the free passage of all consignments of humanitarian aid and other essentials.”); Ruth Abril Stoffels, *Legal Regulation of Humanitarian Assistance in Armed Conflicts: Achievements and Gaps*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 515, 542 (2004) (if an “excessively large portion of aid” is diverted to the opposition, then access could be denied”). See also U.S. DOD LAW OF WAR MANUAL, *supra* note 62, § 5.19.2.

applied in a context where its weaknesses as a restriction are maximally exposed. And the conduct rules in paragraphs 103 and 104 are unlikely to remedy these defects, particularly (though not exclusively) in contexts in which it cannot be guaranteed that essential goods allowed through would be used exclusively for the benefit of civilians.

#### IV. THE ARGUMENT FOR A PERMISSIVE LAW OF BLOCKADE

Given these significant humanitarian vulnerabilities, one might question whether the framework laid out in the *San Remo Manual* is compatible with the move towards a firm prohibition of starvation as a method of warfare. Part V makes the case that it falls short of the proper understanding of that prohibition. Some, however, have taken the opposite view, arguing that restrictions such as those provided in the San Remo framework are, if anything, more demanding than existing IHL, including that codified in the Additional Protocols. On this view, in the context of encirclement, and particularly blockade, it remains lawful to starve the civilian population, including by blocking humanitarian aid.

##### A. *Special Permissions at Sea and the Law of Blockade*

One version of this argument is specific to blockades. It rests on two core claims. First, even if the provisions of Additional Protocol I (and any customary analogues) preclude encirclement starvation in land sieges, those rules are inapplicable to naval warfare, including blockades. Second, the law of naval warfare has long allowed for starvation in the specific context of naval blockade and the San Remo drafters' efforts to progressively develop the law through paragraphs 102–4 of the *Manual* have not been successful in reshaping State practice and *opinio juris*.

This blockade-specific argument places great weight on a combination of the *Commentary* to Protocol I and a particular reading of Article 49(3) of the Protocol, rooted in its relationship to the goal of some of the drafting States, including France and the United Kingdom, to exclude blockades from the rules on starvation and humanitarian access.<sup>178</sup> Article 49(3) states,

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178. Drew, *supra* note 13, at 314, 316; DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 149, at 259. The UK's *Manual of the Law of Armed Conflict* states both that there remains "no opportunity for a besieging force to contribute in any way to civilian starvation" and that the rules on humanitarian access do not affect the existing rules of warfare regarding



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.<sup>179</sup>

A committee rapporteur discussing what would become Article 54 during drafting stated, “The fact that the paragraph [in Article 54] does not change the law of naval blockade is made clear by Article [49].”<sup>180</sup> The official *Commentary* to Protocol I states, without further explanation, that this observation “appears to be correct.”<sup>181</sup>

On this view, the traditional law of blockade endured untouched by the framework enshrined in Article 54 of Protocol I.<sup>182</sup> As such, in their assessment of the law of blockade as “one of the few aspects of the law of naval warfare which has been affected by the adoption of Additional Protocol I,” the San Remo drafters would appear to have acted in error, thereby undermining the authority of the restrictions on blockades asserted in paragraph 102 of the *Manual*.<sup>183</sup>

The reliance of this argument on the final clause of Article 49(3) is significant in two respects. First, as ought to be apparent from a plain reading of the text, it is a highly contestable interpretation. Indeed, as discussed in Part V, it is ultimately untenable. Second, even assuming the British and French reading of Article 49(3) were correct, it would render inapplicable to blockades only those provisions of Additional Protocol I in the same section of the treaty as Article 49. Article 54 falls into that category, but Article 70 does not. Thus, despite having accepted that Article 54 does not apply to blockades, the official *Commentary* provides that

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naval blockade, submarine warfare or mine warfare. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 5.34.2, 9.12.4 (2004) [hereinafter UK MANUAL].

179. AP I, *supra* 63, art. 49(3).

180. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2092.

181. *Id.* See also *id.* ¶ 2114.

182. Drew, *supra* note 13, at 311–12; ERIC TALBOT JENSEN, GEOFFREY S. CORN, M. CHRISTOPHER JENKS, RICHARD JACKSON & VICTOR HANSEN, THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 446 (2014). See generally *supra* Part II.

183. SRM, *supra* note 10, ¶ 102.19. Dinstein describes the *Manual*'s framework as “a compromise of sorts” resulting from “intense discussion.” DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 149, at 259.

If the effects of the blockade lead to [starvation conditions], reference should be made to Article 70 of the Protocol (Relief actions), which provides that relief actions should be undertaken when the civilian population is not adequately provided with food and medical supplies, clothing, bedding, means of shelter and other supplies essential to its survival.<sup>184</sup>

The significance of that caveat depends on whether one accepts a narrow or broad reading of Article 70. France and the United Kingdom issued reservations to Article 70 specifying that, for them, the provision does not apply to naval blockade, submarine warfare, or mine warfare.<sup>185</sup>

### B. Encirclement Starvation and a Permissive Reading of Additional Protocol I

The more comprehensive argument for the permissibility of encirclement starvation does not rely on a blockade carve-out. Those taking this view note that starvation sieges and blockades have long been part of the practice of war,<sup>186</sup> reason that “a clear intention would need to be expressed in a treaty to abolish such a well-established practice,”<sup>187</sup> and contend that no such clarity exists with respect to the rules in the Additional Protocols.<sup>188</sup> The argument has four steps.

First, it is claimed that for the starvation of the civilian population to be a “method” of warfare (as prohibited in paragraph 1 of Article 54), starvation

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184. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2095.

185. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Reservation/ Declaration*, ICRC, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470) (United Kingdom ¶ (p); France, ¶ 17) (last visited Jan. 25, 2021).

186. *See supra* Part II. Even critical analyses of encirclement starvation often begin with the premise that “Blockades, sieges and siege-like warfare are not per se prohibited by international humanitarian law . . .” Group of Experts on Yemen, *supra* note 5, ¶ 357.

187. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 140–41 (3d ed. 2012).

188. *See, e.g.*, Watts, *supra* note 13, at 18–19, 26–33; Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities and Targets*, 39 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 353, 410 (1999).

must be inflicted purposefully on the civilian population with a view to advancing the war effort.<sup>189</sup> Civilian starvation arising as the collateral consequence of an otherwise lawful action would not meet that threshold.<sup>190</sup> This position is not quite the same as that of paragraph 102(a) of the *San Remo Manual* in that it would seem to accept that the purposeful starvation of civilians is prohibited, even if it is not the only purpose. However, when interpreted narrowly and offered without the proportionality or humanitarian access requirements of the *San Remo Manual* (or with significantly diluted versions thereof), the overall effect may still be an even weaker regulatory system than is provided by the latter.

Significant authorities endorse the notion that the ban on starvation includes some form of purpose element. In its affirmation of the customary status of the prohibition, the United States' DoD *Law of War Manual* states that the ban applies only to operations the purpose of which is to starve the civilian population.<sup>191</sup> Purposive language also arises in the military manuals of other States, including some that are party to the First Protocol, as well as in the HPCR *Manual on Air and Missile Warfare*.<sup>192</sup> Perhaps more surprisingly,

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189. Drew, *supra* note 13, at 314; Watts, *supra* note 13, at 18–19. One might point here to the ICRC *Commentary* to Additional Protocol I, which reasons “To use [starvation] 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.” COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2089. See also *id.* ¶ 4791.

190. The UK *Manual* states, “The law is not violated if military operations are not intended to cause starvation but have that incidental effect, for example, by cutting off enemy supply lines which are also used for the transportation of food” UK MANUAL, *supra* note 178, ¶ 5.27.1. See also AUSTRALIAN DEFENCE HEADQUARTERS, ADDP 06.4, LAW OF ARMED CONFLICT ¶ 5.37 (2006), <https://www.defence.gov.au/adfwc/documents/doc-trinelibrary/addp/addp06.4-lawofarmedconflict.pdf> [hereinafter ADDP 06.4].

191. U.S. DOD LAW OF WAR MANUAL, *supra* note 62, § 5.20.1 (recognizing starvation to be banned when “specifically directed against the enemy civilian population. For example, it would be prohibited to destroy food or water supplies for the purpose of denying sustenance to the civilian population”); § 17.9.2.1 (“It is only actions that are for the purpose of starving civilians as a method of combat that are prohibited under this rule”). Much like the *San Remo Manual*, the DoD *Manual* also incorporates a proportionality requirement into its understanding of the prohibition of starvation. *Id.* § 5.20.2.

192. See, e.g., ADDP 06.4, *supra* note 190, ¶ 5.37 (but note *id.* ¶¶ 7.12, 9.32); UK MANUAL, *supra* note 178, ¶¶ 5.27.2, 5.34.3; HPCR MANUAL, *supra* note 11, r. 97, cmt. ¶ 2, r. 157(a). See also NEW ZEALAND DEFENCE FORCE, DM 112, INTERIM LAW OF ARMED CONFLICT MANUAL, §§ 504(2) [including n. 9], 613(2) (1992) [hereinafter NEW ZEALAND INTERIM LOAC MANUAL]. Note, however, that the emphasis on specific purpose in the 1992 Interim Manual is not replicated in the 2019 *Manual*. 4 NEW ZEALAND DEFENCE FORCE,

the ICRC in its study of customary IHL specifies that the “prohibition of starvation as a method of warfare does not prohibit siege warfare as long as the purpose is to achieve a military objective and not to starve a civilian population.”<sup>193</sup> This language is often drawn upon by expert bodies.<sup>194</sup>

On the most limited reading of the starvation ban along these lines, it is permissible to starve combatants through starving the entire population, civilian and otherwise, of the area within which they are encircled—or, in terms used to describe the starvation tactics of the Derg in the 1980s in Ethiopia, to “drain[] the sea to catch the fish.”<sup>195</sup> Sean Watts defends this position on the grounds that, given the impossibility of ensuring discrimination in the ultimate delivery of relief, any alternative interpretation would compel “besieging forces to alleviate starvation of . . . trapped enemy forces.”<sup>196</sup> This highly restricted understanding of purpose starts to resemble that of 102(a) in the San Remo framework.

The second step of the argument for the permissibility of encirclement starvation asserts that paragraphs 2 and 3 of Article 54 of Protocol I are separate and distinct from the general prohibition on starvation as a method of warfare in paragraph 1 of the provision.<sup>197</sup> Recall that paragraph 2 prohibits certain forms of depriving the civilian population of objects essential to their survival for the purpose of denying sustenance to the adverse party, and paragraph 3 prohibits certain kinds of operations that do not have civilian starvation as their purpose but do cause civilian starvation or the forced movement of the civilian population. Asserting that these provisions are distinct from the general prohibition on starvation as a method of warfare allows for a reading according to which their broader prohibition of incidental

DM (2 ed), *MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT* §§ 8.8.25–8.8.26(a, c) (2019) [hereinafter *NEW ZEALAND LOAC MANUAL*]. The one case in which the *Manual* does invoke specific purpose is that of blockade, where the relevant provision replicates the *San Remo Manual*, including on the issue of proportionality. *Id.* §§ 8.8.26(b), 10.5.4.

193. 1 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 70, r. 53.

194. Group of Experts on Yemen, *supra* note 5, ¶¶ 357, 511. The Report is not entirely consistent on this point. *See, e.g., infra* note 311 and accompanying text.

195. Beth Van Schaack, *Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime*, JUST SECURITY (Feb. 4, 2016), <https://www.justsecurity.org/29157/siege-warfare-starvation-civilians-war-crime/> (Quoting a Canadian war crimes investigation team rapporteur on Sarajevo lamenting: “One is left with the unpalatable fact that, unless there is a neutral arbiter, the only way to starve out a besieged military force, a legitimate act of war, is over the starved bodies of the civilian population.”).

196. Watts, *supra* note 13, at 19.

197. Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 761–65. *But see* Akande’s and Gillard’s qualification of this in *infra* note 200.

starvation is not incompatible with a purposive interpretation of paragraph 1.<sup>198</sup> Alternatively, some have even challenged the natural reading of paragraph 3 (or its customary analogue), insisting that the ban on depriving civilians of objects indispensable to their survival should also be understood in purposive terms.<sup>199</sup>

Third, it is argued that paragraph 2 of Article 54 provides an exhaustive and narrowly defined list of the prohibited ways of depriving the civilian population of objects indispensable to the survival of its members.<sup>200</sup> Specifically, it prohibits attacking, destroying, removing, or rendering useless such objects; any other mode of depriving the civilian population of access to

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198. AFRICA WATCH, *EVIL DAYS: THIRTY YEARS OF WAR AND FAMINE IN ETHIOPIA* 141 (1991), cited in Marcus, *supra* note 2, at 257.

199. 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* § 8.3 (2017) (“The intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, *for the specific purpose* of denying the civilian population of their use, is prohibited.” (emphasis added)). See, e.g., provisions in the military manuals of Australia, Ecuador, and New Zealand, cited in 2 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 89, r. 54, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter17\\_rule54](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter17_rule54). It is worth noting, however, that these positions are complicated by some potentially confounding other provisions in the same law of war manuals. See, e.g., *NEW ZEALAND INTERIM LOAC MANUAL*, *supra* note 192, § 504(3); 613(3). Moreover, as noted above, this focus on the specific purpose of civilian starvation is dropped from the more recent *New Zealand Manual*, except for the case of blockades, on which the *New Zealand Manual* simply follows the *San Remo Manual*. *NEW ZEALAND LOAC MANUAL*, *supra* note 192, §§ 8.8.25-8.8.27. See also ADDP 06.4, *supra* note 190, ¶¶ 7.12, 9.32.

200. This distinction is raised even by some who do not support a broad permission to starve. Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 762–65. Importantly, despite having identified the distinction between Article 54(1) and 54(2)–(3), Akande and Gillard question the normative basis for this distinction and raise skepticism about whether “method of warfare” really implies purpose. *Id.* at 765. In line with the *San Remo Manual*, they also argue that proportionality provides a safeguard here (*id.*) and that humanitarian access rules have the practical implication “that measures that can be expected to lead to the starvation of civilians should not be imposed.” *Id.* at 768–69. They further indicate that the requirement to distinguish between combatants and civilians and not to engage in indiscriminate attacks raises problems for starvation methods that are indiscriminate, irrespective of purpose. *Id.* at 766. D’Alessandra and Gillett treat the case of an attack on indispensable objects differently from that of an encirclement, focusing more on purpose in the latter case. D’Alessandra & Gillett, *supra* note 68, at 827–29, 831–32. However, drawing on the ICRC *Commentary*, they appear ultimately to take the view that an encirclement that causes starvation would be prohibited, regardless of purpose. *Id.* at 832.

those objects remains permissible unless it falls afoul of the overarching prohibition in Article 54(1).<sup>201</sup> Encircling an area and denying the passage of essential goods to the starving civilian population would not be prohibited by paragraphs 2 and 3 because it involves blocking the delivery of objects indispensable to civilian survival, not attacking, destroying, removing, or rendering useless those objects.<sup>202</sup> Even the most flexible of the action terms in the provision (“rendering useless”) does not stretch easily to encompass siege or blockade tactics.<sup>203</sup>

Fourth, the argument for an expansive permission to starve by encirclement rejects the utility of humanitarian access provisions in resolving the infirmity of Article 54. Specifically, it is noted that Article 70 of Protocol I provides that impartial humanitarian action shall be undertaken to relieve inadequately supplied populations only “subject to the agreement of the Parties concerned.”<sup>204</sup> The Protocol, the argument goes, imposes no limit on concerned States’ discretion to withhold that consent.<sup>205</sup> Therefore, States may withhold consent in order to further their war aims through imposing a comprehensive starvation siege.<sup>206</sup> On this reading, the humanitarian access obligations provided in paragraphs 103–4 of the *San Remo Manual* go beyond the requirements of the Protocol or any reflection thereof in customary law.<sup>207</sup>

Defending this interpretation, Watts notes that Article 70 lacks language equivalent to that in Article 23 of Geneva Convention IV restricting the denial of relief to children, expectant mothers, and maternity cases to cases when there are “serious reasons for fearing” the consequences outlined in Part II (capacious as those are).<sup>208</sup> As such, he argues, “it appears States were only willing to abandon the GC IV limited scope of relief and protected persons [for coverage of all civilians and a wider range of relief] in exchange for discretion to permit or reject these broader relief actions during siege.”<sup>209</sup>

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201. Drew, *supra* note 13, at 314.

202. Rogers, *supra* note 187, at 140–41.

203. The ICRC *Commentary* states, “With regard to rendering such objects useless, this refers mainly to irrigation works and installations.” COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2100.

204. AP I, *supra* note 63, art. 70.

205. Drew, *supra* note 13, at 315; Watts, *supra* note 13, at 22–23.

206. Watts, *supra* note 13, at 4, 22–23.

207. The *San Remo Manual* drafters claim it moved the law forward from the Additional Protocol rules. See SRM, *supra* note 10, ¶¶ 103.1–103.2.

208. Watts, *supra* note 13, at 22.

209. *Id.*

Suggesting they agree that the Geneva Convention IV rule is not entirely subsumed by the Protocol I rule, several States that are party to Protocol I still incorporate the exceptions articulated in Article 23 of the Fourth Convention into their military manuals.<sup>210</sup> Sassòli and Bouvier describe the Article 70 consent clause as a “severe limitation” in the Additional Protocol’s protection of the civilian population’s right to humanitarian relief.<sup>211</sup>

### C. Precautions as Authorizations

A final argument would flip the duty to allow civilians to exit the besieged area from a cumulative constraint into a ground for reducing the protection for those who remain. This controversial line of reasoning can supplement either of the first two forms of argument outlined in this Part. Although most obviously relevant in land sieges, an argument along these lines could arise in the context of a naval blockade, and certainly in the context of a combined land and naval encirclement.

As noted above, the recent U.S. recognition of the duty to allow civilian exit roots that obligation in the general precautionary requirements of IHL.<sup>212</sup> This is not an uncommon line of reasoning,<sup>213</sup> although some also root the duty to allow egress in the obligation of parties to remove civilians and civilian objects from the vicinity of military objectives.<sup>214</sup>

In its ordinary application to attacks, the relevant precautions rule requires that belligerents take *all* feasible measures to minimize civilian loss.<sup>215</sup> Transposed to the encirclement context, that might be thought to underpin and entail *both* the duty codified in the *San Remo Manual* to allow essentials through when the besieged (and legally protected) population is deprived *and* a duty to allow fleeing civilians safe passage out of the besieged area, as well as any other measures that would limit civilian damage.<sup>216</sup>

210. UK MANUAL, *supra* note 178, ¶ 9.12.

211. MARCO SASSÒLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 182 (1999).

212. As noted above, the U.S. DoD *Law of War Manual* recognizes the besieging party’s obligation not to force fleeing civilians back into the besieged area, deriving this from the general requirement to take precautionary measures to minimize civilian loss. U.S. DOD LAW OF WAR MANUAL, *supra* note 62, § 5.19.4.1.

213. Gillard, *supra* note 145, at 12.

214. AP I, *supra* note 63, art. 58; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 70, r. 24; D’Alessandra & Gillett, *supra* note 68, at 831.

215. AP I, *supra* note 63, art. 57(2)(a)(ii).

216. SRM, *supra* note 10, ¶¶ 103–4.

Some, however, argue that a besieging party that allows protected persons safe passage out of the besieged area thereby provides the justificatory foundation for starving those that remain.<sup>217</sup> For example, in analyzing situations in which civilians remain in the encircled area (whether by their own accord or due to the requirements of the besieged party), the UK *Manual of the Law of Armed Conflict* states, “so long as the besieging commander left open his offer to allow civilians and the wounded and sick to leave the besieged area, he would be justified in preventing any supplies from reaching that area.”<sup>218</sup> Under this line of reasoning, what might have been thought to be a cumulative obligation (one that *adds* to duties of discrimination, non-starvation, allowing humanitarian access when there is an inadequate supply of essentials, and so on) instead becomes the key underpinning of an authorization to starve civilians—seemingly overriding those other IHL duties.

In the traditional defense of this position, Spaight contends that when the civilian population remains voluntarily, “[t]he solidarity between the troops and the inhabitants of a fortified town . . . may almost be said to deprive the latter, temporarily, of their non-combatant character.”<sup>219</sup> More recently, Dinstein asks, “if civilians in a besieged venue are offered a safe passage out of an encircled area but choose to stay in situ, what lawful claim do they have for special protection from the hardships of starvation?”<sup>220</sup> This may appear to bear some relation to a position advanced by some regarding the status of voluntary human shields, although, for reasons discussed below, the analogy is flawed in a number of ways.<sup>221</sup>

Others have argued that in the alternative case in which the encircled party forces civilians to remain, responsibility for the latter’s suffering and death would lie exclusively with that party, rather than with the encircling

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217. Rogers, *supra* note 187, at 140–41 (N. B. Rogers drafted the UK MANUAL cited in the next footnote); James Kraska, *Siege*, ¶ 21 (Dec. 2009), MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e407?rskey=fbUEBV&result=1&prd=MPIL>.

218. UK MANUAL, *supra* note 178, ¶ 5.34.3.

219. J. M. SPAIGHT, WAR RIGHTS ON LAND 164 (1911). *See also* General Orders No. 100, *supra* note 16, art. 156 (justifying inflicting the “burden of war . . . on the disloyal citizens”).

220. DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 149, at 255. Channeling arguments to this effect, see George Alfred Mudge, *Starvation as a Means of Warfare*, 4 INTERNATIONAL LAWYER 228, 236, 241 (1970).

221. *See infra* notes 339–353 and accompanying text.



party.<sup>222</sup> This argument relies either on the besieged party's broad duty to take "necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations," including by removing civilians from areas of danger and avoiding the co-location of civilians and military objectives, or on its narrower but stricter obligation not to use human shields.<sup>223</sup>

Along these lines, Watts argues that the besieged party's failure on such dimensions ought to "significantly alter[]" the evacuation and relief obligations of the besieging party.<sup>224</sup> In his view, "The fact that the besieged force, not the besieging force, exercises immediate and direct control over the besieged area and its civilian population makes a compelling case for allocating the balance of humanitarian responsibility to the former."<sup>225</sup> Parallel arguments have, of course, long been made in debates regarding the targeting of military objectives in densely populated areas or situations in which the adversary is alleged to be using involuntary human shields.<sup>226</sup> This, too, is addressed in the next Part.<sup>227</sup>

#### D. Proportionality Revisited

For reasons explored above, the proportionality rule articulated in paragraph 102(b) of the *San Remo Manual* is unlikely to be a significant constraint in practice. For some advocates of the permissibility of encirclement starvation, however, the provision is objectionable not because it offers too little in the way of humanitarian protection, but because it demands too much of the encircling party and (for reasons discussed in Part III) is not underpinned by robust legal foundations.<sup>228</sup>

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222. DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 149, at 255–56. On the long tradition of this line of reasoning, see Kraska, *supra* note 217, ¶ 7; Provost, *supra* note 57, at 618; Waxman, *supra* note 188, at 363. On the responsibility of the Bosnian government for the impact on civilians of the Bosnian Serb siege of Sarajevo, *see id.* at 420.

223. AP I, *supra* note 63, arts. 58, 51(7).

224. Sean Watts, *Under Siege: International Humanitarian Law and Security Council Practice Concerning Urban Siege Operations* 19 (Harvard Law School & Brookings Project on Law and Security: Research and Policy Paper, 2014), <http://blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-IHL-and-SC-Practice-concerning-Urban-Siege-Operations.pdf>.

225. *Id.* at 12.

226. *See, e.g.*, W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 158–68 (1990).

227. *See infra* notes 339–353.

228. *See supra* notes 144–147 and accompanying text.

Watts, for example, opposes the incorporation of a proportionality rule into the law of siege starvation because it “greatly limits the militarily essential task of physically isolating enemy forces from life-sustaining supplies when these forces are encircled along with civilians.”<sup>229</sup> Drew is more sympathetic to the rule, arguing that by incorporating proportionality requirements into the *Manual’s* section on the law of blockade, the drafters (laudably) pushed the boundaries of *lex ferenda*.<sup>230</sup> In his view, although this move was sure to “invite backlash” from positivists, it was an effort that was in the spirit (if not the clear text) of the First Protocol.<sup>231</sup> However, although the move has gained traction in military manuals, Drew expresses skepticism about its impact on hard State practice.<sup>232</sup> The consequence of that final analysis would seem to be that retaining the San Remo provision on proportionality in the revised edition would continue to promote *lex ferenda*, after a quarter-century of the first such effort failing to gain traction. To put it another way, Drew’s position implies that if the revision is to be faithful to customary international law today, it will reverse the original edition’s incorporation of proportionality as a failed effort to push the law forward.<sup>233</sup>

#### E. Starvation and Military Necessity

The normative underpinning of the arguments for a broad permission to starve is military necessity. Michael Walzer responds to those who might question why civilian deaths can be inflicted by encirclement in ways that would otherwise be prohibited, “The obvious answer is simply that the capture of cities is often an important military objective . . . and frontal assault failing, the siege is the only remaining means to success.”<sup>234</sup> Similarly, Waxman observes,

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229. Watts, *supra* note 13, at 19.

230. Drew, *supra* note 13, at 317–20.

231. *Id.* at 320.

232. *Id.* at 319–20.

233. The original edition of the *Manual* purported primarily to “clarify” existing customary law. Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, 35 INTERNATIONAL REVIEW OF THE RED CROSS 583, 586 (1995). However, the mission did also include “some proposals for progressive development.” SRM, *supra* note 10, at 61. It is unclear whether the revision would retain proposals for progressive development if the experts were to determine that there had not been customary uptake in the intervening decades.

234. MICHAEL WALZER, *JUST AND UNJUST WARS* 162 (1977).

siege methods have long been given leniency in customary law because they were seen as the only viable means of securing certain military objectives. . . . [Therefore,] the international community expressed a reluctance, even among the strongest condemners of Serb practices [in the sieges of Sarajevo and Srebrenica], to accept the wholesale rejection of siege as a legitimate instrument.<sup>235</sup>

Similar arguments extend to naval warfare. As Heintschel von Heinegg puts it, “blockade remains a most efficient method for subduing the enemy.”<sup>236</sup>

Along these lines, Dinstein has condemned Article 54 of Protocol I in part because its posture on siege warfare is “untenable in practice, since no other method of warfare has been devised to bring about the capture of a defended town.”<sup>237</sup> Less willing than Dinstein to accept the comprehensiveness of Article 54’s prohibition, Watts claims that “operationally troubling”<sup>238</sup> efforts to interpret its rules to underpin an obligation on the part of a besieging party to allow in humanitarian relief so as to avert starvation are driven by a myopic “resort to humanitarian objects or purposes, without equal attention to military necessity.”<sup>239</sup> For him, such interpretations fail to take seriously the possibility that “permissive rules for withholding consent to relief actions reflect not inadequacies but rather the presently-operative balance between humanity and military necessity.”<sup>240</sup> His claim is that anything short of total isolation (including on the dimension of humanitarian aid) radically undermines the efficacy of siege warfare.<sup>241</sup> The problem, from this perspective, as Provost frames it, is 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.”<sup>242</sup>

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235. Waxman, *supra* note 188, at 421.

236. Heintschel von Heinegg, *Blockade*, *supra* note 90, ¶ 27.

237. Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 145, 151 (A.M. Delissen et al. eds., 1991); see also DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 178, at 253–57. For a similar view of Article 54 and its implications for the practice of siege warfare, see Kraska, *supra* note 217, ¶¶ 10, 21.

238. Watts, *supra* note 13, at 6.

239. *Id.* at 46.

240. *Id.* at 48.

241. *Id.*

242. Provost, *supra* note 57, at 617.

## V. A REBUTTAL

Critiques of the *San Remo Manual's* humanitarian restrictions on blockades as excessive are misplaced. Quite the opposite, the *Manual's* weaknesses are such that it fails to reflect the comprehensive prohibition of starvation in the contemporary law of armed conflict. The starvation of civilians through encirclement deprivation is prohibited even if the operation has a military purpose, regardless of whether civilians are offered a path out, regardless of the reasons that some do not exit the besieged or encircled location, and irrespective of the weight of the military advantage to be gained from breaking the resistance of the encircled area. The ban is categorical. There is no exception for blockades.

*A. The Fallacy of Blockade Exceptionalism*

Consider the issue of blockade exceptionalism first. As discussed in the previous Part, the ICRC *Commentary* to Additional Protocol I indicates that the starvation ban does not apply to blockades because Article 49(3) of Protocol I stipulates that the relevant section of the treaty is not intended to “affect the rules of international law applicable in armed conflict at sea or in the air.”<sup>243</sup>

Although oft-cited by proponents of a broad right to impose starvation blockades, this interpretation flies in the face of the plain language of the provision. Article 49(3) does not indicate that the law of naval warfare remains untouched by the rules protecting civilians from the effects of hostilities. On the contrary, it identifies two categories of naval warfare that are impacted by those rules. Specifically, it states that the Protocol rules on protecting civilians from the effects of hostilities “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 . . . .”<sup>244</sup> It is only with respect to aspects of naval warfare falling outside of those two categories that the Protocol does not “affect the rules of international law applicable in armed conflict at sea or in the air.” A naval blockade that imposes starvation conditions on the civilian population on land is unambiguously a form of “sea warfare” that

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243. See *supra* Section IV.A.

244. AP I, *supra* note 63, art. 49(3).

“may affect the civilian population . . . on land.” As such, it is plainly within the scope of Article 54.<sup>245</sup>

It is undeniable that the ICRC *Commentary* to Protocol I and at least some of the drafters contradict this reading of the impact of Article 49(3) on the reach of Article 54. However, neither commentaries nor drafting histories are ordinarily thought sufficient to override a clear textual meaning.<sup>246</sup> Far from being interpretively radical for a legal authority to apply Article 54 to the situation of a naval blockade, it is difficult to see how it could do anything else without deviating radically from the plain meaning of Article 49(3).

Apart from the issue of how to interpret Additional Protocol I, there is clear support for the customary prohibition of starvation in naval blockades.<sup>247</sup> Consider, in this regard, the posture of the ICC Statute. As is clear both from its general jurisdictional provisions and the Court’s analysis of the *MV Mavi Marmara* incident in 2010, the ICC Statute applies in the naval domain.<sup>248</sup> There is neither a general naval carve-out in the war crimes provisions nor a specific qualifier excluding blockades from the war crime of starvation.<sup>249</sup> As such, the only way to deny the applicability of that crime to blockades under the ICC regime would be to refer to the chapeau of Article 8(2)(b), which defines all of the listed war crimes as “serious violations of the laws and customs applicable in international armed conflict, within the

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245. See, e.g., Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 487, 554–55 (Dieter Fleck ed., 2009).

246. Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331.

247. Despite reaching divergent conclusions on the legality of the Israeli blockade of Gaza, the various expert bodies tasked with evaluating the operation were unanimous in affirming the applicability of the starvation ban to naval blockades. See sources cited in *supra* note 133.

248. ICC Statute, *supra* note 111, art. 12(2)(a) (“In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . . the State of registration of [the] vessel or aircraft” upon which the crime was committed). For the first in a long and continuing line of decisions on the *Mavi Marmara* incident (all of which depend on this jurisdictional foundation in the context of war crimes investigations), see Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, Decision on the Request of the Union of the Comoros to Review the Prosecutor’s Decision Not to Initiate an Investigation, Pre-Trial Chamber I, ICC-01/13, [https://www.icc-cpi.int/CourtRecords/CR2015\\_13139.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_13139.PDF) (July 16, 2015).

249. ICC Statute, *supra* note 111, art. 8; ICC Elements of Crimes, *supra* note 74.

established framework of international law,”<sup>250</sup> and to argue that the underlying IHL regime does not prohibit starvation in naval warfare for the reasons already stated.<sup>251</sup>

Such a line of reasoning is difficult to sustain.<sup>252</sup> Article 8(2)(b)(xxv) refers specifically to the denial of humanitarian aid, was drafted in a context in which the applicability of some form of starvation ban to blockades had already been recognized in the *San Remo Manual*, and was agreed at a time when the judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) had already demonstrated a willingness to break down formal classification categories when they lack a persuasive normative rationale.<sup>253</sup> Despite that context, States made no effort to exclude blockade from the war crime of the starvation of civilians as a method of warfare. It is hard to believe that this was due to widespread confidence that the chapeau of 8(2)(b) would preclude the application of the crime to that context with such clarity that nothing more needed to be said to qualify it.<sup>254</sup> On the contrary, given the clear lack of consensus in favor of such a preclusion, the ICC provision would seem to apply straightforwardly to blockades. Moreover, precisely because of the relationship between the war crime and the underlying IHL rule, the lack of any blockade exceptionalism at the ICC is a significant indication of ICC States Parties’ understanding of the absence of any such exceptionalism in the underlying IHL rule.

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250. ICC Statute, *supra* note 111, art. 8(2)(b).

251. This issue has caused controversy in the context of the ICC’s inclusion of intra-force rape as a war crime. See *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-196, Judgment the appeal of Mr. Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9,” ¶¶ 46–51, 56–70 (June 17, 2017), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-1962>; Kevin Jon Heller, *ICC Appeals Chamber Says a War Crime Does Not Have to Violate IHL*, OPINIO JURIS (June 15, 2017), <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>.

252. Calling into question the certainty of blockade law, see COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2093; MICHAEL N. SCHMITT, BLOCKADE LAW: RESEARCH DESIGN AND SOURCES 8 (1991) (noting the “lack of codification” and evolving nature” of the regime).

253. *Tadić* Interlocutory Appeal, *supra* note 120, ¶ 119.

254. Indeed, even while asserting the non-applicability of Article 54 over a decade earlier, the ICRC *Commentary* to Protocol I acknowledged, “[T]here is some uncertainty as regards the present state of the customary law relating to blockades. . . . [I]t is to be hoped that the rules relating to blockades will be clarified. . . . to duly take into account the principles put forward in the Protocol which prohibit starvation as a method of warfare.” COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2093.

The case for blockade exceptionalism in NIACs is even weaker. First, there is currently no clarity regarding whether blockade law (and thus any derivative exception to standard rules of IHL) applies in NIACs.<sup>255</sup> Second, regardless of one's position on that debate, Article 13 of the Second Protocol provides that the civilian protections contained therein "shall be observed in all circumstances,"<sup>256</sup> and the *Commentary* expresses none of the blockade exceptionalism found in the *Commentary* to Protocol I. Instead, it states that the "use of blockade and siege as methods of warfare remain legitimate" under Article 14 only "provided they are directed *exclusively* against combatants."<sup>257</sup> Recognizing the likely objection that this is incompatible with the very nature of a blockade and thus an "unrealistic" constraint on the use of blockades, the *Commentary* responds "as soon as there is a lack of indispensable objects, the international relief actions provided for in Article 18 should be authorized to enable the obligation following from Article 14 to be respected."<sup>258</sup> If naval blockade exceptionalism were to hold for IACs, it would be a rare area of the law of war in which the restrictions on conduct in NIACs exceed those applicable in IACs.

Ultimately, the *San Remo Manual* is correct to identify the starvation ban as applicable in blockades (albeit that it defines the contours of that ban in problematic ways, as detailed below). However, by excluding any mention of the starvation ban from its general provisions, it could be read to imply that the ban does not apply to other forms of naval encirclement or naval warfare more broadly. On the narrower reading of the applicability of blockade law, that would leave NIAC naval warfare unregulated by the starvation ban, even though the applicability of the NIAC prohibition of starvation would seem to be even less subject to debate than is the IAC prohibition.

#### B. Clarifying What Counts as the Purposive Starvation of the Civilian Population

If naval blockades are indeed governed by the rules of the Additional Protocols and their customary analogues, the key question is what those frameworks mean for the rules around starvation in the blockade context. One of the areas of dispute identified above focuses on whether the proportionality requirement in paragraph 102(b) of the *San Remo Manual* imposes a con-

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255. See *supra* note 128 and *infra* notes 375–376, 386–387 and accompanying text.

256. AP II, *supra* note 64, art. 13(1).

257. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 4796.

258. *Id.* ¶ 4798.

straint on blockades that exceeds the demands of existing customary international law, or whether it is instead a paper tiger that conceals an overly permissive framework for the regulation of encirclement starvation. In the background of that dispute is the issue of how to understand the role (if any) of purpose in defining the primary starvation ban. The narrower the primary ban, the greater the role for proportionality, and thus the greater the stakes in the debate regarding the utility of proportionality as a constraint in the blockade context. For that reason, it is important to start with the primary prohibition.

Recall that some have seized on the use of the term “method” to infer an element of purpose in that ban, as codified in treaty law in Articles 54(1) of Additional Protocol I, 14 of Additional Protocol II, and 8(2)(b)(xxv) and 8(2)(e)(xix) of the Rome Statute.<sup>259</sup> For reasons elaborated in the ensuing Sections, that claim is unconvincing. However, even if one accepts *arguendo* that the ban is limited to purposive civilian starvation, that proscription, properly understood, would still be far broader than the “sole purpose” prohibition articulated in paragraph 102(a) of the *San Remo Manual*.<sup>260</sup> Moreover, outlawed by that additional breadth would be a range of blockades that would not unambiguously violate the supplementary proportionality rule in paragraph 102(b). In that sense, the invocation of paragraph 102(b) in the San Remo Explanation’s defense of the extraordinary narrowness of 102(a) is unpersuasive. On the specific issue of civilian starvation,<sup>261</sup> the combination of the two paragraphs falls short of even a purposive interpretation of the prohibition of starvation as a method of warfare, properly understood.

This becomes clear when one focuses on blockades imposed with the goal of starving besieged combatants into submission. Such operations do not aim exclusively to starve civilians, so they would avoid the ban articulated in paragraph 102(a). As long as they promise great military advantage, such blockades could also avoid unambiguous prohibition according to the terms of paragraph 102(b). And yet, in most circumstances, such blockades would clearly violate even a purposive interpretation of the prohibition of starvation as a method of warfare.

Encirclement deprivation aimed at starving out combatants depends typically on the denial of essentials to the entire population of the besieged or blockaded area. It is only through the infliction of starvation conditions on

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259. See *supra* notes 189–196 and accompanying text.

260. TURKEL COMMISSION REPORT, *supra* note 133, ¶ 75.

261. The issue of harm to the civilian population other than starvation is addressed below. See *infra* notes 372–373 and accompanying text.



that broader population that the besieging party has any chance to starve out the combatants within.<sup>262</sup> When the combatant population is starved through the starvation of the population as a whole in this way, the latter overarching policy, and not its ultimate objective, is the method of warfare. Put another way, the ultimate goal of starving combatants in such a context entails a predicate purpose of starving the population within which they are ensconced. The question, then, is how to understand the status of that broader population.

Additional Protocol I reflects customary law in providing, “The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”<sup>263</sup> In its judgment in the case against Radovan Karadžić, the ICTY Trial Chamber affirmed prior jurisprudence according to which “a population may qualify as civilian as long as it is predominantly civilian,” holding on that basis that “the population of the urban areas inside the confrontation lines of Sarajevo between 1992 and 1995 had civilian status as a whole,” notwithstanding the existence of combatants in those areas.<sup>264</sup> It is hard to imagine a blockade aimed at starving out combatants, which would not need as its predicate purpose the starvation of a civilian population thus defined. That the commander may (or may not) lament the civilian suffering and death that ensues has no bearing on whether this is the method of warfare pursued.<sup>265</sup>

As noted above, a number of authorities challenge the application of the starvation ban to collateral or incidental civilian starvation.<sup>266</sup> However, even accepting that premise, civilian starvation as the predicate purpose necessary for combatant starvation is clearly distinct from incidental civilian starvation, properly understood. Examples of the latter would include destroying a bridge essential both to the adversary’s supply of weapons or troops and to

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262. Indeed, this is the premise of those who seek to argue for broad rights of encirclement starvation. Watts, *supra* note 13, at 7–16.

263. AP I, *supra* note 63, art. 50(3).

264. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 4610 n.5510 (Int’l Crim. Trib. for the former Yugoslavia Mar. 24, 2016). *See also* Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶¶ 135–38 (Int’l Crim. Trib. for the former Yugoslavia Nov. 30, 2006); Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Appeals Chamber Judgment, ¶¶ 50, 997 (Int’l Crim. Trib. for the former Yugoslavia Dec. 17, 2004); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 115 (Int’l Crim. Trib. for the former Yugoslavia July 29, 2004).

265. This is related to the distinction between motive and purpose, which arises in paragraph 2 of Article 54. *See infra* notes 285–286.

266. *See supra* notes 189–196 and accompanying text.

civilians' supply of food, or possibly destroying fields of crops used by civilians for sustenance to prevent their parallel use "as concealment by the enemy."<sup>267</sup> Blockades that deprive encircled civilian populations of essentials with a view to starving out the adversary within are not in that category. They starve civilian populations purposefully in order to starve combatants.

Notably, the ICRC *Commentary* to Article 14 of the Second Protocol (which bans "starvation as a method of combat") states, "*up to now* there has been no express rule of law forbidding besieging forces to *let* civilians die of starvation."<sup>268</sup> Following the ban on starvation, however, the *Commentary* reasons, the use of blockade and siege warfare remain legitimate only if "they are directed *exclusively* against combatants."<sup>269</sup> As such, in the aftermath of the ban on starvation, military necessity cannot be "used to justify starving the civilian population."<sup>270</sup> The *Commentary* emphasizes the link to Article 54 of the First Protocol, particularly concerning the first paragraph (which bans starvation as a method of warfare), terming Article 14 of Protocol II "a simplified version" of the Protocol I rule.<sup>271</sup>

An interpretation that would allow the practice of starving combatants through starving the civilian population would also contradict core principles of IHL. In the first instance, it would seem to fall afoul of the general injunction in Article 48 of Additional Protocol I that parties must "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."<sup>272</sup> It would also be in deep normative tension with the rules prohibiting indiscriminate attacks. The latter prohibit the use of a "method or means of combat which [are not or which] cannot be directed at a specific military objective."<sup>273</sup> Even assuming the latter prohibition does not apply directly to blockades (insofar as the latter are not

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267. Using genuine examples of incidental civilian starvation along these lines, see U.S. DOD LAW OF WAR MANUAL, *supra* note 62, § 5.20.4; UK MANUAL, *supra* note 178, ¶ 5.27.2; Ministry of Defence, International Humanitarian Law in Armed Conflict with Reference to the Swedish Total Defence System § 3.2.1.5 (1991); 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 89, r. 54, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter17\\_rule54](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter17_rule54); MICHAEL BOTHE, JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 339 (2013).

268. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 4797 (emphasis added).

269. *Id.* ¶ 4796 (emphasis added).

270. *Id.* ¶ 4798.

271. *Id.* ¶ 4792.

272. AP I, *supra* note 63, art. 48 (emphasis added).

273. *Id.* art. 51(4)(a–b).

“attacks” in the strict sense),<sup>274</sup> there is a profound dissonance between an interpretation of Article 54 that would allow belligerents to starve indiscriminately and comprehensively the population of an encircled zone and the clear rule precluding them from subjecting the very same area to comprehensive bombardment.<sup>275</sup> In fact, as argued in the ensuing Sections, far from weakening these general restrictions on the conduct of hostilities, the starvation ban supplements them with a heightened categorical prohibition.<sup>276</sup>

Before turning to the case against a purposive understanding of the prohibition of starvation as a method of war, note two preliminary implications of the argument thus far for the *San Remo Manual*. First, the argument exposes a gap left by paragraph 102 of the *Manual*. Even a purposive understanding of the starvation ban, properly understood, would prohibit starvation blockades that would be permitted under paragraph 102, because they have at least one military purpose and because the military advantage they promise would be sufficient to at least muddy any proportionality analysis. Second, the argument here would clarify the ambiguity in paragraphs 103–4 on whether the blockading party’s obligation to permit the passage of essential goods to deprived populations holds even when the exclusive delivery of those supplies to civilians cannot be guaranteed. The preliminary implication of the discussion thus far is that, even on a purposive understanding of the ban on starvation, the free passage of essentials is required even if the technical arrangements permitted are insufficient to ensure exclusive civilian delivery. Interpreting paragraphs 103–4 to the contrary would erroneously presume the legality of starving combatants through starving the civilian population within which they are ensconced.

### C. *The Ban on Starvation is not Limited to Purposive Starvation*

The argument above accepts the premise that the starvation ban precludes only encirclements imposed with the purpose of starving civilians. It shows that even if that were correct, the *San Remo Manual* is overly permissive. The premise, however, is mistaken. In addition to relying heavily on a very specific reading of an ambiguous term, it construes the general prohibition of

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274. See *supra* notes 144–147 and accompanying text.

275. AP I, *supra* note 63, art. 51(5)(a). On the possible distinction, see Gillard, *supra* note 145 at 5, 8.

276. In work currently in progress, I argue that this heightened protection is best understood as rooted in the torturous wrong at the heart of starvation tactics. Tom Dannenbaum, *Siege Starvation: A War Crime of Societal Torture* (on file with author).

starvation in treaty law in artificial isolation from its context, most notably, the subsequent paragraphs of Article 54 of Additional Protocol I.

The term “method of warfare” is not defined in Additional Protocol I or in prior law of war treaties. The *Commentary* to Protocol I provides only, “The term ‘means of combat’ or ‘means of warfare’ generally refers to the weapons being used, while the expression ‘methods of combat’ generally refers to the way in which such weapons are used.”<sup>277</sup> The focus on weapon use in that definition is neither particularly clarifying nor accurate. Various tactics are specifically designated as methods in the Protocol, despite involving no direct use of weapons, including, for example, the improper use of emblems and the denial of quarter, as well as starvation itself.<sup>278</sup>

What, then, is the meaning of “method of warfare” in such contexts? As outlined in Part IV, one way of making sense of the term in article 54(1) would be to understand it to limit the prohibition to operations that have the starvation of civilians as their purpose. A more capacious view, however, would hold that the term “does no more than describe conduct that is part of hostilities.”<sup>279</sup> To evaluate which end of this interpretive spectrum is more compelling, the prohibition on starvation as a method of warfare must be evaluated in context.<sup>280</sup>

This entails interpreting Article 54(1) in light of Article 54 as a whole. As the ICRC *Commentary* notes, paragraph 2, which prohibits various forms of the deprivation of objects indispensable to civilian survival “develops the principle formulated in paragraph 1 of prohibiting starvation of the civilian population; it describes the most usual ways in which this may be applied.”<sup>281</sup> This relationship between paragraphs 1 and 2 of Article 54 is also reflected in the ICC Statute, which criminalizes the “starvation of civilians as a method of warfare” (drawing on the language of Article 54(1) of the First Protocol), specifying that such starvation occurs “by depriving them of objects indispensable to their survival” (thereby drawing on the language of the second

277. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 1957.

278. Gloria Gaggioli & Nils Melzer, *Methods of Warfare*, in OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 235 (Dapo Akande & Ben Saul eds., 2020)

279. Wayne Jordash, Catriona Murdoch & Joe Holmes, *Strategies for Prosecuting Mass Starvation*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 849, 862 (2019); Global Rights Compliance & World Peace Foundation, *The Crime of Starvation and Methods of Prosecution and Accountability*, *Accountability for Mass Starvation: Testing the Limits of the Law*, ¶ 78 (Policy Paper #1 2019).

280. Vienna Convention on the Law of Treaties, *supra* note 246, arts. 31–32.

281. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2098; *see also* Group of Experts on Yemen, *supra* note 5, ¶ 742.

paragraph of Article 54).<sup>282</sup> Indeed, the only objective non-contextual element of the crime of starvation as a method of warfare in the ICC system is that the perpetrator “deprived civilians of objects indispensable to their survival.”<sup>283</sup> Much like the Protocol’s *Commentary*, then, the Rome Statute understands the deprivation of objects indispensable to civilian survival to be the operationalization of starvation as a method of warfare. This is indicative of how parties to the ICC Statute understand their concomitant IHL obligations.<sup>284</sup>

In reading Article 54 coherently, three key features of paragraphs 2 and 3 warrant attention. First, those paragraphs preclude a narrow purposive reading of the core starvation prohibition. Second, they, in fact, preclude an interpretation according to which the starvation of civilians is permissible as a collateral effect of the deprivation of objects indispensable to their survival. Finally, these implications are not limited to a narrow definition of attacking, destroying, removing, or rendering useless such objects. The first two points are addressed in this Section; the third is elaborated in the next. As such, this Section does not distinguish between deprivation of indispensable objects by kinetic destruction and deprivation by encirclement and denial. Specific issues relating to encirclement are addressed in the ensuing Sections.

The first point is straightforward. Article 54(2) provides, “It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population . . . for the specific purpose of denying them for their sustenance value to the civilian population *or to the adverse Party*, whatever the motive . . . .”<sup>285</sup> This leaves no question that attacking, destroying, removing, or rendering useless such objects is prohibited even if denying their sustenance value to the civilian population is *not* the purpose. It is enough that the purpose is denying their sustenance value to the adverse Party. The provision also leaves no doubt that the motive for that denial is irrelevant.<sup>286</sup>

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282. ICC Statute, *supra* note 111, arts. 8(2)(b)(xxv), 8(2)(e)(xix).

283. ICC Elements of Crimes, *supra* note 74, at 31.

284. Both the IAC and NIAC starvation crimes are enshrined in the Rome Statute as “serious violations of the laws and customs applicable in [international armed conflict or armed conflicts not of an international character, respectively], within the established framework of international law.” ICC Statute, *supra* note 111, arts. 8(2)(b), 8(2)(e).

285. AP I, *supra* note 63, art. 54(2) (emphasis added).

286. Emphasizing this point, see Report of the United Nations Fact-Finding Mission on the Gaza Conflict, ¶ 934, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) (“[T]he motive for denying sustenance need not be to starve the civilian population. Indeed, the motive is irrelevant.”).

Paragraph 3 then provides an exception to and an expansion of that broad prohibition. The exception stipulates that the ban shall not apply when the objects are used by the adverse party “as sustenance *solely* for the members of its armed forces.”<sup>287</sup> Plainly, then, objects used by that party as sustenance for members of the armed forces *and* civilians are covered by the ban. The expansion stipulates that the ban does not apply if the objects are used “not as sustenance” but “in direct support of 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.”<sup>288</sup> Thus, even when the expected starvation of civilians would be genuinely incidental, in some of the ways discussed previously (i.e., because the deprivation of the objects indispensable to their survival would occur for military reasons other than denying their sustenance value) that action would still be legally prohibited simply because it is expected to cause starvation.<sup>289</sup> Indeed, it would be banned even if they might be expected to escape starvation by fleeing the starvation conditions imposed upon them. The only remaining incidental starvation that would appear to remain legally possible would be that occurring as the result of action that does not involve the direct deprivation of essential objects, but which has that effect as one of its downstream consequences.

The *Commentary* to Protocol II indicates a similarly comprehensive understanding of the prohibition in Article 14 of that treaty, noting that the “prohibition would be meaningless if one could invoke the argument that members of the government's armed forces or armed opposition might make use of the objects” and stipulating that

if the objects are used for military purposes by the adversary, they may become a military objective and it cannot be ruled out that they may have to be destroyed in exceptional cases, though *always provided that such action does not risk reducing the civilian population to a state of starvation.*<sup>290</sup>

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287. AP I, *supra* note 63, art. 54(3)(a) (emphasis added).

288. *Id.* art. 54(3)(b) (emphasis added); *see also* Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 764.

289. Provost, *supra* note 57, at 604; Allen, *supra* note 13, at 62; Antonio Coco, Jérôme de Hemptinne & Brian Lander, *International Law Against Starvation in Armed Conflict: Epilogue to a Multi-faceted Study*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 913, 921 (2019). On genuinely incidental starvation, *see supra* notes 266–267.

290. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶¶ 4806–7 (emphasis added).

Although Israel is party to neither Protocol, the Israeli Military Advocate General's Corps manual adopts a similar understanding of the analogous customary rule.<sup>291</sup>

Ultimately, paragraph 3 of Article 54 clarifies that ordinary precautions and proportionality are not sufficient in the context of starvation. In this way, it adopts a posture significantly more prohibitive than either the *San Remo Manual* or any of the positions considered in Part IV. It treats starvation as a qualitatively different kind of civilian harm, requiring a distinct legal framework of protection from that by which civilians are ordinarily protected under IHL.<sup>292</sup>

Ordinarily, under Article 52 of Protocol I, an object that contributes effectively both to civilians and to military action—a so-called “dual-use object”—would qualify as a military objective.<sup>293</sup> Rather than precluding the attack as a matter of distinction or discrimination, the civilian damage one might expect from the destruction of such an object would be prohibitive only if disproportionate to the military advantage anticipated, or if adequate precautions for its minimization had not been taken.<sup>294</sup>

Absent Article 54, objects indispensable to the survival of the civilian population that also contribute to military action (whether by providing sustenance to the armed forces or otherwise) would clearly fall into the category of a dual-use object. As such, they would qualify as a military objective (and thus be legitimate targets) but would be protected by the precautions and proportionality rules. If that were the way Protocol I sought to treat such objects, there would be no need for Article 54, other than to confirm explicitly what is already provided in general terms in Article 52. Such redundancy is plainly not what was intended. The working group charged with developing what became Article 54 at the Diplomatic Conference deemed it “one of

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291. SCHOOL OF MILITARY LAW, MILITARY ADVOCATE GENERAL'S CORPS, RULES OF WARFARE ON THE BATTLEFIELD 25 (2d ed. 2006).

292. In work currently in progress, I argue that this distinctive treatment is warranted in light of the torturous impact of starvation methods. Dannenbaum, *supra* note 276.

293. AP I, *supra* note 63, art. 52(2). See also DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 149, at 120–25.

294. AP I, *supra* note 63, arts. 51(5)(b), 57.

the most important articles of humanitarian law.”<sup>295</sup> The Soviet representative described its Protocol II analogue in Article 14 as “one of the most humane provisions” in the law of armed conflict.<sup>296</sup>

Rather than confirming the Article 52 framework for the specific situation of objects indispensable to civilian survival, the function of Article 54 is instead to divert the deprivation of such objects into a more restrictive framework. In paragraph 2, it issues a prohibition on attacks against objects indispensable to the survival of the civilian population that is unqualified by the ordinary dual-use principles. In paragraph 3, it introduces exceptions to that primary ban, which are far narrower than the ordinary dual-use rule, and which clearly preclude any attack on such objects that would have the consequence of starving the civilian population. That prohibition is prior to questions of proportionality and precautions. It prohibits action irrespective of the military advantage anticipated or the civilian loss minimization measures undertaken.<sup>297</sup> The only exception to its application is the narrow scorched-earth exception in paragraph 5. Appropriately, then, in contrast to those that attempt to qualify the prohibition with reference to purpose, most military manuals simply provide in unequivocal terms that objects indispensable to civilian survival may not be destroyed.<sup>298</sup>

#### *D. Starvation by Encirclement is Not More Permissible than Starvation by Attack*

The question that remains is what this means for deprivation by encirclement methods, rather than via operations that “attack, destroy, remove or render useless” objects indispensable to civilian survival.<sup>299</sup> As discussed above, those who argue for an expansive right to engage in starvation sieges and blockades point to the use of those terms in paragraph 2 as the reason not to apply the approach of paragraphs 2 and 3 to encirclement starvation.

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295. Summary Record of the Thirty-first Meeting, Doc. CDDH/III/SR.31 (Mar. 14, 1975), 14 OFFICIAL RECORDS, *supra* note 67, at 300, ¶ 8. *See also* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶¶ 2087–88.

296. Statement of the USSR Representative, Doc. CDDH/SR.52 (June 6, 1977), 7 OFFICIAL RECORDS, *supra* note 67, at 136, ¶ 84.

297. Akande & Gillard, *supra* note 72, at 767 (“Article 54(3) AP I appears to modify or ‘displace’ the rule of proportionality with regard to measures that fall within the list of prohibited activities referred to in Article 54(2)”). As noted above, Akande and Gillard are less sure whether this extends to measures taken to starve combatants other than those identified in 54(2). *See supra* note 200.

298. *See* 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 89, r. 54.

299. *See supra* notes 200–203 and accompanying text.



However, regardless of how narrowly one reads the language and direct application of paragraphs 2 and 3, this position cannot make sense of Article 54 as a whole. If the meaning of starvation as a method of warfare were to incorporate a purposive element vis-à-vis starving civilians, in what sense could paragraphs 2 and 3 of Article 54 (which clearly prohibit the non-purposive infliction of starvation conditions on the civilian population) be understood to be manifestations of the general prohibition in paragraph 1? In what sense, could they be, as the ICRC *Commentary* puts it, the “usual ways in which [the prohibition of starvation as a method of warfare] may be applied”?<sup>300</sup> If they are elaborations of that prohibition, the fact of their application to the non-purposive infliction of starvation conditions cannot but be relevant to interpreting the meaning of the 54(1) prohibition, including as applied to encirclement methods.

One way to make sense of the provision as a whole would be to interpret “starvation as a method of warfare” as the deliberate deprivation of objects indispensable to civilian survival, rather than as the final infliction of a particular impact on civilian victims.<sup>301</sup> In one sense, that would track the language of the ICC Statute in focusing on such deprivation, and not the final outcome, as the crux of the starvation method.<sup>302</sup> Along these lines, the Group of Experts on Yemen reasoned on the specific issue of what constitutes a method of warfare that “in order for starvation—*defined as the deprivation of essential items for the survival of the population*—to be considered as an international humanitarian law violation, it has to be used as a strategy to defeat the other party to the conflict.”<sup>303</sup> Engaging in the deprivation of objects essential to civilian survival as a strategy to defeat the other party is entirely compatible with lacking the purpose of inflicting a particular form of suffering or harm on the civilian population. Indeed, it would encompass relatively straightforwardly within Article 54(1) the kinds of actions prohibited in paragraphs 2 and 3 of Article 54.

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300. See *supra* note 281 and accompanying text.

301. See *supra* notes 73–74. But see TURKEL COMMISSION REPORT, *supra* note 133, ¶ 78 (specifically distinguishing starvation from the deprivation of objects essential to civilian survival).

302. *Supra* note 283. On the other hand, the differentiation between the deprivation of objects indispensable to civilian survival and the starvation of civilians in the Elements of Crimes might be thought to complicate such a reading. ICC Elements of Crimes, *supra* note 74, at 31.

303. Group of Experts on Yemen, *supra* note 5, ¶ 741 (emphasis added); see also Jordash, Murdoch & Holmes, *supra* note 279, at 862.

Understanding the ban in this way would also call into question the notion that there is a deep qualitative distinction between deprivation by encirclement and deprivation by destruction, attack, removal, or rendering useless. If starvation as a method of warfare is the deprivation of objects essential to civilian survival as a strategy to defeat the other party, the question of whether it has as its purpose the infliction of a particular kind of suffering on the affected civilians is as irrelevant to deprivation by encirclement as it clearly is to deprivation by attack, destruction, removal, or rendering useless under the terms of paragraphs 2 and 3 of Article 54. Supporting this view, the *Commentary* to the Second Protocol states of the use of the latter terms in Article 14:

[C]ertain acts are emphasized, but the list is not exhaustive. Starvation can also result from an omission. To deliberately decide not to take measures to supply the population with objects indispensable for its survival in a way would become a method of combat by default, and would be prohibited under this article.<sup>304</sup>

Drawing a direct connection between the earlier (relatively weak) requirements of Article 23 of Geneva Convention IV and the starvation provisions of the Protocols,<sup>305</sup> the *Commentary* goes on to address the question of whether blocking humanitarian aid would implicate the starvation ban, asserting,

If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. In fact, they are the only way of combating starvation when local resources have been exhausted. . . . [A] refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat.<sup>306</sup>

Developments since the entry into force of the Protocols are also relevant here. In Resolution 2417, the Security Council, “*Strongly condemns* the unlawful denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access for responses to conflict-induced food insecurity in situations of

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304. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 4800.

305. *Id.* ¶ 4793.

306. *Id.* ¶ 4885.

armed conflict, which may constitute a violation of international humanitarian law.”<sup>307</sup>

Similarly, Articles 8(2)(b)(xxv) and 8(2)(e)(xix) of the ICC Statute criminalize “using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.”<sup>308</sup> For the 123 States Parties to the Rome Statute, then, impeding humanitarian aid can count as using starvation as a method of warfare (the focus of Article 54(1) of Protocol I) *because* it is a form of depriving civilians of objects indispensable to their survival (the focus of Article 54(2)). As emphasized above, this is indicative of those States Parties’ understanding of the underlying law of armed conflict.<sup>309</sup> In the proposal that led to the unanimously approved amendment incorporating the NIAC crime of starvation, Switzerland reasoned that “a refusal to grant consent [to humanitarian relief] ‘without good grounds’ is equivalent to a violation of article 14” of Protocol II.<sup>310</sup>

Along the same lines, authorities such as the International Commission of Inquiry on Libya and the Group of Experts on Yemen have indicated that encirclement deprivation can violate the prohibition of starvation as a method of warfare through knowingly causing civilians to starve.<sup>311</sup> The Commission on Human Rights in South Sudan also appears to eschew a

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307. S.C. Res 2417, ¶ 6 (May 24, 2018). *See also id.* ¶ 10 (urging States to investigate “violations of international humanitarian law related to the use of starvation of civilians as a method of warfare, including the unlawful denial of humanitarian assistance to the civilian population in armed conflict”).

308. ICC Statute, *supra* note 111, arts. 8(2)(b)(xxv), 8(2)(e)(xix). The IAC provision references the impediment of relief supplies “as provided for under the Geneva Conventions.” As Akande and Gillard have noted, this framing is slightly odd, given that the starvation ban is provided in Additional Protocol I, which also has more comprehensive rules on humanitarian access. Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 772 n.53. Some have suggested the language is meant to incorporate Additional Protocol I, too. Michael Bothe, *War Crimes*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 402 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002); D’Alessandra & Gillett, *supra* note 68, at 839. Notably, the NIAC crime includes no reference to the Conventions.

309. *See supra* note 284 and accompanying text.

310. Switzerland Non-paper, *supra* note 112, ¶ 12.

311. Report of the International Commission of Inquiry on Libya, annex I, ¶ 542 n.802, U.N. Doc. A/HRC/19/68 (Mar. 8, 2012); Group of Experts on Yemen, *supra* note 5, ¶¶ 744–48, 791. The Yemen Report is not entirely consistent on the issue of purpose. *Id.* ¶¶ 357–58, 511, 777.

purposive understanding of the ban on starvation by encirclement, which it treats no differently from deprivation by destruction or pillage.<sup>312</sup>

Given this context, it is incumbent on those who would distinguish encirclement to explain what would justify its differential treatment. One might argue that encirclement starvation tactics are appropriately the subject of less stringent restriction than are kinetic attacks because they harm civilians only on a slower, incremental timeline.<sup>313</sup> Indeed, encirclement and denial tactics are structured precisely so as to succeed *before* the entire encircled population is wiped out, thereby avoiding the outcome they threaten. The point of a siege or blockade is to stimulate capitulation before it causes starvation or famine. The stretched temporal horizon of the encirclement method allows those impacted the time to react and respond so as to avoid the ultimate harm.

This, however, is not a plausible distinction. Whatever the validity of distinguishing slow from quick inflictions of death and human suffering,<sup>314</sup> that distinction does not differentiate between different kinds of starvation tactics. Whether starvation is caused by destroying crops or by encircling and denying their transfer to a particular population, the impact is equally slow and torturous. In either case, it is possible that the surrender of the affected party could alleviate it. And, in either case, allowing through humanitarian aid could avert it for the population reached by that aid. If it is prohibited to destroy foodstuffs whenever they are not used exclusively for the sustenance of combatants (irrespective of the military advantage promised), why would

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312. See generally Commission on Human Rights in South Sudan, *supra* note 116. Implicitly eschewing a purposive interpretation, see *id.* ¶¶ 9, 11, 105. For more on how to understand the report, see Tom Dannenbaum, *A Landmark Report on Starvation as a Method of Warfare*, JUST SECURITY (Nov. 13, 2020), <https://www.justsecurity.org/73350/a-landmark-report-on-starvation-as-a-method-of-warfare/>.

313. To be clear, kinetic attacks may have reverberating effects that percolate on a longer time horizon. See, e.g., Ellen Nohle & Isabel Robinson, *War in Cities: The 'Reverberating Effects' of Explosive Weapons*, HUMANITARIAN LAW & POLICY BLOG (Mar. 2, 2017), <https://blogs.icrc.org/law-and-policy/2017/03/02/war-in-cities-the-reverberating-effects-of-explosive-weapons/>; Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 835 (2018). Nonetheless, a kinetic attack is characterized primarily by the instantaneousness of its impact.

314. Cf. ROBERT NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR (2011); Ioannis Kalpouzos & Itamar Mann, *Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece*, 16 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1 (2015). In forthcoming work, I argue that the slow infliction of suffering via starvation tactics is an important feature of its torturous wrong. Dannenbaum, *supra* note 276.

it be permitted to deprive those combatants of the same food by encirclement if the deprivation would also impact civilians? If it is prohibited to destroy those crops when they are used for military purposes other than sustenance if the consequence would be the starvation or forced movement of civilians, why would it be permitted to encircle the same population with the same effect? The answer cannot refer to the immediacy of the initial destruction. That same immediacy applies to the destruction of objects protected under Article 52 of Additional Protocol I and the corollary customary rule. What distinguishes objects protected under Article 54 is their essential value to the humans who depend on them. Indeed, Article 54(2) is not concerned at all with the objects for their own sake—it is violated equally whether they are removed (and thus maintained in both their form and future utility) or destroyed. The special concern for, and protection of, the objects is derived instead from their essential value to specific populations. The denial of that value is indistinguishable whether the object is destroyed or obstructed from delivery. What, then, would be the justification for treating encirclement deprivation differently from any other form of deprivation?

Ultimately, an interpretation of 54(1) and the concomitant customary rule that is not limited to actions pursued with the purpose of inflicting starvation conditions on civilians and that does not treat encirclement deprivation differently from deprivation of other kinds is superior. It makes better sense of the structure of Article 54 as a whole and it rests on a more normatively coherent foundation.

#### *E. Humanitarian Access and Starvation*

Related to the question of how to interpret Articles 54 and 14 on the issue of humanitarian relief is the question of how to understand the humanitarian access provisions in Articles 70 and 18 of Protocols I and II, respectively. Here, the key issue is whether language rendering access “subject to the agreement” of concerned parties entails that besieging belligerents have an unfettered right to block those seeking to deliver humanitarian assistance to the encircled population.

The ICRC commentaries deny that discretion on this issue is unlimited. The Protocol I *Commentary* asserts that “a Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.”<sup>315</sup> The Protocol II *Commentary* is more specific, adding, “If the survival of the population is

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

threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. . . . The authorities . . . cannot refuse such relief without good grounds.”<sup>316</sup>

Recently, a reading along these lines has been given lengthier elaboration in the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, commissioned by the U.N. Office for the Coordination of Humanitarian Affairs and drafted by Dapo Akande and Emanuela Chiara Gillard.<sup>317</sup> It follows a number of authorities that have reached a similar conclusion, many of them channeling the understanding of a broad range of States.<sup>318</sup> As the textual basis for denying unfettered State discretion on this issue, the *Oxford Guidance* emphasizes a key terminological shift from Article 10 of Geneva Convention IV (also common Article 9 of Conventions I–III) to Articles 70 of Protocol I and 18 of Protocol II. Whereas the language in Geneva Convention IV provides that an impartial humanitarian organization “*may*” undertake humanitarian action “subject to the consent of the party concerned,”<sup>319</sup> Article 70 of Protocol I provides that relief actions for inadequately supplied civilians “*shall* be undertaken subject to the agreement of the parties concerned” and Article 18 of Protocol II provides similarly that relief “*shall* be undertaken subject to the consent” of the State concerned whenever the civilian population is suffering “undue hardship.”<sup>320</sup> The linguistic shift from 1949 to 1977, it is claimed, indicates the introduction of a limit on State discretion with respect to allowing humanitarian access during armed conflict—namely, the denial of consent may not be arbitrary.<sup>321</sup>

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316. *Id.* ¶ 4885.

317. AKANDE & GILLARD, *OXFORD GUIDANCE*, *supra* note 87, ¶¶ 43–49.

318. G.A. Res. 68/182, ¶ 14, Situation of Human Rights in the Syrian Arab Republic, (Dec. 18, 2013); Human Rights Council Res. 29/13, ¶ 1, Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan, U.N. Doc. A/HRC/Res/29/13 (July 2, 2015); Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the Sudan, ¶ 8(f), U.N. Doc. CCPR/C/SDN/CO/4 (Aug. 19, 2014); Institut de Droit International, Resolution on Humanitarian Assistance art. VIII (Sept. 2, 2003); Francis M. Deng (Representative of the Secretary-General), *Report Submitted Pursuant to Commission Resolution 1997/39*, annex, princ. 25(2), U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

319. GC IV, *supra* note 46, art. 10.

320. AP I, *supra* note 63, art. 70(1) (emphasis added); AP II, *supra* note 64, art. 18(2) (emphasis added).

321. AKANDE & GILLARD, *OXFORD GUIDANCE*, *supra* note 87, ¶¶ 45–47; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2805.

Arbitrariness, of course, is a difficult standard to apply.<sup>322</sup> In an effort to concretize the requirement, the *Oxford Guidance* specifies several factors that ought to inform its determination.<sup>323</sup> These include whether it would violate other obligations to the civilian population, whether it would be unnecessary or disproportionate, and whether it would lead to injustice or to a lack of predictability, or would otherwise be inappropriate.<sup>324</sup> Among these grounds for a finding of arbitrariness, denying access in a context in which starvation would result ought to be one of the least controversial, precisely because it is the natural implication of the ban enshrined elsewhere in the two protocols.<sup>325</sup> If there is an arbitrariness threshold, starvation encirclement would surely violate it. The first question, then, is whether the *Oxford Guidance*, the ICRC, the U.N. General Assembly, the Human Rights Council, the Human Rights Committee, and others are right to point to an arbitrariness threshold to begin with.

Notably, upon their respective ratifications more than two decades after the treaty was agreed, the United Kingdom and France both issued reservations stating that they do not consider Article 70 to apply to blockades.<sup>326</sup> This supplemented a blockade exceptionalism in their interpretations of Article 54.<sup>327</sup> The very fact that they felt compelled to issue reservations on the issue indicates a considerable level of concern within those States that, absent a reservation, Article 70 would be applied in a way that would impose substantive constraints on a State's discretion to deny humanitarian access in a hunger blockade. In short, it indicates recognition that there is a viable interpretation that Article 70 does indeed impose limits on State discretion here.

Watts rejects the *Oxford Guidance* on the grounds that it does not reflect unambiguous shared intent among the drafters, has not been the dominant understanding of Article 70, ignores a reading according to which "shall" has meaning in defining the obligations that flow from having granted consent (but not in limiting the discretion to withhold consent), and fails to explain why the parties did not introduce clear language specifying a non-arbitrariness threshold if that is in fact what they wanted.<sup>328</sup> He recognizes a diversity

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322. Marcus, *supra* note 2, at 268 (decrying the arbitrariness standard as raising "the troubling specter of ambiguity in the obligation to allow humanitarian assistance").

323. AKANDE & GILLARD, *OXFORD GUIDANCE*, *supra* note 87, ¶¶ 43–54.

324. *Id.*

325. *Id.* ¶ 51; Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 771.

326. *See supra* note 185.

327. *See supra* note 178.

328. Watts, *supra* note 13, at 27–32.

of State views on the issue and even suggests the final text reflected a certain constructive ambiguity; however, his view is that such ambiguity should support only a narrow and constrained reading of any obligations on States.<sup>329</sup>

Whatever its force in responding to the claim that there is an arbitrariness limit within the Article 70 framework, this line of argument cannot underpin a claim of unfettered discretion on the part of the encircling power. IHL rules are primarily prohibitive.<sup>330</sup> Absent explicit and unequivocal direction to the contrary, the failure of one rule to prohibit a particular action neither creates an exception to another rule that does prohibit the action nor confers on parties any kind of authority to engage in that action.

Article 70 (and the analogous provision in Article 18 of Protocol II) do not confer any authority to abrogate the independent obligation not to use starvation as a method of warfare. As discussed in the previous Section, that independent obligation includes the duty not to cause starvation by using a position of encirclement to block the passage of essential goods. This imposes an external and categorical limit on States' discretion to withhold Article 70/18 consent.<sup>331</sup> In other words, it imposes a limit that would hold even if Watts were correct that the discretion to deny access is not limited by the internal terms of Article 70 (or Article 18 of Protocol II). Thus, the ICRC *Commentary* to Protocol II is correct to insist that the inadequate supply of the civilian population can create scenarios in which “the international relief actions provided for in Article 18 should be authorized *to enable the obligation following from Article 14 to be respected*.”<sup>332</sup>

Similarly, the Israeli Supreme Court has recognized that the customary rules reflected in Articles 54 and 70 of Protocol I together lead to the prohibition of refusing “to allow the passage of foodstuffs and basic humanitarian equipment necessary for the survival of the civilian population.”<sup>333</sup> The requirement to allow humanitarian relief has been described as the “corollary”

329. *Id.* at 33–35.

330. ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* 30 (2017).

331. This is why the French and British views that Article 54 does not apply to blockades due to the Article 49(3) caveat are an important corollary of their reservations to Article 70. *See supra* notes 178–185.

332. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 4798 (emphasis added).

333. HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence ¶ 14 (2008), [http://www.hamoked.org/items/9862\\_eng.pdf](http://www.hamoked.org/items/9862_eng.pdf) (unofficial translation) (Isr.).



of the underlying starvation ban.<sup>334</sup> And the Group of Experts on Yemen has reasoned that the strict prohibition of starvation as a method of warfare entails that in certain circumstances, “the provision of relief supplies has to be allowed and facilitated.”<sup>335</sup>

This understanding of the prohibition of starvation would not render Articles 70 of Protocol I and 18 of Protocol II redundant. First, Article 70 covers a broader array of scenarios than merely those involving the interaction between a besieging or blockading party and an encircled population. It also defines the duty of a State to its own civilians in areas it controls.<sup>336</sup> In that sense, it covers instances in which the denial of humanitarian access would not be a method of warfare, such that Article 54 would not be implicated. Second, the humanitarian access frameworks in those articles apply whenever the civilian population is “inadequately supplied” or subject to “undue hardship”—thresholds that may be understood to be lower than is starvation (although here it would matter whether one understands the latter to be an outcome or a process).<sup>337</sup> It is in the space between inadequate supply and starvation that one might debate the questions of discretion and arbitrariness under Articles 70 and 18. The point here is that regardless of how that debate is resolved, the rules articulated in Articles 54 and 14 preclude encirclement starvation.

This, again, has implications for how to understand paragraphs 103–4 of the *San Remo Manual*. The *Manual’s* Explanation asserts that those paragraphs are more demanding than is Article 70 of Protocol I.<sup>338</sup> This is true when each provision is read in isolation. Paragraphs 103–4 do not appear to grant the encircling power the kind of discretion that might be thought to flow from Article 70 of Protocol I. However, when Article 70 is read together with Article 54 and when paragraphs 103–4 are read together with paragraph 102, the analysis looks different. The permissiveness of paragraph 102 combines with the ambiguity in 103–4 regarding how to react to contexts in which exclusive delivery to civilians cannot be guaranteed to provide a

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334. Bartels, *supra* note 108, at 286. Arguing that Articles 54 and 70 must be read in “conjunction with the . . . provisions [of Geneva Convention IV] prohibiting the starvation of civilians as a method of warfare and those stating that intentional starvation, including the impediment of relief supplies, is a war crime,” see Pejic, *supra* note 83, at 1103.

335. Group of Experts on Yemen, *supra* note 5, ¶ 738.

336. AKANDE & GILLARD, OXFORD GUIDANCE, *supra* note 87, ¶ 23.

337. Akande & Gillard, *Conflict-induced Food Insecurity*, *supra* note 72, at 760–61. See also *id.* 775. On the process/outcome distinction, see *supra* notes 73–74, 283, 302–303 and accompanying text.

338. SRM, *supra* note 10, ¶ 103.1.

framework for the protection against starvation encirclement that is weaker in certain respects than is the Additional Protocol I framework, given the categorical ban in Article 54.

To be consistent with the demands of IHL, the obligations in paragraphs 103–4 should be clarified to leave no ambiguity that they are not contingent on exclusive civilian delivery. Technical arrangements may be implemented so as to maximize the likelihood that aid will reach civilians, but civilians cannot be starved if those technical arrangements are insufficient to guarantee exclusive civilian use. Instead, these requirements ought to be understood to entail a bright-line rule, requiring permission whenever its denial would lead to starvation.

*F. Allowing Civilians Out Does Not Justify Starving Those Who Remain*

What, then, of the argument that a besieging party engages in no violation vis-à-vis those that remain in starvation conditions in the encircled area, as long as it allows those civilians who are willing and able to leave to do so? This, too, is untenable under existing law. The duty to take all feasible precautions supplements belligerents' other duties; it adds a layer of humanitarian protection. That function is perverted when the fact of having taken precautions is invoked to cloak the attenuation of other IHL protections. It is clear that warning civilians in advance of an attack does not absolve the attacking force from responsibility for complying with the demands of distinction, discrimination, and proportionality in the course of the promised operation.<sup>339</sup> Civilians do not become targets simply by failing to heed such a warning, nor do they cease thereby to count in the proportionality analysis.<sup>340</sup> There is no reason that the rule ought to be any different in the context of encirclement warfare than it is in the context of any other scenario to which precautionary obligations apply.

On the contrary, by the terms of Protocol I, the test for losing civilian protection against starvation is the same as the test for whether a civilian has lost protection against being the target of a kinetic attack—namely, whether

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339. *See, e.g.*, Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), Walter Kälin (Representative of the Secretary-General on Human Rights Of Internally Displaced Persons), Miloon Kothari (Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living), *Mission to Lebanon and Israel*, ¶ 41, U.N. Doc. A/HRC/2/7 (Oct 2, 2006) [hereinafter Report of U.N. Special Rapporteurs].

340. *Id.*

the person is participating directly in hostilities at the time of the attack.<sup>341</sup> Even if one takes the controversial view that voluntary human shields rise to the level of direct participants in hostilities, it is implausible to hold that declining to leave one's home could qualify a person as a voluntary human shield and thereby a lawful target. Such a standard would eviscerate civilian protection.<sup>342</sup> For that reason, it is unsurprising that there is no contemporary support for the view that civilians who stay voluntarily in a besieged area thereby become lawful targets for sniping or bombardment.<sup>343</sup> There is, by extension, no basis for the claim that those civilians may be the targets of starvation.<sup>344</sup>

Similarly, the mere fact that those civilians were offered a path out cannot transform the objects of which they have been deprived from essential to non-essential for their survival. Indeed, even when the civilian population *does* move in response to their deprivation of indispensable objects, this itself is likely to implicate the encircling party in a violation. Article 54(3)(b) prohibits any deprivation of indispensable objects "expected to leave the civilian population with such inadequate food or water as to cause its starvation *or force its movement*."<sup>345</sup> It is hard to see how the infliction of siege conditions with the offer of a path out would not qualify as forced movement in this respect.<sup>346</sup> Certainly, the fact that the deprivation serves a military objective

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341. AP I, *supra* note 63, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section [which includes Article 54], unless and for such time as they take a direct part in hostilities."). What surpasses the threshold for direct participation in hostilities is subject to debate, with voluntary human shields falling into the zone of disagreement. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 56–57 (2009) (classifying voluntary human shields as direct participants in hostilities only when they serve as a "physical obstacle" as opposed to a "legal obstacle"); HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507, ¶ 36 (2006) (Isr.), *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 373 (classifying all voluntary human shields as direct participants in hostilities).

342. Report of U.N. Special Rapporteurs, *supra* note 339, ¶ 41 (In the context of advance warnings: "A decision to stay put—freely taken or due to limited options—in no way diminishes a civilian's legal protections.").

343. On the criminal sniping and bombardment of besieged civilians, see generally Prosecutor v. Galić, Case No. IT-98-29-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Dec. 5, 2003).

344. Provost, *supra* note 57, at 619; Gillard, *supra* note 145, at 12.

345. AP I, *supra* note 63, art. 54(3)(b) (emphasis added).

346. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 4812 ("To deprive the civilian population of objects indispensable to its survival usually results in such

is not itself sufficient to avoid that issue. The ban on forced movement in Article 54(3)(b) attaches specifically to situations in which the deprivation of the objects has a clear military benefit, and would, absent starvation or forced movement, therefore be permissible.<sup>347</sup>

In some circumstances, the besieged party may itself bear responsibility for failing to allow or manage the evacuation of the civilians under its control.<sup>348</sup> Depending on the conditions, that failure could amount to a violation of its passive precautionary obligations to “endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives” and to take “other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”<sup>349</sup> Perhaps in certain circumstances, the besieged party’s refusal to let civilians leave would be deemed a deliberate effort to use the civilian population to render legitimate military objectives immune from attack.<sup>350</sup> In others, the besieged party might prohibit exit with a view to exploiting the ensuing civilian suffering for publicity, as part of a lawfare campaign.<sup>351</sup> However, whether classified as a breach of passive precautionary duties or as a use of human shields, violations of this kind by the besieged party would have no bearing on the duties of the besieging state vis-à-vis those who remain.<sup>352</sup> At most, it would mean that the wrong inflicted on the civilians that were held back would be the shared responsibility of the besieging and the besieged parties.<sup>353</sup>

In short, in the context of encirclement warfare, the protection of civilians from starvation is a categorical bright line. Articles 54 and 14 allow of

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a population moving elsewhere as it has no other recourse than to flee. Such movements are provoked by the use of starvation, which is in such cases equivalent to the use of force.”); see also Riordan, *supra* note 173, at 172; Gillard, *supra* note 145, at 13. Of course, if humanitarian delivery were impossible, evacuation may be the only option. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 2096.

347. AP I, *supra* note 63, art. 54(3)(b).

348. Conley & de Waal, *supra* note 73, at 709 (noting that the willingness to stay and level of solidarity with the besieged combatants will often vary considerably across the civilian population).

349. AP I, *supra* note 63, art. 58.

350. *Id.* art. 51(7).

351. *It Is Necessary That Those Who Are Responsible for These Famines Fear That They Could Be Prosecuted for Their Crimes: An interview with Jane Ferguson*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 907, 909 (2019).

352. Gillard, *supra* note 145, at 8.

353. AP I, *supra* note 63, art. 51(8).

no exception. The ban on starvation functions prior to considerations of proportionality and precautions and cannot be overridden by them. It applies even when the besieging party would allow civilians to leave.

### G. Necessity

Whether encirclement starvation is a particularly effective way of engaging a besieged or blockaded enemy is open to debate.<sup>354</sup> However, even assuming that starvation may serve valuable military purposes in certain contexts, that alone would not be sufficient to debunk a categorical interpretation of the ban. Today's law of armed conflict is not simply subordinate to military necessity.<sup>355</sup> It includes a range of categorical prohibitions that hold irrespective of the potential military advantage associated with their violation. One of those is the protection of both individual civilians and the civilian population from attack. The weaker party in an asymmetric conflict may stand to gain militarily by attacking the enemy's civilian population, seeking to exploit their vulnerability to coerce withdrawal or compliance.<sup>356</sup> Indeed, for some actors, doing so may be the only plausible route to military success. From the legal point of view, however, this imperative is irrelevant. The targeting of civilians who are not participating directly in hostilities is categorically ruled out.<sup>357</sup> The arguments offered in defense of allied "terror bombing" in World War II are clearly legally unavailable today.<sup>358</sup> Whether or not they are the most effective means available, besieging forces may not employ weapons that cannot be directed at a specific military objective.<sup>359</sup>

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354. Mark Lattimer, *Can Incidental Starvation of Civilians be Lawful under IHL?*, EJIL:TALK! (Mar. 26, 2019), <https://www.ejiltalk.org/can-incident-starvation-of-civilians-be-lawful-under-ihl/>.

355. Historically, necessity was closer to being a normative wild card in the law of armed conflict. See, e.g., WITT, *supra* note 16, at 4, 183. However, in the contemporary law of armed conflict, this is no longer the case. DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 149, at 10–12.

356. ROBERT PAPE, *DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM* chs. 3, 6 (2005).

357. AP I, *supra* note 63, art. 51(2).

358. WALZER, *supra* note 234, ch. 16.

359. Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶¶ 461–63, 472 (Int'l Crim. Trib. for the former Yugoslavia June 12, 2007); Prosecutor v. Martić, Case No. IT-95-11-A, Appeals Judgment, ¶¶ 247–52 (Int'l Crim. Trib. for the former Yugoslavia Oct. 8, 2008); 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 338–43 (2009); Kraska, *supra* note 217, ¶ 13.

Similarly, efforts to justify the use of torture on necessity grounds have (with rare and highly controversial exceptions) failed to gain legal acceptance, despite torture advocates' repeated invocation of the practice's alleged benefits. Aharon Barak wrote famously on behalf of the Israeli Supreme Court that a law-abiding State (or, in his words, a democracy) "must often fight with one hand tied behind its back."<sup>360</sup> The decision in which he made that claim has been criticized persuasively as itself providing more of a legitimization function than a constraining one.<sup>361</sup> Nonetheless, Barak was correct in his observation that compliance with the law of armed conflict does not guarantee the adoption of any means or method that would return a military advantage.

Not only would encirclement starvation be anomalous in a regime that requires the infliction of death and suffering to be discriminate and targeted, it would be a striking anomaly, given the torturous suffering it entails. Although it would certainly complicate the use of siege and blockade warfare,<sup>362</sup> the interpretation advanced here would not leave the commander bereft of tools by which to engage the adversary.<sup>363</sup> Blockades of States that are minimally dependent on maritime trade for essential items or where an effective channel for a robust supply of essentials can be maintained would not necessarily fall afoul of the prohibition.<sup>364</sup> The interdiction of contraband would

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360. HCJ 5100/94 Public Committee Against Torture v. Israel 53(4) PD 817, ¶ 39 (1999) (Isr.).

361. See, e.g., Itamar Mann & Omer Shatz, *The Necessity Procedure: Laws of Torture in Israel and Beyond*, 1987–2009, 6 UNBOUND: HARVARD JOURNAL OF THE LEGAL LEFT (2010). That critique has now been confirmed, as the Supreme Court seems to have untied the State's hand completely. HCJ 9018/17 Tbeish & Public Committee against Torture in Israel v. Attorney General (2018) (Isr.), <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Tbeish%20v.%20Attorney%20General.pdf> (unofficial translation).

362. Indicating the incompatibility between the Additional Protocol I rules (at least on the interpretation suggested here) and siege warfare, see, e.g., DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 149, at 255; William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 539, 557 (1997); Côte d'Ivoire's Teaching Manual (2007) provides that it is prohibited to use starvation of the civilian population as a method of warfare, cited in 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 89, r. 53, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter17\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter17_rule53).

363. Riordan, *supra* note 173, at 178.

364. This was how the Israeli High Court of Justice evaluated the situation in Gaza in 2008. HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence ¶ 22 (2008), [http://www.hamoked.org/items/9862\\_eng.pdf](http://www.hamoked.org/items/9862_eng.pdf) (unofficial translation) (Isr.). See also TURKEL COMMISSION REPORT, *supra* note 133, ¶¶ 73, 76.

remain lawful even if humanitarian constraints were to preclude the imposition of a blockade.<sup>365</sup> And partial isolation and targeted operations against military targets can be effective in lieu of a comprehensive encirclement.<sup>366</sup> Encirclement without deprivation can also be useful as a means by which to contain enemy forces within an area, thus precluding their deployment elsewhere.<sup>367</sup>

It is also worth noting that blockades are available only when States can enforce them comprehensively, so they are off the table for many belligerents regardless of starvation-specific restrictions.<sup>368</sup> This efficacy requirement is not ordinarily critiqued as a reason that the existing rules do not properly respond to military necessity, despite the fact that the States thus precluded from adopting encirclement tactics are (almost by definition) less able to draw on other resources to pursue their mission. Military necessity arguments that dispute humanitarian constraints that would limit the actions of powerful belligerents but leave unchallenged constraints that limit the actions of weaker belligerents ought to be treated with some skepticism.

#### H. Reforming the San Remo Manual on Blockades and Starvation

In sum, the *San Remo Manual* falls short of the Additional Protocol I standard of humanitarian protections in encirclement blockades because its combined rules do not clearly and unequivocally prohibit blockades that cause civilian starvation, whether as a non-exclusive purpose, as the predicate purpose to starving combatants within the encircled area into submission, or (on a broader reading of the Protocol I prohibition) as the collateral effect of any other deprivation of objects essential to civilian survival. The introduction of a proportionality rule as the safeguard in the *San Remo Manual* cannot fully

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365. SCHMITT, *supra* note 252, at 3; Heintschel von Heinegg, *Blockade*, *supra* note 90, ¶ 2. Indeed, the significant feature of a blockade is that it “avoids the need to distinguish between the cargoes carried by neutral ships, and so overrides the law of contraband.” 2 DANIEL P. O’CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 1150 (1984). As a matter of policy (rather than *opinio juris*) in the land context, it is worth noting here the Turkel Commission’s framing of an Israeli policy change in 2010. TURKEL COMMISSION REPORT, *supra* note 133, ¶ 97 (“[I]t should be noted that in June 2010, the Israeli Government changed the land border crossings policy from a policy in which only the transfer of limited humanitarian supplies was allowed to a policy where only the entry of goods that have military purposes is prohibited.”).

366. Lattimer, *supra* note 354.

367. Gillard, *supra* note 145, at 2.

368. SRM, *supra* note 10, ¶ 95; Declaration of London, *supra* note 24, art. 3; Paris Declaration, *supra* note 25, principle 4.

cover those gaps. Indeed, a crucial feature of Article 54 of Protocol I is to place a categorical ban on the starvation of civilians—to prohibit it regardless of the military advantage that might accrue, just as IHL prohibits the targeting or terrorizing of civilians, the torture of detainees, or the indiscriminate bombardment of areas of dense civilian population, irrespective of the military advantage such actions may promise.

The legal principles enshrined in the Additional Protocols have been confirmed in important developments since the publication of the *San Remo Manual*. As discussed above, they underpin the war crimes provisions of the Rome Statute.<sup>369</sup> They have been seized upon regularly in response to the deprivations that have characterized the situations in Syria, South Sudan, Yemen, and elsewhere.<sup>370</sup> The Security Council and other U.N. bodies have repeatedly condemned the use of starvation as a method of warfare, including by denying humanitarian access.<sup>371</sup> Although not all of these developments point unequivocally to a particular interpretation of the Additional Protocols, they do contribute to the customary law credentials of the core rules.

In light of this, the *San Remo Manual* should be revised in several respects. Paragraph 102(a) should incorporate the categorical ban on starvation. It might read: “The declaration or establishment of a blockade is prohibited if it has the purpose or foreseeable consequence of starving the civilian population by depriving it of objects essential for its survival.”

On the issue of proportionality (currently included in paragraph 102(b)), the text can be retained, but three things ought to be clarified in the revised Explanation. First, the document should specify the basis for the inclusion of a proportionality rule and explain why that basis would not also demand incorporating rules of discrimination and general precautions. Second, the Explanation should examine the question of how proportionality is to be evaluated over time, particularly as civilian harm or military advantage deviates from initial expectations, whether that entails adopting a prospective,

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369. See *supra* notes 119–120 and accompanying text.

370. Group of Experts on Yemen, *supra* note 5, ¶¶ 358, 511, 737–50; Commission on Human Rights in South Sudan, *supra* note 116. Then-U.N. Secretary-General Ban Ki-moon warned that the siege tactics used against the populations of Madaya and other encircled areas in Syria were potentially criminal. *Starvation ‘as a Weapon’ is a War Crime, UN Chief Warns Parties to Conflict in Syria*, UN NEWS (Jan. 14, 2016) <https://news.un.org/en/story/2016/01/519982-starvation-weapon-war-crime-un-chief-warns-parties-conflict-syria>.

371. S.C. Res. 2258, pmb., para. 4 (Dec. 22, 2015); H.R. Council Res. 26/23, ¶ 7 (July 17, 2014); S.C. Res. 2417, pmb., paras. 5, 6, 10 (May 24, 2018).



quota, or discount approach.<sup>372</sup> Third, it should be clarified that the proportionality rule is included as a supplement to the categorical ban on starvation, rather than as its replacement. In other words, it should be clear that the proportionality constraint is relevant primarily to civilian suffering caused by factors other than the deprivation of essential objects, such that no assessment of military advantage would legitimate the latter.<sup>373</sup>

Paragraph 103 should be framed to specify that any imposition of technical arrangements or supervision conditions cannot impede humanitarian access to the point of causing the starvation of civilians, even if that means that essential objects allowed through cannot be guaranteed to benefit the civilian population exclusively. That could entail adding the following at the end of the provision: “In no case shall the imposition of technical arrangements or conditions on the distribution of essential supplies impede the delivery of such supplies to the point of causing the starvation of civilians.”

A similar clarification should be added to the technical arrangements provision of paragraph 104. Even if the existing text of these two provisions were to be retained, the proper interpretation could be clarified in the Explanation.

#### VI. BEYOND BLOCKADE: TWO NORMATIVE TRENDS THAT CANNOT BE IGNORED IN THE SAN REMO UPDATE

Before closing, it is worth noting two broader dimensions of normative change since the *Manual's* publication that have particularly significant implications for the revision process, both at the level of the encirclement provisions, but also across the document as a whole. The first is the extension by custom of many IHL rules to the realm of NIACs. The second is the growing recognition and elaboration of the role of IHRL in armed conflict.

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372. See *supra* notes 158-162 and accompanying text.

373. International Fact-Finding Mission, *supra* note 133, ¶ 52 (“the damage may be thought of as the destruction of the civilian economy and prevention of reconstruction further to damage”); Cf. TURKEL COMMISSION REPORT, *supra* note 133, ¶ 90 (“the ‘damage’ or ‘suffering’ discussed in international humanitarian law are mainly those that are identified in the prohibitions of starvation and deprivation of objects essential for the survival of the civilian population”).

A. *The Law of Armed Conflict for NIACs*

In the opening paragraphs of the *San Remo Manual's* Explanation, the authors write, “although the provisions of this Manual are primarily meant to apply to international armed conflict at sea, this has intentionally not been expressly indicated in paragraph 1 in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations.”<sup>374</sup> The Turkel Commission took this language to support application of the *Manual's* rules (including on blockades) to NIACs.<sup>375</sup> Predictably, that interpretation has been criticized as straightforwardly inconsistent with the text upon which it relies.<sup>376</sup> Indeed, it seems fairly clear that the *Manual* takes no position on whether or not any of the specific rules it articulates have customary or even emerging status in NIACs.

Just sixteen months after the *Manual's* provisions were initially adopted, the Appeals Chamber of the fledgling International Criminal Tribunal for the former Yugoslavia ruled that many (though not all) rules of IHL apply to NIACs as a matter of custom, even though most treaty provisions focus exclusively on IACs.<sup>377</sup> Famously, the chamber complemented a survey of State practice and *opinio juris* on the issue with the more normative observation that “what is inhumane in international war cannot but be inhumane and consequently prohibited in civil strife.”<sup>378</sup> Regardless of one’s view of the soundness of the Tribunal’s legal determination in 1995, it is now the dominant view among IHL experts. The *Tadić* decision has become one of the most cited judicial interventions in the history of international law.<sup>379</sup>

A decade later, the ICRC released what remains the most comprehensive single study of customary IHL.<sup>380</sup> Confirming the thrust of the *Tadić* decision, it determined that the overwhelming majority of IHL rules apply to both NIACs and IACs. The study was not intended to cover naval warfare, but its identification of a trend in IHL towards the comprehensive regulation of

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374. SRM, *supra* note 10, ¶ 1.1.

375. TURKEL COMMISSION REPORT, *supra* note 133, ¶ 42.

376. Buchan, *supra* note 155, at 268.

377. *Tadić* Interlocutory Appeal, *supra* note 120, ¶¶ 96–127.

378. *Id.* ¶ 119.

379. Consider, for example, its prominence in the word clouds for U.S. and UK international law textbooks in ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 148–49 (2017).

380. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 70; 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 89.

NIACs has implications beyond the intended scope of the study.<sup>381</sup> The ICRC's methodology has been subject to much scrutiny,<sup>382</sup> but the NIAC trend is one that has gained widespread recognition. One year later, the International Institute of Humanitarian Law built on the success of the *San Remo Manual* on armed conflicts at sea by publishing a *Manual on the Law of Non-International Armed Conflict*, which also endorses the theory of significant convergence in the law applicable to IACs and NIACs.<sup>383</sup> The latter *Manual* does not articulate any specific limitation as to the domains to which it applies. It addresses free-floating naval mines and duties to the shipwrecked but says nothing on a range of other issues specific to naval warfare.<sup>384</sup> As noted above, the war crimes code incorporated into the ICC Statute incorporates many of the key IAC war crimes in its NIAC list (now including starvation) and does not exclude naval warfare.<sup>385</sup>

In light of these intervening developments, the revised Manual on International Law Applicable to Armed Conflicts at Sea cannot credibly replicate the first edition's avoidance of the NIAC question. What a review of that issue will mean for the blockade provisions is not clear, as blockade law is one of the remaining issues on which there remains significant support for the view that it is limited to IACs.<sup>386</sup> This, however, only underscores the inadequacy of the *San Remo Manual's* consignment of the starvation prohibition to its blockade law framework. As a result of that approach, the *Manual* fails to address other potentially significant forms of naval starvation warfare, particularly, though not exclusively, in NIACs. This flies in the face of the clear basis in treaty and custom for the application of the ban on starvation of civilians as a method of warfare in all forms of armed conflict, regardless of whether the method of warfare in question qualifies as a blockade.

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381. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 70, at xxxvi.

382. *See, e.g.*, Bellinger & Haynes, *supra* note 97. For a broader array of perspectives on the study, see ELIZABETH WILMSHURST & SUSAN BREAU, PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2007).

383. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT (Michael N. Schmitt, Charles H. B. Garaway & Yoram Dinstein eds., 2006).

384. *Id.* at 30, 46–47.

385. *See supra* notes 106–123, 248–254 and accompanying text.

386. TURKISH NATIONAL COMMISSION OF INQUIRY, *supra* note 157, at 61–63; Fink, *supra* note 3, at 303–4; Heintschel von Heinegg, *Blockades and Interdiction*, *supra* note 126, at 932. *But see* TURKEL COMMISSION REPORT, *supra* note 133, ¶¶ 39–44. The Palmer Report was particularly ambiguous on this issue. *See* Palmer Report, *supra* note 133, ¶ 73.

The implications for the *Manual* of the rise of customary IHL in NIACs in the quarter-century since the first edition are wide-ranging. On the specific issue at hand here, if the revised manual finds sufficient customary basis for the application of blockade law to NIACs, the application of paragraphs 102–4 to the latter context ought to be made explicit. Additionally, and regardless of whether the Group of Experts determines that blockade law applies in NIACs, the revised manual ought to clarify that the prohibition of starvation of civilians as a method of warfare applies to all naval methods of warfare in both IACs and NIACs, and not only to blockades. In evaluating whether measures such as those imposed by the Saudi- and Emirati-led coalition on Yemen violate the starvation ban, the question should be whether those measures constitute the infliction of starvation as a method of warfare, not whether the action is a blockade, or whether the armed conflict is international or non-international.

### B. *International Human Rights Law and Armed Conflict*

A second development has equally wide-ranging implications. The *San Remo Manual* was framed not as a restatement of the law of armed conflict applicable at sea, but as a restatement of “international law applicable to armed conflicts at sea.” Thus, the *Manual* incorporates rules from the *jus ad bellum* and the law of neutrality, as well as rules of IHL.<sup>387</sup> Reading the text today, however, there is a prominent omission. In the quarter-century since the *Manual’s* publication, longstanding grounds for asserting the applicability of IHRL to State conduct in armed conflict have gained traction with a broad range of relevant legal authorities, including the International Court of Justice, the European, Inter-American, and African human rights courts, the Human Rights Committee, and others.<sup>388</sup> Most States have now recognized

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387. See, e.g., SRM, *supra* note 10, pts. I–II.

388. See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 216 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 105–6 (July 9); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8); *Bámaca Velásquez v. Guatemala*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 207 (Nov. 25, 2000); *Coard v. United States of America*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/ser.L/V/II.106.doc.3rev ¶ 37 (1999); *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95.doc.7 rev. ¶ 158 (1997); General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), ¶¶ 7, 13, 20

the applicability of human rights law in armed conflict, and even those that have been resistant to this trend have equivocated in that respect.<sup>389</sup> Notably, the Security Council has also invoked human rights in armed conflict situations regularly in the period since the *San Remo Manual* was published.<sup>390</sup>

Of course, precisely how the regimes of IHRL and IHL are to interact when both apply remains the subject of significant debate and has not always been addressed consistently within the jurisprudence of individual courts or other interpretive authorities. Some hold that both regimes apply unless they diverge in their requirements, in which case IHL applies as the armed-conflict-specific interpretation of IHRL (the *lex specialis*).<sup>391</sup> Alternatively, other

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(Nov. 18, 2015), <https://www.achpr.org/legalinstruments/detail?id=10> [hereinafter General Comment No. 3]; *Hassan v. United Kingdom*, 2014-VI Eur. Ct. H.R. 1, ¶¶ 77–104; Human Rights Committee, General Comment 29: States of Emergency (Article 4), ¶¶ 3, 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); Human Rights Committee, General Comment 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment 31]; U.N. Human Rights Committee, General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life, ¶¶ 2, 64, 67, 70, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018). Note, however, that immediately before this article went to press, the European Court of Human Rights appeared to narrow the degree to which the European Convention on Human Rights can apply extra-territorially in IACs. *Georgia v. Russia (II)*, App. No. 38263/08, ¶¶ 128–44 (2021) (ECtHR), [https://www.echr.coe.int/Documents/GC\\_Judgment\\_20210121\\_ENG.PDF](https://www.echr.coe.int/Documents/GC_Judgment_20210121_ENG.PDF).

389. Most States have recognized the applicability of human rights law in armed conflict for some time now. Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISRAEL LAW REVIEW 310, 324 (2007). For the equivocation of those that have resisted, see, e.g., Fourth Periodic Report of the United States to the Human Rights Committee ¶¶ 506–7 (Dec. 30, 2011); HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507, ¶ 38 (2006) (Isr.), reprinted in 46 INTERNATIONAL LEGAL MATERIALS 373 (relying on human rights law principles in the course of an IHL analysis).

390. For just a few such examples over the course of the last twenty-five years, see S.C. Res. 1019 (Nov. 9, 1995); S.C. Res. 1034 (Dec. 21, 1995); S.C. Res. 1635 (Oct. 28, 2005); S.C. Res. 1653 (Jan. 27, 2006); S.C. Res. 2511 (Feb. 25, 2020).

391. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep. 226, ¶¶ 25, 35; *Legal Consequences of the Construction of a Wall*, 2004 I.C.J. Rep. 136, ¶ 106; *Coard*, Report No. 109/99, OEA/Ser.L/V/II.106. doc.3rev ¶ 42; Inter-Am. Commission H.R., Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116. doc. 5 rev. 1 corr. ¶ 61 (2002); Letter from Inter-Am. Commission H.R. to the United States, Detainees in Guantanamo Bay, Cuba: Request for Precautionary Measures (Mar. 13, 2002), <http://hrlibrary.umn.edu/cases/guantanamo-2003.html>. But see Inter-Am. Comm'n H.R., Resolution 2/11 Regarding the Situation of the Detainees at Guantanamo (July 22, 2011),

authorities approach the issue along the lines defined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which provides for different treaties to be interpreted in light of one another, with neither in a position of presumptive priority.<sup>392</sup> On that approach, divergent rules may be harmonized through a hybrid, coordinated interpretation.<sup>393</sup> In still other instances, bodies with human rights authority have applied human rights law straightforwardly in circumstances of armed conflict, regardless of potentially divergent rules of IHL, unless there is a direct contradiction (as when the latter would require the violation of the former).<sup>394</sup>

Beyond that core issue of interpretative interaction are further layers of complexity and uncertainty. For example, debates regarding the degree to which IHL is facilitative or prohibitive have implications for the extent to which the law of armed conflict is in tension with IHRL on any given issue in the first place.<sup>395</sup> Additionally, there is the longstanding issue of any particular human rights regime's applicability to State conduct outside the latter's territory. A State's flag vessels are relatively straightforwardly included

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<https://www.cidh.oas.org/pdf%20files/Resolution%202-11%20Guantanamo.pdf> (“Although international humanitarian law is the *lex specialis* for determining states' obligations in these situations, in certain circumstances, its norms may not provide sufficient protection for the rights of the persons affected.”).

392. Vienna Convention on the Law of Treaties, *supra* note 246, art. 31(3)(c).

393. *See, e.g.*, Hassan v. United Kingdom, 2014-VI Eur. Ct. H.R. 1, ¶ 102; Inter-state Petition IP-02 Admissibility Franklin Guillermo Aisalla Molina (Ecuador-Colombia), Inter-Am. Comm'n H.R., Report No. 112/10, OEA/Ser.L/V/II.140, doc. 10 ¶¶ 121–22 (2011) (invoking both the Vienna Convention principle and *lex specialis*); *Bámaca Velásquez v. Guatemala*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 207 (Nov. 25, 2000) (“the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention”); *Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 179 (July 1, 2006); General Comment No. 3, *supra* note 388, ¶¶ 13, 32–35; General Comment 31, *supra* note 388, ¶ 11. Having invoked the *lex specialis* concept previously, the International Court of Justice in *Armed Activities* took a more equivocal line, citing those earlier cases only for the proposition that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.” *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 216 (Dec. 19).

394. *See, e.g.*, *Al-Jedda v. United Kingdom*, 2011-IV Eur. Ct. H.R. 305, ¶ 107 (holding that even if the situation at hand had been an IAC (which would have implicated the IHL detention regime), the European Convention detention standard would apply as usual, unless IHL specifically required its violation).

395. HAQUE, *supra* note 330, at 30. *Cf.* Eliav Lieblich, *The Facilitative Function of Jus in Bello*, 30 EUROPEAN JOURNAL OF INTERNATIONAL LAW 321 (2019).

within its sphere of human rights responsibility, as are persons held in detention by its agents.<sup>396</sup> More complex, however, are questions regarding the application of human rights law to State acts or omissions vis-à-vis persons not on one of its flagged vessels, but who are affected by decisions made by those who control those vessels. The precise threshold at which human rights protections kick in in such circumstances is not uniform across regimes.<sup>397</sup> How it applies in the context of economic and social rights is particularly unclear, notwithstanding the fact that the International Covenant on Economic, Social, and Cultural Rights has no territorial jurisdictional clause and even requires “international assistance and co-operation” in the progressive realization of the rights enshrined.<sup>398</sup>

Assuming territorial application, deprivation by encirclement raises significant issues for the rights to life, food (and freedom from hunger), health, and possibly torture or cruel, inhuman and degrading treatment, housing, and freedom of movement, among others.<sup>399</sup> Without providing specifics, the Security Council’s landmark resolution on starvation in armed conflict invokes IHRL twice alongside IHL, including by demanding that “all parties

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396. The reach of a State’s human rights duties to its flagged vessels was recognized even in the European Court of Human Rights’ most restrictive (and since overturned) decision on the extraterritorial application of the European Convention. *Bankovic and Others v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 73. On detention, see, e.g., *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99, ¶ 88 (citing Lord Brown’s determination in the House of Lords’ decision in the case that detention was one of the narrow bases for extraterritorial jurisdiction in the *Banković* era).

397. See generally MARKO MILANOVIĆ, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011). The European regime has been perhaps the most inconsistent on this issue. Compare, e.g., *Bankovic*, 2001-XII Eur. Ct. H.R. 333, ¶¶ 59–82, and *Al-Skeini*, 2011-IV Eur. Ct. H.R. 99, ¶¶ 130–42, with *Jaloud v. Netherlands*, 2014-VI Eur. Ct. H.R. 229, ¶¶ 137–53.

398. International Covenant on Economic, Social and Cultural Rights art. 2(1), 993 U.N.T.S. 3 (Dec. 16, 1966); GLOBAL JUSTICE, *STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW* (Malcolm Langford, Wouter Vandenhoe, Martin Scheinin & Wilem van Genugten, eds., 2013); UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (Mark Gibney & Sigrun I. Skogly eds., 2010).

399. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 82, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011); Group of Experts on Yemen, *supra* note 5, ¶¶ 81–85, 747, 800–809; Ventura, *supra* note 71, at 783; Simone Hutter, *Starvation in Armed Conflicts: An Analysis Based on the Right to Food*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 723 (2019).

to armed conflicts fully comply with their obligations under international law, including international human rights law, as applicable.”<sup>400</sup>

Whether or not the San Remo revision can fully explore how to think about specific human rights in the context of a blockade,<sup>401</sup> the new manual will need to confront the general mechanics of the interaction between human rights law and humanitarian law and to articulate some overarching principles on the specific complexities of the application of human rights law at sea. The drafters could, of course, choose to define the manual’s scope in a more restrictive way than they did in 1994, focusing exclusively on the law of armed conflict, rather than international law applicable to armed conflicts at sea. However, doing so would deviate from the original framing and reduce the new manual’s utility, given that these challenges are central to the contemporary legal environment.

## VII. CONCLUSION

The lack of any comprehensive treaty on the law of armed conflict at sea remains a major gap in existing IHL. Given that void and the unique features of naval warfare, the *San Remo Manual* has tremendous importance as the most prominent and widely read restatement of the law in that domain. Much of its text is replicated in military manuals around the world. Its revision offers an important opportunity to update it to accommodate both technological and legal developments. It also offers an opportunity to reflect upon and revisit the original draft on its own terms.

That reflection ought to lead to a revision of the provisions on blockade and a more comprehensive incorporation of the prohibition of the starvation of civilians as a method of warfare. The introduction of humanitarian protections into the law of blockade in the text agreed in 1994 was an important step. However, it did not reach as far as the law of the time, and it falls short of the legal posture on starvation today. Amending that in the revision and clarifying both that the prohibition applies to naval methods of warfare other than blockade and that there is an equivalent restriction in NIACs ought to

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400. S.C. Res 2417, pmb., para. 2 (May 24, 2018).

401. Adopting a *lex specialis* approach, see, e.g., TURKEL COMMISSION REPORT, *supra* note 133, ¶¶ 98–100. Arguing that ultimate limits of IHRL must constrain any interpretation of IHL here, see Coco, Hemptinne & Lander, *supra* note 289, at 917 (“Any interpretation of the law of armed conflict should be acceptable only insofar as it allows protection for the minimum core of the right to food, which would definitely include the right to be free (and not die) from hunger”).



have high priority in the *Manual's* revision. The group of experts preparing the revision must also consider how and with what degree of detail to engage with human rights law, which could itself have significant implications for blockades and other encirclements.