
FOOD AND THE USE OF FORCE: THE ROLE OF HUMANITARIAN PRINCIPLES IN THE GULF CRISIS AND BEYOND

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Since World War II, several international declarations and agreements have been drawn up to strengthen the application of humanitarian principles and more effectively prevent the suffering of noncombatants during armed conflicts. In this article Major Charles B. Shotwell examines the historical use of starvation as a means of force and the evolution of humanitarian laws of war and peace.

Whereas the inherent inhumanity of war is widely recognized, mankind has long understood the need for moral and legal restraints in the use of force.¹ Throughout the centuries, civilian populations have either intentionally or unintentionally been denied essential foodstuffs and medicines by attacking, sieging, and blockading forces. The great suffering and death that has resulted from these military tactics has highlighted the need to protect the rights of noncombatants in armed conflicts around the world. Recent events in the Gulf have once again brought the issue of humanitarian restraints on military actions to the forefront.

This article reviews the historical use of starvation as a means of force and the development of humanitarian law to protect civilians and civil objects related to food production. The evolution of humanitarian laws of war and peace will be examined, and future directions in the development and enforcement of humanitarian principles will be explored.

The Traditional View of Blockades and Sieges

The use of blockades and sieges has a long history. Interference with the transit of goods intended for the support of military forces often has affected

1. Colleen Maher, "Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare," *Boston College Third World Law Journal* Vol. 9 (Summer 1989): 297.

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the supply of items essential for the survival of the civilian population. In many cases, the deprivation of food for both military and civilians has been used as a method of warfare.

The first serious attempts to regulate the conduct of blockades were made in the nineteenth century. The Declaration of Paris of 1856 stated that a blockade must be effective to be binding (i.e., backed up by "sufficient military force to prevent access to the coast of the enemy"), and also recognized the protection of those flying the neutral flag at sea by allowing only "contraband of war" to be seized from neutral vessels.² Conventions adopted pursuant to the Second Hague Peace Conference of 1907 prohibited the use of blockades for the recovery of debts and prescribed some humanitarian rules.³

At the London Naval Conference of 1908-1909 an attempt was made to further formalize the rules for blockades. The resultant London Declaration proclaimed that items such as agricultural equipment and medical articles would not be considered contraband of war and could not be seized.⁴ Foodstuffs were defined in the Declaration as "conditional contraband," which could be seized when considered "susceptible of use in war."⁵ This agreement, however, was never ratified by its participants.⁶

During World War I, Allied forces used long-distance blockades against the Central Powers, stopping and seizing neutral vessels on the high seas if they carried goods bound for Germany.⁷ The Central Powers used submarines to block military supplies coming from the United States and other "neutrals." Allegations and counter-allegations were exchanged between Great Britain and Germany over the legitimacy of seizures of, or attacks on, "military cargo," particularly after the German attack in 1915 on the passenger ship *Lusitania*, which the Germans claimed was carrying war materials, and during the British blockade of foodstuffs headed for Germany. One British jurist sums up the goal of this military tactic:

The object of . . . blockade is to cut off a state from its supplies and paralyse its trade and industries, and thus bring to bear a method of coercion which is felt by the great majority of its inhabitants.⁸

2. "Law of the Sea and the Law of Naval Warfare," *Naval Warfare Institute Publication (NWIP) 10-2* (Newport, R.I.: Naval Justice School, 1985): 42. See also Leon Friedman, ed., *The Law of War: A Documentary History* (New York: Random House, 1972), 156.

3. R.R. Churchill and A. Lowe, *The Law of the Sea* (Manchester, U.K.: Manchester University Press, 1983), 271. The Hague Conference action was in response to the 1902 blockade of Venezuela by the UK, Germany, and Italy in order to collect compensation for damage suffered during a Venezuelan civil war. For a text of the Convention, see Friedman, *The Law of War*, 298.

4. Friedman, *The Law of War*, 407-408. See Art. 28 (agricultural equipment) and Art. 29 (medical articles).

5. *Ibid.*, 406. See Art. 24 (foodstuffs).

6. "Law of the Sea and Naval Warfare," *NWIP 10-2*, 43.

7. Michael Akehurst, *A Modern Introduction to International Law* (London: George Allen and Unwin, 1984), 234. See also "The Commander's Handbook on the Law of Naval Operations," *Naval Warfare Publication (NWP) 9*, paragraph 7.7.5.

8. Albert Hogan, *Pacific Blockade* (Oxford: Clarendon Press, 1908), 11.

It appears that this object was largely achieved. An estimated 800,000 German civilians died of starvation as a result of the British blockade.⁹

In between the world wars, the Covenant of the League of Nations marked an ambitious attempt to enforce international peace by mandating the pacific settlement of disputes.¹⁰ The Covenant did, however, condone the use of economic sanctions backed by armed force, but only against nations committing acts of war specifically prohibited by the Covenant. Despite this new codification, during World War II blockades were used once again by both the Axis and the Allied forces. Sir Winston Churchill was adamant about the necessity of constricting food supplies to the Axis Powers.¹¹ The Germans imposed a blockade on the besieged city of Leningrad, among others, resulting in the death of an estimated one-third of its residents.¹²

The civilian populations of many developing countries have suffered greatly from sieges and blockades implemented during various international and non-international conflicts. The Nigeria-Biafra dispute of 1968-1970 dramatically illustrated the need to regulate the use of starvation as a military strategy.

The cold war era witnessed much peacetime usage of blockades as a means of exhibiting force short of war.¹³ In 1948, the Soviets imposed a land and waterway blockade against Berlin; the lack of an effective air blockade resulted in its circumvention. During the Korean War, United Nations forces blockaded the northern peninsular coastline of Korea. The United States enacted a "quarantine" rather than a blockade during the Cuban Missile Crisis of 1962, meaning that it could stop non-Cuban ships nearing Cuba and search them for armaments. Some commentators suggest that the United States opted for a quaran-

9. W. Hays Parks, "Air Law and the Law of War," *Air Force Law Review* Vol. 32 (1990): 22.

10. Albert Hindmarsh, *Force in Peace* (Cambridge: Harvard University Press, 1933), 98. See also Covenant of the League of Nations, Part I of the Treaty of Versailles, 1919, reprinted in Friedman, *The Law of War*, 426. Sanctions included "severance of all trade and economic relations, prohibition of all commerce . . ."

11. Guy Roberts, "The New Rules for Waging War: The Case against Ratification of Additional Protocol I," *Virginia Journal of International Law* Vol. 26 (1985): 154. Churchill, who served as Lord of the Admiralty during World War I, defended his views, stating many foods could be used in weapons production, i.e., milk for plastics, fat for explosives, etc.

12. An estimated 671,635 civilians died of starvation in Leningrad and the nearby cities of Pushkin and Peterhof. Source: Harrison Salisbury, *The 900 Days: The Siege of Leningrad* (New York: Avon Books, 1970), 591. See also the trial of General Von Leeb in the High Command Case (1948), in Friedman, *The Law of War*, 1459-1460.

13. Institute of World Polity, *The Law of Limited Armed Conflict* (Washington, D.C.: Georgetown University School of Foreign Service, 1965), 103.

tine in order to circumvent the customary pacific blockade rule that only ships of blockaded states may be stopped and searched.

The civilian populations of many developing countries have suffered greatly from sieges and blockades implemented during various international and non-international conflicts. The Nigeria-Biafra dispute of 1968-1970 dramatically illustrated the need to regulate the use of starvation as a military strategy. In response to the Biafran declaration of independence from Nigeria, Nigerian forces enacted a land blockade which halted the flow of relief supplies. This violated Nigeria's promise to abide by Geneva Convention standards. Biafra itself complicated relief efforts, accepting only night flights and refusing land transports. The International Committee of the Red Cross (ICRC) suspended flights in 1969, though other sporadic relief efforts continued.¹⁴

In 1965 the UN Security Council called for strict economic sanctions against Ian Smith's separatist regime in Southern Rhodesia in Resolution 217.¹⁵ These sanctions were supported by blockade actions by Britain against the Port of Beira in Mozambique, the major supply route for land-locked Rhodesia.¹⁶

During the India-Pakistan dispute of 1971, the Indian Navy blockaded 180 miles of the coastline of East Pakistan in order to deny resupply and egress for the Pakistani Army.¹⁷ A combination of natural disasters and blockade-related shortages led to unprecedented suffering for the civilian population. Similarly, during the 1980s both the Ethiopian government and Eritrean rebels were accused of using food as a weapon in the course of the civil war in that country. This lengthy war, in combination with a devastating regional drought, killed hundreds of thousands of soldiers and civilians.¹⁸

Current US military doctrine accepts the right to use blockades as a legitimate application of force¹⁹ and to conduct operations to starve the military forces of hostile belligerents.²⁰ US military manuals on the law of armed conflict provide some useful insight on US and international views. Those manuals do not constitute policy statements binding upon US military forces, but do represent the probable interpretation of the law by US authorities.²¹

Current US naval doctrine recognizes broad authority for interception and search of merchant vessels, including the authority to attack and destroy vessels actively resisting a visit and search.²² The purpose of naval operations against trade is to reduce an enemy to submission by blocking the receipt of "arms,

14. Michael Bothe, "Article 3 and Protocol II: Case Studies of Nigeria and El Salvador," *American University Law Review* Vol. 81 (1982): 904.

15. See UN Security Council Resolution 217, 20 November 1965, as reprinted in Louis Henkin, ed., *International Law Cases and Materials* (St. Paul, Minn.: West Publishing Co., 1987), 239-240.

16. Churchill and Lowe, *The Law of the Sea*, 271.

17. "Law of the Sea Naval Warfare," *NWIP 10-2*, 60.

18. "Starvation Tactics in a Nasty Little War," *US News & World Report*, 21 March 1988.

19. "Law of the Sea Naval Warfare," *NWIP 10-2*, 59. Also in "Commander's Handbook," *NWP 9*, paragraph 7.7.

20. Roberts, "New Rules for Waging War," 152. Also see *NWIP 10-2*, "The Law of the Sea and Naval Warfare," 59.

21. Parks, *Air Law and Law of War*, 38.

22. "Law of the Sea and Naval Warfare," *NWIP 10-2*, paragraph 503(b)(3).

munitions, *foods and other products needed to carry on.*"²³ US naval rules of engagement for blockades generally require a public declaration by the government of the blockading country, timely notice to all states targeted for the blockade, and effectiveness of enforcement.²⁴ Blockades may not be applied to neutral ports or coasts and must be applied equally to ships of all nations, with the exception of neutral vessels.²⁵ Neutrals engage in trade with belligerents at their own risk, however, where they carry contraband or run the blockade.²⁶ Some commentators would add the requirement of "necessity" to the list of prerequisites for blockades.²⁷ In other words, the imposition of a blockade must be militarily necessary before it may be considered lawful.

Foodstuffs are not considered to be contraband unless there is reason to believe they will be used for military forces or have some other military application.²⁸ This rule partly derives from Article 23 of the 1949 Geneva Convention Relative to the Protection of Civilians Persons in the Time of War (Geneva Convention IV), which requires blockading forces to allow the passage of "essential foodstuffs, clothing, and tonics" for children under the age of fifteen and expectant mothers. Medical items and religious objects are likewise exempt. Exceptions are only permitted if the party has serious reasons to believe that the consignments may be diverted from their purported destination, the control over the goods may not be effective, or a "definite advantage may accrue to the military efforts or economy of the enemy."²⁹

International law recognizes the right to impose a blockade under certain circumstances. Article 42 of the United Nations Charter permits the use of blockade, provided the Security Council sanctions it. It is less clear whether Article 42, by implication, precludes nations from using a blockade for individual and collective self-defense as defined under Article 51. It could be argued that a blockade conducted in the absence of specific UN sanction threatens the economic, and therefore political independence of the state, in violation of Article 2(4) of the Charter. The prevailing view, as demonstrated by recent practice, is that blockades may be imposed without UN sanction when required for individual or collective self-defense.³⁰

23. *Ibid.*, 59.

24. *Ibid.*, 38. Also in "Commander's Handbook," NWP 9, paragraph 7.7.2.1. It is also customary to notify all affected nations, as well as local authorities, para. 7.7.2.2.

25. "Law of the Sea and Naval Warfare," NWIP 10-2, 38. Also in "Commander's Handbook," NWP 9, paragraph 7.7.2.4.

26. L. McNair and A. Watts, *The Legal Effects of War* (Cambridge: Harvard University Press, 1966), 453. See also "Commander's Handbook," NWP 9, paragraph 8.2.3.

27. Institute of World Polity, *Law of Limited Armed Conflict*, 102. The authors maintain that blockades and quarantines are permissible only where they are acts of self-defense (and products of "major coercion"). See also p. 106, the use of blockades to further political objectives was viewed as illegitimate. The offense justifying such an action must be a "true international delict."

28. "Commander's Handbook," NWP 9, paragraph 7.4.1.2.

29. Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959), 155-156.

30. Henry Degenhardt, *Maritime Affairs—A World Handbook* (Detroit, Mich.: Gale Research Co., 1985), 221. He suggests that Art. 51 may justify the use of a blockade as a means of self-defense, notwithstanding the assertion of Art. 2(4) by the blockaded party.

Article 51 of the Charter suggests some limitations on the use of blockades for self-defense. It states that:

Nothing in this charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

It is not clear whether this means that *any* Security Council peacekeeping measure would preempt national defensive operations, especially where the Security Council measure does not exclude such local measures expressly or by necessary implication. Article 51 further requires nations taking such defensive actions to immediately report these actions to the Security Council.

The use of sieges and blockades is generally accepted by the United States and other nations around the world. The methods, extent, and application of individual sieges and blockades, however, are subject to ongoing debate. One important focus of the debate is the extent to which they are subject to humanitarian principles.

The Evolution of Humanitarian Principles

Certain expectations in the form of standards of conduct regarding the treatment of civilians have evolved over time as customary international law. These standards incorporate the principles of humanity, chivalry, and military necessity. The principle of proportionality is often included with the aforementioned, although some question its status as custom.³¹

The principle of humanity requires that force be used in such a manner that loss of civilian life and property is kept to a minimum. The principle of proportionality similarly states that the degree of force should not exceed that which is necessary to fulfill the military objective.³² The principle of chivalry requires that combatants not abuse the protected status of civilian institutions such as hospitals and places of historical or religious significance.³³ The principle of military necessity requires that force be used only where necessary to impede the opponent's ability to wage war or achieve his submission.³⁴

31. Parks, "Air Law and the Law of War," 173. This was a position presented during the US military review of Protocol I.

32. See "International Law—the Conduct of Armed Conflict and Air Operations," *Air Force Pamphlet (AFP) 110-31* (1976): paragraph 1-3.

33. Witness General Douglas MacArthur's order confirming the death sentence of General Yamashita, "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this secret trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits—sacrifice." Source: "Law of the Sea and Naval Warfare," *NWIP* 10-2, 41.

34. "The Right to Life During Armed Conflict: Disabled Peoples v. US," *Harvard International Law Journal* Vol. 29 (1988): 70-71.

Despite the existence of these principles as a part of international customary law, Western history is replete with examples of their blatant disregard resulting in "noncombatant" casualties and destruction of essential elements for their survival: Europe's bloody Thirty Years War, the burning of Moscow during Napoleon's campaign of 1812, General Sherman's and General Sheridan's destruction of the countryside during the American Civil War, and the US campaigns against the Plains Indians (1867-91), to name a few.³⁵

Significant codification of humanitarian principles was achieved in the nineteenth century. Among the first attempts was Francis Lieber's Code of 1863 (US Army General Instruction No. 100) during the American Civil War.³⁶ Dr. Lieber, a veteran of Prussia's campaign against Napoleon and later a law professor at Columbia University, defined and formalized principles such as military necessity (Articles 14-16), notification and evacuation of noncombatants, especially women and children, before bombardment (Article 3), and other rules intended to protect civilians. Despite the Code's progressive advancement of humanitarian principles, Article 7 declares it lawful to starve the hostile belligerent, armed or unarmed, and permits a commander laying siege to drive back noncombatants attempting to flee "so as to hasten on the surrender."³⁷

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The 1874 Brussels Declaration Concerning the Laws and Customs of War, which followed the Franco-Prussian War and the siege of Paris, signed (but never ratified) by sixteen European states, strictly forbade the "destruction or seizure of the enemy's property which is not imperatively required by the necessity of war."³⁸ The same prohibition was reiterated in Article 23(g) of the 1899 Hague Convention With Respect to the Laws and Customs of War on Land, which was signed and ratified by fifty states.³⁹ Article 52 of the Convention limits the requisitioning of resources from local inhabitants by armies of occu-

35. See Hamilton de Sausseure, "Comments," in *Law and Responsibility in Warfare* (Chapel Hill, N.C.: University of North Carolina Press, 1975), 77.

36. L. Penna, "Customary International Law and Protocol I: An Analysis of Some Provisions," in *Studies and Essays in International Humanitarian Law and Red Cross Principles* (Geneva: Martinus Nijhoff Publishers, 1984), 224. For text of the Code, see Friedman, *The Law of War*, 158-186.

37. See the High Command Case, Friedman, *Law of War*, 1459-1460.

38. *Ibid.*, 196 (Art. 13 (g)).

39. *Ibid.*, 229.

pation. Under Article 55 the occupying state has an affirmative obligation to protect agricultural works.

The record subsequent to the 1899 Hague Convention reveals inconsistent adherence to these principles by parties to the Convention. Food shortages in Germany due to British blockades during the First World War, referred to previously, were severe enough to lead to riots that, many maintain, contributed to toppling the regime of Kaiser Wilhelm II.

The 1923 Hague Rules of Air Warfare provide rules for the protection of civilian objects from aerial bombardment (though never adopted in a legally binding form). Article 22 of the Rules forbids bombardment for the purpose of terrorizing civilian population or destroying private property not of a military character.⁴⁰ According to Article 24, bombardment is permitted only when directed at legitimate military objectives, such as military installations, armament factories, and military lines of communication.

Subsequent conflicts witnessed sporadic successes for some humanitarian relief efforts. During the Spanish Civil War, the Republican government requested humanitarian assistance from the League of Nations.⁴¹ ICRC relief was ultimately allowed through Nationalist lines to assist besieged localities. During the Second World War, the ICRC was permitted to make "mercy shipments" to populations in occupied territories, though not to the belligerents.⁴² Among the most notable of the relief efforts were the 1942-1944 shipments, accompanied by considerable naval forces, on behalf of the population of Greece.⁴³

Since the Second World War, several international declarations and agreements have been drawn up to strengthen the application of humanitarian principles and more effectively prevent the suffering of noncombatants. In 1949, the major effort was made through the previously mentioned Geneva Convention IV. Article 3, for example, requires parties to a conflict to treat humanely all "persons taking no active part in the hostilities," and prohibits cruel and degrading treatment. Article 55 states that an occupying power must ensure, to the fullest extent of means available, an adequate supply of food and medicine for the population. Furthermore, occupying forces may take foodstuffs for their own needs only if "the requirements of the civilian population have been taken into account." It remained for the additional protocols to the Geneva Convention to take this one step further.

During the 1970s, more specific humanitarian requirements were discussed. The provision closest to the heart of the issue is Article 54 of the 1977 Protocol Additional to the 1949 Geneva Convention Relative to the Protection of Civilian Persons (Protocol I) which states as follows:

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects

40. Friedman, *Law of War*, 440.

41. Richard Miller, *The Law of War* (Lexington, Mass.: Lexington Books, 1975), 304.

42. *Ibid.*, 80.

43. Claude Pillard and Jean De Preux, *Commentary on the Additional Protocols* (Geneva: Martinus Nijhoff Publishers, 1987), 654.

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 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.

The text of Article 54 sets forth strict obligations and recognizes only limited exceptions. For example, food intended *solely* for support of armed forces is not immune to attack, but only under the condition that the civilian population is not left destitute, per subparagraph 3(b). The exception of subparagraph 5, that a nation defending its own territory has the right to derogate from the rules in its own territory where required by military necessity, has many conceivable implications.⁴⁴ The Netherlands' opening of its dikes and flooding of its lands in advance of the German invasion during World War II would have been considered legitimate under this exception.

The wording of Article 5 stems from concerns that the doctrine of military necessity was stretched too far in the past, particularly in the Nuremberg military trial of *Generaloberst* Lothar Rendulic. His forceful evacuation of 43,000 Norwegians and the destruction of their houses and buildings was held to be justified by military necessity where he held an honest belief that Soviet forces were in hot pursuit of his retreating troops.⁴⁵ Under Protocol I, a foreign occupier may not carry out such destruction, though a force retreating on its own territory could do so, providing there was military necessity. Few would assert the right of an invader to invoke the principle of military necessity to

44. See discussion of Frits Kalshoven, *Constraints on the Waging of War* (Geneva: Martinus Nijhoff Publishers, 1987), 96.

45. Parks, "Air Law and the Law of War," 3. Also B. Carnahan, "Protecting Civilians Under the Draft Geneva Protocol: A Preliminary Inquiry," *Air Force Law Review* Vol.18 (1976): 53. See also comments on the High Command Case by Michael Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts* (The Hague: Martinus Nijhoff Publishers, 1982), 337.

destroy resources of a nation that it had no right to enter to begin with. Caution should be applied, however, to further limiting the principle of military necessity; doing so may restrict legitimate and sovereign rights of military action in self-defense.

A criticism of some commentators is that Protocol I as a whole, and Article 54 in particular, shifts the burden for the protection of civilians to the attacking nation without a concomitant responsibility for the defender, who, in most cases, has more control over the location and use of civilian objects.⁴⁶ Consequently, such rules are viewed as encouraging the use of civilians as "shields" to prevent attacks.⁴⁷ The language of Article 51(7), prohibiting the "presence or movements of the civilian population . . . to shield military objectives from attack" provides little consolation, since the burden of proof, they argue, rests with the attacker, who might have legitimately been acting in self-defense.

Another major limitation to the application of Article 54 is embodied in Article 49(3) of Protocol I, which leaves the existing law of naval blockade intact.⁴⁸ Despite this broad disclaimer, many commentators contend that the law of blockade has been altered by Article 54, particularly where military operations affect the civilian population or civilian objects.⁴⁹ In other words, blockades are not strictly prohibited, but blockading states must allow the passage of medicines and foodstuffs necessary to prevent the starvation of the civilian population. The ICRC's *Commentary on the Additional Protocols* accepts the proposition that the law of blockade is not changed, but points out that the object of blockade is to disrupt military supplies, not to starve civilians.⁵⁰

The Role of Customary International Law

The rules of Protocol I are clear and firm in their intent to outlaw starvation as a method of warfare. The significance of this set of principles cannot be ignored, as approximately one-third of the international community have adopted the Protocols.⁵¹ Signatories are bound by Article 54 to the extent they have not taken reservations. Non-signatories may be subject to the rules, as well,

46. See Abraham Sofaer's comments in *American University Journal of International Law and Policy* Vol. 2 (1987): 463. He states that certain rules of Protocol I, particularly those providing combatant status to irregulars tends to weaken the protection of civilians by imposing subjective standards. See also Parks, "Air Law and the Law of War," 164.

47. See Parks, "Air Law and the Law of War," 164-8. The most blatant use of human shields was Iraq's Saddam Hussein during the Persian Gulf crisis. Other examples include the Palestine Liberation Organization's storage of weapons in heavily populated areas and Libya's use of Thai nationals at the Rabta chemical plant. One may also point to Britain's alleged carriage of military cargo on passenger liners in the First World War.

48. Howard Levie, *Protection of War Victims, Vol. III* (Dobbs Ferry, N.Y.: Oceana Publications, 1980), 241.

49. See comments of B. Zimmerman in *American University Journal of International Law and Policy* Vol. 2 (1987): 537-538, 550.

50. Pillard and De Preux, *Commentary on Additional Protocols*, 663-4.

51. Comments of Theodor Meron in *American University Journal of International Law and Policy* Vol. 2 (1987): 444.

where they have been found to constitute customary law.

Resolutions such as Protocol I may be considered binding under customary international law only if states display intent to give these rules the force of law and there is consistent practice recognizing them as law (*opinio juris communis*).⁵² We must look to the international community as a whole in order to determine whether consensus exists as to the meaning of Article 54 and to what extent states consider it customary law. As Professor Louis B. Sohn states, the international "'common will' may be expressed explicitly or implicitly, by action or inaction, or by the practice of some states or the inaction of others."⁵³

In cases where it is militarily necessary to attack significant enemy targets with the result of collateral civilian suffering, such suffering must not be disproportionate to the strategic benefits of the operation.

Protocol I has not been accepted entirely nor universally as a codification of customary law.⁵⁴ The United States and several other key nations have not ratified Protocol I, although the United States does regard many of the provisions of Protocol I as customary law.⁵⁵ The United States is in substantial agreement with the provisions on the treatment of the sick and wounded, the protection of medical aircraft, and the recovery of missing and dead persons.⁵⁶ US policy supports the general principle that starvation of civilians not be used as a method of warfare, and that impartial relief actions for civilian population should be required, subject to the imperative of military necessity.⁵⁷ Furthermore, the United States concurs with the requirement that all "practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects . . ." ⁵⁸

The United States, however, disagrees with the meaning and import of certain provisions, for example Article 56 of Protocol I, which prohibits attacks on dams, dikes, and nuclear power plants that could result in "severe" civilian

52. Parks, "Air Law and the Law of War," 82-83. Also Henkin, *International Law Cases and Materials*, 37, 127.

53. Comments of Professor L. Sohn, in *American University Journal of International Law and Policy* Vol. 2 (1987): 438.

54. F. Kalshoven, "Civilian Immunity and the Principle of Distinction," *American University Law Review* Vol. 31 (1982): 855, 859.

55. See comments of the Deputy Legal Advisor to the State Department, Michael Matheson, in *American University Journal of International Law and Policy* Vol. 2 (1987): 419-431. See also the comments of Commander Fenwick, same volume, 528.

56. Matheson, 424.

57. *Ibid.*, 426.

58. *Ibid.*, 426-427.

losses.⁵⁹ This position is taken because of a belief that prohibiting attacks on targets with significant military value where there is only the possibility of civilian losses is contrary to prior customary law. US concerns arise where the rules appear to set absolute prohibitions without taking into consideration military necessity. This matter has been used as an argument against US ratification of Protocol I.

A close reading of the provisions of Article 54 reveals that the prohibitions are far from absolute, though they are designed to effectively minimize human suffering. For example, whereas the destruction of food is barred unless it is intended for the exclusive use of hostile military forces, many argue that crops and other civilian objects can be destroyed for purposes other than eliminating access to food, (i.e., clearing a field of fire, preventing an army from using foliage as cover, using a water tower as an observation post, using an irrigation canal as a defensive position, *etcetera*).⁶⁰ Such attacks, however, are still subject to the requirement of military necessity. Under the customary law of armed conflict, it is difficult to conceive of military necessity or advantage gained by deliberately starving civilians, unless the civilians have directly participated in hostilities in such a way as to forfeit their classification as noncombatants.⁶¹ In cases where it is militarily necessary to attack significant enemy targets with the result of collateral civilian suffering, such suffering must not be disproportionate to the strategic benefits of the operation.

The evolution of international consensus will necessitate taking into consideration legitimate concerns of both the humanitarian viewpoint and the practical realities of the legitimate use of force in self-defense.

It is clear that a great number of nations of the world intend to give many principles protecting basic human rights the status of international law. The existence of other treaties and resolutions which also assert universal human rights presents strong evidence of an international consensus against the use of starvation as a weapon. Article 3 of the 1948 UN Universal Declaration of Human Rights declares the right to life, liberty, and security of the person. Article 5 of the Declaration prohibits inhuman treatment, and Article 25 expresses a "right to a standard of living adequate for the health and well-being of himself and of his family, including food . . ." While these provisions are primarily aimed at domestic governments during times of peace, the general

59. Sofaer, 468.

60. Levie, *Protection of War Victims*, 242.

61. See the comments of Commander Bennet in *American University Journal of International Law and Policy* Vol. 2 (1987): 531. Under the new rules, factory workers must be fed.

principles could reasonably be applied to belligerents.

Likewise, the 1951 UN Genocide Convention (Resolution 2670), does not directly address starvation, but instead defines "crimes" against national, ethnic, racial, or religious groups that, *inter alia*, cause "serious bodily . . . harm." A reasonable interpretation of these "acts" could include the deprivation of sustenance by military forces, but only within the Convention's context of genocide. UN General Assembly Resolution 2675 of December 9, 1970 states that, "In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war . . . (take) necessary precautions to avoid injury, loss, or damage . . ." ⁶²

The existence of resolutions and conventions alone does not conclusively establish the existence of custom, despite nearly universal support for the rule against direct and deliberate starvation of civilians. Few, if any, nations will publicly support the *deliberate* use of starvation of civilians as a method of warfare, per Article 54(1), which evidences a universal tendency indicative of customary international law.⁶³ The common will is not as clear when it comes to the meaning and application of the remaining subsections of Article 54, particularly where they concern the collateral starvation of civilians resulting from attacks on objects of legitimate military significance otherwise conforming to the requirement of proportionality.⁶⁴

Many respected commentators argue that a custom may become crystallized in the course of the international consensus building process.⁶⁵ Such "instant" customary law is recognized, provided there is sufficient basis upon which to conclude an intent of the nations to be bound by law. There does not appear, however, to be objective manifestations of international consensus on specific provisions of Article 54 in its entirety.

An element of *opinio juris* requires that there be consistent practice in observing the custom. Even proponents for stronger humanitarian rules, such as commentator Howard S. Levie, observe that starvation of civilians is widely practiced.⁶⁶ The fact that this principle is frequently violated and inconsistently applied argues against the status of Article 54 *in toto* as customary international law.⁶⁷

62. UN General Assembly Resolution 2675 (XXV), "Basic Principles for the Protection of Civilian Populations in Armed Conflicts," 9 December 1970.

63. Penna, "Customary International Law," 221-222. See also comments of Fenwick, *American University Journal of International Law and Policy*, 528.

64. "International Law—the Conduct of Armed Conflict," AFP 110-31, paragraph 5-10c(2)(b). Aerial bombardment rules require the avoidance of civilian casualties to the greatest extent possible. See also Parks, "Air Law and the Law of War," 149-168.

65. See T. Meron, "The Geneva Conventions as Customary International Law," *American Journal of International Law* Vol. 81 (1987): 348. See also Parks, "Air Law and the Law of War," 82-3.

66. Howard Levie, *The Code of International Armed Conflict*, Vol. I (London: Oceana Publications, 1986), 447. Levie, in his commentaries, describes Protocol I as a "giant step" away from the traditional use of blockades and starvation. In his Code, he proposes the "small step" of requiring relief actions.

67. See the Asylum Case (Colombia v. Peru), 1950 ICJ 266. The International Court of Justice found that inconsistent application of a principle protecting political refugees negated its status as custom. It must be noted however, that this case dealt with a "regional" custom (as defined in

Even if the principle is inconsistently applied, it may still carry the status of law if it represents a fundamental right amounting to *jus cogens*, otherwise known as a peremptory norm. Even inconsistently applied norms have been recognized as carrying the weight of international law, where they are either essential to world peace (i.e., Article 2(4) of the UN Charter) or express generally held moral principles (i.e., against torture).⁶⁸ The American Law Institute's Restatement Third of Foreign Relations Law of the United States, Section 702, supports the view that even persistent objection would not overcome the application of this category of norms.⁶⁹

On the other hand, jurists have been very circumspect in expanding the list of *jus cogens* beyond the current, generally accepted categories.⁷⁰ Two of the existing categories, basic human rights and the law of armed conflict, may encompass general rules affecting starvation. For example, the principles of military necessity and humanity would prohibit deliberate harm to civilians, though these principles do not necessarily make proportional collateral harm unlawful. Human rights principles, as codified in international conventions discussed previously, do not directly address the problem in the context of armed conflict, but rather deal with it as civil and social issue.

In any event, it must be recognized there is consensus on the general principle underlying Article 54(1) of Protocol I, though support for the remainder of Article 54 is far from unanimous. However, progressive development of human rights law through international legislation will continue. Provisions not currently accepted as emergent law may gain more support over time. The evolution of international consensus will necessitate taking into consideration legitimate concerns of both the humanitarian viewpoint and the practical realities of the legitimate use of force in self-defense.

The Gulf War and the Impact of Relief Efforts

Iraq's invasion of Kuwait on August 2, 1990 constituted an international armed conflict within the meaning of Article 2 of Geneva Convention IV.

the Montevideo Convention), rather than a "universal" custom. Regional customs seem to be held to a higher standard of acceptance than world-wide or common customs.

68. Henkin, *International Law Cases and Materials*, 129-130. Henkin cites the principle against torture as an example of a norm that would apply despite inconsistent practice of the states.

69. See the comments of Stanislaw Nahlik, *American Journal of International Law* Vol. 84 (1990): 779, 781. Five categories of peremptory norms were listed: 1) the prohibition of aggressive use of force between states, 2) respect for the self-determination of peoples, 3) respect for basic human rights, 4) respect for basic rules guaranteeing the international status, order, and viability of sea, air, and space outside national jurisdiction, and 5) respect for the basic norms of the international law of armed conflict. See also Gerhard Von Glahn, *Law Among Nations* (New York: MacMillan Publishing Co., 1981), 510-511. Despite the recognition of peremptory norms in Article 53 of the Vienna Convention on the Law of Treaties, some commentators dispute their status as a fundamental rule of law. The apparent wide acceptance of the International Law Commission's position, as expressed in the Vienna Convention, however, makes this viewpoint less prevalent, of late.

70. Nahlik, *American Journal of International Law*, 731.

Although Iraq asserted territorial claims to Kuwait in defiance of British colonial demarcations, the international character of the conflict was evidenced by, among other things, the active involvement of the UN Security Council.⁷¹

On the day of the invasion, the UN Security Council unanimously passed Resolution 660 condemning the attack and calling for Iraq's unconditional and immediate withdrawal from the territory of Kuwait. It declared Iraqi actions to be a breach of the peace under Article 39 of the UN Charter and authorized provisional measures under Article 40. On that same day, US President Bush issued Executive Order 12,722 freezing Iraqi property and interests in property in the United States and prohibiting imports from and exports to Iraq. President Bush also issued Executive Order 12,723 enacting similar measures for occupied Kuwait.

The cost of basic food items was seven times higher five months after embargo began and shortages of rice, sugar, and milk have been reported. Saddam Hussein claimed that the UN trade embargo had "killed" more than 2,000 children because of shortages of milk and medicine.

Shortly thereafter, the UN Security Council passed resolution 661 imposing binding economic sanctions under Article 41 of the Charter. It is only the third time such an economic embargo has been used, the others being against Southern Rhodesia in 1965 and South Africa in 1975. The resolution specifically exempted medical supplies and foodstuffs. UN Security Council also affirmed the inherent right of non-military measures to enforce the trade embargo. It sets up a "Sanctions Committee" to monitor actions in the Gulf. Britain, France, the United States, and other countries coordinated an effort to impose a blockade upon Iraq and occupied Kuwait. These nations claimed to act under the authority of Article 51 of the UN Charter. Land, sea, and air forces were mobilized to support the effort.

On August 12, 1990, President Bush ordered the US Navy to halt all Iraqi imports and exports, but refuses to call this action a blockade. Thirteen days later, the UN Security Council passed Resolution 665 expanding sanctions to include all trade with Iraq by land, sea, and air routes, and outlawing financial dealings between Iraq and UN member states. This resolution authorized the use of multilateral maritime forces to uphold the embargo and requested that participating states coordinate their actions.

UN Security Council Resolution 666 of September 13, 1990 declared that international humanitarian law principles, including Geneva Convention IV,

71. "Who's held in Iraq and Kuwait?" *USA Today*, 30 October 1990, 4.

would apply to the treatment of third-state nationals in Iraq. It imposed limits on humanitarian food supplies to Iraq and occupied Kuwait and gave the authority to determine when humanitarian relief is justified to the UN Security Council. It also directed the Sanctions Committee to cooperate with the ICRC and other appropriate humanitarian agencies in distributing food for humanitarian purposes, but only with the strict supervision of international relief organizations.

UN Security Council Resolution 674 of October 29, 1990 stated that Iraq would be held responsible for all crimes against humanity committed by its troops in Kuwait. It demanded that Iraq ensure access to food and water for Kuwaitis and third-state nationals. The Sanctions Committee was given full responsibility for determining the application of humanitarian exceptions to the embargo.

Saddam Hussein refused to allow international relief organizations to monitor distribution of humanitarian aid.⁷² The ICRC, in particular, was denied access to Iraq and Kuwait.⁷³ Hussein recanted somewhat from this position and eventually allowed the Indian Red Cross to distribute aid to Indian citizens and Iraqi children.⁷⁴ British naval forces allowed the ship carrying this aid to proceed past the blockade. In contrast, a Sudanese ship claiming to carry humanitarian relief to Sudanese refugees was turned back in the Red Sea by US naval forces, because it was suspected of carrying supplies bound for Iraq through Jordan's Port Aqabah. The Sanctions Committee, while permitting the Indian relief effort, denied permission to Vietnam to send two boatloads of food to Vietnamese laborers in Iraq.⁷⁵ This was done on the basis of lack of need, though there were reports of increasing shortages among the Vietnamese and Sri Lankans.

Items arrived in circumvention of the embargo through the Jordanian and Iranian borders. Aircraft sent by Western nations to repatriate their citizens were known to carry food and medical supplies, as well as the cash required by the Iraqis to purchase illegally imported food items. As hard currency was used up, however, the flow of foodstuffs slowed.

The cost of basic food items was seven times higher five months after embargo began and shortages of rice, sugar, and milk have been reported.⁷⁶ Saddam Hussein claimed that the UN trade embargo had "killed" more than 2,000 children because of shortages of milk and medicine.⁷⁷ The US Congress recognized the need for humanitarian relief, as it exempted from trade sanctions against Iraq "transactions involving foodstuffs or payments for foodstuffs in humanitarian circumstances. . ." in the Fiscal Year 1991 Foreign Aid Appropriations Act.⁷⁸

72. "Iraq's Children," *Washington Post*, 27 December 1990, 16.

73. Kenneth Roth, "Using Food as a Weapon," *Human Rights Watch* No. 4 (Fall 1990): 4.

74. "Embargo Loophole Worries President," *Washington Times*, 19 September 1990, 9.

75. Roth, "Using Food," 4.

76. "Iraq's Food Rations are Reduced as Trade Embargo Cuts Supplies," *The New York Times*, 2 January 1991, 1.

77. "Kids in Jordan, Yemen Hurt by Embargo," *Washington Times*, 20 December 1990, 8.

78. Public Law 101-51, Section 586. Originally offered as Amendment 166 to HR 5114.

On January 31, 1991 Saddam Hussein finally agreed to accept ICRC and Iraqi Red Crescent supervision of humanitarian distribution of food.⁷⁹ Many viewed this as an act of desperation, as the allied bombing campaign took a heavy toll on objects of military significance, such as key bridges, supply vehicles, and logistics/transportation centers also integral to the civil food distribution network. General Norman Schwarzkopf, the commander of Operation Desert Storm, reported that air attacks had cut the volume of supplies on the key supply route between the city of Basra and Kuwait from 20,000 tons a day to about 2000.⁸⁰ Such actions had an undeniable effect on the Iraqi forces in Kuwait. Increasing numbers of deserting Iraqi troops reported dwindling rations of food: some units were reportedly allotted only one piece of bread per day per soldier.

The collateral effect of these operations on the civilian population of Iraq has been serious, though it is obvious that the Iraqi military support facilities were the intended target. It is also true that the Iraqi people will suffer from the effects of the bombing campaign long after the war has ended, though Saddam Hussein's lack of forthright cooperation with UN inspection teams is clearly to blame for the reluctance of the Security Council to lift sanctions and allow expanded relief efforts. The United Nations has sent a message to the world that despots of the world may not gain military or political advantage through the suffering of the people.

It may never be known whether the economic sanctions alone would have been successful in enforcing the UN mandate for the withdrawal of Iraqi forces from Kuwait, though the Iraqi resistance during the extensive bombing campaigns indicates that considerable hardship could have been endured for some time. It is now fairly clear that Kuwaiti civilians would have suffered more under continued Iraqi occupation than with allied military operations to free Kuwait.⁸¹

The Role of United Nations and Other International Bodies

The Gulf crisis underscores fundamental role that international organizations (IOs) can play in enforcing humanitarian principles. Allied forces participating in the blockade, even prior to UN approval of the blockade, for the most part accorded rights of passage to humanitarian shipments. The most obvious role for international organizations is as a neutral observer monitoring compliance with international humanitarian requirements. This monitoring function would ensure the distribution of foodstuffs and other necessities to the civilian population and serve to deter circumvention of the rules, such as confiscation of relief supplies by the military. Supervising agencies would report infractions to appropriate international organizations for further action. Such watchdog

79. Cable News Network broadcast of 31 January 1991.

80. "Players in a Ground War," *Congressional Quarterly*, 2 February 1991.

81. See generally the report of *Amnesty International*, "Iraq-Occupied Kuwait: Human Rights Violations since August," December 1990.

groups have met with varying degrees of success in the past, depending upon the circumstances.

The weakness of this approach is that in many instances international observers are not welcome or are rejected outright. During the Vietnam war, the government of North Vietnam would neither accept a neutral third country (Egypt) nor the ICRC as a neutral observer.⁸² Most often, the embargoed government itself wants to direct the distribution of foodstuffs.⁸³ Furthermore, IOs have been criticized as being vocal but ineffectual, especially in situations involving non-international conflicts.⁸⁴

International organizations can be effective when the world community intends to give them appropriate authority and support. Further UN cooperation with the ICRC, the International Red Crescent, and other relief organizations, coupled with authorization for an official role in a particular crisis, will contribute to greater respect for IOs and increase their effectiveness in the future.

The claims of individual states to act on behalf of the international community have always been viewed with skepticism. Even where nations participate in such actions in good faith and with the sanction of the United Nations, such as in the Gulf crisis, there is a tendency for many national governments to perceive that such actions are politically, regionally, ethnically, or otherwise motivated.

Another area in which IOs have been lacking is the establishment of uniform international standards.⁸⁵ Article 54 of Protocol I need to be further clarified where there is lack of international agreement, and more extensive rules should be formulated. Not only should substantive rules be standardized, but procedural rules should be codified as well. Rules of investigation, documentation and insignia for authorized investigators, notice and hearings procedures, rights for accused persons, protection of witnesses, grants of immunity, and related matters need to be formalized. Safeguards for international due process

82. G. Aldrich, "New Life for the Laws of War," *American Journal of International Law* Vol. 75 (1981): 765.

83. G. Best, *Humanity in Warfare* (New York: Columbia University Press, 1980): 256. The author suggests that the German government's takeover of food distribution in W.W.I may have made the distinction between civilians and military impossible and therefore made total blockade, arguably, "necessary."

84. Maher, "Protection of Children," 299.

85. *Ibid.*, 299.

may go a long way toward assuaging apprehensive governments to accept new regulation.

Early in the Gulf crisis, there was a perception among many governments that the sanctions imposed against Iraq were not truly international, but rather represent the interests of the United States the allied forces. Some viewed these interests as anti-Arab or neo-colonial, despite the participation of such divergent countries as Egypt, Syria, Britain, Morocco, France, and others in the coalition.

There are means to truly internationalize military forces. Many nations, including the Soviet Union, have pressed for a larger role for the moribund UN Military Staff Committee, provided for under Article 47 of the UN Charter.⁸⁶ The role of this committee is to advise and assist the UN Security Council on all matters relating to military requirements for the maintenance of international peace and security and the employment and command of forces. This committee could be made responsible for the development of an international command structure for forces implementing UN Security Council directives. The Charter states that Chiefs of Staff of the permanent members of the UN Security Council (or their representatives) would be members of the Military Staff Committee. Representation in that committee by many nations, including the United States, has been relegated to lower ranking officers.

The United States has not yet accepted a true UN military command, with commanders designated by the Military Staff Committee.⁸⁷ UN command may, however, be more effective in assuring that United Nations authorized forces uphold universal humanitarian standards, rather than regional political or economic interests. The United States might be induced to accept such an arrangement because of the cost-saving incentive, either in the form of burdensharing or UN reimbursement of expenses. This system would also require a more affirmative role for the UN Security Council in responding to world crises, with the UN taking the lead in certain policing actions. UN action is, of course, subject to US veto through the Security Council, but affirmative and effective UN Security Council action could erode US domestic political support for unilateral action. As international support for democracy and the rule of law grows, unilateralism makes less sense.

Humanitarian Intervention and International Responsibility

Humanitarian intervention, ranging from nonviolent economic sanctions to military action, had been employed long before the UN Charter existed. Such interventions have been used by Western powers to assist the Greeks against the Turks in 1830, to free hostages from Barbary states in 1801, to assist Syrian

86. J. Goshko, "Military Panel of UN Plans Gulf Meeting," *The Washington Post*, 27 October 1990, 21.

87. Under Article 43 of the UN Charter, bilateral agreements were to have been negotiated for assigning forces to the United Nations for international enforcement action. With the advent of the cold war, these agreements were never concluded.

Christians against the Turks in 1860, among many others.⁸⁸ The militarily enforced economic sanctions against Iraq constitute a form of humanitarian intervention. The use of force in the Gulf crisis represents even more serious intervention.

Article 42 of the UN Charter allows the UN Security Council to take military action where necessary to maintain or restore international peace and security, provided that pacific measures have proved inadequate. Some commentators claim that humanitarian intervention may be justified under the Charter in cases where fundamental human rights are threatened or deprived, such as genocide and starvation.⁸⁹

Generally, humanitarian intervention may be justified when four prerequisites are met:

- 1) Gross violations of human rights have occurred and the government is unable or unwilling to correct,
- 2) The intrusion by intervening parties into the sovereign state is limited to the scope of the problem defined,
- 3) The force applied must be proportional to the wrong,
- 4) The intervention must be contrary to the wishes of the target state.⁹⁰

Such interventions have other limitations. For example, they may be subject to the sovereign government's claim that the matter is an intrusion into internal affairs.⁹¹ Furthermore, intervention is subject to abuse by aggressors and hegemonists.⁹² The claims of individual states to act on behalf of the international community have always been viewed with skepticism.⁹³ Even where nations participate in such actions in good faith and with the sanction of the United Nations, such as in the Gulf crisis, there is a tendency for many national governments to perceive that such actions are politically, regionally, ethnically, or otherwise motivated.

In such cases, universal sanction might help overcome parochial barriers to dispute resolution if governments trust that internationally accepted standards of justice will be enforced.⁹⁴ For this reason, forces operating under the banner of the United Nations, acting as a symbol of universal condemnation, might be more effective in both the political and military spheres.

88. M. Reisman (in collaboration with M. McDougal), "Humanitarian Intervention to Protect the Ibos," in *Humanitarian Intervention and the United Nations* (1973), 171.

89. See comments of I. Brownlie in *Humanitarian Intervention and the United Nations* (Charlottesville, Va.: University Press of Virginia, 1973), 140. See also comments of Farer in same, 164. He noted that most participants in the University of Virginia conference on human rights agreed on the need to intervene to prevent large scale abuse of human rights.

90. W. Maddox, "Comprehensive Anti-Apartheid Act: A Case Study in the Legality of Economic Sanctions," *Washington and Lee University Law Review* Vol. 44 (1987): 1439-1145.

91. Maher, "Protection of Children," 301.

92. Brownlie, *Humanitarian Intervention*, 146.

93. Institute of World Polity, *The Law of Armed Conflict*, 105.

94. Brownlie, *Humanitarian Intervention*, 148.

After-the-fact actions, such as demands for restitution and compensation for the victims, and international war crimes tribunals, are important means of enforcing international standards of conduct. International criminal prosecution could act as a deterrent for would-be violators. A significant trend in humanitarian law, has been the recognition of individual responsibility.⁹⁵ The most important precedent for such action was set when the Nuremberg and Tokyo International Tribunals established personal responsibility for crimes against humanity.

The penalty for individual committing humanitarian violations should not be made more severe, however, unless more meaningful guidance can be given to the military commander in the field as to its import. For example, will an officer be held criminally liable where harm to civilians was not deliberate or where battlefield circumstances allowed little time for thoughtful deliberation?

The requirement of willful intent, with the understanding that incidental effects on civilians would not be considered culpable, should ameliorate these concerns. This approach provides a useful and realistic balance between protecting the rights of civilians and giving military commanders sufficient operational discretion within humanitarian limits.⁹⁶

Though it may act as a deterrent in some cases, punitive action would not directly alleviate civilian suffering in a timely manner. Thus, it should be viewed as a supplement, rather than a substitute, for other actions mentioned in this article.

Conclusion

Enforcement of international humanitarian law will remain problematic in the absence of internationally sanctioned police, judges, or prisons for violators.⁹⁷ International standards are needed for sanctions and enforcement,⁹⁸ and IOs need to be granted sufficient legal authority and support from national governments to supervise relief efforts.⁹⁹

The end of the cold war offers new opportunities for cooperation in improving observance of humanitarian principles. At the same time, the rise of nationalistic strife has led to new excesses in warfare, as could be witnessed during the recent siege of Dubrovnik by federal forces in Yugoslavia. Actions against

95. D. Schindler, "Human Rights and Humanitarian Law," *American University Law Review* Vol. 31 (1982): 935, 941.

96. For a review of attempts to set international standards and international enforcement mechanisms, see H. Jescheck, "Development and Future Prospects," *International Criminal Law* (1984): 83-100, and M. Bassiouni, *Yale Journal of World Public Order* Vol. 9 (1982): 193-214. See also the Report of the International Law Commission (ILC) on the Work of its 41st Session (1989), where the ILC discussed the role of intent in the gravity of international criminal acts (151-152, 169) and whether collateral damage would be considered a war crime (166).

97. A. Hay, "President of the ICRC's Opening Statement to Conference on International Humanitarian Law" as reprinted in *American University Law Review* Vol. 31: 815.

98. H. Almond, "The Teaching and Dissemination of the Geneva Conventions and International Humanitarian Law in the United States," *American University Law Review* Vol. 32 (1982): 981.

99. Bothe, "Article 3 and Protocol II," 904.

humanity must be universally recognized as politically and socially self-defeating in the world community, regardless of the political, ideological, religious, or other justification for the action.¹⁰⁰ The United Nations Security Council properly took the hard line in not rewarding President Saddam Hussein for using the suffering of the Iraqi people to his own political or military advantage, while continually offering internationally supervised relief efforts. Determined but pragmatic progress toward such an international consensus offers the best hope for the prevention of unnecessary human suffering in the future.

100. Comments by V. Solf, *American University Law Review* Vol. 31 (1982): 927, quoting an article in *The Washington Post* which declared that El Salvador's FMLN atrocities were "self-destructive brutality which is militarily and politically and diplomatically disastrous," ultimately costing them support from a major sector of the people.

