CIVILIAN STARVATION AND RELIEF DURING ARMED CONFLICT: THE MODERN HUMANITARIAN LAW

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I. INTRODUCTION


In 1977, after four years of intense negotiations by a diverse group of representatives from the world community, the 1977 Protocols Additional to the 1949 Geneva Conventions1 (the Protocols) were finalized. The Geneva Conference that produced the Protocols was the first international conference aimed at the progressive development

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and codification of the humanitarian law of armed conflict since the 1949 Conference that produced the four Geneva Conventions (the Conventions). Moreover, the Conference not only addressed protection of war victims but also reached beyond the scope of the earlier Conventions by grappling with the rules on the conduct of combat operations, an area that had not been developed in an international instrument since the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. This substantial passage of time made more onerous the problems inherent in the regulation of armed conflicts. Against this backdrop, it is not surprising that the product of the consensus-building process at Geneva continues to fuel spirited debate more than a decade after the Protocols were opened for signature.


1 1907 Hague Convention IV Respecting the Law and Customs of War on Land, with annex of regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, reprinted in SCHINDLER & TOMAN, supra note 2, at 57 [hereinafter 1907 Hague Convention IV].

The view of the late Professor Waldemar A. Solf, generally shared by commentators, is that with the exception of the 1925 Geneva Gas Protocols, the law of the Hague “was not updated from the turn of the century until 1977.” Solf, Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I, 1 Am. U.J. Int’l L. & Pol’y 117, 124 (1986). See also Aldrich, New Life, supra note 1, at 765 & n.9.

Although the distinctions have blurred over time, “the law of The Hague” related mainly to limitations on the methods of making war while “the law of Geneva” (exemplified by the 1949 Geneva Conventions and their precursors) addressed protection of victims of war. Levie, Recent Development in the Humanitarian Law of War, 4 Pub. L.F. 369, 369-70 (1985).

The general approach of the Conference was not to effect a whole-sale replacement of the 1907 Hague and 1949 Geneva Conventions but rather to supplement them. Accordingly, in Protocol I, for example, the many provisions do not form a "tightly woven whole". Among the 102 articles of this Protocol are provisions that build on the prior Conventions as well as provisions dealing with subjects that received little or no treatment in the earlier conferences. It is generally agreed that the most important, and overdue, aspect of the Protocols is their profound emphasis on the protection of civilian populations. In particular, several articles place constraints on combat activities, in the interest of protecting civilians. Even those who are critical of the Protocols have applauded provisions regarding civilian protections as being not only substantive developments beyond prior instruments but also capable of practical implementation.

The Protocol I civilian protections can be viewed as a convention within a convention: the study of those articles and civilian protection in general would occupy a major part of any detailed analysis of the Protocols or of humanitarian law in general. Although excellent


6 Aldrich, New Life, supra note 1, at 765. Ambassador Aldrich points to the following distinct areas of coverage: direct supplements to the 1949 Geneva Conventions (relating to protecting powers, guerrillas, mercenaries, and prisoners of war); additions to the 1907 Hague Conventions (regarding methods and means of warfare and constraints imposed on combat for civilian protection); and matters not previously developed that stand "virtually on their own as mini conventions" (regarding medical aircraft and civil defense). Id.
7 Protocol I, supra note 1, arts. 35-42, 48-60. As Professor Hamilton DeSaussure points out, "What is new in the Protocols of 1977 is the added emphasis placed on the protection of the civilian population, not only in occupied areas held by the enemy, but also for the protection of civilians in the homeland." DeSaussure, Introduction: Symposium on the 1977 Geneva Protocols, 19 Akron L. Rev. 521, 521 (1986).
8 After surveying the weaknesses of the Protocols, Professor David P. Forsythe contended that "there may also be consensus that the most positive aspect is the effort to protect civilians in an international armed conflict." Forsythe, Three Sessions of Legislating Humanitarian Law: Forward March, Retreat, and Parade Rest?, 11 Int'l Law. 131, 137-38 (1977) (citing provisions aimed at protecting items indispensable to the civilian population and assuring humanitarian assistance).
overviews of the provisions are found in the literature,9 some civilian protections in the Protocols have attracted little scrutiny. Instead, attention has focused more on the major obstacles to ratification by the United States and other governments.10 One area that often escapes notice in this din is the article on starvation and destruction of indispensable objects as methods of warfare, and the related articles on protection of humanitarian relief efforts on behalf of civilians in time of war.11

B. The Problem of Civilian Starvation and the Impediment of Relief Efforts During Armed Conflict

The practice of starving out combatants to force capitulation is generally viewed as permissible under humanitarian law.12 Regrettably, however, the practice of starvation of civilians, either deliberately or as a result of indiscriminate measures, has also been a part of warfare


10 The debate over the Protocols has been advanced in many articles and a number of symposia in the past ten years. The recent criticism and response found in Major Guy B. Roberts’s and Ambassador Aldrich’s articles focused anew on the major obstacles to ratification of Protocol I, namely provisions on wars of national liberation (art. 1(4)), irregular armed forces (arts. 43, 44), mercenaries (art. 47), and reprisals (art. 51 and others). See Aldrich, Progressive Development, supra note 4, and Roberts, supra note 4. For interesting papers and published proceedings of symposia, see Symposium on the 1977 Geneva Protocols, 19 Akron L. Rev. 521 (1986); The American Red Cross-Washington College of Law Conference: International Humanitarian Law, 31 Am. U. L. Rev. 805 (1982); Protocols Additional to the Geneva Conventions on the Laws of War, 1980 Am. Soc’y Int’l L. Proc. 191.

After lengthy interagency review, the Reagan Administration officially announced its unsurprising decision not to forward Protocol I to the Senate for advice and consent. In the letter forwarding Protocol II, the President stated that “Protocol I is fundamentally and irreconcilably flawed,” with “provisions that would undermine humanitarian law and endanger civilians in war.” He specifically cited as unacceptable the provisions on wars of national liberation and irregular forces. President’s Letter of Transmittal (of Protocol II to the Senate for advice and consent) (Jan. 29, 1987).

11 Protocol I, supra note 1, arts. 54, 68-71.

12 Rosenblad, Starvation as a Method of Warfare—Conditions for Regulations by Convention, 7 Int’l Law. 252, 253-55 (1973) (citing experts’ treatises and providing examples in history of sieges directed exclusively at combatants).
“since time immemorial.”13 History provides many examples, including the Union’s blockades and “scorched earth” tactics against the South in the United States Civil War, the blockades of Germany in both World Wars, and the siege of Leningrad in World War II.14 In the post-World War II period we have seen additional, shocking instances. During the civil war in Nigeria it is said that millions of Biafran civilians starved to death as a result of being “trapped and encircled” by the Nigerian Army,15 and the enormity of devastation wrought by the Pol Pot regime in Cambodia in the late 1970s is well-documented.16

Even in the late 1980s starvation attends warfare. Despite the drought recovery of recent years, civil war exacerbates the African food situation and keeps a number of areas in extremis.17 Mozambique has suffered severe food shortages due to abandonment of agriculture as well as from violent destruction of foodstuffs.18 Another example

13 For brief descriptions of incidents of civilian starvation during warfare through World War II, see Rosenblad, supra note 12, at 255-56; R. MOFFIT, MODERN WAR AND THE LAW OF WAR 15-16 (1973); and Mudge, Starvation as a Means of Warfare, 4 INT’L LAW. 228, 238-43 (1970).
16 Citing a February 1987 report by the United Nations Food and Agriculture Organization (FAO), Blaine Harden of the Washington Post reported that Africa needs less than half the food aid it received during the famine years. Notwithstanding the improved food situation on the continent, he pointed to five countries in need of emergency food: Mozambique, Angola, Botswana, Lesotho, and Ethiopia. Explaining the existence of the drastic situation in “fertile” Mozambique despite the improved conditions on the continent, Mr. Harden stated: “The primary reason why so little imported food is needed across most of Africa is good weather. The primary reason why so much food is needed in Mozambique is war.” Harden, Food Disaster Threatens Mozambique, Wash. Post, Feb. 4, 1987, at A18, col. 6.
17 In January 1987, FAO alerted the world community of the Mozambican emergency, noting shortages “mainly due to civil strife,” U.N. Food & Agric. Org., Foodcrops and Shortages: Special Report, No. 1, Jan. 1987. Conditions continued to worsen through the Spring: “[T]he food situation in Mozambique . . . is deteriorating rapidly. Unless further exceptional measures are taken by the international community . . . widespread suffering and loss of life is inevitable . . . . Many now face possible starvation . . . . Severe difficulties are being encountered with the transportation of relief supplies to the rural areas due to civil strife and shortages
in the news during the summer of 1987 underscored the sensitivity of relief efforts originating outside a country embroiled in civil war. Sri Lankan military offensives against Tamil rebels and siege tactics in the Jaffna peninsula reportedly caused severe food shortages in that area at the northern tip of the country.\(^{19}\) India responded with aid overtures directly to the rebels, drawing angry Sri Lankan protests on the grounds of violation of territorial sovereignty.\(^{20}\) Ultimately the countries reached an agreement under which Sri Lanka would allow consignments as long as government officials were allowed to inspect supplies and supervise distribution.\(^{21}\)

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This rebel movement has devised a cold-blooded strategy of destroying schools, clinics and other social institutions to demoralize the population and to create insecurity leading to abandonment of agriculture and of entire villages.

In addition, the rebels blow up manufacturing units like maize mills and disrupt the transport network in order to bring all production, trade and exchange activities to a halt.


\(^{19}\) *India Plans Relief Flotilla for Sri Lankan Tamils*, Wash. Post, June 2, 1987, at A22, col. 1. The government of the ethnic Sinhalese majority in Sri Lanka has been fighting guerrillas of the Tamil minority since 1983. The Tamil rebels, demanding cultural and political autonomy, “have maintained bases in southern India, where they receive strong support from the 50 million Tamils living there.” *Id.*


In a final tragic example, Palestinians faced starvation in early 1987 due to a siege imposed by Amal Shiite Moslem forces in Lebanon. The press began to bring the horrific details to the world’s attention in February 1987 in editorials such as the Washington Post’s entry, “Eating Rats in Beirut,” and in daily news reports. Fighting between Amal and the Palestinians, competing forces in Lebanon’s political chaos, intensified in late 1986 after a successful Palestinian initiative at Maghdousheh. Amal responded with a more forceful siege of several Palestinian refugee camps with the aim of forcing retreat. In the face of international publicity, Amal began to allow some relief efforts later in February. Nevertheless, harassment of relief workers and sniper attacks against women venturing out for food continued. The sieges were finally lifted under the

22 Eating Rats in Beirut, Wash. Post, Feb. 14, 1987, at A22, col. 1: “So wearied have most outsiders become of the seemingly unending violence, suffering and disorder in Lebanon that it takes an extraordinary event to draw much attention. Such an event is taking place now: starvation dire enough to make the victims eat rats.” Id.

23 In early February 1987, a British surgeon trapped in the refugee camp of Burj al Barajinah succeeded in focusing the attention of the international press on the horrors going on inside. Food supplies had run out since the late October 1986 imposition of the siege, and inhabitants were eating grass, dogs, cats, mules, and rats to survive. See, e.g., Boustany, Food Runs Out at Besieged Beirut Camp, Wash. Post, Feb. 11, 1987, at A1, col. 2.

24 This description of the fighting comes from Boustany, Braving the “Passage of Death”, Wash. Post, Apr. 5, 1987, at A1, A21, col. 1, 2. The following excerpt provides further insight into the Palestinian/Shiite dispute:

Of all the groups in Lebanon, the two most thoroughly disinh erited are the alien Palestinians, who have no home, and the Shiites, who constitute a Lebanese majority but do not have commensurate power. The PLO’s military presence in southern Lebanon drew heavy Israeli fire upon the resident Shiites before Israel invaded and expelled the PLO in 1982. In the chaos of Lebanon, however, PLO forces have been returning and setting up in the few areas halfway open to them—in refugee camps around Beirut and the south. To keep the PLO from consolidating its position and drawing new Israeli fire upon the Shiites, and to keep the PLO from aiding Lebanese rivals of the Shiites, Amal has been battling PLO forces in the “camps war.” This is the context in which Amal blockaded Burj al Barajinah.

Eating Rats in Beirut, supra note 22.


26 Incidents of bloodshed during relief and resupply efforts are described in Braving the “Passage of Death,” supra note 24. Although some deliveries were made between February and April of 1987, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) was rebuffed in several attempts. Boustany, supra note 25. The thwarted attempts (as well as the successful ones) of UNRWA during this crisis are described in United Nations press releases. U.N.
supervision of Syrian soldiers in April 1987. At the end, one of the besieged described the period as a "long bloodbath. There were no days better or worse than others. When the hardship was not physical suffering and death, it was hunger and cold."27

Upon learning of civilian starvation in Biafra in 1968, Professor Arthur Allen Leff, writing in a letter to the Editor of the New York Times, described the obstacles of international law and politics and urged immediate action: "I don't care much about international law, Biafra or Nigeria. Babies are dying in Biafra . . . . I can't believe there is much political cost in feeding babies, but if there is let's pay it; if we are going to be hated, that's the loveliest of grounds."28 Regrettably, as current news reports show, there is the same grave situation today. The suffering of innocents during warfare is not speculative but real. Against this backdrop, the importance of exploring the modern humanitarian law regarding civilian starvation and relief can hardly be questioned.

C. The Need for a New Look at an Old Problem: The Post-World War II Era and the Development of Human Rights Law

Besides the impetus that continued suffering in the world brings to this inquiry, the dynamic post-World War II developments call for a fresh look at traditional notions of civilian protection during armed conflict. Only through a careful evaluation of the important trends and events of the past forty years may the expectations of the world community in this field be identified and today's valid principles of civilian protection be gleaned. Certainly the traditional development of civilian protections and the crystallization of norms in the 1949 Geneva Conventions are important starting points. However, recent years reveal important additional developments in the humanitarian law of armed conflict: the near universal accession to the 1949 Geneva Conventions and ripening of many key articles of


One report summarized the women's tragic resupply attempts as follows: "Amal announced it would allow women to leave the camp to get food and supplies. But the women became targets and their journeys into the city became suicide missions. At least 18 were killed by Amal snipers in a month." Boustany, Syrians Enter Beirut Camp; Refugees Describe Horrors, Wash. Post, Apr. 8, 1987, at A1, col. 4, A17 col. 1, 3.

27 Syrians Enter Beirut Camp; Refugees Describe Horrors, supra note 26.
those instruments into customary international law; the growing outrage in the world over tragic examples of civilian mistreatment in warfare, as seen in reactions to practices in Biafra, Vietnam, Cambodia, and even retrospectively to the conduct by both sides in World War II; and the extensive multilateral consensus process of the 1974-1977 Geneva Conference and the years of experience since the Conference. Moreover, although it is no small task to examine the above issues in the law of armed conflict, the inquiry is not complete without further consideration of the development of human rights law since the end of World War II.\(^\text{29}\) In describing this explosion in human rights law, Professor Louis B. Sohn stated that "[m]ore has been done in this area in the last 40 years than in the previous 4000."\(^\text{30}\) Significantly, although human rights law and humanitarian law are normally studied as separate disciplines, the two are ever more closely related in the post-War period. Professor Myres S. McDougal underscores the importance of binding principles of human rights law to an understanding of the crucial concept of "humanity" in modern humanitarian law: "To give meaning to the policy complementary to military necessity, that of humanity, we must consider the immense development of human rights law since 1945."\(^\text{31}\)

Among the human rights concepts that bear particularly on civilian protections in the area of starvation and relief are the nonderogable right to life, the related prohibition against genocide, and the emerging rights to food and humanitarian assistance. Additionally, the extensive influence of the Universal Declaration of Human Rights\(^\text{32}\) and subsequent declarations and resolutions not only underscore the strength of modern human rights principles but also signal the changing ways in which international legal norms are developed and refined in the post-World War II, United Nations era.\(^\text{33}\) Any study of modern civilian protections during armed conflict would therefore be deficient without a careful analysis of these matters.


\(^\text{31}\) McDougal, supra note 29, at 30.


\(^\text{33}\) See generally Sohn, "Generally Accepted" International Rules, 61 WASH. L. REV. 1073 (1986).
As a foundation for the analysis, this study will first examine the historical development of civilian protections in armed conflict and the codification of principles in the Civilians Convention. The "military necessity"/"humanity" calculus of humanitarian law and the classic norms regarding civilian protections during armed conflict will be addressed. Also, the specific area of civilian starvation and relief will be examined as a subset of the traditional concepts of civilian protection. With these foundational matters in place, the inquiry will turn to the all-important post-World War II era in humanitarian law and the key areas of human rights law that bear on the issues at hand. The broad question to be answered is, to what extent have the events of the past forty years affected the world community's expectations and values with respect to civilian starvation and relief during armed conflict?

The next section will examine in detail the manner in which the 1974-1977 Geneva Conference dealt with the starvation and relief problems. This study will analyze the provisions emanating from that Conference in the light of the negotiating papers and the assessments of participants and commentators. Of particular interest will be how the conferees dealt with the imperative of incorporating the post-War experience and enhanced concepts of "humanity" into the provisions without unduly and unrealistically diminishing the "military necessity" part of the calculus.

After the presentation of the Protocol I articles, the question will remain, how well do the articles reflect principles of customary international law and contemporary values of the world community regarding the problem of civilian starvation and relief? By reference to the previous analysis of post-War influences and the concomitant community values and principles of international law, this analysis will assess the articles' vitality, even without near-unanimous ratification of Protocol I. The articles' reflection of modern principles as well as the validity and workability of the specific rules set forth to guarantee respect for those principles will be judged. In short, this study will attempt to show the degree to which a party to an armed conflict today must consider itself bound by the principles and rules of the Protocol I articles on starvation and relief, whether or not it has ratified the instrument.

Although this inquiry raises many issues, the scope of the study is limited to a narrow range of Protocol I provisions. Focusing on just one of many aspects of civilian protection affords an opportunity for a comprehensive treatment of the issues surrounding sustenance and relief of civilians during warfare. Moreover, the choice of a
discrete area such as this provides a representative, yet manageable, medium for exploring the confluence of the current "human rights" and "humanitarian" law disciplines. Careful scrutiny of one facet of the Protocol I civilian protections, from a number of angles, yields not only insight into specific progressive developments in an important area but also provides a glimpse of the larger structure of civilian protections in modern international humanitarian law.

Because of this narrow scope of inquiry, there are a number of important related matters which are outside the scope of this study. First, the study emphasizes Protocol I articles and the international armed conflict scenario. One should note, however, not only the apt characterization of many so-called noninternational armed conflicts in recent years as "international," but also the fact that a great deal of the Protocol I analysis applies mutatis mutandis to the Protocol II situation in the area of starvation and relief. Moreover, the study does not address in detail the other Protocol I provisions regarding civilian protections, and the controversial proscription against reprisals, areas that have received a great deal of treatment in the literature. Even certain provisions that bear on sustenance items and

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34 Because many "civil wars" have international aspects, Protocol I provisions may apply to a civil war even though it appears at first blush that the conflict is "noninternational." Although the matter is both complex and controversial, it has been generally suggested that an internationalized civil war (one characterized by the intervention of the armed forces of a foreign power) must be broken down into its international and noninternational components. Gasser, International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon, 31 AM. U. L. REV. 911, 915 (1982). Some of the recent conflicts that have occasioned starvation and problems with passage of relief consignments have international aspects, including, Israel's involvement in Lebanon, id. at 921-23, South Africa's support of rebels in Mozambique, and India's pro-Tamil efforts in Sri Lanka.

35 The correlative provisions in Protocol II are contained in Article 14 (protection of objects indispensable to the survival of the civilian population) and Article 18 (relief societies and relief actions). See SCHINDLER & TOMAN, supra note 2, at 627. The Protocol II articles are similar in content and effect to those in Protocol I. However, the Protocol II provisions are shorter, as "[t]he authors of Protocol II were rather sparing with their words in the final version of the Part concerning the 'civilian population.'" Nahlik, A Brief Outline of International Humanitarian Law, 241 INT'L REV. RED CROSS 187, 224 (1984). Additionally, there is increasing support in the literature for universal applicability of basic norms such as protection of civilian sustenance, particularly in the light of modern human rights developments. See generally, T. MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION (1987) (noting the binding nature of Article 3 common to the Geneva Conventions, and the applicability of human rights law in situations of both international and internal armed conflict).

36 See, e.g., Protocol I, supra note 1, art. 49 (definition of attacks and scope of
protection of relief channels, such as the special emphasis on children in Article 77 and the rules applicable in occupied territory, are not treated in depth here.\textsuperscript{37} Despite such exclusions, the focus on civilian starvation is important not only because the area is representative of Protocol I’s upward development of the law regarding protections for civilians generally, but also because this area, even standing alone, “undoubtedly could be one of the most humanitarian provisions ever adopted as a part of the law of war.”\textsuperscript{38}

Notwithstanding the gravity of the problem and the apparent timeliness of an inquiry into civilian starvation and relief during warfare, some consider any venture into humanitarian law a useless exercise. The sentiments that, on the one hand, hoped-for world peace will soon render humanitarian law obsolete, and on the other hand “that war, being hideous, is beyond the ken of law,” exist simultaneously.\textsuperscript{39} But the following basic points may answer the critics. First, because armed conflicts continue in many places with no end in sight, determined efforts to develop humanitarian law remain crucial “to permit efficient use of military force while preserving humanitarian values.”\textsuperscript{40} Next, perhaps the strongest buttress for the humanitarian application, art. 50 (definition of civilians and civilian population), art. 51 (protection of the civilian population, including general proscription against civilian reprisals), art. 52 (general protection of civilian objects), and art. 57 (precautions in attack). For citations to works that examine these articles, see \textit{supra} notes 4 & 9.

\textsuperscript{37} The Fourth Geneva Convention of 1949 addressed both the special needs of children as particularly vulnerable victims of war as well as protection of civilians in occupied territory. For example, relief actions for those in occupied territory are extensively regulated by Articles 55 and 59 (and several articles that follow Article 59) of that Convention. Accordingly, although Protocol I Articles 69 and 77 represented improvements, the need for development of the law to protect civilians of all ages in nonoccupied territory was most critical.

\textsuperscript{38} H. \textsc{Levie}, \textit{supra} note 13, at 69.

\textsuperscript{39} T. \textsc{Farer}, \textit{supra} note 15, at 5. Some critics acknowledge successes of humanitarian law but contend that warfare should not be regulated so that the enormity of the consequences might revolt the conscience and lead to the abolition of war. Telford Taylor rebuts this view, noting that “this has been a pretty bloody century and people do not seem to shock very easily.” T. \textsc{Taylor}, \textsc{Nuremberg and Vietnam: An American Tragedy} 39 (1970).

\textsuperscript{40} Mallison, \textit{supra} note 5, at 102-03. It should also be noted that the line between war and peace is often blurred, and the factual problems of war “derive from a global process of coercion, . . . a process that goes on all the time with varying degrees of intensity.” McDougal, \textit{supra} note 29, at 25 (citing M. McDougal & F. Feliciano, \textsc{Law and Minimum World Public Order: The Regulation of International Coercion} (1961)). Thus, as stated by Professor McDougal, “There exists law about every feature of this process, in all its intensities, from the times that are called peace to the times that are called war.” \textit{Id}. 
Some estimate that past developments in the world legal order, now taken for granted, have saved hundreds of thousands of lives. By virtue of near-universal acceptance of earlier Geneva Conventions, for example, protected medical personnel now often save the wounded who, abandoned on the battlefield, often died in the past. Also, the prisoner of war has gained not only international recognition of his status, but also substantive protection as a result of Hague and Geneva instruments from the turn of the century through 1949.

Although the major humanitarian law advances came in the 20th Century, a number of rules now considered elementary (e.g., the prohibition against attacks during a truce and immunity of civilian property) have a much longer history. In this light, one author answered the “motley of cynics, chauvinists, and idealists” as follows:

Their position is absurd. The record of armed conflict between political entities swells with evidence of recognized and enforced restraints. . . . The momentary advantages of rule violation were often eschewed for the benefits of an ordered belligerence. One dramatic illustration is the tale of a Christian knight who, during a period of truce, effected a successful sortie into a neighboring Islamic state. Returning in triumph to his own lord’s capital bearing captured notables, he was promptly seized, tried, and executed.

T. Farer, supra note 15, at 5.

As an example of the classical “gentleman’s rules” of warfare, another writer alluded to the aftermath of the battle of Jena, when the “retreating Prussians endured without fires the bitter cold of an October night in Central Europe rather than seize civilian stores of wood which lay at hand but for which they were unable to pay.” F. Veale, Advance to Barbarism 107 (1968).

In the past century, . . . humanitarian law has saved hundreds of thousands of human lives that would otherwise have been added to the millions of those lost in the fighting.” Hay, International Committee of the Red Cross, 31 Am. U. L. Rev. 811, 815 (1982) (introductory remarks to American Red Cross-Washington College of Law Conference: International Humanitarian Law).

Pointing specifically to the rules requiring that a surrendering enemy be spared, forbidding denial of quarter, and ensuring minimum protections for prisoners of war, Telford Taylor wrote, “Now, these requirements are followed more often than not, and for that reason millions are alive today who would otherwise be dead.” T. Taylor, supra note 39, at 35-36.

The First Geneva Convention gave protection to medical orderlies wearing the Red Cross emblem. Hay, supra note 42, at 815. The protection of medical personnel and facilities is a prime example cited by Telford Taylor when he wrote, “They [the laws of armed conflict] work . . . . If it were not regarded as wrong to bomb military hospitals, they would be bombed all of the time instead of some of the time.” T. Taylor, supra note 39, at 39.

It is only necessary to consider the rules on taking prisoners of war to realize the enormous saving of life for which [the laws of armed conflict] have been responsible. Millions of French, British, German and Italian soldiers captured in Western Europe and Africa were treated in general
Accordingly, the value of an analysis of relatively new protections for civilians, a class of war victims in desperate need of attention, is indisputable.

Despite the successes of humanitarian law, discussions of new or emerging norms on the "humanity" side of the equation often meet with the criticism that such norms have not been established or are not part of international law. Indeed, a good bit of the work in this area advances principles that by objective standards are more aspirational than settled. Nevertheless, as B.G. Ramcharan stated in rebuttal to such complaints about human rights lawyers (but equally appropriate in the humanitarian law context):

This is to be expected, but it must not deter the international human rights lawyer. For he is rooted in the most solid of bases for determining the validity of international norms: the universal conscience of the world's peoples, which is by far the best form of the "general recognition" so often reiterated as the basis of obligation in international law.

Finally, perhaps the best response to critics of humanitarian law comes from the simple statement of the late Professor Richard R. Baxter: "A little less talk about the obsolescence of the law of war might . . . be welcomed by the victims of warfare."

II. THE DEVELOPMENT OF CIVILIAN PROTECTIONS IN TRADITIONAL HUMANITARIAN LAW

Rules and customs governing the conduct of armed conflict have evolved from centuries of warfare. Despite the harsh realities of compliance with The Hague and Geneva requirements, and returned home at the end of the [Second World War].

T. TAYLOR, supra note 39, at 40.

In discussing the subject of this paper with Professor Sohn during an interview, the author acknowledged that some of the paper's notions might be viewed as "aspirational." Professor Sohn responded quickly that one should not be hesitant to advance such ideas and indicated that he had often heard similar criticism of his own work. He cited criticisms of his early position that the Universal Declaration of Human Rights represented binding norms of international law—a position which became widely accepted over time. Interview with Professor Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law and Bemis Professor of International Law, Emeritus, Harvard Law School (July 24, 1987).


For sketches of early historical development of principles of restraint in warfare, see Solf, supra note 3, at 118-20; and R. Moffit, supra note 14, at 1-3.
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violence throughout history, a generally acknowledged basic premise of humanitarian law is that destruction beyond actual military necessity is "not only immoral and wasteful of scarce resources, but also counter-productive to the attainment of the political objectives for which military force is used." Accordingly, the "overriding objective of humanitarian law is to minimize unnecessary destruction of human and material values.")

That violence against noncombatants is unnecessary and therefore falls outside the legitimate use of force in warfare appears axiomatic. Indeed, humanitarian law has for centuries recognized the distinction between combatants and noncombatants, the cornerstone of civilian protection. What follows is an overview of the classical tenets of civilian protection as refined in the humanitarian law through the time of the 1949 Geneva Conference. The analysis will examine the often misunderstood dichotomy between the existence of norms and compliance with them, in an effort to identify principles considered valid notwithstanding even frequent violations of the principles. Finally, this section will address the traditional concepts as applied to the specific case of civilian starvation and relief.

A. The Foundational Principles of "Military Necessity" and "Humanity"

1. Overview

In addressing the conceptual underpinning of international humanitarian law, namely the military necessity/humanity dichotomy,

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49 Solf, supra note 3, at 117. In The Paquete Habana case, 175 U.S. 677 (1900), the United States Supreme Court recognized this principle as one of long standing in holding that coastal fishing vessels with no role in the war effort were immune from attack or capture.

50 Mallison & Mallison, International Humanitarian Law of Coercion Control (outline for course taught at the National Law Center, George Washington University, Spring 1987) (on file with the author).

51 "It was over [three-and-one-half] centuries ago that Hugo Grotius made the classical distinction between civilians and combatants." Penna, Customary International Law and Protocol I: An Analysis of Some Provisions, in Studies and Essays on International Humanitarian Law and Red Cross Principles 201, 218 (C. Swinarski ed. 1984) (footnote omitted) (also citing subsequent humanitarian law instruments that employed the distinction). According to Professor Solf, Grotius distilled from the practice of states over the centuries a systematic outline of "how that practice had hardened into the law of nations." Solf, supra note 3, at 120 (citing H. Grotius, De Jure Belli Et Pacis Libri Tres (F. Kelsey trans. 1925 of 1625 ed.).
Professor Mallison stated that as long as there is armed conflict, the international law applicable to it must "permit efficient use of military force while preserving humanitarian values and making these two apparently irreconcilable objectives as mutually consistent as possible." In the same vein, Professors McDougal and Feliciano identified military necessity as humanitarian law's "key concept", which "may be said to authorize such destruction, and only such destruction, as is necessary, relevant and proportionate to the prompt realization of legitimate belligerent objectives."

In addition to the restraint inherent in "military necessity" (that is, deliberate destruction beyond necessity being violative of the principle, by definition), the concept of "humanity" gives rise to additional restraints. The umbrella-like humanity concept is that body of community values ("humanitarian" or "moral") that have led to additional restraints on belligerent conduct not strictly required by the principle of military necessity. In the Western world, humanity in warfare gained a foothold when Western rulers and armies had contact with Eastern humanitarianism shown by Saladin, whose compassion for war victims proved him to be "the most chivalrous and great-hearted conqueror of his own, and perhaps of any age." Later, in perhaps the most famous encapsulation of the factors that temper military necessity, the Martens Clause of the 1907 Hague Convention IV underscored the vitality in the law of armed conflict of "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Indeed, the crucial core of principles of civilian protection are often described as flowing directly from the principle of humanity.

52 Mallison, supra note 5, at 102-03.
51 M. McDougal & F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 72 (1961). According to the authors, the fundamental policy embraced in the military necessity concept "[is] modestly expressed as the minimizing of unnecessary destruction of values." Id.
54 W.T. Mallison & S.V. Mallison, The Palestine Problem in International Law and World Order 324-25 & n.168 (1986) [hereinafter Mallison & Mallison, The Palestine Problem] (quoting S. Lane Poole, Saladin and the Fall of the Kingdom of Jerusalem 234 (1964)).
56 See, e.g., U.S. Dep't of the Air Force Pamphlet, The Conduct of Armed
2. Military Necessity: The Broad and Narrow Views

Before focusing on specific civilian protections, a closer look at the key concept of military necessity is warranted. Although the commentators express many different views on the principle,57 there is general agreement that at the very least military necessity prohibits a “Carthaginian peace”—that is, comprehensive devastation of the enemy’s land and people.58 This fundamental principle was codified in the Regulations annexed to the 1907 Hague Convention IV and has been authoritatively endorsed many times since then: “The right of belligerents to adopt means of injuring the enemy is not unlimited.”59 The question remains, however, whether any additional protections are embodied in the traditional principle of military necessity.

Under the broad interpretation of military necessity, little more than purposeless brutality is ruled out. This view treats military necessity as an overriding condition that validates conduct otherwise prohibited as long as the conduct can be shown to confer some sort of military advantage. Thus, acts such as killing prisoners of war when maintaining them might affect the success of the mission, or direct bombardment of civilian populations when it is believed resulting demoralization might hasten defeat of the adversary, would

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Conflict and Air Operations, para. 1-3a(2) (1976) [hereinafter Air Force Pamphlet] (attributing to the principle of humanity the specific prohibition against unnecessary suffering, the rule of proportionality, and the immunity of civilians from being objects of attack). See also Rogers, Conduct of Combat and Risks Run by the Civilian Population, 1982 Revue de Droit Penal Militaire et de Droit de la Guerre 293, 295 (describing humanity as “fundamental to the essential rule of proportionality”).

57 “The basic difficulty in this fundamental policy principle of military necessity is [that it] contains an inherent and infinitely manipulatable obscurity in its reference to the ‘legitimate objectives of violence.’” M. McDougal & F. Feliciano, supra note 53, at 74 (citing several differing formulations of commentators). See also T. Taylor, supra note 39, at 35 (characterizing military necessity as “a matter of infinite circumstantial variation”).

58 The term “Carthaginian peace” comes from “the greatest military conflict of the ancient epoch, the Punic Wars, [in which] Rome saw fit to utterly eliminate her arch-rival Carthage, sowing salt in the grounds where Carthage once flourished.” R. Moffitt, supra note 14, at 1. See also M. McDougal & F. Feliciano, supra note 53, at 43, where the authors state that an underlying assumption in humanitarian law “is that extermination, peace of the Carthaginian variety, is not a permissible objective of international violence; if it were, all legal limitations would be entirely pointless.”

59 1907 Hague Convention IV, supra note 3, art. 22 (of annexed Regulations). See generally T. Farer, supra note 15, at 16-17 & n.8 (with citation to later endorsement of this language).
not be violations of the law of war under the expansive interpretation.\textsuperscript{60} This position is often attributed to nineteenth century German theorists and labelled "\textit{Kriegsraison}"—shorthand for \textit{Kriegsraison geht vor Kriegsmanier} (loosely translated: "The demands of the military situation take precedence over the customs and laws of war.").\textsuperscript{61}

Contrasting with this broad view of military necessity are interpretations that accord military necessity stature as a basic principle, but not as one that displaces all the other rules and principles of humanitarian law. A classic expression of this narrower reading is in the famous instructions written by Professor Francis Lieber of Columbia College, New York, and promulgated by President Abraham Lincoln to the United States Army as General Order No. 100 in 1863. In the "Lieber Code", measures that meet the military necessity test are those that are "indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war."\textsuperscript{62} As an example of actions that would violate this crucial concept, a commander may view as "necessary" such measures as feigning cease-fire or surrender to take advantage of the adversary’s compliance, attacking disabled or captured combatants, and refusal of quarter. Proponents of the narrower view contend that military necessity cannot be invoked to justify these and other measures which are otherwise forbidden by international law.\textsuperscript{63}

3. \textit{Comparison: Substantial Authority Supports the Narrow View}

Although the actual occurrence of widespread violations of the laws of armed conflict might be thought to justify the broad view,\textsuperscript{64} in fact, the narrow interpretation of military necessity rests on much

\textsuperscript{60} See Nardin, \textit{The Laws of War and Moral Judgment}, in 2 \textit{STUDIES IN A JUST WORLD ORDER} 437, 444 (R. Falk, F. Kratochwil & S. Mendlovitz eds. 1985) (criticizing the broad view of military necessity shared by noted commentators).

\textsuperscript{61} \textit{Kriegsraison} is described more fully in R. Moffit, \textit{supra} note 14, at 5-6. See also the description (and denunciation) of \textit{Kriegsraison} in \textit{Air Force Pamphlet, supra} note 56, at para. 1-3a(1).


\textsuperscript{63} See Nardin, \textit{supra} note 60, at 444-45.

\textsuperscript{64} See \textit{infra} notes 69-72 and accompanying text.
firmer ground. First, the expansive view is not compatible with the international instruments that constitute the primary sources of humanitarian law. Neither the Hague nor the Geneva Conventions allow a military necessity justification for suspension of fundamental rules such as those prohibiting treacherous acts, harming prisoners of war, and refusal of quarter. Indeed, the 1949 Geneva Conventions assert that such acts "are and shall remain prohibited at any time and in any place whatsoever" (Article 3), and that states party to the Conventions must respect their provisions "in all circumstances" (Article 1). Accordingly, in the light of virtually unanimous assent to the Geneva Conventions by the world community, it follows that certain rules admit of no derogations by a military commander regardless of how advantageous or even "necessary" to the war effort such derogations may appear.

Second, the narrower view is the one most often reflected in military codes. From their beginning in the Lieber rules, United States military manuals have reflected the narrow view with a high degree of consistency. The adherence of these manuals to the narrow interpretation

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65 1949 Geneva Conventions, supra note 2, arts. 1 and 3. Articles 1 and 3 are common to all four of the 1949 Geneva Conventions. In addition to this "positive" evidence that conventional humanitarian law supports the narrow interpretation, Nardin cites "negative" evidence as well. The Conventions occasionally provide that particular prohibitions may be overridden in exceptional circumstances (e.g., 1907 Hague Convention IV, Article 23a, prohibition against destruction or seizure of enemy property unless "imperatively demanded by the necessities of war"). Accordingly, where there is no reference to a military necessity qualification, the particular prohibition must be regarded as absolute. Nardin, supra note 60, at 445.

66 Not only are more states party to the 1949 Geneva Conventions than are party to the United Nations Charter (164 for the former, 159 for the latter), but there also is compelling authority to support the Conventions as reflective of customary international law. See infra notes 164-70 and accompanying text.


The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.

But see T. TAYLOR, supra note 39, at 35-36 (contending that the field manuals are at best ambiguous on the issue).
is compelling support for its validity, since humanitarian law conventions require issuance of military regulations in conformity with their provisions. In fulfilling this duty, military officials would be unlikely to foreclose military options by incorporating greater restrictions than those required by international law. Accordingly, of particular import are military instructions such as those issued by the United States Air Force, denouncing the Kriegsraison doctrine as "clearly rejected" at Nuremberg and stating that "[a]rmed conflict must be carried on within the limits of international law, including the restraints inherent in the principle of 'necessity'."\(^68\) The final clause in the instruction would be superfluous were it not for the intent to underscore for the benefit of commanders the principle that international law requires them to be concerned about much more than the "necessities" of war faced in given scenario.

4. Postscript on the Compliance/Validity Problem: Do Violations Shatter the Norms?

The readiness of some commentators to embrace the broad view of military necessity is attributable in part to a tendency to draw from violations the conclusion that the norms must be invalid. That is, notwithstanding wide assent to provisions such as the Martens Clause and many absolute prohibitions, the view is that the excesses of war have shattered the norms. An example often cited, and which will be addressed in more depth below, is the bombing of civilian populations by both sides during World War II. The argument posits that this conduct not only reflected an expansive principle of military necessity but also constituted an invalidation of the principle of civilian immunity. In short, some authors conclude that rules that have been substantially violated during a conflict can no longer be regarded as constituting a part of the laws of war.\(^69\)

\(^{68}\) Air Force Pamphlet, supra note 56, at para. 1-3a(1).

\(^{69}\) Nardin attributes this view to T. Taylor, supra note 39, and to Wasserstrom, The Laws of War, 56 The Monist 1 (1972). Nardin, supra note 60, at 448-49 & n.17. Taylor's blurring of principles and violations is evident in the following passage: "Whatever may have been the laws of war before the Second World War, by the time the war ended there was not much law left." T. Taylor, supra note 39, at 140. See also R. Moffitt, supra note 14, at 7 ("In the last World War, we have seen classical military necessity degenerate into Kriegsraison . . . ").

Many people are quick to conclude that violations mean that international rules are invalid. However, Professor Levie's simple comparison of international and domestic law is helpful in clearing up the confusion on this point. Writing about Hague and Geneva law, he noted: "These are still valid rules: some of them have been disregarded and violated, just as every country has laws that are disregarded and violated, but they are none the less valid." Levie, supra note 3, at 369.
Although humanitarian law’s "disorderly combination of customary and conventional rules" causes uncertainty, the authoritative conventions cut sharply against the position that violations by one or even by many parties invalidate the rules. The 1907 Hague Convention IV identifies forbidden acts but neither refers to, nor carves out an exception for, military necessity. Moreover, the Geneva Conventions are filled with provisions defining proscribed acts, addressing accountability for violations, and limiting the freedom of parties to withdraw from obligations. Accordingly, in these instruments to which virtually the entire world community has assented, "[t]here is little ... to support and much to counteract any easy connection between violation and invalidity." 

Finally, violations of customary principles do not a priori constitute invalidation of the present norms or creation of new norms. Even in the face of flagrant violations, an analysis of norms must include, inter alia, a careful assessment of the world community's values and expectations, which may be vastly different from those attributed to violators. Significantly, although promulgated after World War II violations of the Hague law, the 1949 Geneva Conventions repeated the key protective principles from this law as reflective of the post-War values of the world community notwithstanding those violations. Moreover, because of nearly unanimous assent to the majority of the humanitarian law conventions, there is a particularly heavy burden on anyone attempting to claim a customary norm that is less protective than provisions of the 1907 Hague or 1949 Geneva Conventions. In view of the foregoing, and with the issues of norm violations in perspective, the great weight of authority supports the view of military necessity that accords due regard to the other conventional and customary laws of nations that combine with it to form the humanitarian law of armed conflict.

B. Civilian Protection Principles in Traditional Humanitarian Law

From the foundation principles of military necessity and humanity spring further principles relative to the specific area of civilian pro-

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70 Nardin, supra note 60, at 448.
71 Treaty law is at the top of the hierarchy of international law. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, T.S. No. 993 (effective October 24, 1945). Moreover, the key humanitarian treaty law (1907 Hague and 1949 Geneva Conventions) is particularly authoritative in light of the degree of assent to those instruments exhibited by the world community.
72 Nardin, supra note 60, at 448.
tection. The following analysis is an examination of those concepts as developed in the traditional humanitarian law, which for present purposes will extend through the Nuremberg trials and the codification of the laws of armed conflict represented by the 1949 Geneva Civilians Convention. The analysis will touch upon two fundamental principles—the distinction between combatants and noncombatants, and civilian immunity from attacks—as well as the following more specific concepts: the prohibition against civilian targeting and indiscriminate attacks, the requirement to limit attacks to military objectives, and the rule of proportionality.

1. Cornerstone Principles: Civilian Immunity and the Distinction Between Combatants and Noncombatants

Following directly from the military necessity principle is the notion that civilians are to be spared from direct attack during warfare. That civilians should generally be deemed outside the path of war is evident in the facts of many of the conflicts throughout history, in which soldiers "were conspicuous in their proud uniforms; and armies fought each other, and preferred the civilian populations not to mingle in their business." Thus, the principle of distinction between belligerents and the civilian population, and the concomitant immunity of the latter from direct attack, "found acceptance as a self-evident rule of customary law in the second half of the 19th century." Sources include the Lieber Code, the St. Petersburg Conference of

73 Although at their inception crucial to the crystallization of a number of traditional norms of humanitarian law, the Nuremberg judgments and the Civilians Convention have, over time, taken on even more importance in the post-War era. The influence of the Civilians Convention will be further explored below in the analysis of humanitarian law evolution in the post-War era. See infra notes 164-70 and accompanying text.

74 See Roling, The Significance of the Laws of War, in CURRENT PROBLEMS OF INTERNATIONAL LAW 133, 142 (A. Cassese ed. 1975) (reasoning that attacking civilians causes superfluous injury violative of the humanitarian law principle against unnecessary suffering during warfare).


76 Id. For a succinct treatment of the sources and the binding nature of the prohibition against attacks on civilian populations, see S.V. MALLISON & W.T. MALLISON, ARMED CONFLICT IN LEBANON, 1982: HUMANITARIAN LAW IN A REAL WORLD SETTING 60-61 (1985) (with citation to Professor Lauterpacht description of civilian immunity as "a clear rule of law").

77 "[A]s civilization has advanced during the last centuries, so has likewise steadily advanced . . . the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms." Lieber Code, supra note 62, art. 22, reprinted in SCHINDLER & TOMAN, supra note 2, at 7.
1868, the Conference of Brussels of 1874, and the Hague Peace Conferences of 1899 and 1907. The following statement of British Prime Minister A. Neville Chamberlain, often cited as reflective of customary international law, describes the immunity principle and suggests some of the other protections that flow from it:

In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations.... In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives, so that, by carelessness, a civilian population in the neighborhood is not bombed.

Although the principle of civilian immunity is in the abstract an important underpinning of civilian protection, the principle must be further examined in the context of two distinct factual scenarios. The first is that of attack on civilian populations as such, and the second is that of attack on a military objective that might collaterally affect the civilian population. These two scenarios, "so utterly different, at least from a legal point of view," will be addressed in order.

2. The Prohibition Against Direct Attacks on Civilians and Indiscriminate Attacks

At first blush it would appear elementary that direct attacks on civilians, such as terror bombardment, as well as indiscriminate attacks, are violative of the long-standing customary rule of civilian immunity. As if to underscore the general rule, the Regulations annexed to the 1907 Hague Convention IV included a specific prohibition against bombardment of undefended places. However, despite the applicability of the Hague Conventions and the customary principles, the norms were called into question when the character

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78 See Roling, supra note 74, at 142; Rogers, supra note 56, at 295.
79 See generally F. Kalshoven, supra note 75, at 32-35 (with citations to the papers of the Conference of Brussels and the 1907 Hague Convention).
81 F. Kalshoven, supra note 75, at 60.
82 1907 Hague Convention IV, supra note 3, art. 25.
of warfare changed in World Wars I and II, "during which time air power shattered any illusion about the security of the hinterland."83 Indeed, the dramatic increase in civilian casualties during twentieth century warfare is indisputable.84 However, a more difficult question is whether the excesses and violations shattered not only the illusion of security but also the humanitarian law norms prohibiting such direct and indiscriminate attacks.

Subsumed under the general prohibition against attacks directed at civilians and civilian objects is the principle prohibiting attacks launched blindly against combatants and civilians alike, known as indiscriminate attacks. Although the traditional law of armed conflict acknowledges that some collateral damage to civilians is unavoidable when bona fide military objectives are targeted,85 indiscriminate attacks cannot be justified, because they "infringe the very principle of distinction."86 Despite the prohibition of such attacks, however, a number of rationalizations for their use in warfare have been suggested.87 Some theorists claim that workers in war industries are fair game as military objectives even while in their homes. Others generalize even further and contend that in modern societies there is no longer a valid distinction between combatants and the peaceful civilian population, as virtually everyone is involved in the war effort. Finally, there is the view that an attempt to break the morale of the civilian population by terror bombardment is justified by the reasoning that the enemy may give up sooner if war for them can be made "terrible beyond endurance."88 Finally, in the light of the experiences of World War

83 Solf, supra note 3, at 126.

84 "The principle of distinction . . . came to be exposed to severe strain in the course of this century. It may suffice to recall . . . the First World War, the Spanish Civil War, the Second World War, and the Vietnam War [in which] the civilian populations suffered increasingly under the scourge of war." F. Kalshoven, supra note 75, at 36. See also A. Tikhonov, The Inter-Relationship Between the Right to Life and the Right to Peace, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 97 (B. Ramcharan ed. 1983), noting a study by Norwegian sociologist Yu Galtung: "From only five percent of the total loss of human life in World War One, the loss of civilian population climbed to 48% in World War Two, and to 84% in the Korean War. Id.

85 See infra notes 11-15 and accompanying text.

86 F. Kalshoven, supra note 75, at 64.

87 "Strange though it may seem, there has never been a lack of attempts to find justifications for indiscriminate warfare." Id. at 38. See also Carnahan, supra note 9, at 39 (alluding to civilian immunity as customary law but indicating that the matter was "briefly thrown into doubt" by theorists contending that terrorizing civilian populations was important to a winning war effort).

88 F. Kalshoven, supra note 75, at 39 (quoting General Sherman in his justification for attacks on civilian targets during the U.S. Civil War).
II, with bombing of civilian populations carried out extensively by both sides, some contend the practice can no longer be deemed illegal.  

Although the World War II excesses are pertinent to the issue, close scrutiny of the World War II experience reveals that the norms against civilian bombardment were not defeated; rather, they were validated. First, despite the anti-civilian actions, the actors generally did not attempt to invoke the law of armed conflict in defense of the practices. In the words of one commentator, "no one seriously questioned the existence of international norms" on issues of civilian immunity. This is not surprising, for all of the major and virtually all minor parties had acceded to the 1907 Hague Convention IV. Moreover, the United States, British, French, and German governments had made pronouncements at the outbreak of the war acknowledging the rules against attacks on civilian populations and unfortified cities. Other evidence suggesting that the parties considered themselves bound by conventional and customary humanitarian laws is found in government documents revealing that the Nazis, for example, attempted to justify denunciation or suspension of their duties. The German legal advisors responded that denunciation of Convention obligations was not possible during the conflict, and that even if such were possible, the "essentially identical customary laws of war" still applied. A further indication that the direct civilian attacks were not norm-invalidating, but rather bald violations of international law, is the fact that the British leadership worked diligently to disguise deliberate decisions to target civilian populations.

With such clear indications of recognition of norms against terror bombardment, one may reasonably question why the violations were

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89 See, e.g., Nardin, supra note 60, at 449 (alluding to Wasserstrom, supra note 69, as "too willing to accept, as evidence of law, practices—such as the bombing of German and Japanese cities in World War II"). Examples of civilian bombardment are the German attacks on London, the allied attacks on German cities, and the dropping of atomic bombs by the United States on Hiroshima and Nagasaki. See Roling, supra note 74, at 143. See generally Carnahan, The Law of Air Bombardment in Its Historical Context, 17 A.F. L. REV. 39 (Summer 1975).
91 Id. at 8.
92 F. KALSHOVEN, supra note 75, at 36-37.
94 Nardin, supra note 60, at 449 & n.18 (citing C. WEBSTER & N. FRANKLAND, THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY, 1939-1945 (1961)).
not redressed at Nuremberg. Some commentators have suggested that the mutual violations of particular laws of armed conflict rendered the norms invalid, but the failure to convict at Nuremberg is better explained on other grounds.

A useful example for analysis is the sinking of merchant ships by submarines with neither warning nor provision for passenger safety after attack. As in the case of terror bombardments, these acts were carried out by both sides during World War II. Because the Nuremberg Tribunal declined to convict a German naval officer, Admiral Karl Donitz, for these alleged violations, some commentators have suggested that the Tribunal perceived the rules against attacks on merchant ships as invalid because of widespread violations. However, even if one accepts the fact that mutual violations led to the Donitz result, it does not necessarily follow that the principles were not thereby invalidated. Employing a line of reasoning likened to equity, some authors have explained the result by the principle *tu quoque*, that a state which has violated a particular rule may not prosecute an enemy for similar violations. This procedural approach, akin to reciprocity, is quite different from the assertion that mutual violations invalidate the rules of armed conflict. On the contrary, many authorities believe that by just such examples of evenhandedness at Nuremberg (unlike the Versailles peace following World War I), "the Allies succeeded in confirming the viability of laws that, farther down

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95 "[C]ivilian targeting was not among the crimes charged against the Nuremberg defendants . . ." T. Farer, *supra* note 15, at 27. The Tribunal did, however, hold that the general principles of the Hague Convention "had passed into general international law." See Solf, *supra* note 3, at 123 & n.41 (citing the papers of the International Military Tribunal).

96 E.g., T. Taylor, *supra* note 39, at 36-38, suggesting Nuremberg's refusal to hold Germany accountable for violations meant "that the London [Treaty of 1930] rescue requirements were no longer an effective part of naval warfare, because they had been abrogated by the practice of the belligerents on both sides under the stress of military necessity." See also Parks, *The 1977 Protocols to the Geneva Convention of 1949*, 31 *Naval War C. Rev.*, Nov. 1978, at 17, 25 & n.20 (citing the London Treaty of 1930, the instruments of accession by the axis and allied powers, and the finding at Nuremberg that the limitations had not been followed by any party during World War II).

97 See F. Kalshoven, *Belligerent Reprisals* 364 (1971); Nardin, *supra* note 60, at 449. See generally T. Farer, *supra* note 15, at 11 (quoting the Judgment of the Nuremberg Tribunal in its decision not to include grounds of "breaches of the international law of submarine warfare" in assessing the sentence of Admiral Karl Donitz because of clear indications of similar acts by the British and American military leaders).
the twisted corridors of history, they might encounter from the other side of the dock."

A more compelling explanation for the Donitz result, consistent with the foregoing conclusion that the World War II experience did not nullify the rules, is that attacked Allied merchant ships had, by their actions, lost the protection of international law. Specifically, neither the London Naval Treaty of 1930 nor customary international law extended protection to merchant ships, whether armed or not, which participated in the war effort. After extensive analysis, Professor Mallison concluded that, to a considerable degree, merchant ships on both sides had lost the immunity from attack accorded by international law and, as a consequence, "there was not consistent violation of the Protocol by any of the major naval belligerents during the Second World War." 

Those who claim that the Nuremberg inaction on terror bombing deflated the norms against such acts find their arguments further weakened by the results of post-War bombing surveys. By most accounts, the attacks on civilians in both the European and Asian theatres were militarily ineffective in two senses. First, considering the huge amount of explosives expended, the civilian bombings were woefully inefficient. Given limited resources, expending firepower on noncombatants was *per se* inefficient. Such actions depleted the power that could otherwise have been used against the enemy's armed forces. Moreover, so-called "morale" bombing actually proved counterproductive. Studies showed "the enemy civilian population being strengthened rather than broken in its morale by the ruthless methods employed against it." 

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98 T. Farer, *supra* note 15, at 11-12. Farer believes the Allies established a precedent supporting the norms by refusing to prosecute the Germans for violations of rules that the Allies also violated. *Id.*


100 See F. Kalshoven, *supra* note 75, at 40-41; Roling, *supra* note 74, at 144; Carnahan, *supra* note 89, at 50-51.

101 Roling, *supra* note 74, at 144 (citing the costliness and inefficiency of Nazi V-1 and V-2 missile attacks on England).

102 "[E]ven if these [attacks on civilians] would have the desired effect, the attacker would still be up against the armed forces." F. Kalshoven, *supra* note 75, at 40.

103 *Id.* at 41; accord R. Moffitt, *supra* note 14, at 21 (quoting Kunz, *The Laws of War*, 50 AM. J. INT'L L. 316 (1956) to the effect that indiscriminate bombing strengthened civilians' will to resist and lengthened the war). In terms of the values of the international community, there is further persuasive indication that terror bombardment violations did not destroy the norms against that practice. The British
Although the 1949 Civilians Convention did not directly address terror bombing, the principles of civilian immunity and respect for the human person are woven through the Convention and are particularly evident in several provisions that complement customary law and the 1907 Hague principles. Articles 27 through 34 provide extensive protection for persons in occupied territories. In fact, Article 33 prohibits "all measures of intimidation or of terrorism."\(^\text{104}\) Many authorities believe that these articles apply broadly to territories of parties to the conflict, as well as to occupied territory.\(^\text{105}\) Moreover, Article 18 states that civilian hospitals, if used for the proper humanitarian purpose, "may in no circumstances be the object of attack."\(^\text{106}\)

In summation, not only were norms against civilian targeting and indiscriminate attacks firmly established in the pre-World War II conventional and customary humanitarian law, the norms also survived the World War II experience and continued to reflect the values of the world community as codified in the Civilians Convention. The law of armed conflict was not seriously invoked as justification for the violative attacks. In fact, the Nuremberg Tribunal strengthened, rather than shattered, the principles by its evenhanded treatment of the violations. Moreover, post-War analysis of "morale" bombing revealed that such "coercive" warfare was inefficient and counter-productive, thus removing even the kriegsraison argument that the measures were justified as militarily useful. Finally, the Civilians Convention reaffirmed and expanded the rules requiring respect for civilians in warfare.

3. The Requirement of Avoiding Unreasonable Damage to Civilian Values in Attacks on Military Objectives

Having examined general notions of civilian immunity and the prohibitions against deliberate and indiscriminate attacks on civilian

jurist A.P.V. Rogers characterized the international response as follows: "[T]his practice resulted in such hostile criticism after the war that it cannot be regarded as an internationally accepted practice." Rogers, supra note 56, at 297.

\(^\text{104}\) Civilians Convention, supra note 2, arts. 27-34; see S.V. MALLISON & W.T. MALLISON, supra note 76, at 60.

\(^\text{105}\) See, e.g., S.V. MALLISON & W.T. MALLISON, supra note 76, at 58-59.

\(^\text{106}\) Civilians Convention, supra note 2, art. 18. Such absolute protection ceases only when civilian hospitals "are used to commit, outside their humanitarian duties, acts harmful to the enemy." Even in such circumstances, there must be a warning, unheeded after a reasonable time, before attack can ensue. Id., art. 19.

Other Civilians Convention provisions in Part II providing for respect for civilian immunity are Articles 14 and 15, establishing safe refuges and hospital and safety zones for particularly vulnerable classes of civilians. See Solf, supra note 3, at 126-27.
targets, the inquiry turns to the second factual scenario: civilian damage caused by attacks on military objectives.

a. The Concept of Military Objective

Implicit in the “military objective” principle is the reality that, although civilian values are to be spared, military targets may be attacked. However, the amorphous notion of “military objective” has proved difficult to define in the traditional humanitarian law. Some extremists advance the strained reasoning that even civilians in their homes constitute a military objective because of the need to make life generally unpleasant for the enemy. The Hague Draft Rules on Air Warfare of 1923 (the Hague Draft) provide some elucidation of the meaning of military objective. The Hague Draft indicated that the following non-battlefield objects were lawful targets: military works, establishments or depots; factories engaged in the manufacture of arms, ammunition or distinctively military supplies; and lines of communication or transportation used for military purposes.

Indicative of the wide acceptance of the “military objective” principle is the fact that the principle has long been incorporated into the warfare manuals of the United States armed forces. Although widely accepted, the military objective principle tends to be interpreted broadly. Some belligerents regard as “legitimate targets not only strictly military objectives, but also those which are likely to serve, directly or indirectly, the war effort of the enemy, that is, objectives which by their nature are not intended for military purposes but

107 See supra note 88 and accompanying text; see also Rogers, supra note 56, at 297.

Military Objectives—i.e., combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage—are permissible objects of attack (including bombardment). Military objectives include, for example, factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations.

Id.; see also Air Force Pamphlet, supra note 56, para. 5-3b.
which may acquire great importance for armies in the event of war."\textsuperscript{110} Therefore, the military objective limitation, absent further restraints, often provides civilians little protection from war's ravages.

\textit{b. Humanitarian Law Restraints on Attacks Against Military Objectives}

Through the foundational concepts of military necessity and humanity, the traditional humanitarian law imposes limits on a belligerent's actions against military objectives. The guiding principle is that, in attacking military objectives, any unreasonable damage to civilian values shall be avoided.\textsuperscript{111} The abstract "unreasonable" limitation derives some clarity from two additional humanitarian law precepts: the prohibition against unnecessary damage and the rule of proportionality.

Basic humanitarian law demands that belligerents take measures to avoid civilian damage when such measures result in no loss of military advantage.\textsuperscript{112} Thus, combatants must take all possible precautions to spare civilians and civilian objects in the area of military targets. For example, Hague law requires a commander to do everything in his power to warn authorities of an impending attack so that civilians may leave the area of the military objective.\textsuperscript{113} Moreover, as shown above, international law proscribes indiscriminate "area" attacks on zones containing scattered military targets in populous regions.\textsuperscript{114}

Long regarded as a cornerstone of humanitarian law is the customary principle of proportionality. The principle postulates that there must be a reasonable relationship between the lawful destructiveness of measures and the ancillary or collateral effects.\textsuperscript{115} Accordingly, incidental loss of life and damage to property must not be excessive relative to the concrete and direct military advantage expected to be

\begin{footnotesize}
\textsuperscript{110} Cassese, \textit{supra} note 80, at 83.
\textsuperscript{111} See F. Kalshoven, \textit{supra} note 75, at 61, 66.
\textsuperscript{112} See id. at 66. See generally Mallison & Mallison, \textit{The Palestine Problem}, \textit{supra} note 54, at 376 & n.350 (referencing the legal principle of humanity and the military principle of economy of force, and citing Air Force regulations incorporating the prohibition against unnecessary destruction).
\textsuperscript{113} 1907 Hague Convention IV, \textit{supra} note 3, art. 26. See also the United States Air Force's treatment of the duty to take precautions in \textit{Air Force Pamphlet}, \textit{supra} note 56, para. 5-3c (stating the requirement of advance warning when circumstances permit and listing several additional "Precautions Required" in planning attacks).
\textsuperscript{114} See \textit{supra} notes 85-103 and accompanying text.
\textsuperscript{115} Mallison & Mallison, \textit{The Palestine Problem}, \textit{supra} note 54, at 377.
\end{footnotesize}
The principle was codified by the 1974-1977 Geneva Conference; it has been called the "very nub of the rule of armed conflict" and has sturdy underpinnings in the Lieber Code and Martens Clause.

With the foregoing development of traditional humanitarian law concepts concerning civilian protection in mind, the particular problem of civilian starvation and relief under that regime of law will be considered.

C. Starvation and Relief in Traditional Humanitarian Law

1. Historical Background

Acts directed at starvation of people, including the impediment of relief efforts on behalf of starving populations, have long roots in the history of warfare. Speaking during the tragic Nigerian conflict, the British Foreign Secretary stated that "[w]e 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."

Although starvation of civilians is said to have been used in warfare since pre-history, the record of examples in 19th and 20th century warfare provides the most revealing glimpses of rationalizations for the practice. During the United States Civil War, the blockade of the South and destruction of railroad lines were directed in part at starving the Confederacy. Moreover, Union troops deliberately destroyed foodstuffs and farm machinery to "weaken the South and bring the Confederacy to surrender." As Sherman said, "We are..."
not only fighting hostile armies but a hostile people," who must be made to "feel the hard hand of war . . . ."121 In the conflict with China in 1885, France barred shipments of rice as contraband of war and justified the action by pointing to the importance of rice in feeding the Chinese population. Bismarck, whose successful sieges of Metz and Paris in 1870 were accomplished partly by starvation of civilians, reportedly approved of the French measure against China, as it had "for its object the shortening of the war by increasing the difficulty of the enemy."122

Despite earlier protests of others' blockades of foodstuffs as contraband, Great Britain treated food destined for Germany in World Wars I and II in the same manner, even though Britain knew that the blockades were causing starvation among civilians. The British justified the blockades by pointing out the difficulty of distinguishing between military and civilian recipients and the integration of civilians into the war-making effort.123 In World War II, the Nazis made tragic use of denial of foodstuffs. Reportedly, during the 900-day Nazi siege of Leningrad, more than one million Russians died of starvation.124 Finally, starvation and denial of relief have remained ugly parts of war in a number of post-World War II conflicts, perhaps most notably in Biafra.125

2. Development of International Legal Norms Regarding Starvation and Relief

Despite the tragic examples of civilian starvation in warfare, the traditional humanitarian law has not suffered those practices to occur with its imprimatur. In fact, the act of intentional starvation is analogous to that of terror bombardment, with a great deal of confusion resulting from eagerness to equate violations with the non-

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122 Mudge, supra note 14, at 238 (citing J. GARNER, INTERNATIONAL LAW AND THE WORLD WAR 337 (1920)).
123 Mudge, supra note 14, at 241, 248-50. Mudge's article provides interesting historical background on the practice. He concludes that proponents of starvation of civilians rest their justification on two assumptions: (1) it is impossible to distinguish between combatants and civilians; and, (2) even if such a distinction exists, the onus is on the blockaded government to choose between feeding its civilians and sustaining the military effort. Id. at 251.
124 Rosenblad, supra note 12, at 255 (citing A. WYKES, THE SIEGE OF LENINGRAD: EPIC OF SURVIVAL 144 (1969)).
125 See supra note 15 and accompanying text.
existence or invalidation of norms, or with the existence of counter-norms.\textsuperscript{126} Commentators have been quick to find a norm allowing starvation of civilians by reference to history's tragic examples of such starvation, and to Article 17 of the Lieber Code which provides that "[w]ar is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy." Paradoxically (and inaccurately, it is suggested), the work frequently credited as the foundation of modern humanitarian law is saddled with responsibility for justifying the cruelty of civilian starvation in 19th and 20th century armed conflict.

A closer look at Lieber's work reveals that Article 17 was not intended, even at the time of its writing, to give commanders \textit{carte blanche} to starve civilians, to say nothing of the impact of the many conventional and customary humanitarian law developments that have affected the starvation issue since that time. First, the provision includes reference to military necessity in stating that the practice is justified when "it leads to the speedier subjection of the enemy." Accordingly, commanders such as Sherman who carried out wanton and unnecessary destruction of foodstuffs would not be vindicated by the provision.\textsuperscript{128} Even more important, however, the reference to military necessity brings into the assessment other Lieber Code provisions on the issue.\textsuperscript{129} Significantly, Lieber is often credited with

\begin{footnotesize}
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\item See \textit{supra} notes 69-72 \& 89 and accompanying text.
\item Lieber Code, \textit{supra} note 62, art. 17. For the view that this Lieber Code article reflects customary international law at the time, see M. Bothe, K. Partsch \& W. Solf, \textit{New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949}, at 336 (1982). \textit{See also} Solf, \textit{supra} note 3, at 133 (suggesting that civilian starvation remains permissible under customary international law, citing Lieber Code Article 17).
\item Regarding the contention that Lieber did not intend to provide justification for such acts, see \textit{infra} note 135 and accompanying text.
\item Among the qualifications of the military necessity principle in the Lieber Code are the following: (1) Measures must not only be "indispensable for securing the ends of the war" but also "lawful according to the modern law and usages of war." Lieber Code, art. 14. (2) Inclusion of the following famous language evidencing the humanity principle following a partial list of measures that may be included in the military necessity rubric: "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God." \textit{Id.}, art. 15. (3) Additional explication of how humanity tempers military necessity: "Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or revenge . . . nor of the wanton devastation of a district . . . military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult." \textit{Id.}, art. 16.
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enunciation of the narrow view of military necessity by virtue of his adding to the definition of military necessity the phrase "and which are lawful according to the modern law and usages of war." Moreover, the Lieber Code includes affirmation of several key principles of humanitarian law that circumscribe military necessity, including clear references to the principle of humanity and the principle of distinction. Therefore, after analysis of Article 17 in the context of the entire Lieber Code, the justification for civilian starvation is narrowed considerably.

The environment and manner in which Lieber wrote and obtained acceptance of his Code sheds further light on the matter. Although the Code turned out to be "almost entirely sound international law at the core", Lieber had a difficult time gathering support for his project. When he finally persuaded Henry Wager Halleck, General-in-Chief of the Union Armies, to sponsor his work, the initial charter was to produce a set of regulations to make the Union Army a more efficient fighting machine. Although the focus changed to providing a draft revision and systemization of the rules governing land warfare, the fact remains that Lieber knew his Code required the imprimatur of Union generals before it would have any effect. Accordingly, the resulting work was "an admixture of military sternness with basic humanitarianism." Perhaps Lieber believed that he needed to permit the contemplation of civilian starvation under certain circumstances in order to win approval of the work as a whole and assure its lasting

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130 See supra note 62 and accompanying text.
131 See supra note 129 for examples of the humanity principle in the Lieber Code. On distinction, the Code provides:

[A]s civilization has advanced . . . so has likewise advanced the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

Lieber Code, supra note 62, art. 22.

Lieber's words are widely credited with persuasively affirming the distinction principle, resulting in similar characterizations in virtually all subsequent instruments. See MALLISON & MALLISON, THE PALESTINE PROBLEM, supra note 54, at 357; R. HARTIGAN, supra note 62, at 23 (stating that "the echo of Lieber is clear and distinct", after quoting at length language from the Civilians Convention on the distinction principle).

132 F. FREIDEL, LIEBER 335 (1951).
133 On the events leading up to promulgation of the Lieber Code, and particularly the persistent efforts of Lieber to persuade Halleck that the project was worthy and necessary, see generally R. HARTIGAN, supra note 62, at 13-15.
134 F. FREIDEL, supra note 132, at 335.
humanitarian legacy. Support for the contention that Lieber opposed unmitigated destruction is found in his letter to Halleck imploring him to issue specific orders, referencing the Code, to stop the “devastation” and “wanton destruction” of private property:

It does incalculable injury. It demoralizes our troops, it annihilates wealth irrevocably and makes a return to a state of peace and peaceful minds more and more difficult. Your order, though impressive, and even sharp, might be written, with reference to the Code, and pointing out the disastrous consequences of reckless devastation, in a manner that it might not furnish our reckless enemy with new arguments for his savagery.135

The early perspectives of Lieber and others on the starvation issue must be viewed in the larger humanitarian law context. Thus, an unmitigated starvation strategy must be seen not only as violative of the Lieber Code based on the foregoing reasoning, but also as conflicting with the minimum requirement of military necessity: no Carthaginian peace.136 Consequently, even under early humanitarian law formulations, there is little to support an expansive right to starve civilians in contravention of the position that accords due regard to principles of humanity (such as distinction) and to the restraints inherent in the principle of military necessity.137

The 1907 Hague Convention IV perpetuated the principle that destruction of enemy property, including items of sustenance, might be justified during armed conflict, but with clear reference to the military necessity limitation: “[I]t is especially forbidden . . . to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”138 Although the Convention embraced the crucial principles of humanity to temper military necessity,139 no special protection for civilian items of sus-

137 For a discussion of limits on the concept of military necessity in traditional humanitarian law, see supra notes 57-68 and accompanying text.
138 1907 Hague Convention IV, supra note 3, art. 23(g). See also supra note 65.
139 1907 Hague Convention IV, supra note 3. The 1907 Hague Convention IV advanced, inter alia, the following principles of humanity: the notion that the right “to adopt means of injuring the enemy is not unlimited” (Article 22); nonderogable prohibitions such as those against treachery, harming prisoners, and the refusal of quarter (Article 23(b)-(d)); the prohibition against bombardment of undefended places
tenance, nor any direct prohibition of starvation as a method of
warfare, was articulated in the "law of the Hague."

Despite the starvation practices of World Wars I and II, there are
indications that some parties considered the practice questionable, if
not prohibited, under international law. Consequently, to rationalize
these measures, actors resorted to expansive interpretations of military
necessity rather than claiming that civilian starvation was allowable
per se. For example, the orders of desperate Nazi leaders suspending
the laws of war included the declaration that the "supply of food
to local inhabitants and prisoners of war is unnecessary humanitar-
ianism."

Thus, the tragic acts of deprivation and starvation in
Russia were not carried out under some colorable legal justification.
On the contrary, they were undertaken pursuant to the unlawful
suspension of international humanitarian norms prohibiting such prac-
tices.

Further reflections of the norms perceived by the belligerents in
World War II are discernible from their views on blockade and
contraband. The London Declaration of 1909, although unratified,
was an attempt to settle the status of foodstuffs by stating the
 customary rule that the items should be treated as conditional con-
traband (with free passage allowed if intended exclusively for the
civilian population), and by providing conditions under which they
would be subject to seizure. Although this approach gave rise to
severe restrictions on food consignments due to claims of impossibility
of distinction, the principle nevertheless incorporated a duty to con-
sider civilian values. Such a duty is reflected in the expression of
disapproval by the Soviet Union of the harsh British refusal to attempt
to distinguish between provisions for the civilian population and those

(Article 25); the requirement of taking precautions such as warning civilians of
impending attack (Article 26); and the Martens Clause, with direct reference to the
"laws of humanity" and "the dictates of the public conscience" (Preamble). On
these matters of Hague Law see supra notes 55, 59, 65, 79, 82, & 113 and accom-
panying text.

150 An example is the British pronouncements during both World Wars to the
effect that civilian deprivation was militarily necessary because Germany would, as
a result, have the option to reduce its war effort to reduce civilian starvation. See
generally Beveridge, Blockade and the Civilian Population, PAMPHLETS ON
WORLD AFFAIRS, No. 24, at 26-27, 31 (1940) (providing British Government positions sup-
porting civilian starvation), quoted in Mudge, supra note 14, at 242 n.50, 250-51.

151 See T. Färer, supra note 15, at 8; T. Taylor, supra note 39, at 26. See also
supra text accompanying note 93.

152 Declaration Concerning the Laws of Naval Warfare, Feb. 26, 1909, arts. 24,
33-36, reprinted in SCHINDLER & TOMAN, supra note 2, at 757.
for the armed forces of Germany. In a note of October 25, 1939, the Soviet Union protested against the British position on humanitarian grounds:

It is known that the universally recognized principles of international law do not permit the air bombardment of the peaceful population, women, children, and aged people.

On the same grounds the Soviet Government deem it not permissible [sic] to deprive the peaceful population of foodstuffs, fuel, and clothing, and thus subject children, women, and aged people and invalids to every hardship and starvation by proclaiming the goods of popular consumption as war contraband.

Thus, although a detailed treatment of these issues is beyond the scope of this inquiry, there is evidence that the participants in World War II considered the international law governing blockade and contraband as a restraint on the imposition of measures to deprive enemy civilians of sustenance.

Even though the devastating blockades and sieges of World War II were not addressed at Nuremberg, the War Crimes Tribunals did treat issues related to the applicability of Hague law to the destruction of items of sustenance. First, of general importance, the International Military Tribunal held that the Hague Convention had passed into customary international law and thus could be applied to Germany despite Nazi-defendant protestations.

Regarding the retreating Nazis’ devastation of Norway to frustrate pursuit, the court held that such action would be lawful under Article 23(g) of the 1907 Hague Convention IV if supported by the defendant’s honest belief that under the circumstances the necessities of war required the destruction. Moreover, there was a suggestion that a besieging force’s action to drive back civilians being evacuated by the besieged (to lessen logistical burdens) might be a lawful, although an extreme, measure.

In sum, in the wake of the Nuremberg cases Hague law was acknowledged as clearly binding in most particulars, although limited because it provided few special protections against starvation of civilians in

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143 See supra note 140.
144 This diplomatic protest is quoted in Beveridge, supra note 140, at 5, and in Mudge, supra note 14, at 250.
145 I Trial of the Major War Criminals Before the International Military Tribunal 253-54 (1954).
general and devastation of the population’s objects of sustenance in particular.

Despite the Nuremberg holdings that buttressed Hague principles, the excesses of war and frequent violations of law seen in World Wars I and II provided the 1949 Geneva Conference ample motivation to affirm conventional and customary humanitarian law principles and to provide more meaningful civilian protections. The Geneva Civilians Convention of 1949 succeeded in codifying many salutary developments in the protection of civilians during armed conflict, but its provisions did not substantially alter the law to afford special protection for items of sustenance for the civilian population. For example, the Civilians Convention did not deal in any significant way with methods and means of warfare. Moreover, although it stated that derogation from the general prohibition against destruction of enemy property must be “absolutely necessary by military operations,” this provision was not viewed as a material change to the correlative principle in the 1907 Hague Convention IV.

Among the many humanitarian contributions of the Civilians Convention were the extensive obligations imposed on occupying powers for the proper treatment of civilians in occupied territory. Consequently, the Convention marked a most welcome improvement in the law to provide special protection of civilian sustenance items at least under the limited circumstances of occupation. The Civilians Convention provides that the occupying power is required to ensure the adequate supply of food, medical supplies, and clothing for the civilian population and to arrange for relief action to meet shortages. Thus, in the light of these expansive obligations and the subsequent wide accession to the 1949 Geneva Conventions, the traditional humanitarian law can be viewed as effectively addressing

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147 Civilians Convention, supra note 2. See 4 INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (J. Pictet ed. 1958) (known as the seminal analysis of the Civilians Convention).
148 Mudge, supra note 14, at 251 (quoting Kunz, The Laws of War, 50 AM. J. INT’L L. 323 (1956)).
149 Civilians Convention, supra note 2, art. 53. Indeed, three appears to be little substantive distinction among the respective military necessity passages of the Lieber Code (“indispensable”), the 1907 Hague Convention IV (“imperatively demanded”), and the Civilians Convention (“absolutely necessary”).
150 Civilians Convention, supra note 2, arts. 55, 59-61. See M. BOTHE, K. PARTSCH & W. SOLF, supra note 127, at 337.
most issues of civilian starvation and relief as regards occupied territory.

Regarding nonoccupied territory, the pre-1949 legal order provided civilians with protection from starvation tactics mainly in the oft-violated warfare limitations inherent in the principles of military necessity and distinction. The Civilians Convention, however, added two specific protections. First, the rules on sieges were refined to require parties to attempt to conclude local agreements for evacuation of “wounded, sick, infirm, and aged persons, children and maternity cases.” Moreover, in what appears to have been an attempt to deflate the excuse of impossibility of distinction between combatants and civilians, the Convention encouraged relief to those who have been termed “useless mouths,” by requiring parties to allow passage of “consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.” This beneficial provision, however, also contains expansive derogations. Specifically, passage is conditioned on the besieging party being “satisfied there are no reasons for fearing” diversion, ineffective control, or some “definite advantage” inuring to the besieged (for example, enabling the besieged to reallocate productive assets to “military efforts”) by virtue of receiving such relief. Although the exceptions appear to swallow the rule, the provision formed a “clearly worded moral obligation” and thus represented at least a nod towards special protection for civilians in nonoccupied areas against measures to deprive them of needed sustenance during armed conflict.

Civilian protections during warfare, both generally and in the particular area of starvation and relief, are firmly grounded in the traditional humanitarian law as it developed through the time of the

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151 Civilians Convention, supra note 2, art. 17.
152 Professor Solf used the term “useless mouths,” to describe those generally incapable of assisting the war effort, in a discussion with the author. Telephone interview with Waldemar A. Solf, Adjunct Professor of Law, Washington College of Law, The American University (Mar. 30, 1987). Subsequently, the term was encountered in other sources. While the term seems derogatory, it is paradoxically instructive—for “useless” in the sense of “useless militarily” tends to focus attention not only on the illegality (under the military necessity principle) but also on the absurdity of indiscriminate starvation measures during armed conflict.
153 Civilians Convention, supra note 2, art. 23. See also P. MACALISTER-SMITH, INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATION 22 (1985).
154 Mudge, supra note 14, at 253 (with citation to the negotiating history of the Civilians Convention).
1949 Geneva Conference. Restraints on measures affecting civilians are inherent in the very foundations of humanitarian law: the principles of military necessity and humanity. Moreover, the distinction principle and its progeny of tenets aimed at protecting civilians have long roots in the conventional and customary law. Despite the tendency to confuse validity of and compliance with norms, the crucial humanitarian law principles survived, through widely accepted treaty refinements and the willingness of national governments to declare the principles and to incorporate them in military manuals. Moreover, in the international forum of Nuremberg, the crucial principles were confirmed as valid and binding on nations. Finally, the Civilians Convention added a number of special protections, particularly regarding occupied territories, that strengthened the general principles and removed some specious justifications that had been used for savagery in warfare. Thus, the humanitarian law of 1949 explicitly and implicitly prohibited measures directed at civilians and paved the way for further development and reaffirmation of the law to benefit innocents during armed conflicts.

III. THE IMPACT OF THE POST-WAR EXPERIENCE: HUMANITARIAN LAW AND HUMAN RIGHTS ADVANCES

The post-World War II period has brought momentous changes in the international legal order, and many of these changes have touched the humanitarian law of armed conflict. First to be examined are developments in the evolution and affirmation of the humanitarian law as such, including the growing public outrage over the excesses of war and the influence of the 1949 Geneva Conventions, as well as the nature of international lawmaking in the post-War, United Nations era. The focus in this latter area will be on changes in the international legal order accompanying the vast increase in the number of international participants and the rise of the United Nations as a forum for the refinement and expression of international consensus. This discussion will set the stage for treatment of several crucial advances in the world legal order that are significant in an evaluation of modern civilian protections during armed conflict. Under the broad category of "human rights," the nonderogable right to life and the prohibition against genocide will be examined in some depth. Finally, the inquiry will consider the increase in respect for civilian values inherent in the emerging rights to food and humanitarian assistance and the frequent reaffirmation of the distinction principle.
A. Humanitarian Law in the Post-War Era

Almost thirty years elapsed between the signing of the Geneva Conventions and the next multilateral conference on humanitarian law, the 1974-77 Geneva Conference that yielded Protocols I and II. Despite this hiatus, there is ample support for the contention that considerable development of principles of civilian protection occurred in the interim.

1. The Important Role of Public Opinion

Public exposure to the ravages of war has increased markedly as the world community has drawn closer together through greater association and interdependence among nations and through advances in mass communications. As a result, public awareness of, and concern about, the suffering attending many recent armed conflicts has grown substantially. Public opinion, "a most potent force,"\textsuperscript{155} has swung markedly to the "humanity" interest as tragic hostilities are vividly displayed.

The importance of public opinion is apparent in the post-War experience of the International Committee of the Red Cross (ICRC) as it sought to bring states together to fill gaps in the 1949 Conventions regarding civilian protections and to update the 1907 Hague rules limiting methods of warfare.\textsuperscript{156} Despite persistent ICRC attempts since 1956 to arouse interest in the formulation of a new humanitarian law instrument, it was not until 1974 that conferees convened towards this end, after "the wars of the Sixties (Viet Nam, Nigeria, Bangladesh, and the Middle East) and decolonization [brought about] a real interest in the reaffirmation and development of international humanitarian law."\textsuperscript{157} Moreover, the imprint of those wars on the

\textsuperscript{155} T. Meron, supra note 35, at 164.

\textsuperscript{156} For brief overviews of the activities of the ICRC in this period and the events leading up to the 1974-77 Geneva Diplomatic Conference, see Levie, supra note 3, at 371-73; Parks, supra note 96, at 17.


The preliminary ICRC draft of 1956 received only polite response. See generally Levie, supra note 3, at 370, n.10 ("The ICRC presented these Draft Rules to the International Conference of the Red Cross in New Delhi in 1957 only to have them approved by an innocuous resolution which was a death blow."). The United States was, Ambassador Aldrich candidly admitted, "very reluctant" to consider negotiations to expand protections relating to "aerial bombardment, the protection of the civilian population, and the conduct of military operations. I think it was only the experience in Vietnam that brought it around to the view that not only was it timely
public conscience continued to play a dominant role throughout the proceedings. As stated by Ambassador Aldrich, the head of the United States Delegation, many key themes of Protocol I, such as the extensive treatment of civilian protection,

can only be understood in light of the sad experiences of the world in the last 20 years in dealing with international armed conflicts. Virtually every issue discussed . . . had its origins in the conflicts in the Middle East, Korea, Southeast Asia or elsewhere in the world. For each of the proposals that were pressed, there were experiences that were relevant.158

Two other examples illustrate the important role of public opinion in shaping community values regarding humanitarian law. First, the shocking excesses of World War II translated into world consensus after the war to change the international legal order, resulting in the birth of the United Nations and the modern human rights movement. As Professor Sohn stated:

When humanity recovered in 1945 from the double trauma of millions having been killed by the German holocaust and the Second World War, the Members of the United Nations promised both “to save mankind from the scourge of war” and to promote “universal respect for, and observance of, human rights and fundamental freedoms for all” . . . . In the years that followed, the United Nations defined with increasing precision the rights to be protected, first in the Universal Declaration of Human Rights, the modern magna carta . . . .159

Moreover, the 1949 Geneva Conference “dealt mainly with abuses committed . . . during World War II.”160

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159 Sohn, Fundamental Guarantees, supra note 30, at 1.

160 Carnahan, supra note 9, at 32.

Retrospective examination of anti-civilian practices during World War II has helped reaffirm the importance of the distinction principle. For example, the position of some during World War II that it was “legitimate to attack civilian morale” has
The second, more recent example of the effect of public opinion on the formation of community values in humanitarian law comes from the Beirut sieges of early 1987. Despite the fervor and resolve of the besieging Amal forces over several months, the situation began to change rapidly after Dr. Pauline Cutting, a British physician inside a besieged camp, succeeded in alerting the international press of the hardships being caused by the siege. Consequently, after a few days of coverage, it was reported: "[S]ince an appeal by Cutting for relief of the camps gained international attention, Amal has progressively loosened its grip on them." Undeniably, public opinion has assumed a more prominent role in the post-War period in the shaping of values in the international legal order, and there is wide recognition of the importance of public support, "the most effective means of encouraging respect for humanitarian law."

2. The Strength of the 1949 Geneva Conventions

Perhaps the most vivid evidence of post-War endorsement and reaffirmation of humanitarian law tenets of civilian protection is the virtual unanimous acceptance of the 1949 Geneva Conventions. Some provisions of the Conventions can be traced to earlier Geneva Conventions and the 1907 Hague Convention IV, generally accepted as reflecting customary international law, based on holdings of the War Crimes Tribunals. Moreover, the Conventions as a whole have achieved almost universal acceptance in the years since their signature, with the number of parties (164) currently exceeding even the number of State Members of the United Nations (159). Thus, although the Civilians Convention can be characterized as reflective of customary
humanitarian law, the principles embodied therein have even sturdier support as binding norms because they are higher-order, treaty obligations binding on virtually every country. Significantly, this includes the many new states that have emerged as colonial ties have been broken in the post-War period.

The strength of 1949 the Geneva Conventions was underscored in the recent decision of the International Court of Justice in the Nicaragua case. Although both the United States and Nicaragua are parties to the 1949 Conventions, Nicaragua did not invoke them in the proceedings. On its own initiative, the Court referenced the "multilateral treaty reservation" of the United States but held that this issue did not need to be decided because United States conduct could instead be judged by fundamental principles of international law. Specifically, the Court deemed common Articles 1 and 3 of the Conventions as reflective of binding general principles. Commenting on Article 3, the Court stated:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts, and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity ..." 

The growing consensus that the 1949 Geneva Conventions are declaratory of customary international law suggests a greater awareness of the Conventions' humanitarian underpinnings and of their roots in community values. Concomitantly, the international community's expectations that the Conventions will be observed is strengthened. Moreover, fueled by authoritative statements such as that of the World Court in the Nicaragua case, the broadening consensus can lead to elevation of some 1949 Convention rules to jus cogens status. In the post-War era, more and more indications

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166 See supra note 71 and accompanying text.
168 Id. at 114 (quoting Corfu Channel Case, 1949 I.C.J. 22 (Merits)). See also T. Meron, supra note 35, at 7-8.
169 See generally Meron, The Geneva Conventions as Customary Law, 81 Am. J.
show that the noble humanitarian principles of the Civilians Convention have in fact been recognized as positive law by the international community.\textsuperscript{170}

B. \textit{International Lawmaking in the United Nations Era}

Beyond the core process of humanitarian law development and reaffirmation through treaties, the rise of international organizations has greatly expanded the norm-creating process across the entire spectrum of international legal issues in the post-War era. Most prominently, the United Nations has added an entirely new dimension to the creation of customary norms.

Traditional views on the establishment of customary norms focus on state usage or practice, although no particular minimum time period of such usage or practice is required.\textsuperscript{171} It is also acknowledged that some traditional norms have emerged not through consistent state practice, but instead by declarations of principles and subsequent indices of agreement to, or endorsement of, the concepts by the international community.\textsuperscript{172}

The United Nations has embellished and quickened the customary norm-creation process in several ways. First, the concept of "state practice" has expanded to include not only individual state acts in the conduct of world affairs but also expressions of individual state views through votes and pronouncements in United Nations fora. As Judge Tanaka stated in his dissenting opinion in the \textit{South West Africa} cases, a state now has the opportunity "to declare its position to all members of the organization and to know immediately their reaction on the same matter."\textsuperscript{173} Moreover, the United Nations has made the \textit{collective} dimension of state practice much more prominent,

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{See} \textit{Mallison \& Mallison, The Palestine Problem, supra} note 54, at 142-44.

\textsuperscript{172} \textit{See, e.g., id.} at 144-45 (tracing Article 9 of the Brussels Declaration of 1874 "regarding treatment of irregular combatants" as it was enunciated and became accepted as reflective of existing law in ensuing years, even though little or no evidence of usage or practice existed).

\textsuperscript{173} Ethiopia v. South Africa; Liberia v. South Africa, Second Phase [1966] I.C.J. 6, 248 (dissent of Judge Tanaka). Judge Tanaka's contention was that there was a legal norm of equality that was violated by apartheid. \textit{See} \textit{Mallison \& Mallison, The Palestine Problem, supra} note 54, at 147-48.
with "the number of occasions on which states see fit to act collectively . . . greatly increased by the activities of international organizations." Dr. Rosalyn Higgins aptly summarizes these phenomena: "The existence of the United Nations . . . now provides a very clear, very concentrated, focal point for state practice."

Perhaps the most significant aspect of United Nations-era lawmaking is the role of the General Assembly and particularly the resolutions adopted by that body. With practically all of the states in the world represented there, the General Assembly can essentially "supplement the treaty-making process by adopting declaratory resolutions which, if accepted by an overwhelming majority . . . can also constitute 'generally accepted' principles of international law." W.T. and S.V. Mallison describe the substantial impact of the United Nations norm-creation processes as follows, by reference to the two distinct functions of the General Assembly:

The first is as a major political organ of the United Nations with a separate legal identity. The second is as a collective meeting of the states of the world community which comprise its membership. In this second function the legal authority of the Assembly is derived directly from the member states who have the same legal authority to develop and make international law in the General Assembly as they do outside of it . . . The crucial point is that drawing on both sources of authority, the great majority of the member states have adopted the practice of expressing consensus on legal issues through the General Assembly.

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175 Id.

176 Sohn, "Generally Accepted" International Rules, supra note 33, at 1078.

177 MALLISON & MALLISON, THE PALESTINE PROBLEM, supra note 54, at 150-51 (footnotes omitted).

As stated by the Secretariat of the United Nations, a General Assembly pronouncement "may be considered to impart . . . a strong expectation that Members of the international community will abide by it." Memorandum of the Office of Legal Affairs of the Secretariat, U.N. Doc. E/CN.4/L.610, para. 4, (quoted in 34 U.N. ESCOR Supp. (No. 8) at 15, U.N. Doc. E/3614/Rev. 1 (1962)). It should also be noted that these changes in international lawmaking have not been externally imposed:

[They are the result of a voluntary acceptance by states of the need to adapt the methods of law-creation to the needs of the rapidly growing and changing world community. Any prior restrictions on the law-creating process were self-made, and they can be changed by the very method that established them in the first place.

Sohn, "Generally Accepted" International Rules, supra note 33, at 1079.
In no other realm of international law have the greatly changed methods of developing new rules been felt more dramatically than in the area of human rights. Through consensus or through near-unanimous vote, the General Assembly has adopted numerous instruments on human rights. With the Universal Declaration of Human Rights of 1948 as the widely-recognized starting point of the post-War human rights movement, the United Nations has continued to move stridently ahead in the definition and advancement of human rights. The Universal Declaration has been implemented not only by the two International Covenants, on Civil and Political Rights and Economic, Social and Cultural Rights, but also by "some fifty additional instruments on particular subjects, such as genocide, racial discrimination, equality for women, treatment of prisoners and forced labor."\(^{178}\)

Richard Bilder, a human rights scholar, may have slightly overstated the case when he said, "In practice a claim is an international human right if the United Nations General Assembly says it is."\(^{179}\) Nevertheless, there is at least an important core of truth in his words, for the expression of views with near-unanimity in a body of universal representation is indeed a powerful underpinning for an international norm.\(^{180}\) Significantly, a number of human rights tenets that have

\(^{178}\) Sohn, *Fundamental Guarantees*, supra note 30, at 1-2 & n.2 (citing *Human Rights: A Compilation of International Instruments*, U.N. Sales No. E.83.XIV.1 (1983)). See also Sohn, "Generally Accepted" International Rules, supra note 33, at 1078 & n.32.

\(^{179}\) Bilder, *Rethinking International Human Rights: Some Basic Questions*, 2 Hum. RTS. J. 557, 559 (1969). A number of authorities endorse this reasoning and urge states to hold one another to positions expressed in General Assembly actions. That is, once a state has agreed to a position in a General Assembly declaration or resolution, having certainly had the choice of objecting, other states are then fully justified in expecting that state's actions to comport with the position. For further explication of this logical approach that emphasizes the seriousness with which such official state acts ought to be considered, see generally R. Higgins, *supra* note 174.

\(^{180}\) In describing the crucial role of United Nations actions in the human rights norm-creating process, Stephen P. Marks underscores the importance of community values:

A constant feature of human existence is the existence of human needs. To satisfy them, we generally use self-help. When there are social constraints on the satisfaction of certain needs, they may become claims made by individuals or groups seeking such satisfaction through the social process. Other needs become recognized as requiring constant satisfaction and correspond to values in the society. One of the social institutions characterizing societies, including international society, is legislation, by which certain claims, values, or interests are formally recognized.
gained strength in the post-War period bear on the laws governing armed conflict. Some of these principles have reached nonderogable status and are thus universally applicable in times of war as well as peace. Moreover, human rights norms yield insight into world community values and expectations that are relevant to international humanitarian legal analysis.

C. The Impact of Post-War Human Rights Advances on Civilian Protections During Armed Conflict

In the above discussion of the development of humanitarian law through the time of World War II, emphasis was placed on the meaning and contours of "military necessity". Although the traditional humanitarian law placed a number of restrictions on permissible actions through the "humanity" concept, these restrictions operated essentially as limitations on the scope of the military necessity concept, which concept remained the dominant of the two tenets. However, the humanitarian legal order appears to have changed today, with the humanity side of the dichotomy having gained remarkable independent strength through the post-War human rights movement. Professor McDougal describes this modern concept of humanity as follows:

It is said all over the world that the Universal Declaration of Human Rights, despite its origin in aspiration only, has become customary international law. More precisely, it is not the Universal Declaration alone, but the Universal Declaration in the whole global flow of communication—the United Nations Charter, the two basic covenants, the ancillary covenants, the regional covenants, the national constitutions, national legislation and decisions, writing of publicists and so on—that have created a global bill of human rights. It is

International human rights are those human needs that have received formal recognition as rights through the sources of international law . . . [T]he availability of the General Assembly has made a new method of international legislation possible, . . . "the emergence of a new customary rule of international law relating to the establishment of a new law-creating process in the field of human rights."


181 "The tension between military necessity and restraint on the conduct of belligerents is the hallmark of humanitarian law . . . . Originally, military necessity was dominant." T. Meron, supra note 35, at 11.
this vast body of newly established law, not simply preference or pious aspirations, that can now be drawn upon to fill in the outlines of what is meant by humanity.\textsuperscript{182}

The present inquiry now turns to some specifics of this "vast body of newly established law" that bear particularly on community values respecting the problems of starvation and relief during armed conflict.

1. Overview of the Human Rights Movement and the Establishment of Nonderogable Rights

The United Nations Charter includes numerous references to human rights, and among them is the duty of all members to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."\textsuperscript{183} Although the Charter does not list specific human rights, this provision was made concrete by the Universal Declaration of Human Rights, adopted by the General Assembly without dissent in 1948.\textsuperscript{184} The precise legal character of the Universal Declaration has long been debated, but many persuasively contend that a member's failure to respect the rights contained in the Declaration constitutes a violation of the Charter.\textsuperscript{185} The rights recognized in the Universal Declaration are many, including the right to life, liberty and security of the person; freedom from slavery; and freedom from torture or other cruel, inhuman or degrading treatment or punishment. Other rights enunciated in the Declaration relate to criminal procedure, privacy, domestic relations, freedom of expression, participation in government, and economic and social freedom.\textsuperscript{186}

Even if one does not accept a close linkage between the Universal Declaration and the Charter, an impressive number of resolutions, declarations, and other indications of state practice have combined to create a customary international law of human rights requiring

\textsuperscript{182} McDougal, supra note 29, at 30; see also T. Meron, supra note 35, at 11.

\textsuperscript{183} U.N. Charter art. 55. For the text of the Charter, see 59 Stat. 1031, T.S. 993.


\textsuperscript{185} E.g., A. Robertson, Human Rights in the World 27 (1982) (quoting Professor Sohn: "As the Declaration was adopted unanimously, without a dissenting vote, it can be considered as an authoritative interpretation of the Charter of the highest order.").

\textsuperscript{186} Universal Declaration of Human Rights, supra note 32. For a brief summary of the rights, see L. Henkin, supra note 184, at 270-71.
every state to respect the rights set forth in the Declaration. General Assembly resolutions have often been adopted (frequently without objection) underscoring the requirement of all states to “observe faithfully and strictly” the provisions of the Universal Declaration.187 Moreover, the international law of human rights includes a number of formal human rights agreements, some of which have been acceded to by many states. At the top of the list, on the global level, are the United Nations Covenants,188 On the regional level, parallel steps have been taken through several comprehensive human rights agreements in Europe,189 the Americas,190 and, most recently, Africa.191 Finally, there are some fifty additional instruments dealing with particular subjects, a prime example of which is the Genocide Convention.192

In the classical formulations, humanitarian law and human rights law apply to different situations. Humanitarian law has historically focused on protections for victims of armed conflicts between states. On the other hand, the emphasis in human rights law has been on the “intra-state tension between the government and the governed.”193 Nevertheless, as a number of commentators contend,194 a growing convergence of the two areas has evolved. This development is summarized by Professor Meron: “[H]umanitarian law . . . has recently become increasingly implicated in the regulation of intra-state behavior in situations of violence, [and] human rights law is also concerned with protecting basic human rights in situations of inter-

187 A. ROBERTSON, supra note 185, at 28 (quoting the Declarations on Colonialism of 1960 and 1962).
national and internal armed conflict and in other situations of vio-
ence." The two regimes, of course, share the important underpinning
of humanity, and there is a remarkable parallelism of norms as well.
For present purposes, however, one aspect of the post-War human
rights movement is of critical importance in understanding the con-
tours of civilian protections during armed conflict today: the wide
acceptance of certain human rights as nonderogable or absolute.

In the international law of human rights it is acknowledged that
in periods of national emergency, such as war, a state sometimes
may take measures derogating from its obligations under the cus-
tomy and conventional law of human rights. But permissible der-
ogations are circumscribed; specifically, a state may derogate from
obligations only to the extent required by the emergency, and the
state must not act in violation of other international obligations, such
as the 1949 Geneva Conventions, in a case of international or internal
armed conflict. Moreover, certain human rights may not be sus-
ponded under any circumstances. The most authoritative human rights
instruments are consistent in providing no allowance whatsoever for
derogation from four specific rights: the right to life; freedom from
torture or other cruel, inhuman or degrading treatment; freedom
from slavery; and freedom from retroactive penal measures.

In the humanitarian law context, the nonderogable human rights
have special significance as evidence that the world community has
agreed that a certain small but significant subset of human rights
may not be suspended, no matter what the emergency. The inquiry

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196 "The idea of humanity has become the common denominator of human rights
law and of humanitarian law. The fact that these two systems of law have different
historical and doctrinal origins should not obscure the tremendous rapprochement
between them which has already taken place." Id. at 14.
197 Sohn, Fundamental Guarantees, supra note 30, at 7.
198 See Meron, supra note 35, at 52 (citing the Political Covenant (Article 4), the
European Convention (Article 15), and the American Convention (Article 27)). See
also Sohn, Fundamental Guarantees, supra note 30, at 7-8 & n.11 (comparing lists
of nonderogable rights among the major United Nations and regional instruments).
On the nonderogable rights specified in the International Covenant on Civil and
Political Rights, see A. Robertson, supra note 185, at 226 (listing seven "sacrosanct"
rights) and Buergenthal, To Respect and to Ensure: State Obligations and Permissible
Derogations, in The International Bill of Rights: The Covenant on Civil and
199 As a rebuttal to the view that the obligation to observe nonderogable rights
is binding only on state parties to one or more of the cited human rights instruments,
consider the reasoning of Nicole Questiaux, special rapporteur appointed by the
now turns to the manner in which the nonderogable human rights affirm and enhance civilian protections during armed conflict.

2. Impact of the Nonderogable Human Rights on Modern Civilian Protections During Armed Conflict

The essence of the right to life in human rights law is the protection against arbitrary deprivation of life.\(^2\) Although the right to life is nonderogable, the continued reality of armed conflict means deprivation of life within the context of "lawful acts of war" is not violative of the right to life.\(^2\) Thus, for example, although measures against combatants in furtherance of lawful military objectives remain accepted, the right to life underscores such humanitarian law norms as that against killing prisoners.

Both the right to life and the freedom from torture or other cruel, inhuman, or degrading treatment converge with key norms of traditional humanitarian law. Each of the 1949 Geneva Conventions prohibits murder and other acts of violence against protected persons. Acts of "wilful killing, torture, or inhuman treatment" of protected United Nations to study human rights during states of emergency. After acknowledging the principle that states normally are bound only by instruments they have ratified, she stated:

But the idea of a basic minimum, from which no derogation is possible, is present in a sufficient number of instruments to justify our approaching the matter by reference to a general principle of law recognized in practice by the international community, which could, moreover, regard it as a peremptory norm of international law within the meaning of Article 53 of the 1969 Vienna Convention on the Law of Treaties, whereby "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . . ." It therefore seems to us that the peremptory nature of the principle of non-derogation should be binding on every State, whether or not it is a party and irrespective of the circumstances.

N. Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, U.N. Doc E/CN.4/Sub.2/1982/15, at 19 (1982) (footnote omitted). See also T. Meron, supra note 35, at 59 (suggesting on the basis of the key instruments and the draft Restatement of Foreign Relations Law of the United States that the common core of four nonderogable human rights "is binding on all States as customary law or even as jus cogens").

200 See Ramcharan, supra note 46, at 3.

201 In a United Nations Report addressing the meaning of the right to life under Article 6 of the Political Covenant, the Human Rights Committee stated: "[T]o the extent that in present international law 'lawful acts of war' are recognized, such lawful acts are deemed not to be prohibited by Article 6 . . . if they do not violate internationally recognized laws and customs of war." Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, U.N. Doc. A/8052, at 104 (1970).
persons are considered "grave breaches" under the Conventions and as such are war crimes subject to universal jurisdiction. Moreover, common Article 3 of the Geneva Conventions regarding internal armed conflicts prohibits "at any time and in any place whatsoever . . . violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture [of] [p]ersons taking no active part in the hostilities."  

Several practical results emerge from the interpenetration of humanitarian law and human rights norms. First, the human rights law affords a new legal basis for protection of humanitarian legal rights. Moreover, human rights instruments such as the Political Covenant require parties to report measures in furtherance of the rights and afford at least some degree of international supervision by the U.N. Human Rights Committee. Finally, the increasing acceptance of the Political Covenant implies that respect for its provisions is of such concern to the international community that questions of compliance with these rights are less susceptible to exclusion from international scrutiny as matters within states' domestic jurisdiction. Thus, in addition to enhancing crucial humanitarian rights, the modern law of human rights makes possible a greater scrutiny of compliance with these rights than did the humanitarian law conventions alone.

In addition to the foregoing nonderogable human rights, the international law regarding genocide is apposite to the problem of starvation and relief during armed conflict. The prohibition against genocide is widely accepted as jus cogens, and "the practice of genocide is the clearest illustration of a violation of the right to life." The crime of genocide includes killing or causing serious bodily or mental harm to members of a group and the deliberate infliction of conditions of life calculated to physically destroy the group, either wholly or in part, whether in time of peace or war.

The right to life is increasingly being linked to survival needs. Many contend that the right includes not only protection from outright murder (execution, disappearances, and torture), but also from dep-

202 See, e.g., Civilians Convention, supra note 2, art. 147.
203 Id. art. 3. The International Court of Justice recently stated that common Article 3 is "a minimum yardstick" applicable to international armed conflict as well. See supra note 168 and accompanying text.
204 See A. Robertson, supra note 185, at 230-31.
206 Genocide Convention, supra note 192.
vation of basic needs such as food and health care.\textsuperscript{207} In short, although the human rights instruments do not expressly deal with denial of items of sustenance, "it is meaningless to differentiate killing by an act of state and by starving a person to death, because both forms of behavior constitute the worst forms of cruelty."\textsuperscript{208}

With regard to the humanitarian law context of civilian protections, it has been shown that the nonderogable human rights strengthen the traditional humanitarian norms proscribing deliberate measures against protected persons, including civilians.\textsuperscript{209} Moreover, the link between these rights and the protection of civilian sustenance during armed conflict has been acknowledged. Noting the increasingly deep roots of the Geneva Conventions and the post-War human rights advances, one commentator stated: "All seem to agree that starvation of the civilian population as an intentional strategy of war is prohibited."\textsuperscript{210} Another writer directly referenced the Genocide Convention's proscription against "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction",\textsuperscript{211} contending that this proscription was positive law and that "starvation [of civilians] would fall under this explicit prohibition."\textsuperscript{212}

Congruent with the post-War human rights advancements that bear on humanitarian law, the main thrust of the 1977 Geneva Protocols was to provide better protection for civilians against the effects of armed hostilities. The following Protocol I language reflects this major concern: "The civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."\textsuperscript{213} Moreover, it is suggested that the starvation and relief articles of Protocol I, addressed in depth in Section IV below, are also consistent with and representative of the crucial human rights advances noted above. Before turning to the Protocols, however, some emerging human rights relative to sustenance and relief are examined.


\textsuperscript{208} Menghistu, supra note 207, at 63.

\textsuperscript{209} See supra notes 202-04 and accompanying text.

\textsuperscript{210} International Law and the Food Crisis, 1975 Am. Soc'y Int'l L. Proc. 39, 50 (remarks of Jordan Paust).

\textsuperscript{211} Genocide Convention, supra note 192, art. 2(c).

\textsuperscript{212} R. Moffit, supra note 14, at 18.

\textsuperscript{213} Protocol I, supra note 1, art. 51(2).

The inquiry so far has focused on perhaps the most urgent human rights, those that have such unequivocal support in international instruments as to be widely considered nonderogable, and even to have risen to the level of *jus cogens*. Indeed, the right to life and the freedom from torture or other cruel, inhuman, or degrading treatment have been frequently reaffirmed and strengthened since their enunciation in 1948 in the Universal Declaration of Human Rights and the Genocide Convention. It has been suggested that these paramount civil and political rights have particular significance in the humanitarian law of armed conflict. Also important, however, are human rights in the realm of economic and social values that have underpinnings in the Universal Declaration as well.

By reference to the motto of the French revolution—*liberté, égalité, fraternité*—Karel Vasak has identified a third generation of human rights predicated on brotherhood (*fraternité*), in the sense of solidarity. These rights are characterized by the relatively new aspirations they express, and by the fact that "they seek to infuse the human dimension into areas where it has all too often been missing" and that "they can be realized only through the concerted efforts of all the actors on the social scene: the individual, the State, public and private bodies and the international community." In a persuasive endorsement of Vasak's notion, Stephen Marks calls this body of rights a "new generation" of human rights corresponding to "certain major planetary concerns, which, although they were always present and sometimes acutely felt in the past, have taken on a renewed urgency at a time when the legislative process in the field of human rights is particularly receptive." Although some authorities challenge the strength and even the very bases of economic and social human rights, the "new generation" right that finds perhaps the most support is the right to food. In-

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214 On the work of Karel Vasak in this area, see generally Marks, *supra* note 180, at 506.
215 Lecture of Karel Vasak, Tenth Study Session of the International Institute of Human Rights (July, 1979), quoted in Marks, *supra* note 180, at 506.
216 Marks, *supra* note 180, at 505-06.
disputably, global concern about world sustenance has advanced dramatically in the post-War years, having been the "subject of genuinely interdisciplinary investigation and enlightened debate . . . in a way that has not occurred previously." Particularly in view of the unprecedented response to the African drought of the early 1980s, it may fairly be stated that eradication of such tragedies has become a prominent interest of the world community.

The emerging right to food stands firmly on a number of bases, as "[f]ormal international law is replete with declarations of a right to food." The Universal Declaration specifies the right to food as part of the right to an adequate standard of living. The 1966 Covenant on Economic, Social and Cultural Rights expands the notion by obligating states to act individually and through international cooperation to effectuate "the fundamental right of everyone to be free from hunger." Additionally, a basic right to food is acknowledged in numerous declarations of the General Assembly, including the 1974 Resolution 3348 (XXIX) endorsing the Declaration on the Eradication of Hunger and Malnutrition.

The right to humanitarian assistance is also cited as an emerging or "new generation" human right. Indeed, the concept that people in dire need have a right to assistance from the international community is a natural manifestation of the solidarity principle. Although the term "humanitarian assistance" is not prevalent in human rights-instruments, the concept follows directly from provisions dealing with the rights to life, health, food and shelter, and to special care for children and the sick. Moreover, the Universal Declaration provides support for important principles relevant to humanitarian assistance, including the obligation to cooperate with and assist others

218 Marks, supra note 180, at 506. Evidence of such profound interest and multifaceted inquiry into the matter of a global right to food is seen in the collection of essays, THE RIGHT TO FOOD (P. Alston & K. Tomasevski eds. 1984).


220 Universal Declaration of Human Rights, supra note 32, art. 25.

221 International Covenant on Economic, Social and Cultural Rights, supra note 188, art. 11.

222 The first article of the Universal Declaration on the Eradication of Hunger and Malnutrition provides: "Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties." Report of the World Food Conference, Nov. 5-16, 1974, U.N. Doc. No. E/CONF.65/20, at 2 (1975).

223 Marks, supra note 180, at 510-11.
in times of emergency and to accept relief following a disaster if domestic resources are inadequate. Finally, the human rights tenets focusing on the minimum necessities of life, such as Article 25 of the Universal Declaration, lead naturally to a right to humanitarian assistance as a crucial means of ensuring that populations are supplied with the minimum necessities to sustain life. As one commentator summarized: "Humanitarian assistance deserves the particular attention of the international community because of the concrete application of fundamental human rights involved."

Despite the obvious links between these "new generation" human rights and such sacrosanct principles as the right to life, it is not suggested that the rights to food and humanitarian assistance apply a priori to armed conflict as do the nonderogable rights. However, the phenomenon of concerted efforts to further these rights reveals much about contemporary community values. Moreover, although viewed as "emerging", these rights draw weighty support from prominent human rights instruments, which constitute a significant benchmark of international consensus. In sum, the human rights to food and humanitarian assistance shed additional light on the modern principle of humanity in the calculus of international humanitarian law norms.

4. Reaffirmation of the Distinction Principle

The foregoing analysis reveals that the law of human rights has been prominent in expressions of individual and collective state prerogatives in the post-War, United Nations era of international norm creation. The principle of distinction enjoys a similar emphasis in the international law of armed conflict, especially in the direct reaffirmation of this essential underpinning of civilian protection.

Throughout the 1950s and 1960s, the International Committee of the Red Cross (ICRC), with widespread representation from the states of the world, worked to keep key principles of civilian protection at the forefront of international concern. The General Assembly of

224 See P. MacAllister-Smith, supra note 153, at 64-65 (citing international human rights instruments).
225 Id. at 65-66.
226 The activities of the ICRC during this period are detailed in F. Kalshoven, supra note 75, at 42-44. The climactic event in this process was passage of Resolution XXVIII at the 20th International Conference of the Red Cross in Vienna in 1965, which resolution stated in part that "all Governments and other authorities responsible for action in armed conflict" should conform as a minimum to a set of
the United Nations then took up the matter, resulting in the unanimous adoption in 1968 of Resolution 2444 (XXII) concerning “Respect for Human Rights in Armed Conflicts”.\textsuperscript{227} Significantly, the Resolution included the precise statement of the distinction principle that had been refined by the ICRC. In 1970, the crucial tenets of civilian protection were reaffirmed by the General Assembly in Resolution 2675 (XXV).\textsuperscript{228} Besides containing a statement of humanitarian law principles such as the distinction principle, Resolution 2675 linked these protections with the human rights movement: “Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.”\textsuperscript{229}

In summary, further development through the United Nations of the cornerstone distinction principle and other humanitarian concepts of civilian protection bespeaks a strengthening of these principles. According to Professor Kalshoven, the “reaffirmation of the principles in question as valid norms of international law can certainly be regarded as an authoritative statement of the law.”\textsuperscript{230} Now, having examined the contextual foundation of post-War international consensus regarding matters of humanitarian and human rights law, the inquiry turns to consideration of the provisions on starvation and relief which were drafted by the 1974-77 Geneva Diplomatic Conference.

IV. PROTOCOL I PROVISIONS ON THE PROBLEMS OF STARVATION AND RELIEF

The post-War activity of the international community detailed above demonstrates a heightened concern for the rights and protection of victims of armed conflict. Underlying the human rights instruments and General Assembly resolutions are the unmistakable principles and

\begin{footnotes}
\item[229] \textit{Id.}
\item[230] F. Kalshoven, \textit{supra} note 75, at 44.
\end{footnotes}
aspirations of humanity, quickened by "the sad experiences" of armed conflicts of the previous decades.\textsuperscript{231} Thus, besides the articulated need to fill gaps in the 1949 Geneva Conventions and to address limits on methods of warfare,\textsuperscript{232} the changing concept of humanity, also, served as a catalyst for the unprecedented level of participation by members of the international community in the effort to supplement the 1949 Conventions.\textsuperscript{233} Based on the tenor of international expressions in the years preceding the Conference, and in the light of such tragedies as the devastation in Viet Nam and the starvation in Biafra, the Protocol I emphasis on issues of civilian starvation and relief is not surprising.

A. \textit{Starvation of Civilians as a Method of Warfare}

Reflective of Protocol I's acute emphasis on civilian protections is that instrument's Article 54 on starvation,\textsuperscript{234} which provides:

\textbf{Article 54—Protection of Objects Indispensable to the Survival of the Civilian Population}

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 para. 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. The objects shall not be made the object of reprisals.

\textsuperscript{231} See supra text accompanying note 158.
\textsuperscript{232} See supra note 156 and accompanying text.
\textsuperscript{233} See supra note 1 and accompanying text.
\textsuperscript{234} Protocol I, supra note 1, art. 54.
5. In recognition of the vital requirements of any Party to the conflict in the defense of its national territory against invasion, derogation from the prohibitions contained in para. 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Article 54 is contained in the section of the Protocol that is generally aimed at advancing the law regarding conduct of hostilities. Rather than leave the issue of civilian sustenance in the fog of the "military necessity" concept, Article 54 begins boldly in paragraph 1: "Starvation as a method of warfare is prohibited." The four remaining paragraphs not only shape the contours of the general prohibition, but also address the realities of military considerations.

Paragraph 2 brings specificity into the article in a number of important ways. The provision addresses the range of acts (attacking, destroying, removing or rendering useless) that are prohibited against objects indispensable to civilian survival. Paragraph 2 also provides criteria for determining which objects are covered by the prohibition and addresses the problematical issues regarding purpose and motive. The "military objects" issue is addressed in paragraph 3, which provides that objects are not immune from attack if used "as sustenance solely for the . . . armed forces" or if used "in direct support of military action." Paragraph 4 applies the overall Protocol I prohibition against civilian reprisals (Article 51) to the specific case of objects of sustenance. Finally, paragraph 5 provides a military necessity derogation from the prohibition when such action is vital to the defense of a party's own national territory.

Paragraph 1's simply-stated, yet potentially far-reaching prohibition against starvation of civilians did not appear in the ICRC working draft used at the outset of the negotiations in 1974. The original provision dealt with indispensable objects in a fashion similar to
paragraph 2 of the Article that was eventually adopted. Among several proposed amendments to the draft in the 1974 meetings of Committee III was the first direct reference to starvation. Although the matter drew little attention in the early going, the amendment proposed by Belgium and Great Britain in March of 1974 was included verbatim in the final document as paragraph 1 of Article 54.238

Despite the seeming lack of interest in the bold starvation prohibition in Committee III plenary meetings, the amendment was discussed in depth and approved by the Working Group. The Group’s concern about the expansive scope of the provision influenced the contours of the prohibition formed by the paragraphs that follow it. According to the Rapporteur, the Working Group deemed paragraph 1 “a useful statement of the basic principle from which the rest of the article flows.”239 Not only did Committee III adopt paragraph 1 by consensus on March 14, 1975, but the provision remained intact until adopted by the entire Conference by consensus on May 27, 1977.240

Perhaps the heart of Article 54 is paragraph 2, which in large measure provides the guidelines by which a plan to attack items of sustenance must be evaluated. Several important issues are addressed, including the confusing interplay between “purpose” and “motive,” the scope of persons protected, and the range of items that are immune from attack.

The foundation for paragraph 2 was the ICRC draft, which provided a list of sustenance items that a belligerent would be forbidden to destroy “to starve out civilians, to cause them to move away or for any other reason.”241 But the provision underwent considerable refinement in the Working Group. Among the difficulties were two issues relating to the purpose of such attacks. First, to be workable the provision had to allow destruction of sustenance items such as irrigation works when necessary, for example, to keep the enemy

238 U.N. Doc. CDDH/III/67, 3 Official Records, supra note 237, at 218. To trace the proposed amendment through the negotiations, see 3 H. LEVIE, supra note 237, at 229, 241, & 243-44.


240 See 3 H. LEVIE, supra note 237, at 244, 256 (with citations to negotiating documents approved by Committee III and the Conference as a whole in 1975 and 1977, respectively).

241 The text of the relevant ICRC draft article is provided in 3 H. LEVIE, supra note 237, at 227.
from advancing. Accordingly, the Working Group (with finishing
touches applied by the Drafting Committee) came up with the pro-
hibition against attacks "for the specific purpose of denying [the
items] for their sustenance value." 242

Another concern was the need to ensure that the provision covered
specious excuses a party might use to justify destruction of sustenance
items. For example, if not carefully drawn, the provision might give
a belligerent leeway to say, "We didn't destroy the crops to starve
the civilians, just to force them to evacuate for lack of food." As
a result, the drafters focused on the proscribed purpose of denying
the objects for their sustenance value, no matter what the underlying
motive (starvation, evacuation, etc.) may be. 243

Of potentially far-reaching consequence is paragraph 2's language
regarding the scope of persons protected. Although the overall thrust
of the article is civilian protection, paragraph 2 proscribes denial of
sustenance items "to the civilian population or to the adverse
Party. 244

Although paragraph 3 states unambiguously that a belligerent may
derogue from the rule if the items are used solely by the adverse
Party, the paragraph 2 wording ostensibly removes the option of
destroying sustenance items used by both civilians and military per-
sonnel. Accordingly, the article advances humanitarianism by disal-
lowing indiscriminate starvation measures under some notion of
"military necessity" in scenarios where both military forces and
civilians might consequently suffer. By way of recent example, the
Beirut sieges aimed at starving Palestinian forces—which also severely
harmed civilians in besieged refugee camps—would appear to be
violations of this rule. 245

(Report of Committee III, Second Session). See generally M. Bothe, K. Partsch
& W. Solf, supra note 127, at 338-39 (example of a railroad line used to transport
food being a lawful target if otherwise a military objective under Article 52).

240 The Working Group proposal that was adopted by Committee III included the
prohibition against attacks on objects indispensable to civilian survival "for the
specific purpose of denying them as such." U.N. Doc. CDDH/III/266, 15 Official
Records, supra note 237, at 308. The Rapporteur acknowledged drafting problems
and noted particularly that the intended prohibition against any destruction of items
to keep people from consuming them was "a heavy burden of meaning to be carried
by the two words 'as such.'" U.N. Doc. CDDH/215/Rev. 1, 15 Official
Records, supra note 237, at 279. Before adoption by the Conference, the Drafting Committee
strengthened the wording by replacing "as such" with "for their sustenance value."

244 Protocol I, supra note 1, art. 54, para. 2 (emphasis added).

245 See supra notes 22-27 and accompanying text. Applicability of Protocol I
The ICRC draft referred only to civilians, but two early amendments proposed by the United States and by Belgium and the United Kingdom used the wording "for the purpose of denying them to the enemy or the civilian population."\(^{246}\) The negotiating papers show little attention focused on the matter, with not even an explanatory comment by the Rapporteur when the Working Group proposal with the words "or to the adverse party" was forwarded.\(^{247}\) This language passed every subsequent scrutiny—(Committee III approval, Drafting Committee action, and Conference approval)—without controversy.\(^{248}\) Accordingly, although seen by some as reflecting a divergence from customary humanitarian law,\(^{249}\) this language did not occasion the flurry of contention that one would expect from such a change.

Committee III addressed the list of protected sustenance objects in depth in paragraph 2. The ICRC draft's list was similar to the provision later adopted, but would have made the list *exhaustive* by preceding it with "namely". To make the list *illustrative* instead, Finland and Sweden suggested in an early proposal that "namely" be replaced with "such as".\(^{250}\) Although the delegation from the

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\(^{247}\) According to the Rapporteur, the Working Group Report to Committee III (U.N. Doc. CDDH/III/264, 15 *Official Records*, *supra* note 237, at 348-50) was not a complete account of the deliberations. It dealt "with the articles which had proved to be the most difficult." U.N. Doc. CDDH/III/SR.31, 14 *Official Records*, *supra* note 237, at 299-300. Because of its omission from the report and debates on the Working Group proposal, it can be presumed that the language "or to the adverse Party" posed no significant difficulty.

\(^{248}\) See *supra* note 240 for citation to documents outlining the adoption of the article as the Conference progressed. Regarding comments on the proposals (and the lack of contention concerning the instant language), see 3 H. LEVIÈRE, *supra* note 237, at 230-46, 255-58.

\(^{249}\) E.g., Solf, *supra* note 3, at 133 (stating that the Lieber Code remains reflective of customary international law and that Article 54 "establishes a substantially new principle which is not yet customary international law"); Telephone interview with Waldemar A. Solf, *supra* note 152 (specifically citing "or adverse party" language as contrary to customary international law). See also *supra* note 127 and accompanying text. But see infra notes 296-314 and accompanying text.

\(^{250}\) U.N. Doc. CDDH/III/13, 3 *Official Records*, *supra* note 237, at 216 (amendment proposed by Finland and Sweden on Mar. 12, 1974). The text of the relevant ICRC draft article is provided in 3 H. LEVIÈRE, *supra* note 237, at 227.
United Kingdom preferred keeping the list exhaustive to provide clearer guidance to the field commander,\textsuperscript{251} the illustrative language was adopted in deference to the view that other life-sustaining objects such as clothing and shelter in certain climatic conditions should be covered. The Working Group rejected proposals to add items such as fuel reservoirs and communications systems used for food distribution.\textsuperscript{252} Consequently, despite the abstraction of an illustrative list, the reluctance to include items other than those related to food and drink may make it "difficult to establish that objects other than the latter category are intended to be protected by the Article."\textsuperscript{253} The Committee III Rapporteur, Ambassador Aldrich, later explained the balancing of interests that led to the adoption of the final list. First, the illustrative approach was a matter of caution since every contingency could not be foreseen. Fuel reservoirs and similar items were rejected as invariably important military objectives. Alternatively, the few food and water-related items included in the list were those "that could be identified as \textit{always} indispensable."\textsuperscript{254}

The ICRC draft contained no provisions allowing derogation from the general requirements of paragraph 2, but such provisions were the subject of several amendments proposed early in the deliberations.\textsuperscript{255} Rather than attaching the derogation provision to an already complex paragraph 2, the Working Group formed a two-part paragraph 3 to cover situations in which the paragraph 2 prohibitions would not apply. First, paragraph 3(a) recognizes the "military necessity" of actions against an enemy's objects of sustenance used "solely for the members of its armed forces." Although the provision preserves starvation of armed forces as a method of warfare, it also underscores, by use of the qualifier "solely", the implication in


\textsuperscript{252} Ghana proposed the addition of "means of communications, such as arterial roads essential to the supply of such indispensable objects." U.N. Doc. CDDH/III/28, 3 Official Records, supra note 237, at 216. A proposal by thirteen Middle Eastern countries urged adding "fuel reservoirs and refineries" because "fuel concerned the whole international community, which depended on oil in all spheres." U.N. Doc. CDDH/III/Sr.16, 14 Official Records, supra note 237, at 127 (statement of Mr. El Ghonemy, Egypt, on Feb. 10, 1975, introducing proposed amendment, U.N. Doc. CDDH/III/63, 3 Official Records, supra note 237, at 217).

\textsuperscript{253} M. Bothe, K. Partsch & W. Solf, supra note 127, at 340 & n.17.

\textsuperscript{254} Aldrich, \textit{New Life}, supra note 1, at 779 (emphasis in original).

paragraph 2 that destruction of items used by both civilians and military personnel is prohibited. This may prove difficult to apply since it might well afford protection even to objects in military supply channels if those objects are intended for protected persons such as prisoners of war or civilians in occupied territory.

While paragraph 3(a) excludes from paragraph 2's protection objects used for military sustenance, the first clause of paragraph 3(b) excludes items used "in direct support of military action" in ways unrelated to their sustenance value. Although the latter provision is supported by the military necessity notion, it arguably adds nothing to Article 54. That is, there appears to be no need for a "direct military support" exception because the prohibition in paragraph 2 applies only if the object is being attacked to deny its sustenance value. This matter did not present a major difficulty in the Working Group, but the dynamics of the consensus-building process within the Group may have given rise to the language of paragraph 3(b). For example, the "direct military support" idea appeared in proposals by socialist delegations, who may have insisted on such a provision.

The Rapporteur's frustration with the drafting process is reflected in his comment regarding paragraph 3 in the Working Group Report: "Here the drafter continues to be plagued by the necessity of distinguishing between uses of the objects as sustenance and other uses." Perhaps a better explanation for the phrase "direct military support" is that it was intended not as a restatement of the exception already contained implicitly in paragraph 2, but rather, as introductory language to the proviso that follows the phrase in paragraph 3(b). Specifically, paragraph 3(b) states that not even the "direct military support" justification warrants destruction of an item if such destruction is "expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement." In other words, although couched in language suggesting

256 See supra notes 244-49 and accompanying text.
257 See generally M. Bothe, K. Partsch & W. Solf, supra note 127, at 340-41 & n.18 (with citations to the 1949 Geneva Conventions and Protocol I articles that protect POWs and civilians in occupied territory).
258 For the text of Article 54, paragraph 3(b), see supra text accompanying note 234.
259 See supra note 255 and accompanying text.
260 U.N. Doc. CDDH/III/264, 14 Official Records, supra note 237, at 349. Ambassador Aldrich's transmittal of the Working Group proposal was apologetic for the shortcomings of the final language: "The Rapporteur hopes the Drafting Committee will have better luck." Id.
an exception to the paragraph 2 prohibition, paragraph 3(b) arguably has much more impact as a limit on the "military necessity" grounds a belligerent may use to try to avoid the prohibition.

By way of example, a belligerent might reasonably attack an irrigation canal used as a defensive position, a water tower used as an observation post, or an orchard used as cover for the enemy.\textsuperscript{261} Such attacks would not run afoul of paragraph 2 because they would not be directed at denying sustenance value. Likewise, the attacks would be justified under the first clause of paragraph 3(b) because of the objects' direct military uses. However, the second clause of paragraph 3(b) would require the potential attacker to inject into the decision the additional consideration of whether the destruction might cause civilian starvation or force movement of the civilian population. Accordingly, the second clause of paragraph 3(b) both strengthens the starvation prohibition and weakens the military necessity exception, but only in the limited factual scenario in which an object is both being used for direct military support and is desperately needed by civilians in the area. Moreover, Ambassador Aldrich has suggested that the object might still be attacked as long as the belligerent thereafter acts "to ensure relief... in the extreme case where such destruction would cause starvation or force movement of the civilian population."\textsuperscript{262}

The general prohibition against civilian reprisals is applied specifically to sustenance objects in paragraph 4. The reference to reprisals in Article 54, however, appears only to underscore for these objects the overall ban on reprisals.\textsuperscript{263} No unique contentions regarding sustenance reprisals surfaced in the negotiations. In fact, even those delegations that disagreed with wholesale prohibition of civilian reprisals "approved of the prohibition in regard to Art. 54, which was adopted by consensus."\textsuperscript{264} Accordingly, the vigorous debate about civilian reprisals in general need not be addressed in the present inquiry.\textsuperscript{265}

\textsuperscript{261} See generally M. Bothe, K. Partsch & W. Solf, supra note 127, at 341 (providing hypothetical situations).
\textsuperscript{262} Aldrich, New Life, supra note 1, at 779.
\textsuperscript{263} See supra note 36 and accompanying text.
\textsuperscript{264} M. Bothe, K. Partsch & W. Solf, supra note 127, at 342 & n.20.
\textsuperscript{265} For a persuasive defense of the prohibition against civilian reprisals, see Kalshoven, Protocols Additional to the Geneva Conventions on the Law of War, 1980 AM. Soc'y Int'l L. Proc. 191, 204-07 (citing several Protocol I articles intended to protect civilians and stating: "If one attacks the civilian population [by way of reprisal], it escapes me how the attacker can at the same time protect it."). Id. at 205.
Paragraph 5 addresses actions by a party in its own territory. Paragraph 5 permits a party defending its national territory to pursue a "scorched earth" course if such a course is made "imperative by military necessity." Although some conferees disagreed with this apparent sanction of civilian starvation measures, the Working Group concluded that a blanket prohibition in a party's own territory would be unrealistic. Because of the preeminent right to defend one's territory, the view was that it would be impossible to prohibit a completely "scorched earth" policy where the armed forces were being forced to retreat within their own country.

Until the last session of the Conference in 1977, the matter of actions within a party's own territory was considered along with issues relating to occupying powers. Accordingly, the Working Group's proposal approved in 1975 contained only paragraphs 1 through 4 and did not deal with the issue. The Working Group's position that the "national territory" concern would require a stated exception was expressed by adding the paragraph 5 language to the article dealing with occupation. However, in the final refinements by the Drafting Committee, the "occupation" article analogous to Article 54 was deleted as surplusage. Not only did the Civilians Convention already contain expansive protections against such actions by an occupying power, but Article 49 of Protocol I made Article 54 universally applicable by stating that the articles in the section applied "to all attacks in whatever territory conducted," and (by explicit reference to the Civilians Convention) "to the whole of the populations of the countries in conflict."

However, because of the consensus in favor of an exception for a party's action in its own territory, the Working Group concluded that a blanket prohibition in a party's own territory would be unrealistic. Because of the preeminent right to defend one's territory, the view was that it would be impossible to prohibit a completely "scorched earth" policy where the armed forces were being forced to retreat within their own country.

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266 For the full text of paragraph 5 of Article 54, see supra text at note 234.
268 Early in the 1975 session, the ICRC Representative, Mrs. Bindschedler-Robert, explained to Committee III that Article 48 of the ICRC Draft (corresponding to the eventual Article 54) did not apply to objects under a party's own power. Rather, she said, the cases of control of objects by virtue of either occupation or by presence of the objects in a party's own national territory were covered by Article 66 of the ICRC Draft. U.N. Doc. CDDH/III/SR.17, 14 Official Records, supra note 237, at 141.
270 Protocol I, supra note 1, art. 49. For an overview of the ways in which the Civilians Convention addressed civilian sustenance in occupied territory, see supra note 37 and accompanying text.
Because of the universal applicability of Article 54 and the lack of any further stated exceptions, it follows that any "scorched earth" measure that does not fall under the narrow exception in paragraph 5 of that article would be impermissible. Accordingly, even if part of its territory is under occupation by another, the party would be prohibited from attacking objects within the occupation area for purposes of denial of sustenance. Moreover, the "scorched earth" practices of the Nazi German Army to protect forces retreating from Norway, arguably permissible under Hague law, would be prohibited under Article 54.

The Protocol I treatment of starvation in warfare reflects the complexities of the issues and the deference that must be accorded to the harsh realities of warfare. Although the prohibitions are not absolute, Article 54 contains both general humanitarian principles and criteria to guide decision-making during conflict. These provisions is an overdue development of combat rules, and the degree of consensus reached on Article 54 portends its validity as an affirmation of the expectations of the world community.

B. Relief in Favor of Civilians During Warfare

The prohibitions against starvation measures address just one dimension of the problem of civilian sustenance during warfare. Generally speaking, Article 54 defines in part what belligerents cannot do in waging war. Nevertheless, some objects may legitimately be destroyed based on exceptions to the prohibitions. Moreover, civilian sustenance problems are also frequently exacerbated during conflict by a weakening of the economy and a general deterioration of living conditions. That is, considerable suffering may result even if the Article 54 prohibitions are observed. Therefore, the matter of what

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271 U.N. Doc. CDDH/401, reprinted in 3 H. LEVIE, supra note 237, at 255-56 (article reviewed by the Drafting Committee and transmitted to the Conference for adoption, 1977); U.N. Doc. CDDH/SR.42, 6 Official Records, supra note 237, at 205 (Plenary Meeting of May 27, 1977, at which the starvation article was adopted by consensus).

272 See supra notes 145-46 and accompanying text.

273 M. BOTHE, K. PARTSCH & W. SOLF, supra note 127, at 342 (concurring in the view that the only "scorched earth" practice permissible under Protocol I is the narrow situation addressed in paragraph 5, Article 54).
the parties should or must do to remedy such suffering is crucial. This other affirmative dimension is addressed in the articles on relief.

Although the Civilians Convention dealt comprehensively and satisfactorily with relief in occupied territory, gaping holes remained in the provisions pertaining to areas not under enemy occupation.\textsuperscript{274} Moreover, the 1949 Geneva Conventions did not appreciably advance protections for personnel participating in relief operations. It follows, then, that Protocol I’s codification of rules on relief actions in non-occupied territories and of substantive protections for relief personnel are indeed “important achievements.”\textsuperscript{275}

1. Relief Actions

The difficulty of refining a regime governing relief operations is apparent in the sheer length of Article 70 of the Protocol,\textsuperscript{276} which follows:

\textbf{Article 70 - Relief Actions}

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

\textsuperscript{274} See \textit{supra} notes 150-54 and accompanying text.

\textsuperscript{275} M. Bothe, K. Partsch & W. Solf, \textit{supra} note 127, at 426-27. It should be noted that two of the authors (Professor Bothe of the Federal Republic of Germany and Professor Solf) of this highly-regarded, comprehensive commentary on Protocol I were intimately involved with the refinement of the relief articles as members of Committee II. \textit{See generally} 4 H. LeVie, \textit{Protection of War Victims: Protocol I to the 1949 Geneva Conventions} 9-25 (1981) (discussing the negotiating history of Articles 70 and 71).

\textsuperscript{276} Protocol I, \textit{supra} note 1, art. 70.
3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

(a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;

(b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;

(c) shall in no way whatsoever divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international coordination of the relief actions referred to in paragraph 1.

Among the primary issues addressed by the conferees considering this article were the contours of the relief obligation attaching to the various parties, the conditions placed on the duty to allow relief, and the nature of procedural agreements necessary to carry out relief operations. Additional, practical matters such as priority among relief recipients and the role of humanitarian agencies and protecting powers had to be considered. Finally, myriad philosophical issues muddied the waters as well, including the traditional balancing of military necessity and humanity, and the receiving country's sensitivities, due to security concerns and national pride, about relief efforts undertaken within its boundaries.

Regarding the nature of the relief obligation, the ICRC draft stated that the parties “shall agree to and facilitate” relief to civilian populations if inadequately supplied. However, consensus developed in the Working Group to place parties under a more clearly defined

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277 The ICRC draft provision is set forth in 4 H. LEVIE, supra note 275, at 9.

As to the designation of items which must be in inadequate supply to trigger the article, the ICRC draft specified “foodstuffs, clothing, medical and hospital stores and means of shelter.” Id. As adopted, Article 70 covers an expanded list (by reference to Article 69 on duties of an occupying power): “food and medical supplies, ... clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population ... and objects necessary for religious worship.” Protocol I, supra note 1, art. 69.
obligation. Accordingly, paragraph 1 was amended in a manner reminiscent of the bold proscription against starvation as a method of warfare: if civilians are inadequately supplied, “relief actions . . . shall be undertaken.”

Because of the use of the passive voice, the question arises, to whom does the obligation apply? According to the authoritative commentators, the obligation attaches to those providing relief, those granting transit, and those receiving relief. Regarding potential donors, paragraph 1 arguably creates a duty, for states in a position to do so, to make reasonable efforts to contribute to and facilitate relief actions. Next, the obligation of the receiving party to accept the relief appears uncontroversial. However, this duty is important in that it prevents a state from arbitrarily denying entry of relief consignments for reasons of internal politics, national pride, or unsupported security concerns. The final but most important obligation is that attaching to the party granting transit, whether through its territory or a blockade. The duty is unambiguously spelled out in paragraph 2—the party shall allow passage of relief consignments, even if destined for the civilian population of the adverse party. Moreover, the blockading or besieging party must “facilitate” passage, suggesting that there is a duty to provide active assistance.

These nontrivial duties, particularly those placed on parties granting transit, would probably be disregarded out of hand if no qualifications in recognition of the realities of warfare had been added. The Working Group addressed such concerns by adding the words “subject to the agreement of the Parties concerned” to paragraph 1 immediately after the language recognizing substantial duties. The remarks in Committee II meetings indicated that the qualification, although opposed by several delegations, was deemed necessary by the Working Group in the “spirit of compromise.”

Although the language of the paragraph 1 qualification might suggest that a party has veto power (by simply refusing to agree), a contextual analysis shows that this is not the case. First, the overall thrust of the relief provisions is in the direction of improving civilian

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278 The evolution of the “clearly defined obligation” regarding relief was discussed in some depth in the meeting of Committee II of April 28, 1977. U.N. Doc. CDDH/II/SR.87, 12 Official Records, supra note 237, at 333. See generally M. Bothe, K. Partsch & W. Solf, supra note 127, at 433-34 (analyzing the contours of the respective duties in the light of the negotiating history).

protection. In addition, the article contains forceful language indicating that the duty to agree is by no means perfunctory. Thus, to permit arbitrary refusal of relief would defeat the purpose of the article. Moreover, the "subject to agreement" clause can be seen as merely recognizing unavoidable practical considerations flowing from notions of sovereignty and made more poignant by conflict. That is, relief from outside depends a priori on obtaining permission from the competent authorities in a given area to enter that area and conduct relief work therein. The language of Article 70 therefore suggests both a weighty duty to permit relief and an acknowledgment that details must be agreed upon. Moreover, the statements of a number of delegates reflect the understanding that the requirement to make an agreement "was as strong as possible", and that relief may be rejected only for compelling reasons, not for arbitrary and capricious ones. Finally, paragraph 2 underscores the obligation to agree on terms by stating that, even if relief is destined for the civilian population of the enemy, a party "shall allow and facilitate unimpeded passage."

In further deference to the position of the party granting transit, three additional conditions are stated in paragraph 1. First, the article and its substantial duties apply only when the relief is necessary—that is, when the civilian population is not adequately supplied. If this condition is not met, then the special protection would not apply and transit decisions would be governed by other humanitarian law principles such as those relating to contraband and acts directed at civilian objects generally. Second, the relief actions must be "humanitarian and impartial" to draw the article's protection. Although transit, under paragraph 2, may not be denied solely because the goods are destined for the adverse party's civilians, the underlying purpose of a relief action must not be that of giving undue advantage to one side. The best-known relief agencies such as the ICRC and

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280 U.N. Doc. CDDH/II/SR.87, 12 Official Records, supra note 237, at 336 (remarks of Mr. Gonsalves of the Netherlands). For similar comments see the statements of Professor Bothe, Professor Solf, Mr. Krasnopeev (U.S.S.R.), and Mr. Makin (U.K.) during the same Committee II meeting. Id.

281 M. BÖTHE, K. PARTSCH & W. SOŁF, supra note 127, at 434-35, point out that by the statutory construction principle lex specialis, paragraph 2 language prevails over the suggestion that paragraph 1 allows arbitrary refusal to agree. Moreover, by virtue of Article 54's proscription against starvation measures, a frivolous refusal would appear to be a guise for impermissible denial of civilian sustenance as a method of warfare.
United Nations organs would be presumed to provide impartial relief within the spirit of the article. Third, relief must be "conducted without any adverse distinction," which means without any discrimination.\textsuperscript{282} Finally, it is here suggested that these conditions were intended to be construed narrowly, based not only on the overriding humanitarian purpose of the article but also on the provision that "such relief shall not be regarded as interference . . . or as unfriendly acts." That is, as long as the relief is necessary and impartial, and the relief actions are conducted without discrimination, the consignment may not be denied because of lesser, politically-motivated, contentions.\textsuperscript{283}

The party granting transit has substantial obligations respecting consignments, to be sure. However, paragraph 3 of Article 70 also grants that party the prerogative to protect its own security and military interests. Thus, the transit party may prescribe technical arrangements, including searches of relief supplies. Moreover, passage may be conditioned upon supervision of distribution by a protecting power, which is a neutral state or an organization accepted by both sides to protect the interests of the enemy state in another's territory.\textsuperscript{284}

In addition to affording protection for the transit state, these provisions provide alternative transit procedures to use in the event of a party's recalcitrance. For example, if the transit state claims that a consignment would be diverted to military use, the other party may counter with a proposal for a protecting power to manage the relief. Finally, an extremely narrow right to divert consignments from the intended purposes is recognized "in cases of urgent necessity in the interest of the civilian population concerned."\textsuperscript{285} For example, al-

\textsuperscript{282} Although no elaboration of "adverse distinction" appears in Article 70, the essence of the concept is "without discrimination" as indicated by Article 9 of Protocol I (in Part II: Wounded, Sick and Shipwrecked). Article 9 states that provisions are to be applied "without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria." Protocol I, supra note 1, art. 9.

\textsuperscript{283} See generally M. Bothe, K. Partsch & W. Solf, supra note 127, at 435 (recounting that the concerns of interference and violation of national pride were expressed frequently during the Conference).

\textsuperscript{284} Ambassador Aldrich has called the protecting power the "backbone of the Geneva Convention system" and has touted the provisions designed to make it more likely that protecting powers will be appointed as one of the most impressive accomplishments of Protocol I. For an overview of the issues surrounding protecting powers, see Aldrich, New Life, supra note 1, at 765-68.

\textsuperscript{285} Protocol I, supra note 1, art. 70, para. 3(b).
though the transit party would not be permitted to divert relief for its own use, it would be allowed to delay passage to prevent destruction of the goods in a storm.

Receiving states also have important duties under Article 70. Paragraph 4 requires the receiving state to "protect and facilitate" rapid distribution of relief consignments. Additional duties devolving upon the receiving state are in paragraph 1, including the requirement to give priority in distribution to the weaker parts of the population. Perhaps more important, this provision affords some protection to the transit party's interests in that it requires the receiving country to adhere to the humanitarian purposes of Article 70 by not diverting relief from these weaker elements of the population in favor of weapons factory workers, for example. Finally, paragraph 5 flows from the logistical complexities and political obstacles inherent in relief actions during armed conflict. This provision implores parties to foster "international co-ordination" in relief efforts so the purposes of the article may be achieved.286

The lack of an earlier convention dealing with the many issues surrounding relief in non-occupied territory, combined with the need to address myriad duties and to foresee labyrinthine factual scenarios, led inevitably to a complex article. Nevertheless, through the diplomatic process the conferees shaped a regime that heeds the realities of warfare and at the same time breathes life into the "basic principle of humanity that the outside world does not stand idly by while the civilian population in a country is suffering, starving and being deprived of basic supplies as a result of armed conflict."287

2. Relief Personnel

Protocol I's important enunciation of protections for relief personnel is contained in Article 71,288 which provides:

**Article 71 - Personnel Participating in Relief Actions**

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose

286 See generally U.N. Doc. CDDH/II/SR. 87, 12 Official Records, supra note 237, at 333-34 (including discussion and rejection of the proposal to include an illustrative list of international bodies in paragraph 5).

287 M. BOTHE, K. PARTSCH & W. SOLF, supra note 127, at 432-33.

288 Protocol I, supra note 1, art. 71.
territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

Article 71 was the Committee II Working Group's solution to an issue that was not addressed by the ICRC draft. The Group recognized that an affirmation of a right to relief, and provision of effective rules governing relief efforts during armed conflict, required protection for relief personnel as well as enunciation of the duties incumbent on relief workers. Under general notions of protection in traditional humanitarian law, personnel accompanying relief consignments in most cases would carry the status of neutral civilians. As such, they would be immune from attack but would not necessarily be allowed to pursue relief activities. Accordingly, without more substantial protection for relief personnel, the salutary relief passage provisions of Article 70 could be hollow in practice.

The declaration in paragraph 2 that relief personnel "shall be respected and protected" acknowledges and incorporates into the regime a high standard of protection. The same words are used in Protocol I articles dealing with medical personnel, for example. Accordingly, a degree of protection similar to that afforded medical personnel attaches to personnel engaged in bonafide relief efforts. That is, not only must they not be knowingly attacked, they also must not be "unnecessarily prevented from discharging their proper

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289 See generally 4 H. LEVIE, supra note 275, at 25.
290 Id. Even expansive Civilians Convention protections covering occupied territories did not address protection of relief personnel. Accordingly, the conferees adopted Article 71 to fill this gap regarding both occupied and non-occupied territories.
291 A brief overview of the degree of protection afforded neutral civilians is provided in M. BOTHE, K. PARTSCH & W. SOLF, supra note 127, at 438.
292 Protocol I, supra note 1, art. 12 (Protection of Medical Units).
functions.” An additional underpinning of this high level of protection is in the paragraph 3 clause obligating the receiving state to assist relief personnel “to the fullest extent practicable.”

In a balancing approach similar to that used in the relief passage provisions, Article 71 imposes qualifications on the protections afforded relief personnel. First, participation of relief personnel is “subject to approval” by the transit or receiving state (or both) depending on the nature of the duties to be performed. Although the approval may not be arbitrarily denied, the approving state has the right to require that certain precautions and terms be observed just as in the case of relief consignments themselves. Moreover, personnel are required to be admitted as part of a relief action only “where necessary” for transportation and distribution. Accordingly, the mere fact that a relief consignment is deemed necessary under Article 70 does not mean that relief personnel accompanying consignments will meet this additional test of necessity under Article 71. Finally, under paragraph 4, a party is empowered to terminate the mission of relief personnel who do not respect security requirements or who exceed the terms of the relief mission.

The provision of specific and substantive protections for relief personnel is a noteworthy development in humanitarian law. Despite the fact that Article 71 filled a significant gap in the Civilians Convention coverage, however, a review of the negotiating documents shows that the matter raised only scant discussion during the Conference. Perhaps two points explain this absence of controversy. First, the need to protect necessary relief personnel flowed naturally from the Conference’s obvious commitment to form a truly effective regime for relief during warfare. Moreover, even though there was no earlier codification of such a regime, the concerns and expectations of the world community had undoubtedly changed a great deal since the 1949 Geneva Conference. Thus, rather than reflecting new (and

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293 M. Bothe, K. Partsch & W. Solf, supra note 127, at 118 (quoting U.S. and U.K. field manuals that express the traditional interpretation of “respected and protected”).

294 See supra notes 279-81 and accompanying text.

295 U.N. Doc. CDDH/III/SR. 88, 12 Official Records, supra note 237, at 345 (Committee II meeting on Article 71 of Apr. 27, 1977). The Committee II proceedings reflect mainly discussion about minor points of phraseology. The only substantive contention came from a delegate indicating that Article 71 should contain stronger language to stress the importance of relief. Id. at 347 (statement of Mr. Klein of the Holy See).
thus controversial) law, the provisions to a large degree represented a cogent restatement of those concerns and expectations held in 1977.

Now that the specifics of the Protocol I articles on starvation and relief have been examined in the context of the negotiating process, the impact of the concepts in the development of humanitarian law should be assessed. The inquiry thus turns now to the degree to which these provisions, even if unratified, may be seen as reflective of today’s rules and customs of armed conflict.

V. The Protocol I Articles on Civilian Starvation and Relief as Reflective of the Rules and Customs Governing Armed Conflict

A. Introduction

An analysis of the details and purposes of treaty provisions, even those refined in multilateral processes, rather begs the question of how a governing legal regime might be applied in real world situations. Because Protocol I has been ratified by only 60 countries, a key issue as to its effect in future armed conflict is the extent to which it can be viewed as reflective of the rules and customs of warfare extant in the world today. No matter how efficacious its provisions may be, they must embody the values and expectations of the world community if they are to be recognized during conflict. As one commentator points out, “the pages of history are strewn with moralistic documents which failed in their usefulness because they attempted to establish an unattainable standard of conduct.”

Therefore, in view of the gravity of the matter of civilian sustenance during warfare, it is important to examine the question of whether the Protocol provisions aptly reflect the progressive development of humanitarian law based on the interests of the world community.

B. Customary Norms of International Law

There are difficulties inherent in attempts to explicate the norms of customary international law that bear on any particular part of the world legal order. “Customary law” concepts resist precise definition, and any serious analysis must consider contextual matters such as the values, interests and expectations of the parties concerned. Even the

296 See T. Meron, supra note 35, at 9 & n.23 (citing an official ICRC report showing accessions and ratifications to Protocol I as of July 1986).
297 Parks, supra note 96, at 25 (footnote omitted).
simplified but common definition of customary international law—consistent state practice accompanied by *opinio juris*—suggests imprecision: the consistent practice of the many international players and the degree to which those players consider themselves bound are by no means facile matters to determine. Moreover, the processes by which states show adherence to a particular practice have changed considerably in the United Nations era. It is therefore not uncommon for the literature to reflect wide variations in opinion on what the law is. The statement by Oppenheim long ago remains true today: "Many of these . . . are mere fancies, the outcome either of what the respective authors consider the law of nature, or of patriotic prejudice, or of misunderstood authority, and the like." The literature contains numerous approaches to the elusive question of what constitutes customary international law, but the detailed examination of such studies is beyond the scope of this inquiry. Instead, it is suggested that an analysis of the relevant underlying values and context of the starvation and relief articles provides the appropriate framework for their assessment. According to Professor McDougal, to make a realistic assessment, one must be able to identify the following specific components: (1) a policy content, (2) expectations of authority, and (3) expectations of control. In a humanitarian law context, the analysis must consider the factual problem to which humanitarian law is addressed as well as the extent to which the underlying policy prerogatives of the participants are served by the regime.

In assessing rules in the rubric of community policies, a number of other indicators or signposts may be relevant. Multilateral processes, for example, can provide an invaluable litmus test. During a multilateral conference, the extent of world community representation and the degree of consensus reached are important considerations. Moreover, the culmination of the process often shows how well community

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299 "[I]t is always difficult to extricate unwritten rules from the mass of pronouncements, attitudes, views and written rules posed by States." Cassese, *supra* note 80, at 57 (footnote omitted).


301 McDougal, *supra* note 29, at 23.

302 See generally Cassese, *supra* note 80, at 58-66 (addressing treaties and treaty-making processes as sources of international law).
values have been served. Specifically, the number of signatures as well as ratifications of a resulting instrument can be useful augurs of community assent. Finally, the experience after completion of the multilateral process is pertinent to the evaluation. In this vein, perhaps the best glimpses of validity come through state actions consistent (or inconsistent) with the rules contained in the instrument and through pronouncements reflecting willingness (or unwillingness) to be bound by its terms.

Of critical importance in a modern evaluation of community values is the impact of international expressions in world organizations such as the United Nations. It has been shown that although the weight accorded resolutions is a matter of controversy, the force of a unanimous or near-unanimous world community expression through a General Assembly resolution has become increasingly substantial in the post-War era. Finally, the writings of experts can be helpful, although law is not necessarily made by "influential people . . . assert[ing] in a very loud voice that it is law." Nevertheless, the writers' views often are "relevant communications."

With the foregoing guidelines in view, the inquiry now turns to the policies and context of modern humanitarian law respecting starvation and relief, and the degree to which Protocol I provisions reflect the values of the world community.

C. Assessment of the Starvation and Relief Provisions

1. Relevant Policies and Interests

The fundamental policy reference in any humanitarian law context is the unified concept of humanity and military necessity. It is said that to be effective, rules of humanitarian law must accord due regard to both perspectives. For present purposes, the foregoing examination of military necessity in traditional humanitarian law is relevant. It was shown that the international legal order circumscribes the concept of

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303 McDougal, supra note 29, at 24.
304 Professor McDougal cautions against looking narrowly at any particular source in assessing international legal norms:

International law, like other law, is not made in any one way or from any one source. It is not made by agreements only; nor by organizational resolutions only; nor by practice only. It is not, most assuredly, made by text writers saying that a policy is the law. International law is made by the accumulation of all relevant communications.

Id.
military necessity through restraints inherent in the concept and through the evolution of additional, narrowing principles in the "humanity" dimension of traditional humanitarian law of both the conventional and customary varieties. Despite violations of the laws of armed conflict, it was concluded that the crucial tenets of civilian protection emerged intact after World War II and were affirmed and embellished in many important ways by the Civilians Convention.

The policy of civilian protection, based on the long-standing immunity principle, has been shown to be an interest of increasingly great concern to the international community in the post-War era. Tragic armed conflicts have focused attention on the issues, and a number of expressions of commitment to the immunity principle have been made by the world community, most prominently in the form of unanimous General Assembly resolutions. Moreover, it has been shown that the immense development of human rights law reflects this concern for populations not just during peacetime, but during armed conflict as well. Some aspects of the burgeoning human rights jurisprudence bear acutely on issues of civilian starvation and relief, including key nonderogable rights and "new generation" human rights.

There has been an unmistakable strengthening of the humanity interest in the world community's conception of civilian protections since World War II, when perhaps the Lieber code and Hague concepts of "military objective" gave some color of legitimacy to starvation of and denial of relief to civilians in warfare. However, despite an expanding humanity principle, armed conflict continues in many areas of the world. There is, therefore, a continuing, vital need for an effective regime of humanitarian law. The question remains, then, whether Protocol I provisions on starvation and relief not only reflect the expanded values of humanity, but also continue to comport with the demands of military necessity.

2. An Evaluation of the Protocol I Articles

It has been suggested that the validity and effectiveness of Protocol I articles on starvation and relief depend largely on how these articles serve all of the relevant community interests and policies. Moreover, and perhaps as an aid to the policy analysis, there are certain indicators of the vitality of a set of rules, particularly when the rules have been formed by multilateral processes.

The first concern is whether the policy content is identifiable in the rules. Although Protocol I is lengthy and contains ambiguities, the

305 See supra text accompanying note 301.
global constitutive process by which this multilateral instrument was formulated helped to clarify the common interest reflected in it.\textsuperscript{306} In the starvation and relief provisions, despite the need for many paragraphs and clauses to meet the goal of providing a comprehensive and balanced regime, there are nevertheless clear statements of general principles. For example, Article 54 not only deals in some detail with the matters that must be considered before an attack on civilian sustenance objects, but it also unambiguously states the policy that starvation of civilians as a method of warfare is prohibited. Similarly, Article 70 articulates that, where necessary, humanitarian relief measures “shall be undertaken.” Finally, it is provided in Article 71 that relief personnel “shall be respected and protected.”

In addition to enunciating broad principles of humanity, the provisions embody policy content respecting the “military necessity” part of the humanitarian law calculus. For example, the proscription against attacks on objects for the “purpose of denying them for their sustenance value” recognizes that such objects may be subject to attack as military objects under certain circumstances. Moreover, the balancing approach of all three of the articles, with conditions on the protections stated in a number of particulars, reveals further evidence of “military necessity” consideration.

Having established that the starvation and relief articles incorporate rather clearly identifiable policy content, the inquiry turns to an evaluation of how well the community policies and interests are served by the articles’ provisions. In the foregoing section, it was suggested that the crucial humanitarian law policies of humanity and military necessity remained paramount. However, it was further suggested that special priority has been added to the “humanity” interest.

In view of significant post-War enhancement of the humanity interest, perhaps the key question is whether the Protocol I provisions go far enough in reflecting community concerns. Although some conferes expressed worry that clauses imposing conditions on, and permitting derogations from, the stated protections might dilute otherwise salutary rules,\textsuperscript{307} the starvation and relief articles are generally seen as substantial advances in humanitarianism over earlier codifications.\textsuperscript{308} The articles were crafted both to articulate appropriate principles and to devise a legal regime aimed at ensuring respect for those principles.

\textsuperscript{306} McDougal, \textit{supra} note 29, at 23.
\textsuperscript{307} See, \textit{e.g.}, \textit{supra} note 295.
\textsuperscript{308} See, \textit{e.g.}, \textit{supra} text accompanying note 38.
during armed conflict. It is concluded, then, that the reach of the starvation and relief articles is sufficient to reflect community concern for more humane treatment of civilians during warfare. In fact, the provisions can and should be read as quite far-reaching, supported firmly by the community priority of reducing the unnecessary civilian suffering seen in World War II and subsequent conflicts, and by today's manifest, extensive concern for human rights and global sustenance problems.

Whether the "military necessity" interest has been preserved by the starvation and relief articles is another matter of contention. One commentator, for example, decries the fact that the provisions would affect the conduct of sieges and blockades and contends that the articles fail to provide clear enough guidelines for the field commander.309 Given the fact that the humanity principles advanced by the articles are well supported by community interests, the question is whether the realities of warfare are sufficiently regarded.

In the foregoing examination of the articles, there was ample evidence that the conferees took seriously both the philosophical and practical needs to regard "military necessity". Despite the bold proscription carried in the starvation article, true military objectives are excepted from the restriction in most cases, as are objects of sustenance identified as solely for military forces. One may argue that the bans on indiscriminate starvation (i.e. of both military forces and civilians) and on scorched earth practices of a retreating enemy represent departures from traditional notions of military necessity. However, it is suggested here that such destructive practices, and not the new proscriptions, fail miserably in a modern analysis of community values. First, these measures have shown at best only a tenuous connection to achievement of military objectives. But more importantly, quickened by the tragic conflicts of the 1960s and the burgeoning human rights movement, the earlier response of revulsion to such practices has changed to a consensus that they cannot be tolerated in the modern humanitarian legal order. The starvation article is an apt reflection of that consensus.

The relief provisions embody considerable protections for military interests. Although humanitarian duties are clearly stated, so are

309 Roberts, supra note 4, at 150-55. But see Parks, supra note 96, at 25: "To avoid the imposition of unrealistic restraints upon its armed forces, the Protocols were the subject of detailed review by the Department of Defense and the Joint Chiefs of Staff prior to their signature by the United States."
detailed conditions respecting the realities of armed conflict. For example, the transit party has the authority to set terms of passage of consignments. Also, military necessity is directly addressed by the provisions allowing measures to guard against security violations and diversions of relief for use by enemy forces. Relief personnel are subject to additional constraints. Although they must be respected and protected, relief personnel have strict "marching orders" from which they may not deviate. Moreover, relief personnel do not gain entry as a matter of right along with passage of a relief consignment, but only when their services are a necessary part of the relief effort. In short, the relief provisions accord due regard to military necessity. To the extent the rules complicate the conduct of military operations, such complication is amply warranted by the crucial concerns of humanity served by provision of relief to civilian populations in need.

Among the several additional indicators of whether a set of rules reflects community interests is the multilateral process by which the rules were promulgated. Protocol I was negotiated in a lengthy Conference with wide participation by the world community. Such a process lends a certain imprimatur of validity to the policies embodied in the resulting instrument. With respect to the starvation and relief articles, the negotiating papers show consensus in a number of ways. First, these provisions were by no means given short shrift; rather, they were scrutinized carefully and reworked considerably by Working Groups during the Conference. Then, once the various concerns were incorporated into the draft articles by the Working Groups, the provisions were adopted by the respective committees by consensus after discussion revealed no major disagreements. Finally, all of the provisions were adopted by the entire Conference in plenary session, also by consensus. In view of the foregoing, it is suggested that the exhaustive multilateral process that yielded consensus on these articles signifies a high degree of congruity between the provisions and community values.310

The signing of Protocol I by sixty-two states, including the United States, is another significant factor. Although merely signing did not

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310 See also Cassese, supra note 80, at 92-93:
The adoption of [Article 54] by consensus, the lack of any reservation, and the implicit acknowledgment of the humanitarian principle that civilians should not suffer unduly from the rigors of war, all indicate that the provision was the subject of such broad consensus that it came to regarded as a rule of general application.

Id. (footnote omitted).
bind the signatories to the Protocol, a colorable duty arose at least not to defeat the object and underlying policies of the instrument. Moreover, a large number of signatures shows community assent to the principles of the agreement.

In the noise of controversy over whether the United States should ratify Protocol I, it is easy to lose sight of the importance of the accession to the agreement by sixty states. That is, the fact that Protocol I is in force for these countries is indicative of assent by a significant number of states to the whole of Protocol I. But more important for present purposes, complaint about the starvation and relief articles is rarely heard in discussions on why more countries have not ratified Protocol I. In fact, as Ambassador Aldrich stated in response to one of the few complaints in the literature about these provisions, Article 54 was among the provisions "most warmly welcomed by the United States in 1977." Also, the change from a Democratic to a Republican Administration, which appears to have been a major factor in the shift in U.S. position on Protocol I, did not bring a change in view on the starvation and relief provisions. The remarks of Michael J. Matheson, Deputy Legal Adviser, U.S. Department of State, reflect the Reagan Administration view:

We support the principle that starvation of civilians not be used as a method of warfare, and, subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged. These principles can be found, though in a somewhat different form, in Articles 54 and 70.

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We have seen that the Protocols do not become treaties upon signature; they do, however, have a normative effect on the development of the customary law of war and therefore cannot be ignored by international lawyers and the military commanders in the field, for they are designed to protect human rights and good faith demands that this purpose should be borne in mind when they come to be used as criteria for conduct.

*Id.*

313 Aldrich, *supra* note 4, at 699. In addressing the military objections of Major Roberts (see *supra* note 4), Ambassador Aldrich also detailed the high degree of U.S. military participation in the Conference (including Major Generals Walter D. Reed and George S. Prugh in "key negotiating roles"). *Id.* at 695.
Therefore, it is a reasonable conclusion that, if it were not for areas of contention unrelated to the rules on starvation and relief, the U.S. and perhaps many other states would have already bound themselves to those rules by accession to Protocol I. Concomitantly, it may be concluded that these states are willing to be bound by the starvation and relief provisions even without acceding to the Protocol.

CONCLUSION

The analysis has shown that the Protocol I articles on starvation and relief are in large measure congruent with current international consensus on the priorities to be observed in armed conflict. The provisions embody clear policy content that comports with current community interests and values. The undeniably strong interest in advancing humanitarian treatment of civilians during warfare, rendered even more urgent by the devastation of the most recent conflicts, is amply reflected in the articles. Beyond general concern for civilian suffering, these provisions focus on the population's basic needs for survival. As such, the protections find further support in the "immense development of human rights law" since 1945. At the same time, however, the requirements of military necessity are served. Appropriate conditions on the protections are specified in acknowledgment of the realities of warfare. Accordingly, despite the powerful humanitarian interests that are addressed, the legal regime does not sink under the weight of unattainable standards. The multilateral consensus process that gave rise to the provisions, along with post-Conference writings and government pronouncements, underscore the assessment that the interests of the world community are well served. It is finally suggested that to call these provisions effective legal norms for the 1980s and beyond is not "fancy," "misunderstood authority", but rather an accurate assessment of post-World War II progressive development in international humanitarian law.