

# An Analysis of the Legality of Maritime Blockade in the Context of Twenty-First Century Humanitarian Law

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By

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## **Abstract**

The law of Blockade is derived from customary law that developed during the height of eighteenth and nineteenth century naval warfare. As a method of warfare that has the goal of crippling an adversary's economy, blockade can devastate not only the military apparatus of a country, but the civilian population as well. In this manner, it is a method of warfare that cannot distinguish in its effects between civilians and military objectives.

The existing IHL framework governing blockade does not provide satisfactory protections to the civilian populations of affected states. Starvation, malnutrition and disease are the consequential effects of a lengthy and effective blockade.

A new approach to the law of blockade is required, one that will codify contemporary practice and obligate those engaging in blockade operations to ensure that humanitarian relief cannot be denied to affected civilian populations.

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# CHAPTER 1: INTRODUCTION

## A. The Problem With Blockade

These old rules of blockade still exist, but...they only define those rights and duties in a particular set of circumstances and, as International Law is a living organization which must grow and extend and be applied [accordingly] as new circumstances and new methods come into existence, in the same way as do other improvements in civilization and science; similarly, in the region of the rules of blockade...must also the growth and extension of International Law be provided for.<sup>1</sup>

In the law of naval warfare, few if any issues are as legally and morally contentious as that of the practice of blockade. Derived primarily from principles that emerged during eighteenth and nineteenth century conflicts, blockade is a method of warfare governed solely by customary international law. Considered by some to be an archaic form of warfare unsuitable for use in the post-modern conflict paradigm, it is subject to criticism both for its impact on international commerce and, more importantly, the devastating effects that it can have on the civilian population of a blockaded state.

One of the primary concerns of many critics of blockade is the fact that in any campaign designed to cause the collapse of an economy, the consequential effects of the operation cannot be limited, nor can they be accurately predicted. Insofar as a lengthy blockade has the potential to destroy a nation's ability to produce or import foodstuffs, it can cause an entire population to suffer from malnourishment and related diseases, and starvation.

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<sup>1</sup> George I. Phillips, *Economic Blockade* (1920) 36 LQ Rev 227 at 231.

For a variety of reasons the current framework of International Humanitarian Law (IHL) contains no steadfast protections for civilians faced with starvation resulting from naval blockade. Although several attempts have been made to reduce the impact of blockade on civilians, a dearth of protection exists.

## **B. Outline of Argument**

This thesis is about the lawfulness of naval blockade operations in contemporary armed conflict. Through examination of the development of the law and practice of blockade since the mid-nineteenth century, I will demonstrate that effective long-term blockades, when implemented in accordance with existing interpretations of the law of blockade, can and do have disastrous consequences to the civilian population of a blockaded state.

The principal theory of this paper is that the existing customary international law framework for blockade does not meet the requirements of distinction under international humanitarian law. As a result blockade, in its current form, is unlawful. The premise of this contention is based on the fact that when the complete strangulation of an enemy's economy is the goal of a military operation, there is no way in which the objective can be achieved without directly and adversely affecting the civilian population. That is to say, a complete and effective blockade of a state can no more distinguish between military objectives and civilians than can a nuclear weapon detonated over a city.

In keeping with the notion that blockade is an indiscriminate method of warfare, I contend that civilian deaths caused by starvation, malnutrition or disease resulting from a blockade, constitute arbitrary deprivation of life. In making this point, I will argue that the

proportionality test, as outlined in article 57 of The First Protocol Additional to the Geneva Conventions of 1949 (Additional Protocol I),<sup>2</sup> can not apply to blockade because the proportionality test, which requires that incidental deaths or injuries of civilians, or damage to civilian property expected to be caused from a State's use of force must not be excessive in relation to the concrete and direct advantage anticipated from the use of that force, cannot be applied when the very nature of the impugned method of warfare is such that its effects cannot distinguish between military objectives and civilians and their property. In the alternative I will argue that even if the proportionality test can be applied to blockade, the test is so ambiguous that it is of little value in a strategic operation aimed at crippling a state. Furthermore, because there is no international body established to monitor and determine violations of the principle, the proportionality test is open to manipulation by states that may use the principle of military necessity to over-rule virtually any humanitarian concerns, thus rendering the test meaningless in all but the most extreme circumstances.

Insofar as under the current law of armed conflict there is no absolute obligation to provide humanitarian relief to affected populations during a blockade, I assert that due to a fundamental flaw in the provisions for the protection of civilians under the current regimes of international humanitarian law, (IHL) there is a gap in humanitarian protection. In addressing this issue, I argue that insofar as this gap exists, international human rights law obligations may be engaged to deal with the failure of IHL to provide satisfactory protection in the unique circumstances of blockade.

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<sup>2</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 art 57. Can TS 1991/2 (entered into force 7 December 1978, accession by Canada 20 November 1990) [Additional Protocol I].



Contending that a properly constituted blockade is an extension of jurisdiction over another nation's territory, and that the blockading force can exercise significant, if not complete, control over the welfare of the blockaded population, I refer to the growing body of case law emanating from international tribunals, and particularly from the European Court of Human Rights,<sup>3</sup> to show that under the proper circumstances, a blockading force may exercise sufficient control to trigger extraterritorial application of IHRL obligations, thus obligating the blockading force to ensure that the basic human rights requirements of the civilian population are met. Reviewing a variety of decisions of International Human Rights bodies, I will argue that those bodies are generally not well equipped to address issues of IHL, and that it would be more beneficial for nations to develop a new legal regime for blockade rather than to rely on the judgements of Human Rights tribunals which may or may not have expertise in IHL. From that perspective, I advocate that the blockade provisions of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*<sup>4</sup> represent a valiant effort by naval warfare experts and academics to influence the law of blockade so that its effects on civilian populations will be minimized. However, because of the difficulties inherent in applying the Additional Protocol I test for proportionality to strategic long term operations, and the opinion by some nations that the provisions of Additional Protocol I which prohibit starvation do not apply in blockade, I contend that the protections offered by the San Remo Manual, while well intentioned, fall short of providing the solution to blockade's inherent problem of indiscriminate. In making this assessment I refer to the German Navy's policy toward blockade, and offer that it presents a reasonable and realistic model for addressing the humanitarian challenges posed by blockade.

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<sup>3</sup> See e.g. *Isaa v Turkey*, *Al Skeini v United Kingdom*, *infra* notes 224 and 232.

<sup>4</sup> Louise Doswald-Beck, ed, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995) at ix [San Remo Manual] .

I approach this thesis from the perspective of a military officer who has participated in two international armed conflicts and who, as a member of The United Nations Assistance Mission in Rwanda (UNAMIR) in 1994-95, witnessed genocide and mass starvation first hand. While I understand and support the principle of necessity in IHL, I abhor unnecessary injury caused to civilians. I contend that in the case of blockade, where the effects of the military operation can be mitigated with little or no adverse effect on the military mission, there is no excuse for wide-spread suffering amongst the civilian population.

Having acted as a legal advisor during international operations with the Royal Canadian Navy, I consider blockade as a method of warfare that has a legitimate and important role in contemporary conflict. Properly employed, an effective blockade can significantly reduce a nation's ability to sustain armed conflict and, as a result, may lessen both the duration and lethality of conflict. I assert, however, that the current framework of the customary law of blockade fails to ensure that the basic humanitarian requirements of the civilian population of a blockaded nation will be protected in all cases, and that as a result, a blockade that is conducted in accordance with customary humanitarian law, can constitute a violation of IHL as a result of the inability of a blockading force to distinguish the effects of the operation between civilians and military objectives.

I advocate that band-aid solutions, such as "soft law" approaches to reducing civilian harm caused by blockade are ineffective. Instead, I recommend that the international community should come together, as they have done recently to ban the use of anti-personnel mines and cluster munitions, to prohibit blockades that result in starvation of the civilian population. New, updated rules that can minimize collateral harm can help- to ensure that

blockade can continue as a valuable and effective method of warfare; one that if conducted properly, can satisfy the requirements of military necessity without violating the principle of distinction.

Through examination of previous unsuccessful attempts to codify the law of blockade, and consideration of the emerging trends toward humanitarian protection, I suggest a legal framework for a contemporary law of naval blockade; one that balances the principle of military necessity against humanity. Understanding the complexities involved in attempting to change four centuries of practice, I offer that the United Nations and the United Nations Security Council has the capacity to significantly affect the development of blockade law by using its powers under article 103 of the *United Nations Charter*<sup>5</sup> to ensure that any blockade conducted under the mandate of the United Nations must prohibit starvation of civilians as an effect of the operation. Ultimately I recommend that the best manner in which to deal with the issue of humanitarian access and assistance in blockade is for nations to consider the codification of blockade, and in so doing, establish a convention that includes provisions for the protection of civilians from the effects of this method of warfare.

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<sup>5</sup> *The Charter of the United Nations*, 26 June 1945, UNTS CH-0, Can TS No 7 (accession by Canada 9 November 1945) [*UN Charter*].

## CHAPTER 2: BLOCKADE

Blockade is a very particular form of naval warfare. In this section of my thesis I introduce blockade and discuss its development through the centuries. I pay particular attention to the attempts to codify blockade at the turn of the twentieth century and examine the reasons for the failure of those initiatives. Acknowledging that the law of blockade is a product of international customary law, I compare how it has been applied in the twentieth and twenty first centuries, and if and how it has evolved over the century and a half since the first attempts at codification were made.

### A. Defining Blockade

Defined as “an act of war directed to the exercise of economic pressure on an adversary,”<sup>6</sup> blockade is “a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation.”<sup>7</sup> The objective of blockade<sup>8</sup> operations is to halt all maritime trade from entering or leaving a state.

Although similar in many respects to siege<sup>9</sup> warfare, blockade differs from siege in three fundamental aspects. First, the focus of modern blockade is the economy of the blockaded nation. Thus whereas a siege is a limited tactical level operation with the

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<sup>6</sup> Phillips, *supra* note 1 at 230.

<sup>7</sup> US Naval War College *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, (Newport 2007: US Naval War College) at 7-26 [*Commander's Handbook*].

<sup>8</sup> For the purpose of this paper, “blockade” refers only to the traditional method of warfare by which a belligerent power prevents egress or ingress of all maritime vessel or air traffic to or from the ports of a blockaded state. It does not include any restrictions on land transport or any other form of economic or political isolation of a state.

<sup>9</sup> A siege is a military operation in which enemy forces surround a town or building, cutting off essential supplies, with the aim of compelling those inside to surrender. Online: Oxford Dictionary <[http://english.oxforddictionaries.com/view/entry/m\\_en\\_gb0771540#m\\_en\\_gb0771540](http://english.oxforddictionaries.com/view/entry/m_en_gb0771540#m_en_gb0771540)>.

objective of causing a localized garrison to capitulate, blockade is a strategic operation whose goal it is to cause such extensive damage to a nation's economy that it can no longer sustain its war-fighting capability. Secondly, a siege will generally include the bombardment of the area, while ships conducting a blockade are usually stationed outside of the range of most coastal weapons and therefore do not launch weapons against the blockaded coast. Thirdly, a siege rarely encompasses an area larger than a city. As a result, its effects are limited to the immediate area of the siege. A blockade, however, has far reaching effects. Insofar as a blockading force must, in accordance with the law of blockade, stop all maritime trade from entering or exiting a blockaded state's ports, it can seriously affect not only the economy of the blockaded nation, but the economies of its trading partners as well.

Insofar as the goal of a blockade is destruction of a state's economy, it is virtually impossible to engage in this form of warfare without causing serious damage to the affected civilian population. As history has demonstrated, blockades can have extremely deleterious effects on adversely affected civilian populations.<sup>10</sup>

## **B. The Law of Blockade**

In order to assess the legality of blockade as a method of warfare in the post contemporary conflict paradigm, it is essential to understand the legal and historical

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<sup>10</sup> See e.g. N.P. Howard, "The Social and Political Consequences of the Allied Food Blockade of Germany 1918-1919" (1993) 11 *German History* 161. Although it is difficult to determine the exact number of deaths that were directly attributable to starvation as a result of the blockade, conservative estimates are that approximately 250,000 German civilians died of starvation during the winter of 1918-1919. See also United Kingdom House of Commons Research Paper 98/28, HC Deb 21 January 1998, c990, which stated:

Since the imposition of economic sanctions on Iraq in 1990, the humanitarian situation in Iraq has deteriorated significantly. According to a UNICEF report published on 26 November 1997 there are some 960,000 chronically malnourished children in Iraq, representing a rise [sic] of 72% since 1991. The UNICEF representative in Baghdad has spoken of "a dramatic deterioration in the nutritional well-being of Iraqi children since 1991." Although the sanctions against Iraq did not qualify as a blockade *per se*, the naval embargo did significantly disrupt humanitarian aid shipments into the country.

evolution of the practice. It is equally important to understand the development of blockade as a form of economic warfare; the effects that it can have on neutral commerce; and, from a humanitarian perspective, the effects that it can have on the civilian population of a blockaded state.

A product of customary international law,<sup>11</sup> naval blockade has been employed as a method of warfare against littoral states on numerous occasions over the past four and a half centuries. Beginning with the first modern blockade by the Dutch against Flanders in 1584<sup>12</sup>, blockade has been used by naval powers to deny all sea trade between targeted littoral states and any other states, including neutrals. While there are some disagreements as to the exact meaning of the term “blockade” and the specific rights and duties that apply to a blockading power, most nations recognize blockade as a valid instrument of warfare.

The theory behind blockade is that by stopping all maritime traffic from entering or leaving a blockaded nation’s ports, and by extension ports in neighbouring countries from which goods can be trans-shipped, a belligerent can cause tremendous damage to the blockaded nation’s economy.

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<sup>11</sup> Customary international law (CIL) is derived through a constant and virtually uniform practice among States over a period of time, combined with a sense of obligation (*opinio juris*) to the effect of the binding nature of the practice. Rules of customary international law bind all states, except those that have objected persistently. For a discussion on CIL, see Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008) at ch 5.

<sup>12</sup> The Dutch naval blockade of Flanders (1585-1792) is widely considered to be the first example of modern blockade. Unlike the age-old concept of maritime siege, the Dutch blockade was focused on interdicting all maritime trade between Flanders and the rest of the world. Two of the fundamental differences between the previous practice and the new concept were that unlike siege, the goal of maritime blockade was not to attack or invade the coastal region, and that all trade, including that between the littoral states and neutrals was to be prevented. Thus, the nature of blockade was transformed from being a kinetic based operation into a form of economic warfare. See James F. McNulty, “Blockade: Evolution and Expectation” (1980) 62 US Naval War College International Law Studies 172.

Blockades are most effective when conducted against modern industrialised economies. Insofar as very few of the world's economies are completely self sufficient in resources, fuel and food, the disruption of trade can, over time, severely impede upon the country's ability to sustain military operations. One of the main components of blockade is that it must be applied to all commercial vessels, irrespective of nationality, including those of the nation conducting the blockade. Thus, a state that is subjected to blockade is cut off from sea trade with all nations, even those that are neutral.

### **C. The Law of Neutrality**

In order to properly examine the concept of blockade operations it is essential to review the law of neutrality as it applies to maritime vessels in time of conflict. Long recognized in international law, the law of neutrality constitutes recognition that under international law, "all nations have the option to refrain from participation in an armed conflict by declaring or otherwise assuming neutral status."<sup>13</sup> When a nation is recognized by the belligerents as being neutral, there is an obligation on part of the belligerents to respect the status of the neutral, to not engage in military activities on neutral territory or territorial waters, or to interfere with the neutral state's affairs.<sup>14</sup> In return, the neutral state must refrain from engaging in activities that assist the war effort of any belligerent. It also has the duty to

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<sup>13</sup> *Commander's Handbook*, *supra* note 7 at 7-1.

<sup>14</sup> The law of neutrality that emerged from customary law in the nineteenth century was codified in several of the Hague Conventions of 1907, including No. III, *Convention Relative to the Opening of Hostilities (requiring notice to neutrals of a state of war)*; No. V, *Convention Respecting Rights and Duties of Neutral Powers and Persons in Case of War on Land*; No. VI *Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities*; No. XI, *Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War*; and No. XIII .

prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side.<sup>15</sup>

While the law of neutrality with respect to conflict on land was relatively well established by the middle of the nineteenth century, the same can not be said for that of maritime neutrality. While “the juridical principle of freedom of the sea is as ancient as the Holy Roman Empire,”<sup>16</sup> the absence of customary practice concerning the rights of maritime neutrals during nineteenth century naval warfare effectively rendered the principle meaningless.<sup>17</sup> The lack of respect for the law of neutrality during the wars of the eighteenth and nineteenth centuries, combined with the growing importance of international trade during the turn of the twentieth century, were recognized as issues that required international agreement. Thus, when the European powers convened at the Second Hague Peace Conference of 1907, one of the principal topics addressed was that of the rights of neutrals during armed conflict at Sea.<sup>18</sup>

In keeping with the law of neutrality, and *res nullius*, in times of armed conflict all neutral vessels are legally entitled to exercise complete freedom of movement and operation on the high seas without hindrance from belligerent warships.<sup>19</sup> This right of freedom of

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<sup>15</sup> *Commander's Handbook*, *supra* note 7 at 7-2.

<sup>16</sup> Thomas David Jones, “The International Law of Blockade – A Measure of Naval Economic Interdiction” (1983) 26 *Howard LJ* 759 at 759.

<sup>17</sup> Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005) at 51.

<sup>18</sup> See in particular *Hague Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities – 1907*, 18 October 1907, 205 *Cons TS* 395, UKTS 006/1908: Cd. 4175 (entered into force Jan. 26, 1910).

<sup>19</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 *UNTS* 397 (No 31363), UKTS 1989 No 81 (entered into force 16 November 1994, accession by Canada 7 November 2003) arts 87 and 89 [UNCLOS]. More recently codified in the *United Nations Convention on the Law of the Sea* is the principle that *res nullius* applies to the high seas. Under this principle, “the high seas are open to all States and, no State may validly purport to subject any part of the high seas to its sovereignty.”



movement on the seas is fundamental to the operation and development of international commerce. Insofar as maritime shipping is the backbone of international trade, any interference with it can have significant impact on the global economy.

*i. Limitations on Neutrality*

Henceforth the neutrals will have their food imports strictly controlled. They will receive only what is truly required for their needs after their stocks have been greatly reduced and after they have proved the exhaustion of their resources. Under these conditions it becomes practically impossible for them to share their supplies with [Germany].<sup>20</sup>

It is well established in international law that a belligerent is not required to stand by and permit a neutral to replenish or otherwise support the war effort of its enemy.

While under the provisions of the *Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War – 1907*, “a neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet,”<sup>21</sup> the provisions of the *Declaration of Paris* made it abundantly clear that the neutral flag covers enemy's goods, so long as those items are not contraband of war.<sup>22</sup> Under the terms of *The London Declaration*, any vessel found guilty of breach of blockade could be liable to liable to seizure and or condemnation.<sup>23</sup>

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<sup>20</sup> M. Saint-Brice “French Statement on the Blockade of Neutral Commerce to Germany” in Charles F. Horne and Walter F. Austin eds. *The Great Events of the Great War* (New York: The National Alumni, 1920) vol 2 at 36.

<sup>21</sup> *Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War – 1907*, 18 October 1907, 205 Consol TS 395, UKTS 006/1908: Cd. 4175 (entered into force Jan. 26, 1910) at art 7 [Hague XIII].

<sup>22</sup> *Paris Declaration Respecting Maritime Law – 1856*, 16 April 1856, Martens, *Nouveau Recueil Général* 1<sup>re</sup> ser, vol XV, UK, HC, c. in *Sessional Papers* vol 66 (1856), at art 2 [Paris Declaration].

<sup>23</sup> *Declaration Concerning the Laws of Naval War*, 208 Consol TS 338 (1909), art 21 [London Declaration].

The participants to the London Conferences dedicated a chapter of the *Declaration to the issue of contraband of war*. Arising from the meetings, three categories of goods were identified: absolute contraband, that is, goods having obvious military use, such as ammunition and weapons; conditional contraband, consisting of goods that could be of dual purpose use; and, items that were not contraband, otherwise known as non-contraband or free goods.<sup>24</sup>

Under the contraband system, neutral ships laden with absolute contraband were always liable to capture and seizure, vessels carrying conditional contraband were liable to seizure only if delivering cargo for the use of the enemy government, and ships carrying only free goods were not liable to capture. Thus, the liability of a neutral vessel to be captured by belligerents if it was destined for enemy ports was linked directly to category of the goods it was carrying.<sup>25</sup>

For a variety of reasons, as will be discussed, the rise of unrestricted warfare in World War One “obliterated the distinction between the various categories of contraband.”<sup>26</sup> Under the new regime, any neutral vessel bound for either enemy ports or transshipment ports became liable to seizure by the blockading force, no matter the cargo being carried.

#### **D. The Development of the Law of Blockade**

While legal definitions of naval blockades attempt to be precise, the range of activities that have historically fit under this rubric are vast indeed.<sup>27</sup>

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<sup>24</sup> *Ibid*, arts 22-44.

<sup>25</sup> *Ibid*.

<sup>26</sup> Jones, *supra* note 16 at 767.

<sup>27</sup> Bruce A. Elleman & S.C.M. Paine, eds, *Naval Blockades and Seapower: Strategies and Counter-Strategies 1805-2005* (London: Routledge, 2006) at 4.

The history of 17<sup>th</sup> and 18<sup>th</sup> century warfare informs us that blockade was frequently employed as a method of naval warfare in post-Westphalian European conflicts. Despite its regular use, there was no international consensus as to the characteristics or rules governing blockade. Rather, the principles of blockade were developed over time through state practice and custom, and were generally formed through the acquiescence of neutral states that chose not to challenge blockades that had been established against their trading partners. “Over time, the process of assertion, followed by acceptance or rejection, led to the recognition of the following general principles governing a lawful blockade: (1) proper establishment; (2) adequate notice; (3) effective enforcement; (4) impartial application; and (5) respect for neutral rights.”<sup>28</sup>

### **E. Attempts to Codify the Law of Blockade**

Although by the early 19<sup>th</sup> century there was broad consensus with respect to the five general principles of blockade, disagreement with regard to the specifics of blockade “[had] long been the subject of deplorable disputes”<sup>29</sup> between the major European maritime powers. The uncertainty of the state of the law by the mid 19<sup>th</sup> century gave the major powers impetus to codify the law of blockade. Convening in Paris in 1856 as part of the Congress of Paris, which brought an end to the Crimean War, the United Kingdom, Austria-Hungary, France, Prussia, Russia, Sardinia and the Ottoman Empire established the first ever peace-time convention aimed at moderating naval warfare.

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<sup>28</sup> Michael G. Fraunces, *The International Law of Blockade: New Guiding Principles in Contemporary State Practice* (1992) 101 Yale LJ 893 at 895.

<sup>29</sup> *Paris Declaration*, *supra* note 22 at preamble.

Acceded to by the majority of European and South American states,<sup>30</sup> and adhered to by all the Powers that had joined in the Crimean war,<sup>31</sup> the treaty set out four general rules aimed principally at protecting neutral commerce in times of war, as follows: privateering is, and remains, abolished; the neutral flag covers enemy's goods, with the exception of contraband of war; neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag; blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.<sup>32</sup>

While the Declaration of Paris represented a turning point in the realm of international law, and more particularly the law of naval warfare, it soon became clear to the international community that the Declaration had not sufficiently addressed the tensions between belligerent and neutral rights during blockade operations. Whereas the codification of the principle of effective blockade was welcomed, and quickly assumed the status of customary law,<sup>33</sup> many of the most contentious issues relating to blockade remained unsettled. Chief amongst the controversial practices at the turn of the twentieth century was the concept of distance blockade. Under this doctrine all ships, including neutral vessels, bound for a

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<sup>30</sup> *Ibid* at signatories list.

<sup>31</sup> Henry Sumner Maine, "Naval or Maritime Belligerency" *International Law: A Series of Lectures Delivered Before The University of Cambridge 1887* [unpublished], online: Yale University <[http://avalon.law.yale.edu/19th\\_century/int05.asp](http://avalon.law.yale.edu/19th_century/int05.asp)>.

<sup>32</sup> *Paris Declaration*, *supra* note 22 at art 4.

<sup>33</sup> See Hisakazu Fujita, "1856 Paris Declaration" in Natalino Ronzitti, ed, *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Dordrecht: Martinus Nijhoff Publishers, 1988) 61 at 61-72 While the concept of "effective blockade" effectively terminated the practice of "paper blockades", the meaning of "effective" remains unsettled to this day. Whereas some countries consider a blockade to be effective only if belligerent vessels remain relatively close to the targeted state's territorial waters, other nations consider that the distance that a blockading force operates from the targeted shoreline is irrelevant, so long as no belligerent or neutral vessels can pass without danger of interception.

blockaded port, were subject to interception and possible seizure hundreds of miles from the enemy coast.<sup>34</sup>

The concept of distance blockade was born out of necessity as a result of three late nineteenth to early twentieth century developments in maritime warfare: first, the growing importance to belligerents of conducting economic warfare in conjunction with armed conflict; second, the introduction of a large array of new weapons into maritime arsenals that rendered close-in blockade impossible; and third, the proliferation of modern weapons to less powerful nations that were incapable of conducting traditional blockade.<sup>35</sup>

With a goal of drafting a code to govern the international prize court in accordance with the requirements the *Hague Conventions* of 1907, the world's ten largest naval powers convened in London during 1908 - 1909 to resolve some of the differences that were interfering with the establishment of the court. The result of their meetings was the *Declaration Concerning the Laws of Naval War*,<sup>36</sup> a comprehensive treaty that codified of the general principles of blockade. In the *Declaration*, it was established that for a blockade to be lawful it must meet five basic requirements as follows:

1. A blockade must be physically established. There can be no such thing as a paper blockade. A blockade must be enforced by the presence of naval vessels and weapons systems;
2. A blockade, in order to be binding, must be declared and properly notified. A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name. It specifies:
  - (1) The date when the blockade begins;

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<sup>34</sup> Peter Malanczuk, ed, *Akehurst's Introduction to Modern International Law*, 7<sup>th</sup> ed (New York: Routledge 1997) at 351-52.

<sup>35</sup> Robert D. Powers, "Blockade: For Winning Without Killing" (1958) US Naval Inst Proc at 63.

<sup>36</sup> *London Declaration*, *supra* note 23.

- (2) the geographical limits of the coastline under blockade;
- (3) the period within which neutral vessels may come out;
3. A blockade must respect the rights of neutrals. No neutral vessel may be subject to capture if it is sailing to a neutral port or not carrying contraband.
4. A blockade must be impartial. A blockade must be applied impartially to the ships of all nations, including merchant vessels of the belligerent as well as all neutral vessels; and,
5. A blockade must be effective-that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.<sup>37</sup>

At the London Conference the majority of the naval powers argued that the high seas are *res nullius*, and rejected the practice of continuous voyage, a practice which permits a blockading force to intercept vessels on the high seas if those vessels are bound either for a blockaded port or a neutral port through which contraband may be transhipped to the blocked state. While Britain entered the conference as a nation that favoured the practice of continuous, it was alone in its position.<sup>38</sup> Ultimately, at the conclusion of the negotiations, the Declaration stated at article one that, “A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.”<sup>39</sup>

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<sup>37</sup> Fraunces, *supra* note 28 at 896, summarizing the *London Declaration*, *supra* note 23 arts 1-11.

<sup>38</sup> James Brown Scott, *The Declaration of London February 26, 1909: A Collection of Official Papers and Documents Relating to the International Naval Conference Held in London December 1908-February 1909*. (New York: Oxford University Press, 1919) at 74, referring to Austrian submissions on the topic of continuous voyage at the London meetings. “The so-called “theory of continuous voyage,” applied by the prize courts of some Powers, is rejected almost unanimously by the continental authors. By admitting that there could be contraband between neutral ports, every neutral vessel would be susceptible of being captured under pretext that the goods it was carrying could, by detours, reach the enemy. Goods which, according to the ship's papers, are destined for a neutral port can not, in all justice, be seized.”

<sup>39</sup> *London Declaration*, *supra* note 23 at art 1.

Although Britain and all of the other participants to the London Conference signed the Declaration, disagreement in the British House of Lords in respect to the establishment of the international prize court and concerns about “future blockade practice prevented final ratification.”<sup>40</sup> As Michael Schmitt points out, “Since the Declaration was intended as the law which was to be applied to the international prize court, the rejection of the court rendered [the Declaration] superfluous.”<sup>41</sup> As a result of the British decision to not ratify the London Declaration, the first and only attempt to substantively codify the law of blockade in the twentieth century was thwarted.

While the majority of the rules governing the establishment of a blockade as set out in the London Declaration are generally accepted as customary international law, a review of legal literature from the beginning of the twentieth century illustrates the significant disagreements that the primary naval powers encountered when they convened in London.<sup>42</sup> One of the main areas of conflict continued to be the practice of distance blockade.<sup>43</sup>

## **F. Practice in the Twentieth Century**

The increasing emphasis in modern warfare on seeking to isolate completely the enemy from outside assistance and resources by targeting enemy merchant vessels as well as warships, and on interdicting all neutral commerce with the enemy, is not furthered substantially by blockades established in strict conformity with the traditional rules.<sup>44</sup>

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<sup>40</sup> Fraunces, *supra* note 28 at 896.

<sup>41</sup> Michael Schmitt, “Aerial Blockades in Historical, Legal and Practical Perspective” (1991) 2 USAF Acad J Legal Stud 21 at 28 [Schmitt, “Aerial Blockades”].

<sup>42</sup> For an excellent discussion on the issues facing the participants in the London Conference, see generally Scott, *supra* note 38.

<sup>43</sup> *Ibid* at 73-88.

<sup>44</sup> *Commander’s Handbook*, *supra* note 7 at 7-11.

*i. World War One*

With the outbreak of the First World War in 1914, the rules of blockade were put to the test. Although Britain was encouraged by its allies and neutrals to abide by the provisions of the Declaration of London, and to specifically refrain from engaging in distance blockade operations, it disregarded those requests. Recognizing that “in an era of mines, torpedoes, submarines and aircraft, it was simply not feasible to place blockading forces in the immediate vicinity of the shore,”<sup>45</sup> “British naval ships spent the war patrolling the North Sea, intercepting and detaining thousands of merchant ships thought to be harbouring cargo bound for enemy destinations.

The Royal Navy’s practice of conducting distance blockade operations was in direct contravention to the provisions of the London Declaration which stipulated that: “A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy (art 1); Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective (art 17); The blockading forces must not bar access to neutral ports or coasts (art 18); and, Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port (art 19).”<sup>46</sup>

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<sup>45</sup> Schmitt, “Aerial Blockades”, *supra* note 41 at 29.

<sup>46</sup> *London Declaration*, *supra* note 23 at art 37. Under the London Declaration a vessel carrying goods liable to capture as absolute or conditional contraband could be captured on the high seas or in the territorial waters of the belligerents throughout the whole of its voyage, even if it were to visit another port before reaching the hostile destination. This provision, however, applied only to vessels whose ultimate destination was a belligerent blockaded port. It did not generally apply to vessels that were off-loading their cargoes in neutral ports for trans-shipment.



The aggressive display of maritime power by the Royal Navy aroused considerable anger in neutral countries, many of whom enjoyed strong trading links with Germany,<sup>47</sup> including the United States.<sup>48</sup> As Professor Goldsmith observes, “it is well known that the war destroyed any pretence of a law of maritime rights.”<sup>49</sup>

As the First World War progressed, and particularly following the commencement of the German policy of unrestricted submarine warfare, the Royal Navy began to conduct high-seas seizures of neutral vessels carrying cargo that was destined for transshipment to the axis powers, irrespective of whether or not the cargo included contraband items. As war cabinet papers from as early as 1917 demonstrate, the British extended their blockade to interrupt trade between the northern neutral nations<sup>50</sup> and the rest of the world so that goods could not be transhipped into Germany.<sup>51</sup> Acknowledging that their actions were, at best, tenuous under international law, the British entered into bilateral arrangements with the northern neutral states whereby overseas “imports to all the neutral countries bordering on Germany [were] governed by agreement, and as far as overseas goods [were] concerned the blockade [of Germany was] substantially complete.”<sup>52</sup>

As the practice evolved through the two world wars, the prohibition against intercepting vessels bound for neutral ports, as provided in article 18 of the Declaration of

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<sup>47</sup> National Archives of the United Kingdom, “Spotlights on History: The Blockade of Germany” online: The National Archives <<http://www.nationalarchives.gov.uk/pathways/firstworldwar/spotlights/blockade.htm>> [“Spotlights on History”]

<sup>48</sup> Schmitt, “Aerial Blockades”, *supra* note 41 at 29

<sup>49</sup> Goldsmith and Posner, *supra* note 17 at 51.

<sup>50</sup> The northern neutral nations were Norway, Sweden, the Netherlands, and to a limited extent, Denmark.

<sup>51</sup> See “Memorandum to Cabinet In Regard to the Present Position of The Blockade, January 1<sup>st</sup>, 1917” online: National Archives (UK) <[http://www.nationalarchives.gov.uk/pathways/firstworldwar/transcripts/spotlights/cabinet\\_memo\\_blockade.htm](http://www.nationalarchives.gov.uk/pathways/firstworldwar/transcripts/spotlights/cabinet_memo_blockade.htm)>.

<sup>52</sup> Goldsmith and Posner, *supra* note 17 at 3.

London, was eventually disregarded by all parties. From this evolution emerged the doctrine of continuous voyage. Under the doctrine of continuous voyage “Attempted breach of blockade occurs from the time a vessel ... leaves a port ... with the intention of evading the blockade, and for vessels exiting the blockaded area, continues until the voyage is completed. It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area.”<sup>53</sup> In accordance with the doctrine, there is also a presumption of attempted breach of blockade in situations where cargo bound for a neutral may be transshipped to the blockaded area.

Because of its potential to interfere with neutral shipping, the doctrine of continuous voyage has been and remains a contentious matter in the law of naval warfare. As Professor Heintschel von Heinegg has pointed out, the doctrine is not universally accepted. In fact, “It has only been recognized in the military manuals of some Anglo-American states.”<sup>54</sup> Most continental European authors have always rejected the doctrine’s applicability to blockade.”<sup>55</sup>

Although the doctrine of continuous voyage has been rejected by many states, contemporary practice, and general acquiescence (that is to say, a lack of formal objections by states) to the practice since the conclusion of the Second World War, indicates that it may have attained status as customary international law.

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<sup>53</sup> *Commander’s Handbook*, *supra* note 7 at 7-11.

<sup>54</sup> Canadian Forces, *The Law of Armed Conflict at the Operational and Tactical Level* (Ottawa: Department of National Defence, 2001) [Canadian LOAC Manual] does not mention the doctrine of continuous voyage.

<sup>55</sup> Wolff Heintschel von Heinegg, “Naval Blockade” in Michael N. Schmitt, ed (2000) 75 *International Law Studies* 207 [Heintschel von Heinegg, “Naval Blockade”] at 214.

Related to, though somewhat different from continuous blockade is the practice of employing blockade zones. Particularly effective for smaller naval forces, especially when operating against long coast-lines, blockade zones are areas such as straits or other strategically important sea-lanes which, if blocked, can deny maritime traffic access to a coastline or part thereof.<sup>56</sup> Often enforced through the use of submarines or more commonly, naval mines, as was the case in the US blockade of North Vietnamese harbours during the Viet Nam War, blockade zones can be employed virtually anywhere at very limited cost. Although the vast majority of states did not register objections against the US use of naval mines to enforce the blockade,<sup>57</sup> this form of blockade has been heavily criticized by many commentators.<sup>58</sup> The main criticisms against this form of blockade are the effectiveness of the blockade cannot be guaranteed, and in the case of mines, has the potential to indiscriminately sink vessels, irrespective of their cargoes or purposes, without first providing the option of capture.

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<sup>56</sup> Insofar as blockade zones are generally used to deny access to a single port rather than an entire coast-line, many observers question the legality of such operations under customary international law. Recalling that a blockade must be effective in order to be legal, many commentators argue that unless there is a physical presence of naval assets sufficient to make transit dangerous, the blockade cannot be lawful. The test of dangerousness essentially turns on the probability of interception. See Richard Jacques, ed., *Maritime Operational Zones* (Newport: United States Naval War College, 2006) at 4-23.

<sup>57</sup> The USSR was the sole state that officially objected to the naval mine blockade of Viet Nam. It is relevant to note that the USSR was the principal supplier of weapons and material to North Viet Nam and that sea transport of such material was the only viable method of supply. Thus, the USSR was not objecting from the point of view of the party that was most affected by the matter. This is a very important factor in determining whether or not a practice develops into CIL. See Antonio Cassese, *International Law* 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2005) at 156-163. See also Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 Am J Int'l L 4, 757.

<sup>58</sup> See Heintschel von Heinegg, "Naval Blockade", *supra* note 55 at 215. It should be noted that in contrast to that of Professor Heintschel von Heinegg, the US position is that the closing of Haiphong and other North Vietnamese ports, accomplished by the emplacement of mines, was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality. For US position see *Commander's Handbook*, *supra* note 7 at 7-11.

*ii. United Nations Actions*

Article 42 of the *UN Charter* specifically provides that the Security Council may employ blockade as a coercive measure against a state in order to maintain or restore international peace and security. Acknowledging that blockade is specifically mentioned in the *UN Charter*, a number of leading experts in naval warfare have argued that in the era of the *UN Charter* there is no requirement for a separate law of blockade. Their basis for this contention is that in accordance with the provisions of the *UN Charter*, no such action such as blockade should occur without the consent and direction of the UN Security Council. This argument is particularly compelling when one considers that in accordance with article 103 of the *UN Charter*, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the ... Charter shall prevail.”<sup>59</sup> The so-called “supremacy clause” from the *UN Charter* is generally accepted to mean that in the event of a conflict between a decision of the security Council, and any obligations that a state or states may have, the decision of the Security Council will prevail.<sup>60</sup> It therefore follows that in the event of a blockade authorized by the UNSC, any rules regarding the function, as stipulated by the UNSC, would prevail over the customary law that currently informs the practice of blockade. As professor Heintschel von Heinegg notes, “This statement is certainly correct insofar as the Security Council, when taking action under Chapter VII, has a wide range of discretion and

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<sup>59</sup> *UN Charter*, *supra* note 5 at art 103.

<sup>60</sup> See, B Fassbender, “The United Nations Charter as Constitution of the International Community” (1997) 36 *Colum J Transnat’l L* 529 at 586.

that it...is not directly bound by rules of international law that are primarily designed to regulate the conduct of states in armed conflict.”<sup>61</sup>

Of particular importance to the issue of blockade law is the fact when the Security Council passes a resolution that “Calls Upon all Member States” to take action under a Chapter VII resolution, there can be no neutral states. In essence, under a UN Security Council resolution there are only two categories of states; those that are being admonished by the Security Council, and those that form the world community upon whose behalf the Security Council is taking action.<sup>62</sup> Insofar, as there are no neutrals under a Chapter VII resolution, the traditional concept of blockade becomes meaningless, since one of the principal functions of blockade is to halt all neutral shipping into and out of a targeted state.

United Nations practice under article 42 tends to diverge from traditional blockade in one very important aspect; UN actions are generally categorized as embargoes, that is to say, they target specific items rather than cutting off maritime commerce entirely.<sup>63</sup> By implementing an embargo aimed at specific items, the United Nations has effectively re-instituted the contraband system, permitting naval forces to stop and search vessels bound for belligerent ports, but to seize only those that are transporting prohibited items in violation of the relevant UNSCR.

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<sup>61</sup> Heintschel von Heinegg, “Naval Blockade”, *supra* note 55 at 217.

<sup>62</sup> Article 49 of the *UN Charter* states that “The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.” And article 50 provides that “[i]f preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.”

<sup>63</sup> See e.g. UNSC Res 1973 (2011)- The Situation in Libya; UNSC Res 665 (1990)- Arms embargo against Iraq; UNSC Res 700 (1991) – Guidelines on Arms and Dual Use Embargo Against Iraq; UNSC Res 713 (1991)- Arms Embargo Yugoslavia; UNSC Res 1160 (1998) – Arms Embargo Yugoslavia.

Of particular note, the Resolutions passed by the Security Council, never specifically block the transit of humanitarian items, and in some cases, the passage of humanitarian goods is explicitly permitted. Although the embargo system does not generally have the same effect on a targeted nation's economy that blockade can, an embargo may, through the denial of military or dual use goods, create significant restrictions on a targeted nation's ability to wage war.

### *iii. Contemporary Blockades*

The argument that the customary law of blockade has been displaced by the *UN Charter* falters on the assumption that international armed conflict is conducted only in accordance with the authorities as set out in the *UN Charter*. As has been seen in the cases of the Viet Nam War, the Falklands conflict, the NATO conflict against Serbia (Kosovo War), the 2003 US-Iraq War, and the current Israeli action against Gaza, many contemporary conflicts are conducted outside of the framework of the *UN Charter*. In such situations the body of customary international law that applies to blockade must be operative.

## CHAPTER 3: WINNING WITHOUT KILLING? THE HUMANITARIAN EFFECTS OF BLOCKADE

It is predictable that sanctions which inflict high economic costs on a country run by a ruthless government are likely to result in severe suffering among the general population even if there are humanitarian exemptions and relief programmes.<sup>64</sup>

The history of warfare is replete with examples of civilian suffering caused by siege-type actions. Insofar as the primary goal of siege operations is to isolate, enclose, bombard and starve the besieged populations into submission, the potential for civilian inhabitants to suffer is significant, especially in cases in which the besieging force refuses to permit civilians to leave.<sup>65</sup> One needs only to mention the names of besieged cities such as Stalingrad, Sarajevo and Leningrad to evoke scenes of misery and suffering.

In this portion of the thesis I examine several blockades that occurred during the 20<sup>th</sup> century, and one that is ongoing. The blockades chosen have been selected because of the effects that they have had on the civilian populations of the states in question. The intention, in choosing these blockades over some others that have occurred<sup>66</sup> is to demonstrate that far

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<sup>64</sup> UK, HL, *The Impact of Economic Sanctions 2<sup>nd</sup> Report*, session 1 (2007), vol 1 No 96-I at 20 (9 May 2007).

<sup>65</sup> While such actions may rightly be considered to be unlawful in the post Additional Protocol I era, as late as 1976, the US Army's Field Manual on the Law of War stated that:

There is no rule of law which compels the commander of an investing force to permit non-combatants to leave a besieged locality. It is within the discretion of the besieging commander whether he will permit non-combatants to leave and under what conditions. Thus, if a commander of a besieged place expels the non-combatants in order to lessen the logistical burden he has to bear, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender." See Department of the Army, *Field Manual No. 27-10: The Law of Land Warfare* (Washington: Department of the Army, 1976) at para 44.a [FM 27-10].

<sup>66</sup> Other examples of 20<sup>th</sup> century blockade include, but are not limited to: the 1937–41 Japanese blockade of China; the 1939–1940 German blockade of Great Britain; the 1944–1945 United States blockade of Japan; the 1949–1958 Kuomintang blockade of the PRC; the 1971 Indian blockade of East Pakistan; the 1991–1992 blockade of the Croatia coast by Serbia; and , the 1993–1996 NATO blockade of the Federal Republic of Yugoslavia.

from being benign, blockade is a form of quiet warfare that, over time, can have extremely deleterious effects against the civilian populations of the affected littoral states.

With the goal of inflicting “the maximum degree of economic strangulation of an opposing belligerent that can be achieved,”<sup>67</sup> blockade operations have the potential to devastate a nation. In as much as a nation’s food supplies are intrinsically tied to the economy, the collapse of that economy can result in widespread hunger and malnutrition. Additionally, in cases where the blockade is sufficiently effective to cause significant disruptions to energy supplies and internal transportation systems, the consequences for the civilian population can be catastrophic.

The naval blockades of Germany during World War One, Iraq in the 1990’s and the ongoing blockade of Gaza, stand out as contemporary examples of how blockade operations can adversely affect the civilian population of a state that is cut off from its ability to conduct trade. As the three examples set out below demonstrate, the longer and more effective a blockade is, the more significant will be the damage to the civilian population of the blockaded state and the higher is the probability that a humanitarian crisis will ensue.

### **A. The Blockade of Germany: 1914-1919**

Described as the “great seminal catastrophe of the [20<sup>th</sup>] century,”<sup>68</sup> the First World War is most commonly remembered for its sheer brutality and the incorporation of national economies and civilians into the war effort. As had never been seen before, the employment of modern technology and machinery in warfare was causing unimaginable suffering and

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<sup>67</sup> Jones, *supra* note 16 at 767.

<sup>68</sup> George F. Kennan, *The Decline of Bismarck’s European Order: Franco-Prussian Relations, 1875-1890* (Princeton N.J.: Princeton University Press, 1979) at 3.



devastation. Locked in a struggle for national survival, the armies of Europe were consuming materials and supplies at such a rate that the sustainment of the war effort became primary focus of the economies of the nations involved.

Because the economies were a key instrument of the war effort, belligerents began to consider their enemies' economies as military objectives. Those who worked in the factories, farms and other sectors that could be seen to be supporting the war effort were considered to be equally complicit and were therefore characterised as legitimate targets as well. Thus, the concept of total war in the modern era was born.<sup>69</sup>

While the technology at the time did not permit the belligerents to conduct direct attacks against each others' industrial complexes, the naval powers did have the capacity to inflict severe damage on each others' economies through the operation of blockades and attacks against neutral shipping bound for enemy ports. Control of the seas and of maritime trade assumed strategic importance at a level never previously seen in naval warfare.

As the largest and most powerful naval force in the world at the outbreak of World War One, the Royal Navy was in a particularly strong position to affect the outcome of the war. Its dominance of the sea would prove effective, both as a method for debilitating the German economy, and destroying the country's resolve to continue fighting.

As noted earlier, many of the provisions of the London Declaration did not survive the opening months of the First World War. The demise of the system of contraband, coupled

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<sup>69</sup> Roger Chickering and Stig Förstner, eds, *Great War, Total War: Combat and Mobilization on the Western Front 1914-1918* (Cambridge: Cambridge University Press, 2000) at 5.

with the Royal Navy's application of doctrine of continuous voyage, rendered the blockade of Germany as one of the deadliest campaigns of the First World War.

Much to the consternation of many neutrals, the British declared the North Sea to be a blockade area on 3 November 1914. Following this declaration, in early 1915 the Royal Navy established an impenetrable barrier across the North Sea. Consisting of a mixture of naval vessels and anti-ship mines, the blockading force stopped virtually all neutral shipping traffic from reaching Germany's ports for the duration of the war.

A snapshot of the pre-war German economy shows that the country "depended on foreign suppliers for a third of [its] food,"<sup>70</sup> and virtually all of its supply of "nitrogenous and phosphatic fertilizers, imported products upon which German agriculture had an almost absolute dependency."<sup>71</sup> Aside from causing shortages in important raw materials such as coal and various non-ferrous metals, the blockade cut off fertiliser supplies that were vital to German agriculture.<sup>72</sup>

While at the advent of the war some authorities in the German government warned of the potential for food shortages in case of a protracted conflict, Germany's primary focus in 1914 was directed at military materiel and the sustainment of troops in the field. When the war commenced in August, virtually no one anticipated the four year carnage that was looming. As is the case in virtually all conflict, the overall well being of the civilian population came second to the requirements of maintaining a healthy and combat capable

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<sup>70</sup> C. Paul Vincent, *The Politics of Hunger*, (Athens, Ohio: Ohio University Press, 1985) at 20.

<sup>71</sup> *Ibid.*

<sup>72</sup> "Spotlights on History", *supra* note 47.

military. Germany was no exception to this general rule. As the war progressed and provisions became scarce, “civilians [were] forced to make do with what [was] left over.”<sup>73</sup>

As the war evolved, and the blockade of Germany tightened, the civilian population began to feel the effects of the food shortages that had been foreseen as early as 1914 by authorities such as Walther Rathenau.<sup>74</sup> By 1915, German imports had fallen by 55% from pre-war levels and bread rationing commenced. “By 1916 the German population was surviving on a meagre diet of dark bread, slices of sausage without fat, an individual ration of three pounds of potatoes per week, and turnips. Only the turnips were in abundant supply.”<sup>75</sup> Staple foodstuffs such as grain, potatoes, meat and dairy products became so scarce by the winter of 1916 that many people subsisted on a diet of ersatz products that ranged from so-called 'war bread' (*Kriegsbrot*) to powdered milk.<sup>76</sup>

By the end of the war in November 1918, “individual rations, when available, in comparison with pre-war levels of consumption per head, were down to 12 per cent of the peacetime diet of meat, 5 per cent in fish, 7 per cent in fats, 13 per cent in eggs, 28 per cent in butter, 15 per cent in cheese, 6 per cent in beans and pulses, 82 per cent in sugar, 94 per cent in potatoes, 16 per cent in margarine, and 48 per cent in the bread diet.”<sup>77</sup> The average daily

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<sup>73</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 2<sup>nd</sup> ed (Princeton: Basic Books, 1992) at 171.

<sup>74</sup> Walther Rathenau was the founder of Allgemeine Elektrizitäts-Gesellschaft (AEG) an electrical-engineering company. When the von Schlieffen plan failed and Britain declared war, it became apparent to him that Germany was entering into what would be a protracted war. When he approached the government to express his concerns that Germany was not prepared to sustain a lengthy war, he was pressed into service as the head of the Kriegsrohstoffabteilung [the War Raw Materials Section] (KRA). He is widely recognized for his leadership and management that permitted Germany to sustain its war effort for years despite the serious shortages caused by the blockade.

<sup>75</sup> Vincent, *supra* note 70 at 21.

<sup>76</sup> “Spotlights on History”, *supra* note 47.

<sup>77</sup> Howard, *supra* note 10 at 163.

diet of 1,000 calories was insufficient even for small children. Disorders related to malnutrition - scurvy, tuberculosis and dysentery - were common.<sup>78</sup>

The signing of the armistice on 11 November 1918 did not bring the blockade of Germany to an end. On the contrary, in a strategy aimed at forcing the conditions of the Versailles Treaty upon the German government, the allies tightened the food blockade on Germany. The Hunger Blockade, as it has come to be known lasted from November 1918 until the signing of the Treaty of Versailles in July 1919. The winter of 1918-1919 was particularly deadly for the population of Germany. Weakened by hunger and malnutrition as a result of the ongoing blockade, the people of Germany were particularly susceptible to the influenza pandemic as it swept through Europe.<sup>79</sup> Although it is difficult to determine the exact number of deaths that were directly attributed to starvation as a result of the blockade, conservative estimates are that approximately 250,000 German civilians died of starvation during the winter of 1918-1919.<sup>80</sup>

While historians continue to debate the humanitarian toll of the blockade, the British government has estimated that approximately 763,000 wartime deaths in Germany can be attributed to starvation caused by the five year economic strangulation of the country.<sup>81</sup> As compared to the combat losses of Germany, estimated at approximately 1.74 million

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<sup>78</sup> “Spotlights on History”, *supra* note 48.

<sup>79</sup> Although influenza killed a significant number of German citizens in 1918-1919, the most alarming mortality figures are found in the incidence of tuberculosis, the virility of which has a strong nutritional basis. While tuberculosis was generally on the rise amongst civilians in Europe during the war, mortality rates among women in Germany increased 72 percent, while in the UK the increase was 28 percent. By 1919 the mortality rate from tuberculosis in young children in Germany increased 100 percent over the 1913 rate. For those children who did survive disease, many were afflicted with rickets. See discussion in Vincent, *supra* note 70 at 124-156.

<sup>80</sup> See e.g. Howard, *supra* note 10.

<sup>81</sup> “Spotlights on History”, *supra* note 47.

persons,<sup>82</sup> the effects of the five year blockade are clearly remarkable. Placed in perspective, the 1915-1919 blockade of Germany was responsible for the deaths of more German civilians than was the allied bombing campaign of the Second World War.<sup>83</sup>

As noted earlier, many of the provisions of the London Declaration did not survive the opening months of the First World War. The demise of the system of contraband, coupled with the Royal Navy's application of doctrine of continuous voyage, rendered the blockade of Germany as one of the deadliest campaigns of the First World War.

## **B. The Blockade of Iraq: 1990-2003**

The scale of economic sanctions against Iraq is probably unprecedented in recent history. The imposition of sanctions can be regarded as a macroeconomic shock of massive proportions. Although the sanctions regime has allowed for an easing of the restrictions on the importation of foodstuffs and medical supplies, the availability of these essential supplies, among other things, continues to fall far short of the requirements of the civilian population.<sup>84</sup>

The invasion of Kuwait by Iraq in August 1990, was the catalyst for the longest blockade action in modern history. Passed unanimously by the United Nations Security Council on 6 August 1990, UNSCR 661 authorized the banning of all imports and exports of goods to and from Iraq, with the exception of "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs."<sup>85</sup>

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<sup>82</sup> "Casualty and Death Tables: World War One" online: PBS <[http://www.pbs.org/greatwar/resources/casdeath\\_pop.html](http://www.pbs.org/greatwar/resources/casdeath_pop.html)>.

<sup>83</sup> Noted historian John Keegan places the civilian death toll from the allied bombing campaign at approximately 593,000: see John Keegan, *The Second World War*. (New York: Viking, 1990).

<sup>84</sup> Peter Boone, Haris Gazdar and Athar Hussain, "Sanctions Against Iraq: The Cost of Failure" (1997) A report prepared for the Center for Economic and Social Rights (formerly the Harvard Study Team) on the impact of United Nations-imposed economic sanctions on the economic well-being of the civilian population of Iraq. online: CESR <<http://www.cesr.org/downloads/Sanctions%20Against%20Iraq%20Costs%20of%20Failure%201997.pdf>>.

<sup>85</sup> UN Security Council, *Resolution 661 (1990) Adopted by the Security Council at its 2933rd meeting, on 6 August 1990*, 6 August 1990, S/RES/661 (1990) at para 3.

At the completion of the Gulf War in March 1991, the Security Council, in its resolution 687 (1991) authorized the continuation of the embargo and sanctions against Iraq, with the same humanitarian caveats that were contained in resolution 661.<sup>86</sup> The embargo against Iraq was strictly and effectively enforced, with the navies of many nations, including Canada, policing maritime traffic in the Arabian Gulf region. Under resolution 687, a Sanctions Committee was established with the authority to permit exports of petroleum originating from Iraq, in order to enable Iraq to pay for imports of foodstuffs, medicines and essential civilian supplies. The provisions of UNSCR remained in place until the completion of the Second Gulf War in 2003.

With its infrastructure decimated by the Gulf War, and an economy that depended on oil revenues for its main source of income, Iraq was particularly vulnerable to the effects of the blockade. Reporting on the UN- imposed sanctions in 1999, the United Nations Economic and Social Council stated, “The sanctions against Iraq are the most comprehensive, total sanctions that have ever been imposed on a country.”<sup>87</sup>

As was the case with Germany in the First World War, Iraq’s ability to feed its population was dependant not only on the importation of foodstuffs, but fertilizers and farm, machinery as well. With all of these items subjected to the embargo, Iraq was faced with an immediate and significant food crisis. Furthermore, with its oil revenues cut off, the Iraqi

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<sup>86</sup> The term blockade refers to a belligerent act, thus indicating that it is a *jus in bello* concept. In the case of Iraq, while the extension of the sanctions were part of the ceasefire provisions as contained in UNSCR 687, the sanctions were effectively tighter after the war than they were prior to it. Insofar as the sanctions were a Chapter VII action, and the resulting naval action resembled a blockade in every manner, the term blockade has been used to describe the action.

<sup>87</sup> *The Adverse Consequences of Economic Sanctions on The Enjoyment Of Human Rights*, UN ESCOR, UN Doc E/CN4/Sub 2/2000/33 (2000) at 15.

government was faced with a situation wherein it was unable to afford medicines and other humanitarian items for its population.

Much of Iraq is non-arable desert. As a result the country relies heavily on imported foodstuffs to feed its population. When the UN blockade was imposed, virtually all imports of food were halted. While immediate government rationing helped to fend off mass starvation, the meagre diet imposed on the majority of Iraq's citizenry was barely sufficient to keep them alive.

In 1998, the Parliament of the United Kingdom was advised that “[s]ince the imposition of economic sanctions on Iraq in 1990, the humanitarian situation in Iraq has deteriorated significantly . . .and that there are some 960,000 chronically malnourished children in Iraq, representing a rise of 72% since 1991.”<sup>88</sup> The following year, the United Nations Children Emergency Fund reported that “under-5 mortality more than doubled from 56 deaths per 1000 live births (1984-1989) to 131 deaths per 1000 live births (1994-1999). Likewise infant mortality -- defined as the death of children in their first year -- increased from 47 per 1000 live births to 108 per 1000 live births within the same time frame.”<sup>89</sup> In the same report, the executive director of UNICEF, Ms. Carol Bellamy, noted “that if the substantial reduction in child mortality throughout Iraq during the 1980s had continued

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<sup>88</sup> “ United Kingdom House of Commons Research Paper 98/28” HC Deb 21 January 1998, c990. [House of Commons 98/28]

<sup>89</sup> “Iraq surveys show 'humanitarian emergency'” online: UNICEF <<http://www.unicef.org/newsline/99pr29.htm>>.

through the 1990s, there would have been half a million fewer deaths of children under-five in the country as a whole during the eight year period 1991 to 1998.”<sup>90</sup>

When reviewing the resolutions that established the embargo against Iraq (UNSCRs 661 and 687) in hindsight, it is abundantly clear that by allowing the provision of Humanitarian aid to be conditional, "on the policies and practices of the Government of Iraq, including the implementation of all relevant resolutions of the Council...",<sup>91</sup> there was “a clear hierarchy in the goals of the Security Council in the favour of military objectives over and above humanitarian concerns.”<sup>92</sup> Because the resolutions tied the provision of humanitarian assistance to the United Nations’ military and political objectives, it was inevitable that the civilian population of Iraq would become the pawns in a deadly game of brinksmanship.

### **C. The Gaza Blockade: 2007- Present**

‘The idea is to put the Palestinians on a diet, but not to make them die of hunger.’<sup>93</sup>

Few, if any, conflicts are more politically charged than the interminable conflict between Israel and its Palestinian neighbours, particularly those in Gaza. Described by many as an ongoing occupation,<sup>94</sup> and by others as active international armed conflict,<sup>95</sup> the very basic question of the nature of the Israeli conflict with Gaza has been highly politicized; to

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<sup>90</sup> *Ibid.*

<sup>91</sup> UN Security Council, *Resolution 687 (1991) Adopted by the Security Council at its 2981<sup>st</sup> meeting, on 3 April 1991*, 3 April 1991, S/RES/687 (1991) at para 21.

<sup>92</sup> Boone, *supra* note 84 at 34.

<sup>93</sup> Duv Weisglas, senior advisor to Israeli Prime Minister Ehud Olmert as quoted in Conal Urquhart, “Gaza On Brink Of Implosion As Aid Cut-Off Starts To Bite” *The Guardian* (16 April 2006) online: [Guardian <http://www.guardian.co.uk/world/2006/apr/16/israel>](http://www.guardian.co.uk/world/2006/apr/16/israel).

<sup>94</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Rep 136 at para 101 [*Wall Opinion*].

<sup>95</sup> Israel Government, *The Report of the Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Report* ( 23 January 2011) at 45-53 [Turkel Report].



weigh in on either description risks being branded as either a Zionist or a terrorist. The undeniable fact arising from this conflict, however, is that Palestinian civilians are caught in the middle, and it is those civilians that are being most adversely affected by it.<sup>96</sup>

The blockade of Gaza was initiated by Israel in response to the general election in Gaza in February 2006 in which the Hamas party was the victor. Shortly after Hamas took power in June 2007, Israel declared that “Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory.”<sup>97</sup> In response to increased rocket attacks originating from within Gaza, Israel, which controls Gaza’s eastern and northern borders,<sup>98</sup> placed tight restrictions on the movement of all goods into and out of Gaza by land, including food, electricity, fuel, and building materials. Additionally, in what has been described by John Holmes, United Nations Undersecretary-General for Humanitarian Affairs as a “collective punishment of the people of Gaza,”<sup>99</sup> the Israeli government, established a seaward Blockade of Gaza, effectively cutting the region off from all outside commerce.

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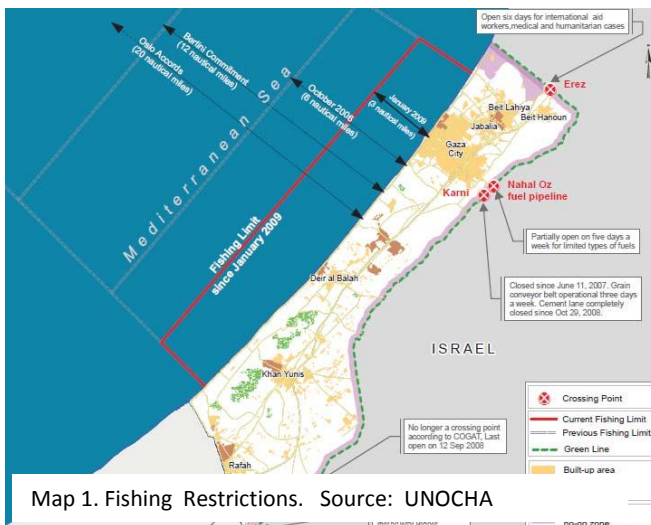
<sup>96</sup> Because of the highly politicized nature of the Gaza conflict, and the polarization of the international community regarding the Israeli policies toward the Gaza Strip, it is very difficult to objectively determine the exact effects of the Gaza blockade. For the purposes of this paper, statistics used will be derived from United Nations bodies and the ICRC. While these statistics might not be completely accurate, they do reflect a middle range between the extremes as offered by Israel and its detractors. As such I consider the statistics from these organizations to be the least objectionable.

<sup>97</sup> “Security Cabinet Declares Gaza Hostile Territory”, (19 September 2007), online: Israel Ministry of Foreign Affairs. <<http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>>.

<sup>98</sup> By arrangement with Egypt, which borders Gaza to the south, no goods or persons are permitted to enter or leave Gaza through Egypt.

<sup>99</sup> See Louise Charbonneau, “Collective Punishment For Gaza Is Wrong: UN.” (18 January 2008) online: Reuters <<http://www.reuters.com/article/2008/01/18/idUSN18343083>>.

With a stated goal of keeping the “Gazan economy on the brink of collapse without quite pushing it over the edge,”<sup>100</sup> and “encourag[ing] the people of Gaza to force Hamas to change its attitude towards Israel or alternatively, force Hamas out of government,”<sup>101</sup> Israel has maintained an effective and impartial blockade



against Gaza since it was established in 2007. While it is indisputable under international law that Israel has the right under international law to defend itself and its citizens from attacks originating from within Gaza, the indiscriminate

method with which chosen to respond at the strategic level to the attacks from Hamas extremists has raised concerns amongst even the closest of Israel’s

allies.<sup>102</sup> Contrary to the provisions of Hague XI,<sup>103</sup> which is widely recognized as

<sup>100</sup> Jeffrey Heller, “Israel Said Would Keep Gaza Near Collapse: Wikileaks”, (5 January 2011) online: Reuters <<http://www.reuters.com/article/2011/01/05/us-palestinians-israel-wikileaks-idUSTRE7041GH20110105>>.

<sup>101</sup> Urquhart, *supra* note 93.

<sup>102</sup> See e.g. “Clinton: Gaza Situation Unacceptable” online: CNN <<http://www.cnn.com/video/#/video/us/2010/06/01/sot.hillary.flotilla.attack.cnn>> and statement by Australian Prime Minister Kevin Rudd, condemning the use of violence, online: Australian Broadcasting Corporation <<http://www.abc.net.au/news/2010-06-01/rudd-condemns-aid-flotilla-violence/849712>>.

<sup>103</sup> *Hague Convention (XI) Relative To Certain Restrictions With Regard To The Exercise Of The Right Of Capture In Naval War – 1907*, art 3. “Vessels used exclusively for fishing, along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.” While *Hague XI* does allow for fishing vessels to conduct their regular business unmolested, there are provisions for their capture if they engage in military activities. By the language of the treaty, it is apparent that the onus is on the accusing party to show that the fishing vessel is engaging in hostile activity. The assumption in *Hague XI* therefore, is that fishing vessels are to be permitted to conduct their regular business. A blanket prohibition against fishing appears to be a contravention of the letter and spirit of the treaty.

customary international law,<sup>104</sup> in January 2009, Israel began to restrict Gazan fishing vessels from operating beyond three miles from shore. Although the Israelis claim that the restriction is designed to keep fishermen from importing weapons and terrorists, the primary effect of this restriction is that it denies Palestinian fishermen access to their most productive deep sea fishing grounds. As the United Nations Office for the Coordination of Humanitarian Affairs noted in its special report of August 2009,<sup>105</sup>

“Since the beginning of “Cast Lead”[in January 2008], the IDF has prohibited Palestinians from fishing beyond three nautical miles (nm) from the shore, undermining the volume of fishing catch, the bulk of which is located in deeper waters than 3 nm. This prohibition followed a previous reduction of the fishing zone in October 2006 from 12 to 6 nm... The total fishing catch in April 2009 amounted to 79mt, which represents one third of the amount of fish available in the market place in April 2007.”<sup>106</sup>

In April 2010, the UNOCHA reported that, “The deterioration of living conditions in the Gaza Strip, mainly as a result of the Israeli blockade continued to be of concern.”<sup>107</sup> Furthermore, a poverty survey conducted by the United Nations Relief and Works Agency (UNRWA) “showed that the number of Palestine refugees completely unable to secure access to food and lacking the means to purchase even the most basic items, such as soap, school stationary and safe drinking water (‘abject poverty’) has tripled since the imposition

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<sup>104</sup> Israel is not party to the *Hague Conventions* of 1907.

<sup>105</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), *Locked in: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip*, (August 2009) online UNOCHA, <<http://www.unhcr.org/refworld/docid/4a8a5d272.html>> [“Locked In”].

<sup>106</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), “Farming Without Land, Fishing Without Water: Gaza Agriculture Sector Struggles to Survive.” (May 2010) online: UNOCHA, <[http://www.ochaopt.org/documents/gaza\\_agriculture\\_25\\_05\\_2010\\_fact\\_sheet\\_english.pdf](http://www.ochaopt.org/documents/gaza_agriculture_25_05_2010_fact_sheet_english.pdf)>.

<sup>107</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Monitor* (April 2010) online: UNOCHA <[http://www.ochaopt.org/documents/ocha\\_opt\\_the\\_humanitarian\\_monitor\\_2010\\_04\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2010_04_english.pdf)> at 2.

of the blockade...”<sup>108</sup> While Israel did ease some of the restrictions against Gaza following its raid on the Turkish vessel MS Mavi Marmara on 31 May 2010, most of the fundamental aspects of Israel’s blockade remained in place. As of the end of 2010, “one third of the Palestinian population, or 1.43 million people, continued to be food insecure, i.e. lacking “secure access to sufficient amounts of safe and nutritious food for normal growth and development and an active and healthy life.”<sup>109</sup> Furthermore, the high unemployment rate caused by the isolation of Gaza’s economy, combined with scarce supplies of fish has lead to “a gradual shift in the diet of Gazans from high-cost and protein-rich foods such as fruit, vegetables and animal products, to low-cost and high carbohydrate foods such as cereals, sugar and oil, which can lead to micro-nutrient deficiencies, particularly among children and pregnant women.”<sup>110</sup>

In many ways, the plight of the population of Gaza is not unlike that of the inhabitants of European ghettos in the Second World War. The population of Gaza has been cut off from the outside world and their access to food and other necessities of life has been severely disrupted. The civilian population of Gaza is slowly starving.

#### **D. Summary**

As the historical and contemporary examples of blockade that have been chosen demonstrate, the devastation that blockade can inflict on a population is significant and far reaching. The objective of a blockade is to cripple the opposing state’s economy. With the increasing urbanization of populations over the past century and the resultant migration away

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<sup>108</sup> *Ibid*

<sup>109</sup> *Ibid.*

<sup>110</sup> “Locked In”, *supra* note 105 at 3.

from rural areas, many modern states are wholly dependent on a functioning economy to feed their populations. Indeed, many states that were once self sufficient in food production now rely heavily on imports to meet their food supply requirements. As a result, it is virtually impossible to establish a traditional blockade without causing serious harm to the civilian population of the targeted state. The question that must therefore be posed is whether military operations, such as blockades, that affect the civilian population as much as if not more than they do the military, are lawful under the ambit of IHL.

## **CHAPTER 4: INTERNATIONAL HUMANITARIAN LAW**

The purpose of this section is to provide an overview of the relevant portions of IHL that are applicable in the context of blockade. In this section I discuss the application of existing frameworks and how the contemporary body of IHL fails to provide concrete and enforceable protections for civilian populations affected by this method of warfare.

Referring to the blockades that have been mentioned earlier in this thesis, section I argue that the inherent inability to distinguish in effects between a military objective and the civilian population in blockade operations renders the customary notion of blockade unlawful.

Acknowledging that the humanitarian effects of blockade have provided impetus for some academics and naval law experts to minimize the impact of this form of warfare on civilians, I examine some of the attempts that were made to influence the law of blockade in the final decades of the 20<sup>th</sup> century. I contend that despite the efforts made by leading scholars in the field of naval warfare to lessen the impact of blockade,<sup>111</sup> the law of blockade remains unsettled, with no clear parameters to which states must adhere. As a result, a serious humanitarian gap continues to exist in the law of blockade.

### **A. Introduction to IHL**

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<sup>111</sup> See e.g. San Remo Manual, *supra* note 4 at arts 102-103.

The use of force in armed conflict is regulated by IHL, also known as the Law of War, or the Law of Armed Conflict (LOAC).<sup>112</sup> Consisting of both treaty law and customary international law, the principal objectives of IHL are “to regulate the conduct of hostilities, to protect combatants and non-combatants from unnecessary suffering; to safeguard certain fundamental rights of persons who fall into the hands of the enemy, such as prisoners of war, the sick, and civilians; to maintain the distinction between combatants and non-combatants; and to facilitate the restoration of peace.”<sup>113</sup> The rules of IHL “reflect a compromise between effective prosecution of war and the ideal of protecting the lives and human rights of those endangered by it.”<sup>114</sup> This basic premise is achieved “by maintaining a balance between military necessity on the one hand and humanitarian imperatives on the other.”<sup>115</sup>

The means and methods of warfare upon which a state may rely are not unlimited.<sup>116</sup> Laws and customs regulating armed conflict have existed for centuries; there is historical evidence to show that there were rules governing the treatment of prisoners as far back as ancient Egypt. While Hugo Grotius, in his seminal work, “On the Law of War and Peace,”<sup>117</sup> is credited with having been the first scholar to compile the rules of warfare and reduce them to writing, it was not until more than two centuries after his death in 1645 that

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<sup>112</sup> The terms IHL, LOAC and Law of War are used interchangeably.

<sup>113</sup> Australian Defence Force, *The Law of Armed Conflict*, (Canberra: Defence Publishing Service, 2006) at para 1.3.

<sup>114</sup> Gabriella Blum, "Laws of War and the 'Lesser Evil'" (2010) 35:1 Yale J Int'l L 1 at 3.

<sup>115</sup> G. Ravasi and G. L. Beruto, *IHL and Other Legal Regimes: Interplay in Situations of Violence* (New York: Nagard, 2005) at 13.

<sup>116</sup> Additional Protocol I, *supra* note 2 at art 35(1).

<sup>117</sup> Hugo Grotius, *On the Law of War and Peace*, English translation (Whitefish, Montana: Kessinger Publishing LLC, 2004).

the major nations of the western world began to embark on the process of negotiating and codifying the universal rules of warfare.

The introduction of the concepts of humanity into the law of war at the end of the nineteenth century signified “a shift from the traditional motivations of reciprocity in rules of engagement, notions of honor or chivalry, and religious teachings and natural law, toward laws that are more absolute, unconditioned by reciprocity, and unlimited to any one class, religion, or race. This change marked the move from the sovereign or state as the bearer of rights to a more enlightened human society which identifies the welfare of individuals as its subject of concern.”<sup>118</sup>

In their formational stages, IHL treaties were split into two streams, named after the two European cities in which the preponderance of the treaties were negotiated; Geneva, Switzerland, and The Hague, Netherlands. Commencing with the First Geneva Convention of 1864, which was inspired by Henri Dunant’s experiences at the battle of Solferino,<sup>119</sup> the Geneva stream, aimed primarily at the protection of wounded and sick soldiers as well as Prisoners of War, was the first codification of the modern rules of war. Unlike any treaty that had preceded it, the Geneva Convention of 1864 established multi-national rules and obligations designed to govern the actions of its signatory parties in all future conflict. Since its inception in 1864, the Geneva stream has evolved to meet the requirements of the victims of war, culminating in the four Geneva Conventions of 1949 and the three Additional Protocols of 1977 and 2005. The Geneva Conventions of 1949 are of such importance in

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<sup>118</sup> Blum, *supra* note 114 at 8.

<sup>119</sup> See “Founding and Early Years of the ICRC (1863-1914)” online: ICRC < <http://www.icrc.org/eng/who-we-are/history/founding/overview-section-founding.htm>>.



modern international relations that becoming party to them is widely recognized as a *de facto* element of statehood.<sup>120</sup>

The second stream of IHL, known as the Hague stream, commenced with the first Hague Conventions of 1899.<sup>121</sup> Focused primarily on regulating the methods and means of warfare, the Hague stream continues to create treaties<sup>122</sup> that outlaw the use of inhumane weapons such as, poisonous gas, expanding bullets, anti-personnel land mines and other weapons that cause unnecessary suffering to combatants. In addition to regulating the types of weapons that may be employed in conflict, the conventions of the Hague stream have also established rules designed to limit the over-all effects of warfare.

The development of the laws of war in the early to mid-twentieth century was remarkable. Whereas at the wane of the nineteenth century the IHL treaty process was in its infancy, by the middle of the twentieth century there was a vast body of law governing the conduct of nations in armed conflict. However, while much effort was expended on establishing rules respecting the relationship between combatants, little attention was given to the protection of the civilian population from the effects of war.

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<sup>120</sup> For example, on 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". online: ICRC <<http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS>>.

<sup>121</sup> It is widely acknowledged that *St. Petersburg Declaration Renouncing The Use, In Time of War, of Certain Explosive Projectiles – 1868*. Martens, *Nouveau Recueil Général* 1<sup>re</sup> ser, vol XVIII at 474-75, UK, HC, c. in *Sessional Papers* vol LXIV (1869), at 659 [*St Petersburg Declaration*] is widely considered to have been the model and forerunner for the Hague conventions.

<sup>122</sup> See e.g. *1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty)*, 1 March 1999, 2056 UNTS 211 (entered into force 1 March 1999, accession by Canada 3 December 1997) [*Ottawa Treaty*].

The horrors of World War Two, and the massive casualties that it caused amongst civilians, led the nations of the world to recognize that in any armed conflict the humanitarian concerns of the civilian population must be taken into account. Encouraged by the principles enshrined in the Charter of the United Nations, and the Universal Declaration of Human Rights, the nations of the world gathered in Geneva in 1949, where, the Fourth Geneva Convention on the Protection of Civilian Persons in Armed Conflicts (GC IV) was adopted. The primary goal of GC IV was to protect injured and sick civilians, civilian fugitives, and installations for their care and protection, and to offer general guidelines on the rights and duties of civilian populations of occupied territories.

While GC IV marked the beginning of the development of civilian protections in IHL, it was immediately recognized as falling short of providing the levels of protection required to secure civilians from being considered as legitimate targets in warfare.<sup>123</sup>

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<sup>123</sup> The *Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923*. online: ICRC <<http://www.icrc.org/ihl.nsf/FULL/275?OpenDocument>> [ *Hague Air Rules of 1923* ] was an attempt to establish and clarify rules for the use of aircraft in warfare. One of the central themes to the draft rules was the distinction between civilians and combatants and the prohibition against attacking non-military objectives. Rejected in part because of the limitations that they would place on future military operations, the draft rules were never incorporated into IHL. Many of the provision, were, however recognized as universal principles. Completely ignored in World War Two, the principles were eventually revived and now form the basis of rules for the protection of civilian populations as outlined in Part IV of Additional Protocol I. The relevant articles to the 1923 Draft Rules are:

*Article 22:* Aerial bombardment for the purpose of terrorizing civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

*Article 24:* (1) Aerial bombardment is legitimate only when directed at a military objective. . . . (2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes. (3) The bombardment of cities . . . not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment. (4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities . . . is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population. (5) A belligerent State is

Whereas it protected certain persons who had fallen under the control of the enemy, it did nothing to protect the general civilian population of a state from the ravages of a war being imposed upon them by an outside power.

It was not until 1977, after five years of protracted negotiations that the international community was able to agree on the provisions of the Protocols Additional to the Geneva Conventions of 1949.<sup>124</sup> Of particular importance were the thirty-one articles of Part IV of Additional Protocol I, all of which are dedicated to the protection of civilians.

The introduction of the Additional Protocols into conventional law was a watershed in IHL. For the first time in history, specific protections were formulated that obligated belligerents to distinguish between combatants and civilians, to protect civilians from the effects of military operations, and to balance the requirements of military necessity against those of humanity. Seen by many as the confluence of the Geneva and Hague streams, Additional Protocol I, in particular, is considered by practitioners as the contemporary standard below which the conduct of military forces must not transgress.<sup>125</sup>

## **B. The Main Principles of IHL**

Fundamental to any discussion on methods of warfare that afflict the civilian population are the provisions of Additional Protocol I that pertain to the protection of

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liable to pay compensation for injuries . . . caused by the violation . . . of the provisions of this article.

<sup>124</sup> Unlike the Geneva Conventions of 1949, Additional Protocol I, *supra* note 2, does not enjoy universal acceptance or adherence. At the time of writing, the following major international powers were not party to the Additional Protocols: United States, India, Pakistan, Iran, Israel.

<sup>125</sup> Additional Protocol I, *supra* note 2, contains the following major parts: Part I- General provisions; Part II – Wounded Sick and Shipwrecked; Part III – Methods and Means of Warfare, Combatant and Prisoner of War Status; Part IV – Civilian Population; Part V – Execution of the Conventions and of the Protocol; and, Part VI – Final Provisions.

civilians. Thus, when assessing the legality of blockade operations, any analysis must include a review of the principles of distinction, proportionality and humanity.

*i. The Principle of Distinction*

The law of war recognizes the inevitability of incidental damage in the attack of legitimate targets. What is prohibited is ... the use of means or methods of warfare incapable of distinguishing between military targets and civilian objects, or incidental damage so extensive as to be tantamount to the intentional attack of civilian objects or the civilian population per se.<sup>126</sup>

Described by the International Court of Justice as one of the two “cardinal principles ... constituting the fabric of humanitarian law,”<sup>127</sup> the principle of distinction, as outlined in article 48<sup>128</sup> of Additional Protocol One (Additional Protocol I) is the foundational rule for the protection of civilians from the effects of war. In accordance with this principle, parties to a conflict are required, at all times, to “distinguish between the civilian population and

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<sup>126</sup> W. Hays Parks, “Linebacker and the Law of War” (1983) 34 Air University Review 2, online: Air & Space Power Journal <<http://www.airpower.maxwell.af.mil/airchronicles/aureview/1983/jan-feb/parks.html>> at 10 (cited to html version).

<sup>127</sup> *Legality of the Threat of Use of Nuclear Weapons Opinion*, Advisory Opinion, [1996] ICJ Rep 226 at 257 [Nuclear Weapons Opinion].

<sup>128</sup> As noted in Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987) [Commentaries]:

The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 (1) and in Geneva from 1864 to 1977 (2) is founded on this rule of customary law. Up to the First World War there was little need for the practical implementation of this customary rule as the population barely suffered from the use of weapons, unless it was actually in the combat zone itself. The few measures adopted in The Hague in 1899 and 1907 seemed sufficient: a prohibition against attacking localities which are not defended, the protection of certain buildings, the fate of the population in occupied areas etc. The situation altered radically already during the First World War as a result of the increased range of artillery and the arrival of the first aerial bombardments from aircraft or airships. However, it was above all the development of weaponry after this conflict and its use during the Second World War which radically changed the situation. As a result the customary rule was affected to such an extent that one might have wondered whether it still existed.

combatants and between civilian objects and military objectives, and accordingly shall direct their operations only against military objectives.”<sup>129</sup>

The requirement to distinguish between civilians and combatants has not always been recognized as a custom of warfare. Throughout the middle ages, wars and battles were often fought with little or no regard for civilians and their property. “Civilians were at the mercy of the conquerors, who all too often, even if they spared their lives, submitted them to forced labour, looted their property and treated them in a way which showed contempt for even the most elementary rights. Especially during a siege, civilians shared the dangers faced by soldiers.”<sup>130</sup> Indeed, as recently as 1976, the doctrine of the United States Army stated that, “if a commander of a besieged place expels the non-combatants [i.e. civilians] in order to lessen the logistical burden he has to bear, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender.”<sup>131</sup>

The general notion of distinction began to gain acceptance as a custom of war as early as the sixteenth century, and had gained wide acceptance by the middle of the nineteenth century. First embodied in the preamble to the *St. Petersburg Declaration*, it stated that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”<sup>132</sup> Although it was one of the principal areas of discussion in the Hague peace conferences of 1899 and 1907, the principle was largely ignored during the First World War where the development of long range artillery and aerial bombardment allowed for the delivery of the effects of war to population centres

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<sup>129</sup> Additional Protocol I, *supra* note 2 at art 48.

<sup>130</sup> Commentaries, *supra* note 128 at para 1822.

<sup>131</sup> FM 27-10, *supra* note 65 at para 44.

<sup>132</sup> *St. Petersburg Declaration*, *supra* note 121.

as well as communication and transportation hubs surrounding the main battlefields. While the Draft Hague Air Rules of 1923,<sup>133</sup> expanded on the rules of distinction and provided a solid foundation for the protection of civilians from aerial warfare, those rules were never implemented; their principles were ignored as strategic bombing campaigns delivered the war to the civilian inhabitants of many of the world's major cities.

Distinction was one of the early victims of the Second World War, as strategic bombing campaigns and long range artillery laid waste to many Europe and Asia's major cities. In spite of the virtual abandonment of the principle during the war, it was not relegated to the back burners for eternity. In the years following the conclusion of the war much of the focus of international law was aimed at the enshrinement of humanitarian principles. As the principles of human rights outlined in the *UN Charter* began to influence the development and practice of international law, the principle of distinction re-emerged with renewed vigour. Beginning in 1956, at the nineteenth International Conference of the Red Cross, where the *Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Times of War*,<sup>134</sup> were created, the codification of the principle became one of the primary objectives of those developing IHL. The efforts to enshrine this critical principle of IHL culminated in implementation of Additional Protocol 1, which has been described as the "crowning achievement...and the most significant victory achieved in IHL since the adoption of the Fourth Geneva Convention in 1949."<sup>135</sup>

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<sup>133</sup> See discussion re Hague Air Rules 1923, *supra* note 123.

<sup>134</sup> *Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Times of War* (Geneva: International Committee for the Red Cross, 1956).

<sup>135</sup> *Commentaries*, *supra* note 128 at para 1816.

The distinction principle was famously referred to in 1996 in the *Nuclear Weapons Case*, where the International Court of Justice held that, “...the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited.”<sup>136</sup>

*ii. Distinction and Blockade*

That the intentional destruction of an economy through blockade can cause starvation, suffering and death amongst the civilian population that relies on it, is indisputable; history shows that prolonged blockades can have disastrous consequences for the civilian population. The issue of whether or not a non-kinetic military operation such as blockade falls within the legal parameters of distinction, however, is not without contention in international law.

While article 48 of Additional Protocol I would appear, on its face, to prohibit any and all military operations that have the civilian population as their objectives, this is not necessarily the case. When one considers the wide variety of operations in which contemporary militaries participate, such as aerial reconnaissance, psychological operations and humanitarian operations, it is evident that some military operations might not cause deleterious effects against the civilian population, while some might very well have a beneficial effect, depending on the circumstances.<sup>137</sup> In order to understand the application of article 48 properly, it is therefore imperative to assess the requirements of that article in

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<sup>136</sup> *Nuclear Weapons Opinion*, *supra* note 127 at para 95.

<sup>137</sup> For example, a psychological operations campaign aimed at encouraging a civilian population to leave an area before it is attacked can significantly reduce civilian casualties in an impending attack.

the broader context of the subsequent articles that refine its application. In particular, one must consider article 51, which is titled “Protection of the Civilian Population.” It states in part that:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. 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....
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - (a) those which are not directed at a specific military objective;
  - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Article 51 has been described as “one of the most important articles in the Protocol. It explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities.”<sup>138</sup> It is this article that establishes bases for the prohibitions and precautions that protect civilians and civilian objects from the effects of military operations.

The first paragraph of article 51 provides that, “The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”<sup>139</sup> It then proceeds to state that, “To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all

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<sup>138</sup> *Commentaries*, *supra* note 128 at para 1923.

<sup>139</sup> Additional Protocol I, *supra* note 2 at art 51.



circumstances.”<sup>140</sup> By way of this construction, the convention requires that the provisions of Part Four be interpreted through the succeeding rules.

Paragraph two of article 51 operates to refine paragraph one as follows; “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.”<sup>141</sup> As Professor Schmitt notes, for the remainder of this part of the protocol, the “proscriptions are routinely expressed in terms of ‘attacks’”<sup>142</sup>; and it is through these prohibitions that Part IV of Additional Protocol I must be interpreted.

### **C. The Meaning of “Attack”**

The term “attack” appears fourteen times in the Geneva Conventions of 1949, but is not defined in any of them. It was not until the inception of Additional Protocol I that the term was defined in international law as “acts of violence against the adversary, whether in offence or in defence... which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.”<sup>143</sup>

Insofar as blockade operations are focused on preventing trade, their main goal is to stop trade from entering or departing blockaded harbours. Understanding that civilian

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<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> Michael Schmitt, “Wired Warfare: Computer Network Attack and Jus in Bello” (2002) 84 IRRC No.846, 365 at 376 [Schmitt, “Wired Warfare”].

<sup>143</sup> Additional Protocol I, *supra* note 2 at art 49.

merchantmen are generally not armed, it is rare that a blockading force will be required to use force against neutral vessels in order to enforce the blockade. Rather, the mere presence of warships will usually be sufficient to deter neutral vessels from attempting to trade with the blockaded nation. Additionally, unlike traditional siege operations, blockades do not include the bombardment of the shoreline. Instead, blockading forces will normally remain far enough out to sea that they cannot be engaged by the enemy's shore defence systems. Thus, a contemporary blockade can be undertaken without resort to an armed attack against either neutral shipping or the enemy coast-line. Arising from this is the issue of whether or not a non-kinetic operation, such as blockade, can be considered as an attack under the auspices of Additional Protocol I.

It is often said that IHL is developed reactively to regulate the war that just finished. With this in mind it is apparent that when the signatories agreed to the Geneva Conventions and the definition of "attacks" as found in article 49 of Additional Protocol I, they understood the term as being synonymous with words such as bombardment, air strikes and other violent acts that were the norm during the Second World War and other conflicts of the mid-twentieth century.

Early post-Protocol analysis of the meaning of 'attack' reflected the positivist approach that was envisioned by the working groups when article 49 was drafted. Writing in their commentary to Additional Protocol I in 1982, Professors Bothe, Partsch and Solf stated that the term "'acts of violence' in article 49 denotes physical force."<sup>144</sup> In advocating this

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<sup>144</sup> Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, (The Hague: Martinus Nijhoff Publishers, 1982) at 289. [New Rules]

narrow interpretation of the term, they rejected the possibility that any action that was not a violent act with near instantaneous effects (such as aerial bombardment), could be considered an attack. They specifically stated that the “concept of ‘attacks’ excludes dissemination of propaganda, embargoes or other non-physical means of psychological, political or economic warfare.”<sup>145</sup>

Accepting that Bothe, Partsch and Solf’s commentaries were accurate reflections of what the working parties and drafters contemplated while developing the Protocols in the 1970’s, it must be determined whether the scope of the definition of ‘attacks’ has evolved over the thirty years since the Protocols were adopted. In order to do so, it is necessary to consider the intentions of the drafters, not just on a paragraph by paragraph basis, but on an over-all assessment of the purposes behind the development Protocols. It is also imperative to consider how globalization and the development of new technologies have changed the nature of warfare over the past three and one half decades.

Understanding that one of the primary intentions of the protocol was to protect civilians from attacks and other forms of violence, and that not all eventualities could be addressed in a given treaty, the drafters of Additional Protocol I included a version of the Martens Clause<sup>146</sup> at Article 1(2). The addition of the article points to the intent of the

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<sup>145</sup> *Ibid* at 289.

<sup>146</sup> The Martens Clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899. It states in part, that “Until a more complete code of the laws of war has been issued... the inhabitants and the belligerents remain under the protection and the rule 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.” Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. Large military powers argued that they should be treated as *francs-tireurs* and subject to execution, while smaller states contended that they should be treated as lawful combatants. Although the clause was originally formulated to resolve this particular dispute, it has subsequently reappeared in various but

Parties to encourage the Protocol to evolve to meet the “principles of humanity and the dictates of the public conscience.” It follows, therefore, that the Protocol should be interpreted broadly and purposefully, as set out in the preamble, “to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.”<sup>147</sup>

In the ICRC commentary published in 1987, the interpretation of the term “attacks” reflects a broader and more purposeful definition than that afforded by Professor Bothe et al. As stated at paragraph 1879 of the ICRC Commentary, ‘It is quite clear that the meaning given here is not exactly the same as the usual meaning of the word.’<sup>148</sup> The authors note that the definition “closest to the meaning of the term as used in the Protocol [is] ‘to set upon with hostile action.’”<sup>149</sup> By not restricting the meaning to a very narrow and limited set of actions, this more expansive interpretation appears to better reflect the aims and spirit of the Protocol. Of particular significance in the ICRC Commentary is the avoidance of an exclusive interpretation. Whereas the Bothe commentary rejects embargo and other forms of economic affect as being part of ‘attack’, the ICRC does not. By not engaging in exclusive language, the ICRC acknowledged that the term “attacks” should not be read narrowly; the term should be broadly defined so that it can evolve in step with humanitarian law.

As one of the leading contemporary academics in IHL, Professor Schmitt has written extensively on the issue of ‘attack’, and is one of the few scholars who has analyzed the

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similar versions in later treaties regulating armed conflicts: see “The Martens Clause and the Laws of Armed Conflict” online: ICRC < <http://www.icrc.org/eng/resources/documents/misc/57jnhy.htm>>.

<sup>147</sup> Additional Protocol I, *supra* note 2 at Preamble.

<sup>148</sup> *Commentaries*, *supra* note 128 at para 1879.

<sup>149</sup> *Ibid.*

meaning of the term in Part IV of Additional Protocol I as it applies to post-contemporary conflict. He advocates that ‘attacks’ is “...a term of prescriptive shorthand intended to address specific consequences. It is clear that what the relevant provisions hope to accomplish is shielding protected individuals from injury or death and protected objects from damage or destruction. To the extent that the term “violence” is explicative, it must be considered in the sense of violent *consequences* rather than violent *acts*. Significant human physical or mental suffering is logically included in the concept of injury; ...”<sup>150</sup>

Although much of Professor Schmitt’s writing in this area is focused on computer network attack (CNA), his analysis is far reaching. His conclusions constitute a rejection of the Bothe approach toward a restrictive interpretation of attacks, dismissing the narrow act-based model in preference of a more expansive and consequence-driven construction. Through use of this purposeful form of analysis, Schmitt argues that means and methods of warfare that did not even exist at the time of the drafting of the Protocol can and should be assumed into the body of law. In so doing, Schmitt advocates that the Protocol can remain relevant as new methods of warfare emerge and the very nature of warfare changes.

A review of legal literature and military doctrine manuals<sup>151</sup> indicates a broad acceptance of Professor Schmitt’s conclusions that non-kinetic actions which cause physical damage and suffering constitute attacks for the purposes of determining the application of the attack provisions of Additional Protocol I.

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<sup>150</sup> Schmitt, “Wired Warfare”, *supra* note 142 at 377.

<sup>151</sup> See e.g. Louise Doswald-Beck “Some Thoughts on Computer Network Attack and the International Law of Armed Conflict”, and Knutt Dormann, “Applicability of the Additional Protocols to Computer Network Attacks” in Michael N. Schmitt and Brian T. O’Donnell, eds, *Computer Network Attack and International Law: War Studies*, vol 76 (Newport: US Naval War College, 2002); Paul A. Walker, “Rethinking Computer Network Attack: Implications for Law and US Doctrine” (2010), online: SSRN <<http://ssrn.com/abstract=1586504>>; United States Joint Publication 3-13: *Information Operations* (2006) online: Joint Electronic Library <[http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_13.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_13.pdf)> .

The acceptance of the Schmitt consequence-based interpretation of attacks not only opens the door to a variety of new types of warfare that do not rely on kinetic attack, but permits, as well, a re-evaluation of existing methods of warfare to determine whether they constitute attacks in spite of their benign appearance. Whereas at the time of the drafting of the Protocol it might not have occurred to the Parties that embargo or blockade could be considered to be an attack, the contemporary focus the effects of a military action rather than on the method of warfare utilized, infers that an action such as blockade would fall well within the definition of “attacks.”

*i. Indiscriminate Attacks*

“...attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians... The Appeals Chamber finds that the impugned finding ... supports the view that a direct attack can be inferred from the indiscriminate character of the weapon used.”<sup>152</sup>

Underlying the fundamental protection arising from article 48 is the requirement that only military objectives<sup>153</sup> may be attacked. Ergo, it follows that “The civilian population as such, as well as individual civilians, shall not be the object of attack.”<sup>154</sup>

Article 51(4) of Additional Protocol I explicitly prohibits indiscriminate attacks and defines them as:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and

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<sup>152</sup> *Prosecutor v. Stanislav Galić*, IT 98-29-A, Judgement on Appeal, (30 November 2006) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), (WL) at para 132.

<sup>153</sup> “Military Objectives” is defined in Additional Protocol I, *supra* note 2 at art 52(2) as, “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.”

<sup>154</sup> Additional Protocol I, *supra* note 2 at art 51(2).

consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>155</sup>

Accepting, as most contemporary commentators do, that Professor Schmitt's consequence based interpretation of 'attacks' is the correct method for determining the applicability of Article 48, it is necessary to determine whether blockade meets the criteria for 'attack'. While the short answer would appear to be yes, it must be noted that, "a general principle only ... becomes fully operative when it is accompanied by rules of application."<sup>156</sup> As a result, any interpretation of article 51 must be considered in light of article 49 which sets out the scope for the part of the Protocol (Articles 48-67) that pertains to the protection of civilians against the effects of warfare.

The fact that the drafters of Additional Protocol I did not intend to change the law of blockade is indicated in article 49(3): "The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air."<sup>157</sup> Considering this, Professor Dinstein argues that, "those advocating the

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<sup>155</sup> *Ibid* at art 51(4).

<sup>156</sup> Commentaries, *supra* note 128 at para 2091.

<sup>157</sup> Additional Protocol I, *supra* note 2 at art 49(3) (Emphasis mine). The commentaries state at para 2092 that

According to the Rapporteur of Committee III: 'The fact that the paragraph does not change the law of naval blockade is made clear by Article 44, (5) paragraph 1.' This remark appears to be correct. However, it should be noted that there is some uncertainty as regards the present state of the customary law relating to blockades. In fact, although they were codified in the Declaration of London of 24 February 1909, this instrument was never ratified. Furthermore, the rules were not always complied with during the Second World War. Thus it is to be hoped that the rules relating to blockades will be clarified as part of a future revision of certain aspects of the laws of war at sea, a revision for which there is a great need. Such a reexamination should make it possible to duly take into account the principles put forward in the Protocol which prohibit starvation as a method of warfare.

illegality of blockade...are forced to concede that their position collides head on with the intention of the diplomatic conference that the instrument it produced have no impact on the law of blockades.”<sup>158</sup>

While Professor Dinstein’s analysis of the original intent of the drafters, and ultimately the signatories to the Protocol may be correct, those original intentions must be considered in the context of the over-all purpose of Part IV of the Protocol, and specifically in respect to how the protections for civilians, including the advancements in protections offered through IHRL, have evolved in the 35 years since Additional Protocol I was signed. That is to say, the practice of international humanitarian law has progressed significantly since 1977, particularly in relation to the collateral effects of military operations. In this respect, while the decision to not restrict blockade in Additional Protocol I was a valid reflection of the intention of the signatories at that time, it is arguable that in the 21<sup>st</sup> century paradigm, a treaty which permits the starvation of civilians as a side effect of military operations is unconscionable.

As noted earlier, and illustrated in the examples of Germany, Iraq and Gaza, the intentional destruction of an economy through blockade can have devastating consequences for the civilian population that relies on that economy for its survival. Thus, on a consequence based analysis, blockade’s effects of hunger, disease and starvation meet Schmitt’s criteria of physical and psychological suffering. Therefore, just as the drafters of Additional Protocol I may have intended for the term “attack” to refer only to kinetic actions,

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<sup>158</sup> Dinstein “The Right to Humanitarian Assistance” (2000) 53 USNWC Rev 4 77at 82 [Dinstein, “Humanitarian Assistance”].



it is arguable that the intention to exclude blockade from the provisions of part IV of Additional Protocol I is untenable in the context of twenty-first century humanitarian law.

An analysis of distinction does not end with the simple fact that a civilian population can be negatively affected by a military operation. IHL acknowledges and accepts that in military operations civilians may be injured or killed, and their property destroyed, so long as the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>159</sup> The principle in IHL lies not against the incidental harm caused to civilians in an attack, but against directing attacks against them. In accordance with the dictates of Humanitarian Law only military objectives can be the object of attacks. Therefore in determining whether or not an attack is lawful *ab initio* an assessment of whether or not the target is a 'military objective' is required.

It is commonly accepted that to qualify as a military objective under Article 52(2), an object has to satisfy two simultaneous conditions: the object has to make an effective contribution to the military action of the defender; and, its destruction, capture or neutralization has to offer the attacker a definite military advantage. As Professor Schmitt notes, "a potential target either qualifies as a military objective because it makes an effective contribution to military action (through nature, location, purpose or use) and destruction or neutralization will yield a definite military advantage...or it does not."<sup>160</sup>

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<sup>159</sup> Additional Protocol I, *supra* note 2 at art 51(5)(b).

<sup>160</sup> Michael N. Schmitt, "Fault Lines in the Law of Attack", in Susan C. Breau and Agnieszka Jachec-Neale eds., *Testing the Boundaries of IHL* (London: The British Institute of International and Comparative Law, 2006) at 285 [Schmitt, "Fault Lines"].

One of the most thorough explanations on interpreting ‘military objective’ is found in the United Kingdom’s Law of War Manual. Its amplification of article 52(2) states, “The term “military objective” includes combatant members of the enemy armed forces and their military weapons, vehicles, equipment and installations. It may include other objects which have military value such as bridges, communications towers, electricity and refined oil production facilities. Objects are only military objectives if they come within the following definition: 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.”<sup>161</sup>

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<sup>161</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004) at paras 5.4.1 and 5.4.4 [*UK LOAC Manual*]. The definition of military objectives contains various elements that require explanation:

- a. The second part of the definition limits the first. Both parts must apply before an object can be considered a military objective.
- b. Attacks on military objectives that cause incidental loss or damage to civilians are not prohibited so long as the proportionality rule is complied with.
- c. “Nature” refers to the type of object, for example, military transports, command and control centres or communications stations.
- d. “Location” includes areas which are militarily important because they must be captured or denied to the enemy or because the enemy must be made to retreat from them. An area of land can, thus, be a military objective.
- e. “Purpose” means the future intended use of an object while “use” means its present function.
- f. The words “nature, location, purpose or use” seem at first sight to allow a wide discretion, but they are subject to the qualifications later in the definition of “effective contribution to military action” and the offering of “a definite military advantage”. There does not have to be geographical proximity between “effective contribution” and “military advantage”. That means that attacks on military supply dumps in the rear or diversionary attacks, away from the area of actual military operations, can be launched.
- g. “Military action” means military action generally, not a limited or specific military operation.
- h. The words “in the circumstances ruling at the time” are important. If, for example, the enemy moved a divisional headquarters into a disused textile factory, an attack on that headquarters would be permissible (even though the factory might be destroyed in the process) because of the prevailing circumstances. Once the enemy moved their headquarters away, the circumstances would change again and the immunity of the factory would be restored.

The Manual then provides a checklist of ten points which will assist in the determination as to whether or not an objective is a “military objective.”<sup>162</sup>

While the UK checklist makes it clear that that there must be a direct link between the destruction of the objective and the *military advantage* realized, not all nations concur. For example, the United States, which is not a signatory to Additional Protocol I, employs a different standard for determining what constitutes a military objective. As described in the USNWC Commanders Handbook, military objectives “are combatants, military equipment and facilities (except medical and religious equipment and facilities), and those objects which, by their nature, location, purpose, or use, *effectively contribute to the enemy’s war-fighting or war-sustaining capability* and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force.”<sup>163</sup>

Under the test for “military objective” as outlined in the “UK Manual of the Law of Armed Conflict”, the economy as a whole cannot be a military objective because it is a civilian object and the destruction of it would generally be considered too remote to offer a

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- i. “Definite” means a concrete and perceptible military advantage rather than a hypothetical and speculative one.
  - j. “Military advantage”. The military advantage anticipated from an attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The advantage need not be immediate .

<sup>162</sup> *Ibid.*

<sup>163</sup> *Commander’s Handbook, supra* note 7 at para 8-2 (emphasis mine).

“direct military advantage”<sup>164</sup>. The same, however, cannot be said for the US test. The ‘*effectively contribute to the enemy’s war-fighting or war-sustaining effort*’ has been criticized as being too broad, incorporating a “but-for causation [test] - but for having money, the enemy cannot continue the war.”<sup>165</sup> Taken to its extremes, the US definition for ‘military objective’ could include such things as a country’s taxation system, natural resources, energy sources and food supplies, and ultimately, the entire economy.

While under the US interpretation of “military objective”<sup>166</sup> it is arguable that the economy could be a legitimate military objective, it is quite clear that the majority of the nations of the world do not concur. “Targeting of the sort practiced during the Second World War (WWII), when anything that contributed to the war effort could be attacked, is no longer acceptable.”<sup>167</sup>

An attack that does not “...distinguish between the civilian population and combatants and between civilian objects and military objectives,”<sup>168</sup> is an indiscriminate attack. In accordance with article 52(2) of Additional Protocol I the economy, as an entity, is not a ‘military objective’. It follows therefore, that any attack whose goal it is to strangle an

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<sup>164</sup> *UK LOAC Manual*, *supra* note 161 at para 5.24.2.

<sup>165</sup> “Report on Expert Meeting ‘Targeting Military Objectives.’” (12 May 2005) Geneva, University Centre for IHL at 6 [Experts’ Meeting].

<sup>166</sup> Although the United States has one of the largest and most active military forces in the world, its definition of military objectives is not shared by most states party to Additional Protocol I. As of 15 June 2011, there were 171 States Party to Additional Protocol I. online: ICRC <<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>>.

<sup>167</sup> Experts’ Meeting, *supra* note 165 at 5.

<sup>168</sup> Additional Protocol I, *supra* note 2 at art 48.

economy<sup>169</sup> violates the principle of distinction. The objective in a contemporary blockade is the targeted state's economy.

There can be no doubt that the blockade of Germany was an indiscriminate act of warfare aimed not only at the German military, but the whole population of Germany as well. It is clear, from official British government documents, that the German economy and the German population were considered to be valid targets in what was, by all measures, a total war. Indeed, there is evidence to show that the British government demonstrated concern that the blockade, as an act of war against Germany, might not be legitimate under customary law. Ultimately, in order to legitimize the blockade and its effects against the German people, the British characterized the naval blockade as a reprisal against Germany in response to its policy of unrestricted submarine warfare.<sup>170</sup>

As was the case with Germany, the blockade of Gaza was, and continues to be aimed not just at the leadership and military capabilities of Hamas, but at the civilian population of Gaza as well.<sup>171</sup> By adopting a strategy of using hunger pangs "... to encourage the Palestinians to force Hamas to change its attitude towards Israel or force Hamas out of

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<sup>169</sup> While attacks against the economy as an entity are not attacks against military objectives, there is no doubt that attacks against portions of the economy can be conducted lawfully. For example, munitions factories and aircraft manufacturing facilities, while part of the economy, are military objectives and can be lawfully attacked, so long as it does not cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

<sup>170</sup> Phillips, *supra* note 1 at 230-235. Under IHL, a reprisal is a deliberate act that violates the law of war, conducted in response for an illegal act done by the enemy. While reprisals were commonplace prior to the adoption of the Geneva Conventions of 1949, they were significantly restricted by the advent of Additional Protocol I. It is now unlawful to conduct reprisals against prisoners of war, civilians, and civilian objects.

<sup>171</sup> Evidence of the indiscriminate nature of the current Israeli action is found in statements by Israeli officials, and in Israeli documents. See for example, Duv Wienglass statement, as quoted in Urquhart, *supra* note 93 and Heller, *supra* note 100.

government,”<sup>172</sup> Israel has employed blockade as a method of warfare aimed simultaneously at the Hamas regime and the morale and well-being of the civilian population. By engaging in a complete naval blockade, and restricting or prohibiting cross border trade, Israel is inflicting serious and long lasting damage on the citizenry of Gaza. Insofar as Israel’s strategy is aimed at the morale of the civilian population, with the effect causing hunger, malnutrition, disease or other forms of suffering amongst the population, those actions constitute indiscriminate attacks.

While under Dinstein’s interpretation of Additional Protocol I any state can argue that the starvation of a population is not unlawful so long as it is not the sole objective of a military operation, the evolution IHL, with increased emphasis on protection of civilians, indicates that such arguments no longer find favour in the international community.

The examples from Germany, Iraq and Gaza demonstrate that when the aim of a blockade is to wreak havoc on a state’s economy, it is virtually impossible to achieve that objective without severely and adversely affecting the civilian population. This effect grows exponentially with the degree of the effectiveness of the blockade and the longevity of it. In other words, in a protracted blockade that follows the rules as established and practiced in customary law, the civilian population will suffer as much as, if not more than, the blockaded regime and its military apparatus. From this perspective, blockades, as currently practiced, are unlawful military operations because in situations of full blockade it is impossible to

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<sup>172</sup> Urquhart, *ibid.*

“direct operations only against military objectives”<sup>173</sup> in the targeted state(s). In other words, blockades are impugned because they fail the test of distinction.

#### **D. Proportionality and Blockade**

Assuming that a military operation does not violate principle of distinction *ab initio*, it falls on the attacking party to ensure that a proper analysis of the related yet distinct principle of proportionality is conducted before a military operation is commenced. The test for proportionality, which is found at article 51(5)(b) of Additional Protocol 1, forbids as indiscriminate, “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>174</sup> The proportionality test, introduced in 1979, represents one of the most significant advances respecting the protection of civilians in armed conflict. Whereas in the past “once an attack was directed at an indisputable military objective, any unavoidable injury or damage caused to civilians or civilians was accepted... this is no longer the case.”<sup>175</sup> While the proportionality test is an acknowledgement that in armed conflict civilian casualties are inevitable, it reflects the international community’s abhorrence toward unmitigated civilian damage by attempting to strike a balance between the principles of military necessity and the requirements of humanity.

While the proportionality test has changed the face of warfare, it is not, by any means without its detractors. Critics of the proportionality test base their objections on two main

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<sup>173</sup> Additional Protocol I, *supra* note 2 at art 48.

<sup>174</sup> *Ibid* at art 51(5)(b).

<sup>175</sup> Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2008) at 119. [Dinstein, *Hostilities*].

arguments. The first is that the proportionality test is exceedingly difficult to apply to a strategic operation such as blockade. The basis of this contention is the fact that the proportionality test is a pro-active assessment that must be conducted before an attack is commenced. As Dinstein notes, “The Protocol refers to expected injury to civilians and to anticipated military advantage. From this, one can deduce that what ultimately counts, in appraising whether an attack which engenders incidental loss of civilian life or damage to civilian objects is ‘excessive’, is not the actual outcome of the attack, but the initial expectation and anticipation.”<sup>176</sup> As is demonstrated in the International Institute for Humanitarian Law’s *Rules of Engagement Handbook*, there is a sequence of steps that must be followed when planning an attack.<sup>177</sup> “The implications here are unsurprising: planners and decision makers cannot authorize the launching of disproportionate attacks and must cancel or suspend attacks if their disproportionate nature ‘becomes apparent’.”<sup>178</sup>

In order to conduct a blockade that would not violate the principle of proportionality, a thorough analysis of the expected effects of the operation would have to be conducted. When attempting to conduct the test with respect to a blockade and the anticipated effects it would likely have on a civilian population, one of the key foci of the analyses would necessarily be on whether or not the targeted nation is self sufficient in food and other humanitarian items. If the answer to that question is no, then, it would be very difficult to argue that a full and effective blockade that lasts beyond the point that the nation’s food reserves (if any) last, would be proportional.

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<sup>176</sup> *Ibid* at 121.

<sup>177</sup> Alan Cole, Phillip Drew et al, *International Institute for Humanitarian Law Rules of Engagement Manual* (San Remo: International Institute for Humanitarian Law, 2009) at 27.

<sup>178</sup> Robert P. Barnidge, Jr., “The Principle of Proportionality Under IHL and Operation Cast Lead” in William C. Banks, eds, *New Battlefields/Old Laws* (New York: Columbia University Press, 2011) at 277.



If the state does have the capacity to feed its citizenry, then assessments such as the reliance on imports for fertilizers, farm machinery and other agricultural items would be required in order to determine what, if any, effect the denial of those items might have. Such analysis would require a review not only of existing agricultural capacity, but the projected capacity of the nation's agricultural sector during wartime when resources and manpower might be significantly decreased or diverted.

As history demonstrates, civilians are more "...susceptible to the dire consequences of a lengthy blockade"<sup>179</sup> than are members of the military, because critical foodstuffs will be diverted to the front so that soldiers can continue to fight. Acknowledging that the severity of humanitarian effects in a complete blockade increases exponentially with time, the performance of a valid and realistic analysis of the potential effects of a lengthy blockade would be an incredibly difficult, if not impossible, task.<sup>180</sup> As an analogy, Professor Fenrick notes, "If military benefit is assessed on too broad a basis, for example, the military benefit derived from the World War II strategic bombing offensive against Germany as compared to the total losses suffered by the enemy civilian population as a result of that campaign, then it may well be extremely difficult to apply the proportionality equation until the war has ended."<sup>181</sup>

Professor Fenrick's statement supports the notion that the validity of a proportionality analysis in a long term operation would be questionable. If a valid proportionality test cannot

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<sup>179</sup> Dinstein, *Hostilities*, *supra* note 175 at 137.

<sup>180</sup> For a discussion on the application of mid-to long term effects in the proportionality equation see Timothy L. H. McCormack & Paramdeep B. Mtharu, "Expected Civilian Damage & The Proportionality Equation: IHL & Explosive Remnants Of War." Online: Asia Pacific Centre for Military Law <[http://www.apcml.org/documents/un\\_report\\_exp\\_civilian\\_damage\\_1106.pdf](http://www.apcml.org/documents/un_report_exp_civilian_damage_1106.pdf).>

<sup>181</sup> William Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare" (1982) 98 Mil L Rev 91 at 107.

be conducted prior to such an operation it would follow that the decision to engage in a complete blockade would constitute an indiscriminate attack.

The second challenge in conducting any analysis of proportionality lies in the implementation of the test itself. The essence of the test is subjective, requiring the military commander to determine whether or not the anticipated civilian casualties and property damage will be excessive in relation to the concrete and direct military advantage that he wishes to accomplish.

One of the key weaknesses in assessing proportionality lies in the ambiguity of the very meanings of the terms “excessive” and “concrete and direct military advantage”. While much has been written on the question of what these terms mean, there is no absolute guidance, and therefore, no discernable standard for commanders to follow or adhere when planning and conducting attacks. This problem is illustrated by the authors of the Turkel Report, who wrote, “Within the “zone of proportionality”, there can be disagreement regarding the impact of a decision and the answers can be politically and morally controversial. There is no exact formula against which a determination of excessiveness can be made. As a result, a determination that an act is "disproportionate" is invariably left to the clearest of examples.”<sup>182</sup>

“The fact that considerable damage has been caused does not necessarily mean that the damage is ‘excessive.’ The word ‘excessive’ does not refer to an absolute concept and it is always measured ‘in light of the military advantage that the attacker anticipates to attain through the attack. A significant military advantage can justify significant damage, whereas a

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<sup>182</sup> Turkel Report, *supra* note 95 at 100.

marginal advantage will not.”<sup>183</sup> Much lies in the good faith of commanders and their willingness to apply the spirit of the Protocol, which requires them to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects.”<sup>184</sup>

The Turkel Report provides a classic example of how the proportionality test can be manipulated to favour the requirements of military necessity over concerns for humanity. For example, in the Report, the Israeli Commission observed that. “... the combined purpose of the naval blockade and the land crossings policy is to strategically limit the ability of the Hamas to carry out operations against Israel and its citizens. An important fact that should be taken into account in this regard is that the number of missile attacks from the Gaza Strip at Israel that has fallen from a record of 3,278 in 2008 to 165 in 2010.... This ‘anticipated military advantage,’ which concerns restricting Hamas’s ability to continue to attack the citizens of Israel, is significant, especially in view of Israel’s responsibility to protect its citizens against attacks and security threats, the scope and duration of the attacks in the past, and the fact that Israel is confronted against an enemy that is committed to Israel’s destruction.”<sup>185</sup>

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<sup>183</sup> *Ibid* at 90.

<sup>184</sup> Additional Protocol I, *supra* note 2 at art 57(2)(a)(ii).

<sup>185</sup> Turkel Report, *supra* note 95 at 92-93. The Israeli conclusions regarding food and humanitarian aid contradict the findings of a significant number of agencies, including the United Nations, that conduct humanitarian operations in Gaza. As a result of this statement by the Commission, which appears to be disingenuous, it is difficult to accept the Israeli conclusions regarding proportionality. It must be noted that the Turkish government’s investigation into the Flotilla incident reached a very different conclusion with respect to the proportionality of the effects against the civilian population of Gaza. Unfortunately, however, the writers of the Turkish report appear to have confused the *jus in bello* proportionality test with that which is used in the *jus ad bellum* concept of self defence. As a result of applying the incorrect legal test, the Turkish report’s conclusions lack credibility. See: Government of Turkey “Turkish National Commission of Inquiry: Interim Report On The Israeli Attack on The Humanitarian Aid

While providing valid and compelling statistics to support the military necessity side of the proportionality equation, the Turkel Commission failed to provide any particular statistics or analysis of the effects that the blockade may be having on the civilian population. Rather, by stating that "...that the naval blockade has not caused starvation in the Gaza Strip, and that Israel has not prevented the passage of objects essential for the survival of the civilian population or the passage of medical supplies,"<sup>186</sup> the Commission was able to conclude that Israel's combined blockade and border closure policies were not disproportionate.<sup>187</sup> The Commission's conclusions respecting the humanitarian effects of the blockade are heavily disputed.<sup>188</sup> As a result of arriving at its conclusions without conducting a full analysis of the harm done to Gaza's civilian the over-all credibility of the report has been negatively affected.

## E. Starvation and the Law of Blockade

From the biblical accounts of the battle of Jericho through to the siege of Sarajevo in the 1990's, the history of warfare abounds with examples of starvation being used as a

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Convoy To Gaza on 31 May 2010." online: Turkish Ministry of Foreign Affairs, <[http://www.mfa.gov.tr/data/Turkish%20Interim %20Report.pdf](http://www.mfa.gov.tr/data/Turkish%20Interim%20Report.pdf) > at pp. 33-36 [Turkish Report].

<sup>186</sup> Turkel Report, *supra* note 95 at 94.

<sup>187</sup> Similarly, the *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident July 2011*. online: The United Nations, <[http://www.un.org/News/dh/infocus/middle\\_east/Gaza\\_Flotilla\\_Panel\\_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf),> at p 43[Palmer Report], found that, "while we were unable to conclude that the combined effects of the naval blockade and the crossings policy rendered the naval blockade disproportionate, we can make the policy judgement that the procedures applied by Israel in relation to ... Gaza are unsustainable and need to be changed." This very statement underlies the essential problem with applying the proportionality test to blockade. In the Palmer Report, the Commission found that the combined effects of the blockade and land crossings policy were not disproportionate, yet said that the policy should not be maintained. This argument is internally inconsistent. If the policy is not disproportionate, then it means that the collateral damage is not excessive in relation to the direct and concrete military advantage anticipated. If this is the case, then there should be no reason to halt this proportionate action. By stating that the blockade policy is "unsustainable and should be changed," the Commission is acknowledging that the policy is either failing to distinguish in its effects or that it is disproportionate in its effects. Otherwise, there should be no reason in law to discontinue the operation.

<sup>188</sup> See e.g. "Blockade of Gaza Denies Palestinians 'Humanity and Dignity' Says UN Special Rapporteur" on line: UNOHCHR <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11179&LangID=E>>; "World Health Organization: Gaza Health Fact Sheet" online: WHO <<http://unispal.un.org/UNISPAL.NSF/0/80E8238D765E5FB7852576B1004EC498>>.

method of warfare against an adversary. Usually only possible to accomplish during a siege or blockade in which a force can cut off the importation of all foodstuffs, a starvation campaign affects everyone inside the targeted area. Historically, civilians enjoyed no protection from starvation. Indeed, their presence within a besieged area was considered to benefit the attacking force, as the besieged garrison had to not only with the requirements of its military personnel, but with the needs of the resident civilians as well. In fact, it was common practice in warfare for besieging forces to intercept civilians attempting to flee a besieged area and turn them back so that they would continue to be a logistical burden for the besieged or blockaded force.

As is the case in any situation in which commodities become scarce, nations that face shortages will ration commodities. As evident in historical examples from Germany and Iraq, “soldiers ... [were given] priority when distributing food; they were vital to the defence of the nation. Those who came lowest down the food-chain were those who contributed the least to the war effort: the old, the young, the deranged, the physically unfit. These, the true non-combatants, were the principal victims of the economic war.”<sup>189</sup>

The first protections against the starvation of civilians were provided for in The Fourth Geneva Convention in 1949 (GC IV). In particular, Article 23 (1) provided, in part, that “Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise

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<sup>189</sup> Hew Strachan, “Strategic Bombing and the Question of Civilian Casualties up to 1945” in Paul Addison and Jeremy A. Crang, eds, *Firestorm: The Bombing of Dresden, 1945* (London: Random House, 2006) at 5.

permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.”<sup>190</sup>

While prohibitions against starvation were introduced in Geneva Convention IV, the obligations of Parties to allow the free passage of the consignments under Geneva Convention IV are subject to significant conditions. First and foremost, the provisions of Geneva Convention IV that pertain to the starvation of civilians are applicable only in times of occupation. This, by its very nature, excludes blockade, which is a form of active warfare that generally ends once the target nation is no longer able to sustain military action. Secondly, the passage of foodstuffs and other items necessary for survival is obligated only for children under the age of fifteen and expectant mothers<sup>191</sup>, that is to say, the obligation does not apply universally to all civilians. Finally, the provisions of article 32 are “subject to the condition that [a] Party is satisfied that there are no serious reasons for fearing: (a) that the consignments may be diverted from their destination, (b) that the control may not be effective, or (c) that a definite advantage may accrue to the military efforts or economy of the enemy...”<sup>192</sup>

During the development of Additional Protocol I it was recognized that there remained a significant gap in relation to the protection of civilians from starvation during armed conflict. Responding to this gap in humanitarian protection, the drafting committees created Article 54, which provides in part:

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<sup>190</sup> *The Geneva Convention Relative to the Protection of Civilian Persons in Time of War Of August 12, 1949*, 75 UNTS 287, Can TS 1965 No 20 (entered into force 21 October 1950, accession by Canada 14 May 1965) art 23(1) [Geneva Convention IV].

<sup>191</sup> *Ibid.*

<sup>192</sup> Jean-Marie Henckaerts, and Louise Doswald-Beck eds, *Customary International Humanitarian Law*, (Cambridge: Cambridge University Press 2005) at para 1138 [*Customary Law Study*].

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

Whereas Article 54 may appear on its face to forbid any military action that causes starvation amongst a civilian population, the article cannot be considered in isolation from other articles in part IV of the Protocol. Specifically, when interpreting article 54, its provisions must be considered in conjunction with those of Article 49(3) which state:

The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.<sup>193</sup>

The qualification in article 49(3) has led to considerable disagreement with respect to how or if article 54 applies during blockade operations. A review of the Commentary to the Additional Protocols indicates that during the negotiations of the Part IV to the Protocol, there was a specific intention to ensure that the provisions of Article 54 would not apply to blockade. This is reflected in the statement of the Rapporteur of Committee III when he said

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<sup>193</sup> Additional Protocol I, *supra* note 2 at art 49(3).

that, “The fact that the paragraph does not change the law of naval blockade is made clear by article [49].”<sup>194</sup> As the Commentary notes, “this comment appears to be correct.”<sup>195</sup>

The inclusion of Article 49(3) has caused significant debate as to whether or not the article prohibits blockades that cause starvation amongst civilians. As Professor Dinstein points out, because of the operation of article 49(3) “no...obligations exist outside of occupied territories,”<sup>196</sup> that require the free passage of foodstuffs for all civilians.

This interpretation is, according to Professor Heintschel von Heinegg, “untenable.” He advocates that the proper interpretation of Article 49 is that it “applies to naval blockades if they may affect the civilian population...on land”<sup>197</sup> He further argues that “if the establishment of a blockade causes the civilian population to be inadequately provided with food and other objects essential for their survival, the blockading party must provide for free passage of such essential supplies.”<sup>198</sup>

The differing positions between Professors Dinstein and Heintschel von Heinegg are reflected in the variety of directions contained in the doctrines of various militaries. For example, nations, such as New Zealand<sup>199</sup> adhere to the notion that the provisions of Part IV of Additional Protocol I do not apply to blockade operations, but do accept the notion that the conduct of a blockade with the sole intention of starving the civilian population would

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<sup>194</sup> Commentaries, *supra* note 128 at para 2092.

<sup>195</sup> *Ibid.*

<sup>196</sup> Dinstein, “Hostilities”, *supra* note 175 at 139.

<sup>197</sup> Wolff Heintschel von Heinegg, “The Law of Armed Conflict at Sea” in Deiter Fleck, ed, *The Handbook of International Humanitarian Law*, (Oxford: Oxford University Press, 2008) at 555 [IHL Handbook].

<sup>198</sup> *Ibid.*

<sup>199</sup> New Zealand Military Manual as quoted in *Customary Law Study*, *supra* note 192 at Rule 53, states that blockade is not prohibited “even if it causes some collateral deprivation to the civilian population, so long as starvation is not the specific purpose”.



constitute an indiscriminate attack. Thus, nations which apply this interpretation hold that “the prohibition ... of starvation of civilians as a method of warfare does not by itself render blockade unlawful as a method of warfare, provided that such starvation is not the sole purpose of the blockade.”<sup>200</sup>

The Canadian position on the issue of starvation and blockade, which is drawn directly from the San Remo Manual,<sup>201</sup> represents a slightly different approach by providing that, “The declaration or establishment of a blockade is prohibited if:

- a. it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- b. the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.”<sup>202</sup>

Ultimately both the Canadian and New Zealand policies permit the starvation of civilians, the fundamental difference being that the Canadian manual stipulates that the proportionality test must be applied to the operation, while the New Zealand manual does not.<sup>203</sup>

A third approach to the issue of starvation and blockade is exemplified in the manuals of France the United States,<sup>204</sup> which circumvent the issue of Article 49(3) by adopting the

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<sup>200</sup> Dinstein, “Humanitarian Assistance”, *supra* note 158 at 5.

<sup>201</sup> See discussion on *San Remo Manual* below at p.78.

<sup>202</sup> Canadian LOAC Manual, *supra* note 54 at p 8-12. See also *Maritime Operational Zones*, (Newport: US Naval War College, 2006) at p 4-25 which indicates a position that is virtually identical to that of Canada.

<sup>203</sup> See discussion in *Customary Law Study*, *supra* note 192 at Rule 53.

language of Article 70 which states, in part, that, “If the civilian population of any territory under the control of a Party to the conflict...is not adequately provided with [food, medical supplies clothing, bedding, means of shelter, and other supplies essential to the survival of the civilian population ], relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions.”<sup>205</sup>

As with the problems discussed with respect to applying the proportionality test to a strategic operation such as blockade, the use of Article 70 contains a fundamental weakness that lies in the conditional nature of the obligation; it is contingent upon the agreement of the parties to the conflict. Ultimately, if the blockading force and its adversary cannot agree on a humanitarian relief plan, there is no requirement for the blockading force to allow any aid to pass the blockade.

The Swedish IHL Manual underscores the conundrum faced by those who study the most nefarious aspect of blockade in contemporary armed conflict. In what is arguably the most forthright assessment of the state of the law of blockade by any official military publication, it explains that:

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

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<sup>204</sup> *Commander's Handbook*, *supra* note 7 at 7-10: “...neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded should be authorized to pass through the blockade cordon, subject to the right of the blockading force to prescribe the technical arrangements.”

<sup>205</sup> Additional Protocol I, *supra* note 2 at art 70.

warfare, which, according to Article 49:3, shall not be affected by the new rules of Additional Protocol I. There is thus no consensus that the prohibition of starvation shall be considered to include maritime blockade.<sup>206</sup>

## **F. Attempts to Address the Humanitarian Impact of Blockade**

One of the leading international treatises on naval warfare is the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (The San Remo Manual).

Undertaken as a project by the International Institute of Humanitarian Law (IIHL), and prepared by some of the world's foremost specialists in IHL and naval warfare, the San Remo Manual "is a contemporary restatement of the law, together with some progressive development which takes into account state practice, technological developments and the effect of related areas of the law..."<sup>207</sup>

Acknowledging that much of the law of naval warfare is not codified, one of the primary goals of the expert contributors to the San Remo Manual was to design a reference document that could be used to assist legal advisors and naval officers to understand and apply the law in contemporary naval warfare. One of the most contentious topics for the drafters was the issue of blockade and its relevance in modern conflict, with some of the

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<sup>206</sup> Government of Sweden, *IHL Manual* (Stockholm, 1991), Section 3.2.1.5, at 59 - 60. Consider also, Germany's Military Manual, in a section on blockades, states that "starvation of the civilian population as a method of warfare is prohibited". New Zealand's Military Manual states that blockade is not prohibited "even if it causes some collateral deprivation to the civilian population, so long as starvation is not the specific purpose". The US Naval Handbook states that "neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population . . . should be authorized to pass through the blockade cordon".

<sup>207</sup> San Remo Manual, *supra* note 4 at ix..

experts expressing the opinion that the practice of blockade was “entirely archaic... [and] the traditional rules for formal blockade were in complete desuetude.”<sup>208</sup>

While the majority of the participants ultimately concurred that blockade still had a role as a coercive instrument in the law of naval warfare, they acknowledged that the legality of traditional blockade was questionable in the Additional Protocol I era. As was noted by the editor of the San Remo Manual, Professor Louise Doswald-Beck,

... specific mention must be made of the fact that the Manual lays down that starvation blockades are unlawful and requires the blockading power to allow relief shipments if a secondary effect of the blockade is that civilians are short of food or other essential supplies. This is a definite departure from traditional law and reflects the new rules prohibiting the starvation of the civilian population and stipulating the provision of relief supplies which were introduced in Protocol I in 1977 and are now generally seen as having become an established part of international customary law.”<sup>209</sup>

In order to address the issue of starvation in blockade, the drafters of the San Remo Manual created Rules 102 and 103, which state:

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

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

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<sup>208</sup> *Ibid* at 176.

<sup>209</sup> Louise Doswald-Beck, “Background - Development of the San Remo Manual and its intended purpose - Content of the San Remo Manual,” *International Review of the Red Cross*, No. 309. online: ICRC <<http://www.icrc.org/eng/resources/documents/misc/57jmst.htm>>.

and

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

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

Acknowledging the shortfalls in protection afforded by Additional Protocol I, and recognizing that blockade remains a significant threat to the survival and health of affected civilian populations, the drafters of the San Remo Manual imported the language of proportionality from article 51(5)(b) by including in rule 102 a blockade would be prohibited if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.<sup>210</sup>

Although a review of national manuals and policies would indicate that a significant number of states have adopted the San Remo Manuals approach to blockade as *opinio juris*, others dismiss these provisions as *lex ferenda*,<sup>211</sup> noting that the intention of the nations at the time of the signing of Additional Protocol I was to not include blockade under the provisions of Part IV. Still, others criticize the manual for importing the proportionality test into the realm of blockade, a function for which the proportionality test is arguably not well suited. While some commentators have commented negatively on the legal activism found in the

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<sup>210</sup> *San Remo Manual*, *supra* note 4 at art 102(b).

<sup>211</sup> For discussion on the nature and meaning of *lex ferenda* see Hugh Thirlway, "Reflections on *Lex Ferenda*" (2001) 32 *Netherlands Yearbook of International Law* 3.

blockade provisions of the San Remo manual, Professor Heintschel von Heinegg points out that,

[I]n view of the fact that many of its provisions are but a compromise between the differing views within the group of international lawyers and naval experts who drafted it, some of its provisions may be far from perfection. Still, this has not prevented a considerable number of States from adopting most of the San Remo rules in their respective manuals or instructions for their naval armed forces.<sup>212</sup>

When the working group experts gathered in San Remo in 1992, the prevailing attitude in the international community was that blockade had been unaffected by the adoption of Additional Protocol I. This left the drafters in a dilemma. They could either accept the *status quo* and concede that the starvation of civilians was a tolerable incidental consequence of blockade, or they could attempt to influence customary law by allowing for the protection of civilians subjected to blockades. The decision to include protection against starvation during blockades signalled a desire to correct a wrong that had been done when the drafters of Additional Protocol I deliberately excluded blockade from the provisions protecting civilians from starvation.

In his article addressing some of the challenges facing those who advocate changes to the Geneva Conventions and their Protocols, Gregory Rose noted that, “The current treaty instruments have themselves become a holy canon. The suggestion that aspects of them might be inappropriate or ill adapted to 21st Century asymmetrical conflict, and that they

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<sup>212</sup> Wolff Heintschel von Heinegg, “The Current State of The Law of Naval Warfare: A Fresh Look at the San Remo Manual”, in Anthony M. Helm ed, *The Law of War in the 21st Century: Weaponry and the Use of Force, International Law Studies* (Newport: US Naval War College, 2006) Vol 82 at 269.

need rethinking, attracts consternation and opprobrium among many expert practitioners.”<sup>213</sup>

The inclusion of articles 102 and 103 into the San Remo manual was a bold move that promised to invite significant backlash from legal positivists. It was, however, in this writer’s opinion the correct action, demonstrating a principled, reasonable and responsible approach that is in keeping with the intention of the Additional Protocols “...to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.”<sup>214</sup>

As has been noted, the acceptance of the provisions of the San Remo manual has not been universal, and there is “some uncertainty as to the present state of the customary law relating to blockades.”<sup>215</sup> As a consequence, the law in this area is unsettled, the result of which is a lack of international consensus as to the obligations surrounding humanitarian access and assistance to the civilian population of blockaded states.

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<sup>213</sup> Gregory Rose, “Updating IHL and The Laws Of Armed Conflict For The Wars Of The 21st Century” (2007) 14 *Defender: The National Journal of the Australian Defence Association* 21 at 21.

<sup>214</sup> Additional Protocol I, *supra* note 2 at Preamble.

<sup>215</sup> *Commentaries*, *supra* note 128 at para 2093.

## CHAPTER 5: INTERNATIONAL HUMAN RIGHTS LAW

In this part of the thesis I discuss the emergence of International Human Rights Law (IHRL) in the latter half of the twentieth century, with an emphasis on the relationship between it and IHL. Analyzing trends from case law, I suggest that in the proper circumstances, IHRL can and does apply extraterritorially and concurrently with IHL. Expanding upon analysis provided by international tribunals, I suggest that because of the gap that currently exists in humanitarian protection under the law of blockade, IHRL obligations may apply extraterritorially to blockading states.

The end of the Second World War signalled a fundamental turning point for international relations as well as for the relationships between states and their peoples. In 1945, with the horrors of the Second World War still fresh in their minds, the nations of the world converged under the banner of the United Nations and recognized that “the protection of human dignity is a proper concern of international law.”<sup>216</sup>

The inclusion of human rights principles in the Charter of the United Nations<sup>217</sup> signalled a fundamental shift in the scope of public international law.<sup>218</sup> With the advent of the *UN Charter*, and the development of Human Rights mechanisms during the subsequent decades, the relationships between states and between states and their people

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<sup>216</sup> John Cerone, “Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context” (2007) 40 *Isr LR* 72 at 89.

<sup>217</sup> *UN Charter*, *supra* note 5 at preamble.

<sup>218</sup> While the *UN Charter* signalled a new era and emphasis for IHRL, it was not the first instance of human rights law being incorporated into public international law. For example, one of the first true human rights treaties was the *Declaration Relative to the Universal Abolition of the Slave Trade*, 8 February 1815, CTS 63, No 473.



were changed forever. Whereas international law originally governed only the affairs of states, the import of IHRL subjected the relationship between states and people within their control and jurisdiction, to the scrutiny of international bodies.

During the nascent years of IHRL most jurists and practitioners considered IHRL to be a body of law completely separate from IHL.<sup>219</sup> However, as IHRL matured through the latter half of the twentieth century, and the nature of contemporary warfare changed, human rights commissions and international tribunals affirmed the universal principles of human rights, rejecting the notion that IHL and IHRL are two distinctly separate bodies of law that cannot operate in the same paradigm.<sup>220</sup>

The first decade of the twenty-first century has seen a fundamental shift in the manner with which most jurists and scholars interpret the relationship between IHRL and IHL. With very few exceptions<sup>221</sup>, most international tribunals, and the majority of nations, accept the notion that the two bodies of law have undergone a convergence and that they coexist in the paradigm of armed conflict. Thus, in contemporary international law, the primary issues to be resolved rest not in the question of whether IHRL can apply during armed conflict, but rather, when and to what extent IHRL is operative in a particular situation.

## **A. Extraterritorial Application of IHRL**

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<sup>219</sup> Nancie Prud'homme, "Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?" (2007) 40 Isr LR 355 at 357.

<sup>220</sup> See for example, *Nuclear Weapons Opinion*, *supra* note 127 at 240. For more examples of case law affirming the concurrent operation of IHL and IHRL see discussion below.

<sup>221</sup> The United States and Israel are two of the leading opponents to the theory of convergence. Thus, to many observers it was not surprising that the *Turkel* Commission found that the law applicable to the Gaza blockade was IHL and that the application of IHRL was estopped by the doctrine of *lex specialis*.

Whether and to what extent states are bound by human rights obligations with respect to the conduct of their armed forces abroad in armed conflict, occupation, and peace operations is one of the most controversial and politically charged issues in current human rights discourse. In the modern world, states are capable of mobilizing massive destructive power across the globe with increasing speed and efficiency. A crucial consequence of this enhanced military power is the increasing breadth of states' impact on the enjoyment of human rights in territories far beyond their physical frontiers<sup>222</sup>

Most International and regional human rights conventions contain jurisdiction language which generally states that each Party “undertakes to respect and to ensure to all individuals within its ... jurisdiction the rights recognized “ in the respective treaty.<sup>223</sup> Whereas the application of human rights instruments has traditionally been seen by states as being primarily territorial, international tribunals have, in their rulings over the past two decades, have been consistent in their findings that “In exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there (“extra-territorial act”) may amount to exercise by them of their jurisdiction.”<sup>224</sup>

In this twenty year period the issue of extraterritorial jurisdiction of human rights instruments has been addressed in the ICJ, the inter-American Commission on Human Rights and the European Court of Human Rights (ECtHR). While until very recently case law pointed toward a threshold of “effective control” as the catalyst for the extraterritorial application of IHRL obligations, the landmark case of *Al-Skeini*, decided by the ECtHR in July 2011, has moved the threshold quite significantly. The *Al-Skeini* case indicates that

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<sup>222</sup> John Cerone, “Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations.” (2006) 39 Vand J Transnat'l L 1 at 5.

<sup>223</sup> See e.g. *International Covenant on Civil and Political Rights*, art 2 [ICCPR] See also *European Convention for the Protection of Human Rights and Fundamental Freedoms* art 1 [ECHR]: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of [the] Convention.” ; and *American Convention On Human Rights* art 1 [ACHR], “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction...”

<sup>224</sup> *Issa and Others v Turkey*, (2004) ECHR App no 31821/96 at para 68.

jurisdiction under Article one of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* (ECHR) will depend not solely upon the level of control exercised by one state over another, but upon the control that the state exercises over individuals as well.

Prior to the judgement in *Al Skeini*, IHRL tribunals adopted a model of spatial control over territory for determining extraterritorial application of IHRL obligations. Through jurisprudence spanning the last decade, international courts have indicated that long term occupation of one state's territory by another will impose a duty upon the occupier to observe and enforce human rights obligations in the occupied territory. Such was the case in the ECtHR case of *Loizidou v Turkey* in which the court found that "...the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory."<sup>225</sup>

Similarly in the ICJ's *Wall Opinion*, "the court noted Israel's 37 year occupation of Palestinian territory when it rejected Israel's assertion that "humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace." In doing so, the court held that, "Israel is bound by the provisions of the [ICCPR and ICESCR]."<sup>226</sup>

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<sup>225</sup> *Loizidou v Turkey* (Preliminary Objections), (1995) Eur Ct HR App no 15318/89 at paras 62-64.

<sup>226</sup> *Wall Opinion*, *supra* note 94 at para 112.

At the opposite end of the spectrum, is the case of *Bankovic et al v. Belgium et al.*<sup>227</sup> In that case, the issue was whether the applicants could invoke the ECHR in order to make claims against the NATO nations that had engaged in aerial bombing in support of the Kosovo campaign. In finding that the ECHR did not apply to the bombing missions, the court noted that “extra-territorial jurisdiction by a Contracting State is exceptional,”<sup>228</sup> and is restricted to situations in which a “State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government”<sup>229</sup>. In its finding the court set the threshold at beyond which IHRL obligations will definitely not attach to the state acting extraterritorially.

In the case of *Issa and others v Turkey*, the ECtHR reviewed a claim that Turkish forces operating in Northern Iraq should be held “responsible for acts or omission imputable to [them].”<sup>230</sup> In its decision the Court acknowledged that “In exceptional circumstances the acts ... performed outside their territory or which produce effects there (“extra-territorial act”) may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.”<sup>231</sup>

As noted earlier, the *Al-Skeini* judgement has moved the application threshold quite significantly from the *Bankovic* decision. While not necessarily over-ruling *Bankovic*, the

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<sup>227</sup> *Bankovic et al v Belgium et al*, (2002) Eur Ct HR App No 52207/99.

<sup>228</sup> *Ibid* at para 71.

<sup>229</sup> *Ibid*.

<sup>230</sup> *Issa, supra* note 224 at para 66.

<sup>231</sup> *Ibid* at para 68.

Court has established a reduced threshold at which extraterritorial application of positive IHRL obligations will apply. As stated above, in the case of *Bankovic*, the court set a high threshold for extraterritorial application. *Al-Skeini*, on the other hand, introduced a new, more reasonable model for determining extraterritorial jurisdiction. Departing from the “effective control” test, the Court established a two pronged approach which assesses the issue from both spatial and personal considerations. Firstly the court examined whether United Kingdom forces “exercised of some of the public powers normally to be exercised by a sovereign government.”<sup>232</sup> By adopting this approach, the Court was able to sidestep the issue as to whether the UK forces were occupying Iraq and whether or not they had effective control over the area. The simple fact that they exercised some of the powers usually exercised by the Iraqi government was sufficient. Secondly the Court examined the control that UK forces had over Mr Al-Skeini and found that, “...the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.”<sup>233</sup>

As Professor Marko Milanovic has noted, in the *Al-Skieni* case “the Court applied a *personal* model of jurisdiction ..., but it did so only *exceptionally*, because the UK exercised *public powers* in Iraq. But, *a contrario*, had the UK *not* exercised such public powers, the personal model of jurisdiction would not have applied. In other words, *Bankovic* is according to the Court still perfectly correct in its result. While the ability to kill is ‘authority and

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<sup>232</sup> *Al-Skeini v United Kingdom*, no. 55721/07, [2011] ECHR 1093 (7 July 2011) at para 149.

<sup>233</sup> *Ibid.*

control' over the individual if the state has public powers, killing is not authority and control if the state is merely firing away missiles from an aircraft.”<sup>234</sup>

## **B. The Extent of Positive IHRL Obligations in Cases of Extraterritorial Jurisdiction**

In the case of *Bankovic*, the ECtHR was “of the view that the wording of Article 1 does not provide any support for the ...suggestion that the positive obligation ... to secure “the rights and freedoms ...can be divided and tailored.”<sup>235</sup> By adopting this all or nothing approach, the Court essentially negated any flexibility it may have had to impose extraterritorial IHRL obligations in virtually any situation short of occupation. Because of this all-or-nothing approach, the Court’s decision in *Bankovic* was subjected to significant criticism.

The Court’s retreat from *Bankovic* began with the case of *Issa*, where the Court held that an expeditionary force could be held responsible for IHRL acts and omissions, but did not extrapolate on the nature and extent of such obligations. Subsequently, in the case of *Ilascu*, the Court provided some guidance on the issue by finding that in determining the “...scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or

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<sup>234</sup> Marko Milanovic. “Al-Skeini and Al-Jedda in Strasbourg” online: EJIL < <http://ssrn.com/abstract=1917395>> at 22.

<sup>235</sup> *Bankovic et al v Belgium et al*, no. 52207/99 [2001] XII ECHR (12 December 2001) at para 75.

disproportionate burden.”<sup>236</sup> This guidance is supported by Judge Rozakis in his concurring opinion in *Al-Skeini*, where he stated that:

Extraterritorially, a Contracting State is obliged to ensure the observance of all those human rights which *it is in a position to ensure*. It is quite possible to envisage situations in which a Contracting State, in its role as an occupying power, has well within its authority the power not to commit torture or extra-judicial killings, to punish those who commit them and to compensate the victims – but at the same time that Contracting State does not have the extent of authority and control required to ensure to all persons the right to education or the right to free and fair elections: those fundamental rights it can enforce would fall squarely within its jurisdiction....<sup>237</sup>

The more flexible model, in which states are required to do only what they reasonably can to meet positive IHRL obligations in a given situation, has opened the door for a balanced and meaningful approach to the issue of extraterritorial jurisdiction. Indeed, the *Al-Skeini* decision has affirmed that “... whenever [a] State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the

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<sup>236</sup> *Ilascu and Others v Moldova and Russia*, no. 48787/99 [2004] VII ECHR (8 July 2004) at para 332.

<sup>237</sup> *Al-Skeini*, *supra* note 232 at para 32 (Concurring opinion).

Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored.”<sup>238</sup>

Where exactly the trigger for the commencement of obligations under IHRL treaties is has not been set out. Rather, as illustrated in the figure below, the direction from the courts seems to be that temporal and physical presence, plus the degree of control and capacity of the extraterritorial actor to enforce or comply with IHRL obligations, will be factors in assessing which, and to what extent, IHRL obligations attach to extraterritorial activities.

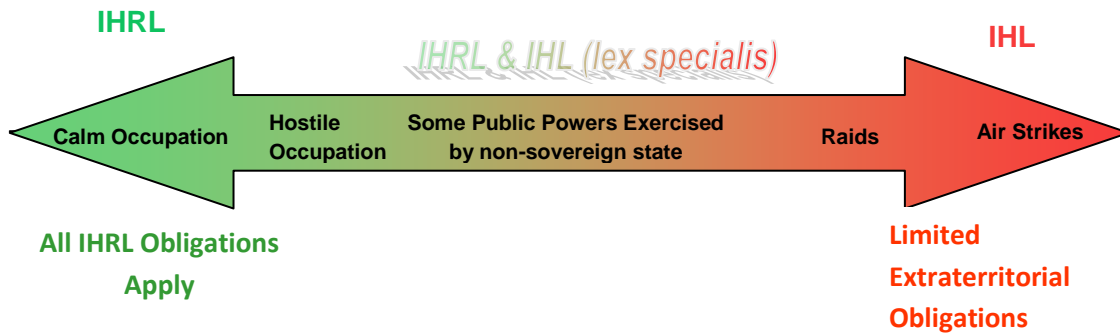


Figure One: IHRL Continuum

### C. IHRL and Blockade

A coherent approach to the interpretation of human rights and humanitarian law—maintaining their distinct features—can only contribute to greater protection of individuals in armed conflict.<sup>239</sup>

Because of the disparate obligations and protections provided to civilians under the regime of IHL as compared to that of IHRL, the question of whether or not human rights law applies to blockade operations will depend on the facts of the given operation and the effects that it is having on the civilian population of the blockaded state. Under a purely IHL

<sup>238</sup> *Ibid* at para 137.

<sup>239</sup> Cordula Droegge, “Elective Affinities? Human Rights and Humanitarian Law” (2008) 90 IRRC 501 at 548.



regime, the obligations between states and affected civilians are generally negative in nature; “...the requirement is generally the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible...”<sup>240</sup> In contrast; IHRL obligations require states to engage in positive action to ameliorate the conditions under which civilians are living. Thus, for example, under the IHL regime a blockading state’s obligations are to not make starvation of civilians the objective of military action,<sup>241</sup> while under IHRL the blockading state would be required to take the utmost care to protect civilians and to ensure that basic needs for the survival of the civilian population are met.<sup>242</sup> These standards are very different; one requiring positive action to ameliorate suffering, the other requiring only that a state undertake to not make the starvation of civilians the sole purpose of its operations.

As has been discussed, under the current the IHL regime there are no binding obligations, short of occupation, that require a state to ensure that the basic needs of an adversary’s population are met.<sup>243</sup> While it is acknowledged that the primary obligations<sup>244</sup> for the maintenance of human rights rests with the sovereign state, “This presumption may be

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<sup>240</sup> Louise Doswald-Beck and S. Vité, “IHL and Human Rights Law” (1993) 293 IRRC 94 at 99.

<sup>241</sup> Additional Protocol I, *supra* note 2 at art 54.

<sup>242</sup> Another example of the disparity between IHL and IHRL arises when force is used by a state. Whereas under the IHL regime, states conducting operations are required to ensure that they refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated..., (Additional Protocol I Art 57 2.(a)(iii)), the requirement under IHRL is that methods chosen employ no more force than that which is absolutely necessary. See for example, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (1950) Art 2(2)(c).

<sup>243</sup> While Additional Protocol I articles 54 and 70 prohibit the deliberate starvation of civilians and obligate the parties to a conflict to provide for relief for the civilian population, the relief is subject to an agreement being reached between the parties. If no such agreement is reached, then there is no obligation for the blockading power to provide relief. In this vein, the non-deliberate starvation of civilians is not necessarily unlawful. For a discussion of this issue see Sandoz, *supra* note 132 at paras. 2083-2123.

<sup>244</sup> For a discussion on a state’s obligations to its population, see: *Z and Others v United Kingdom*, no 29392/95 [2001] V ECHR 2001 (10 May 2001) at paras 73 -74.

limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory.”<sup>245</sup> In a situation of enduring and effective blockade in which the littoral state is no longer capable of providing for its population, and the blockading state does not permit humanitarian access, there exists strong potential for an absence of humanitarian protection to ensue. As the authors of the *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident* have noted, “there cannot be gaps in the law. In line with the rationale expressed in the Martens Clause—now a part of customary law—it must be assured that minimum standards of humanitarian /human rights protection are observed at all times.”<sup>246</sup>

As discussed, in order for a blockade to be legal, it must be established and it must be effective. Once a blockade is in place, the blockading power exercises control over all activities<sup>247</sup> that take place on, under or above a nation’s territorial waters<sup>248</sup> and displaces the sovereign nation’s authority and control over that part of its territory. It can be deduced, therefore, that when a state imposes an effective blockade against another, that state is exercising control over a part of the littoral state, and is directly affecting those portions of the blockaded civilian population that depend on maritime trade or the sea for sustenance. In

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<sup>245</sup> *Ilascu, supra* note 238 at para 312.

<sup>246</sup> As stated in Palmer Report, *supra* note 187 at 99:

It is important to stress that it is difficult to make generalized statements on the exact nature of the relationship between human rights law and international humanitarian law. Rather, the application of specific provisions of either legal area depends heavily on the factual context of the situation and has to be assessed accordingly. In any case, there cannot be gaps in the law. In line with the rationale expressed in the Martens Clause—now a part of customary law—it must be assured that minimum standards of humanitarian/human rights protection are observed at all times.

<sup>247</sup> An example of such control is the current Israeli blockade of Gaza, wherein the government of Israel has restricted all fishing activity to a three mile coastal strip. This action by Israel is arguably in contravention of international law. See *Hague XI, supra* note 103 at art 3.

<sup>248</sup> Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with UNCLOS art 3. See also, Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001) at 55-65.

this respect, it can be concluded that in cases where a blockade is effectively imposed, the blockading power should be required to take action to ensure that civilians subjected to the blockade are not arbitrarily deprived of the right to life, and that other reasonable IHRL obligations are satisfied.

*i. Lifting the Veil of Lex Specialis in Blockade Operations*

“... the so-called *lex specialis* argument ..., to the effect that applicability of the law of armed conflict excludes the application of human rights norms, is untenable... The normative similarity if not identity between a number of the principles and rules of the two bodies of law should lead to an insight of complementarity, not to mutual exclusion.”<sup>249</sup>

Germane to any discussion concerning the application of IHRL in armed conflict is the principle *Lex specialis derogat legi generali (lex specialis)*. *Lex specialis* is an interpretative tool that is used to assist in resolving conflict when there is discordance between two parallel normative frameworks operating in the same legal paradigm. Whereas it was originally conceived as a conflict tool, in recent years, and particularly with respect to the relationship between IHL and IHRL, it has expanded to apply not just in areas of conflict, but also in situations in which “...the two rules have a relationship in the sense that they must have the same characteristics, and the special rule must either supplement or displace one of the characteristics of the general rule.”<sup>250</sup>

Under the principle of *lex specialis*, when there is conflict between the application of two laws in a given circumstance, “Of the laws of two conventions, we ought (all other circumstances being equal) to prefer the one which is less general, and which approaches

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<sup>249</sup> Frits Kalshoven, “Some Comments on the International Responsibility of States” in Wolff Heintschel von Heinegg and Volker Epping, eds., *IHL Facing New Challenges* (Berlin: BWV, Berliner Wissenschafts-Verlag, 2007) at 210.

<sup>250</sup> Anja Lindroos, “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*” (2005) 74 *Nordic J Int'l L* 27 at 45.

nearer to the point in question.”<sup>251</sup> Thus, when considering whether or not *lex specialis* should be applied in a given situation, the “idea that the most closest, detailed, precise or strongest expression of state consent as it relates to a particular factual circumstance, ought to prevail.”<sup>252</sup> It is for this reason that many IHL experts generally reject the notion of the wholesale application of IHRL in times of armed conflict, stating that the IHL regime, which is specifically designed to operate in armed conflict, must be used to interpret legal issues arising from the conflict. Such was the case in the report of the Turkel Commission where the board stated that “Since the right of the inhabitants of the Gaza Strip to life is addressed in the *lex specialis* that applies here, namely the rules of international humanitarian law, it is these rules that should primarily be applied.”<sup>253</sup>

The International Court of Justice addressed the issue of *lex specialis* and the operation of IHRL in situations of armed conflict in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* where it “observe[d] that the protection of the International Covenant of Civil and Political Rights [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency...”<sup>254</sup>

The *Nuclear Weapons Case* was a watershed in that it affirmed for the first time at the international level that human rights norms continue to function in armed conflict.

Unfortunately, however, other than stating that the test of arbitrary deprivation of life

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<sup>251</sup> Emmerich De Vattel, *The Law Of Nations; Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, (1793) Book II, Ch. xvii, Paras. 311, 316, as cited in Prud'homme, *supra* note 219 at 367.

<sup>252</sup> Joost Pauwelyn, *Conflict Of Norms In Public International Law: How WTO Law Relates To Other Rules Of International Law* (Cambridge: Cambridge University Press, 2003) at 388.

<sup>253</sup> Turkel Report, *supra* note 95 at 103.

<sup>254</sup> *Nuclear Weapons Opinion*, *supra* note 127 at 240.

“...falls to be determined by the appropriate *lex specialis*...”<sup>255</sup> the ICJ failed to provide guidance on when or how IHL should interact with the still-functioning IHRL regime.

The lack of direction from the ICJ has led to confusion and conflicting interpretations as to exactly what the *lex specialis* principle is. Differing opinions as to how it affects the relationship between IHL and IHRL have resulted in the development of divergent approaches and interpretations for dealing with *lex specialis*. At one end of the spectrum is the theory that *lex specialis* should be interpreted to mean that although the two bodies of law continue to operate in the same paradigm, the principles of IHL are supreme. Under this interpretation, all issues are to be interpreted through the lens of IHL, and IHRL principles will apply only in situations that cannot be addressed through IHL. At the other end of the spectrum, a more cooperative context is proposed; “...where *lex specialis* is used to interpret the terms of another, more general law ... it does not conflict with nor, *a fortiori*, overrule the norm. Thus...both the *lex specialis* and the *lex generalis* could be applied side by side, [with] the *lex specialis* playing the greater role of the two.”<sup>256</sup>

In its subsequent advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ expanded on its earlier comments respecting the interface between IHL and IHRL, stating, “As regards the relationship between IHL and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both

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<sup>255</sup> *Ibid.*

<sup>256</sup> Pauwelyn, *supra* note 252 at 410.

these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”<sup>257</sup>

Although the ICJ has been criticized by some<sup>258</sup> for not having further elaborated on its interpretation respecting the relationship between IHRL and IHL, it is now generally accepted that the court has expressed its opinion that a “convergence between human rights protections and humanitarian law protections is ... in operation.”<sup>259</sup> Flowing from this is the notion that *lex specialis* cannot be used as a blanket argument to ignore legitimate human rights concerns in the arena of armed conflict. As Nancie Prud’homme rightly points out, “While it is correct to assert that use of the humanitarian law framework is crucial to the assessment of the taking of life between combatants during international armed conflict, the *lex specialis* principle seems of less assistance for many other problems of co-application. For instance, the application of the *lex specialis* principle in cases of potential violations of the right to life is not readily transposable to situations ... where the IHL[is] less clear.”<sup>260</sup>

Understanding that there is international disagreement on the mechanisms of blockade, inconsistent application of this method of warfare in modern conflict, and doubt by many that

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<sup>257</sup> The *Wall Opinion*, *supra* note 93 at para 106.

<sup>258</sup> Prud’homme, *supra* note 219 at 371-379.

<sup>259</sup> Richard Goldstone, “Human Rights In Palestine And Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict” A/HRC/12/48, 25 September 2009 at p.78. For an opposing point of view see: Michael J. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation” (2005) 99 AJIL 119, at 141:

The obligations assumed by states under the main international human rights instruments were never intended [...] to replace the *lex specialis* of international humanitarian law. Extending the protections provided under international human rights instruments to situations of international armed conflict and military occupation offers a dubious route toward increased state compliance with international norms. A judicial requirement of broader application of the peacetime protections provided under these instruments during periods of armed conflict and military occupation is likely to produce confusion rather than clarity and increase the gap between legal theory and state compliance.

<sup>260</sup> Prud’Homme, *supra* note 219 at 382.

blockade has crystallized as customary law, the employment of the “... the so-called *lex specialis* argument ..., to the effect that applicability of the law of [blockade] excludes the application of human rights norms, is untenable.”<sup>261</sup>

Insofar as the international courts appear to abhor the possibility that a conflict situation will result in an absence of humanitarian protection, the invocation of the *lex specialis* argument to summarily dismiss the possibility that IHRL can apply during a blockade is disingenuous and irresponsible. The convergence of IHL and IHRL has occurred. While *lex specialis* can and should be used to interpret the relationship of the regimes in any given situation, it cannot be used to stifle legitimate discourse. As has been discussed, recent jurisprudence from all major international human rights tribunals is unequivocal: human rights obligations continue to apply in times of armed conflict.

There is a significant gap in humanitarian protection for civilians who are affected in blockade operations. International human rights tribunals and international courts have made it abundantly clear that “ [t]he judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect.”<sup>262</sup>

Recognizing the progress that international law has made toward enhanced humanitarian protection during armed conflict, and the lack of consensus as to the obligations that parties have with respect to humanitarian relief during blockade operations, it is very likely that in the case of an enduring and effective blockade, some extraterritorial obligations

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<sup>261</sup> Kalshoven, *supra* note 249 at 210.

<sup>262</sup> *Nuclear Weapons Opinion*, *supra* note 127 at para 41.

of IHRL may attach to the blockading force. In such situations, the veil of *lex specialis* can be lifted and “human rights norms can compensate for the deficiencies of IHL.”<sup>263</sup>

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<sup>263</sup> Judith Gardam, “The Contribution of the International Court of Justice to International Humanitarian Law” (2001) 14 LJIL (2) 350 at 353.



## **CHAPTER 6: CONFRONTING THE HUMANITARIAN CHALLENGES OF BLOCKADE**

In this part of my thesis I review some of the recent approaches that have been made in attempts to reduce the humanitarian impact of blockades. By far, one of the most effective approaches to influencing the law of blockade rests with the United Nations Security Council. Whereas this body is responsible for the implementation of a significant number of contemporary blockades and embargoes, it has the capacity to play a crucial role in shaping the law. I argue that article 103 of the *UN Charter* over-rides the customary law of blockade. Therefore, if the UNSC could develop and consistently apply rules that would permit the passage of all humanitarian materials through blockades, their actions could have a positive impact on what nations will consider to be acceptable rules for blockade. Finally, I offer the German Navy's policy on humanitarian relief in blockade as a realistic and reasonable model that could be used as a basis to developing a blockade convention.

The twentieth century stands out in history as being the most destructive and violent century in the history of warfare. Paradoxically, as the international community developed treaties and protocols to moderate the effects of conflict, technological innovations permitted warfare to spread from the battlefield to cities and towns as the concept of total war was born. As part of the total war concept, civilians and the economies of belligerent states became military objectives. Of the examples of total war in the twentieth century, the blockade of Germany in the First World War stands out as a particularly deadly and effective campaign. It was through the very deliberate strangulation of the German economy and the starvation of its people that the state was ultimately brought to its knees and compelled to

sign the treaty of Versailles in the spring of 1919; a remarkable demonstration on how deadly and effective a blockade can be.

Whereas the incorporation of Additional Protocol One in 1977 provided specific protections for civilian populations from the effects of armed conflict, the blockades against Iraq (1991-2003) and Palestine (2007 – present) have demonstrated that insofar as humanitarian protection in blockade is concerned, the law has truly not progressed since the First World War. The fact remains that in contemporary international armed conflict, there are no absolute protections against the starvation of civilians.

While it is clear that the world's more militarily advanced nations have embraced the proportionality test in respect to the conduct of kinetic operations in international armed conflict,<sup>264</sup> the same cannot be said to hold true for acts of war that do not have immediate violent effects, such as blockade. Through the deliberate act of excluding blockade from the protections offered in Additional Protocol I, the international community was able to ensure that this very effective method of warfare could continue and that the belligerents could lawfully cause the population to starve so long as starvation was an incidental effect rather than the primary objective of the operation.

Evidence that the starvation of civilians is untenable in contemporary international law is apparent in the aversion that many nations and commentators have demonstrated toward the notion of starving civilians. While some attempts have been made to adopt a “soft

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<sup>264</sup> I acknowledge that while the protection of civilians from kinetic attack has become a central principle in contemporary international armed conflict, the same cannot be said for many non-international armed conflicts. The conflicts in Bosnia Herzegovina, the Sudan, Somalia, Uganda, Sierra Leone, Congo and the Central African Republic provide stark reminders that in civil wars, civilians are often the objects of attacks.

law”<sup>265</sup> approach toward ameliorating the plight of civilians during blockade, acceptance and adoption of the principles, such as those laid out in the San Remo Manual, has not been universal. The result is that in international law there is confusion, if not outright disagreement as to the state of the law respecting humanitarian protection in blockade.

### **A. Recommended Approaches**

States Party to Additional Protocol I are required to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>266</sup> In kinetic operations it is understandable, and indeed lawful, that civilians may be killed or injured due to their proximity to a military objective. The same, however, cannot be said to hold true for starvation resulting from a protracted campaign. Starvation does not occur overnight. It is a condition that comes about only after a significant period of hunger and malnutrition. Unlike the case in kinetic operations, where surprise and security are key to the successful engagement of a belligerent target, there is always time in the planning of blockade to appreciably reduce the humanitarian impact of the military action without jeopardizing the legitimate military goals of the campaign.

As has been noted in this thesis, one of the fundamental weaknesses of humanitarian protection during military operations lies in the fact that obligations to provide humanitarian

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<sup>265</sup> In the parlance of international law, “soft law” refers to quasi-legal instruments whose binding force is somewhat “weaker” than that of conventional or customary international law. Generally communicated in the form of Manuals, Handbooks, Guidelines and other similar publications, soft law generally reflects a consensus amongst academics and practitioners as to what the state of the law should be, rather than what it is. In this manner, the designers of soft law instruments attempt to persuade the international community to accept and adopt a customary norm. The blockade provisions of the San Remo Manual that require a proportionality test are examples of soft law.

<sup>266</sup> Additional Protocol I, *supra* note 2 at art 57(2)(a)(ii).

relief are “subject to the agreement of the Parties concerned.” Understanding this, there exist several options for addressing the humanitarian effects of blockade. One is to do essentially nothing. Blockade has existed for centuries. The fact that hundreds of thousands of civilians have starved to death or have been otherwise injured as a result of blockade can be, by some, considered as a lawful consequence of military action. When the nations of the world adopted Additional Protocol I, they purposefully decided not to change the law of blockade. By doing so, they were able to avoid imposing positive obligations on themselves in situations where they were attempting to economically strangle their opponents. The argument that the *status quo* is lawful does reflect the intentions of Additional Protocol I; however, for many nations the contention that it is permissible to starve civilians, so long as the starvation is not the primary purpose of the blockade, is no longer acceptable.

The apprehension that many nations share with respect to the humanitarian effects of blockade is reflected in the San Remo Manual, the authority of which lies not in conventional or customary law *per se*, but rather in the international reputation of its authors and the persuasive value of their scholarship. While not all nations have adopted the tenets of the San Remo Manual into their naval warfare doctrine, many have; including Canada, the United Kingdom, Australia, France and Germany. The refusal by some states to adopt the soft law approach to moderating the effects of blockade has prevented the San Remo Manual’s provisions from attaining status as settled law. While the efforts of the individuals who have attempted to change state practice are laudable, it is apparent that those efforts alone have not been sufficient to change this body of customary international law.

As has been noted, when confronted with gaps in humanitarian protection, international tribunals, and more specifically human rights bodies, have moved with haste to fill the voids. Considering the inroads that IHRL has recently made into the arena that was once thought to be the sole domain of IHL, it is quite conceivable that if a case loss of life due to starvation resulting from blockade was to be adjudicated by an international tribunal, the regulation of humanitarian relief during blockade operations could be forced upon belligerent states by those courts.

When one considers that IHL generally obligates parties to either do, or refrain from doing certain acts in warfare, it establishes a code of conduct to which belligerent states must adhere. Thus, by way of its operation, IHL is a pro-active body of law that seeks to regulate the conduct of hostilities. IHRL, on the other hand, contains broad obligations designed not to govern state activities in armed conflict, but rather to regulate the relationship between a state and those that are subject to its jurisdiction. While the primary goal of IHL is to prevent excessive harm and suffering *ab initio*, much of the emphasis in IHRL is to compensate the individual for wrongs done to him or her by the state. While the concept of individual compensation may appear to be attractive, the stark reality is that thus far case law respecting whether or not IHRL will apply during armed conflict has focused on situations in which the arbitrary deprivation of life is at issue. As Professor Hampson notes, ‘this is a remarkably arbitrary and haphazard way of working out ...the relationship between two bodies of [law].’<sup>267</sup> That is to say, it would be preferable to develop a binding IHL norm to address blockade rather than having a norm developed by IHRL bodies whose main focus is not to

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<sup>267</sup> Françoise Hampson, “The Relationship Between IHL and Human Rights Law From the Perspective of a Human Rights Treaty Body”, (2008) 90 IRRC 871 549 at 559.

regulate the conduct of belligerents, but to compensate the families of persons who have been killed arbitrarily.

## **B. A Role for the Security Council**

Given that many contemporary armed conflicts are conducted under the authority of United Nations Security Council Resolutions, the Security Council can play a significant role in moderating the effects of blockades, at least in cases in which blockades are conducted under the auspices of Security Council Resolutions.

In response to the Iraqi invasion of Kuwait in 1990, the Security Council passed UNSCR 661, imposing a *de facto* naval blockade against Iraq. By allowing the provision of food to Iraq only in “humanitarian circumstances,”<sup>268</sup> the Security Council did not change the existing *status quo* respecting humanitarian protection in blockade. The coalition powers that implemented the blockade against Iraq interpreted the provisions of UNSCR 661 so as to impose a devastating blockade. Although later resolutions were intended to ease the humanitarian burden of the blockade, the ultimate effect was that malnutrition remained a severe problem until after the US invasion of Iraq in 2003.

In contrast to the blockade against Iraq, the most recent Security Council –initiated naval blockade against Libya prohibited the import or export only of “arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision,

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<sup>268</sup> UNSC Res 661(1990), *supra* note 85.

maintenance or use of any arms and related materiel.”<sup>269</sup> By restricting the scope of the blockade to only goods that have a definite military purpose, the Security Council has ensured that the nations enforcing the Chapter seven action cannot deliberately deprive the Libyan population of those items necessary to sustain life.

The potential for the Security Council to influence the development of blockade law is significant. By application of a consistent approach to humanitarian relief in blockade operations, the Security Council can ensure that civilians’ basic needs can be met in blockade. UNSCR 1970 (2011) has provided a starting point for a humanitarian approach to the conduct of blockade. It has not, however, gone far enough.

While UNSCR 1970 (2011) does call upon nations to “facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance” to Libya, it does not specifically make provision for the passage of humanitarian supplies and foodstuffs through the blockade. This infers that until such time as humanitarian agencies are able to return and operate in Libya, the blockading forces are not specifically directed to ensure that the humanitarian requirements of the population are being met. By not obligating the states to permit the passage of humanitarian relief the UNSCR has left open the possibility that the delivery of humanitarian aid could be hindered.

Through the operation of article 103 of the *UN Charter*, the Security Council can significantly influence the evolution of the law blockade in the 21<sup>st</sup> century. Considering the deadly consequences of blockades in the 20<sup>th</sup> century, including the UN sanctioned blockade

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<sup>269</sup> UN Security Council, *Resolution 1970 (2011) Adopted by the Security Council at its 6491<sup>st</sup> meeting, on 26 February 2011*, 26 February 2011, S/RES/1970 (2011) at para 9.

against Iraq through the 1990s, the UNSCR should be encouraged in the future to ensure that any blockade operation ordered by the UN includes specific obligations for the blockading parties to permit the passage of all humanitarian goods. By adopting a consistent approach to the issue of humanitarian relief, the UN can, and should, influence the manner in which blockade is exercised.

### **C. A Role for States**

Twice in the last decade and a half, the international community has convened to abolish methods and means of warfare that are indiscriminate in their effects. Both the *Ottawa Treaty*<sup>270</sup> and the *Cluster Munitions Treaty*<sup>271</sup> were initiated to address the issue of weapons and methods of warfare that could not distinguish between military objectives and civilians and their property. When one considers the devastating effects that blockades wreaked on civilian populations during the 20<sup>th</sup> century, it can be argued that complete blockades are equally indiscriminate. Professor Bothe argues that “it is a 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.”<sup>272</sup> While his contention may be true, history has shown time and again that this principle is too often ignored.

Many states have implemented, or have at least accepted the provisions of the San Remo Manual. While the Manual does not provide a perfect solution to the problem of civilian harm in blockade, it does provide a solid foundation from which to commence

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<sup>270</sup> *Ottawa Treaty*, *supra* note 122.

<sup>271</sup> *Convention on Cluster Munitions*, UNTS I-47713. The preamble’s first paragraph addresses concerns that civilian populations and individual civilians continue to bear the brunt of armed conflict.

<sup>272</sup> Michael Bothe, *New Rules for Victims of Armed Conflicts*, (The Hague: Martinus Nijhoff Publishers, 1982) at 433.



negotiations toward resolving this particular issue. Like minded nations, especially those that do have navies capable of conducting a blockade, have the opportunity to modernize blockade by minimizing its deleterious effects on affected civilian populations. By engaging in a treaty to modernize and codify the law blockade, such powers could not only bind parties to the terms of the convention, but could also significantly influence the customary law of blockade.

#### **D. A Suggested Model for Humanitarian Assistance in Blockade**

In its “Kommandanten-Handbuch - Rechtsgrundlagen für den Einsatz von Seestreitkräften”, the German Navy has implemented the following policy respecting humanitarian assistance in blockade:

If there is a shortage of foodstuffs and pharmaceuticals or other essential items for the civilian population in the blockaded area, the blockading state is obligated to authorize the passage of relief consignments. This also applies to pharmaceuticals intended for the wounded and sick members of the armed forces. The blockading state will continue to be entitled, however, to determine the technical details for a passage of this kind, including visit and search. Moreover, it can make the authorization conditional upon the fact that local distribution of relief supplies is monitored by a protecting power or a humanitarian relief organization (e.g., International Committee of the Red Cross) ensuring impartiality. Use of the relief consignments is to be confined to their original purpose.<sup>273</sup>

The German policy is a model very similar to that found in the San Remo Manual. If implemented universally, it could significantly reduce the humanitarian impact of blockade

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<sup>273</sup> Wolff Heintschel von Heinegg and Hans-Joachim Unbehau, *Kommandanten-Handbuch - Rechtsgrundlagen für den Einsatz von Seestreitkräften*, English translation (Berlin: Bundessprachenamt - Referat SM 3, 2002) at 156 (English translation cited) [German *Commander's Handbook*].

operations. By permitting the passage of essential items for the survival of the population (i.e. Free Goods), it effectively re-introduces the notion of contraband into the law of blockade.

Described as “part of the painstaking effort, extending over generations, to strip war of its most savage aspects by establishing a sharp distinction between combatants and non-combatants,”<sup>274</sup> contraband was one of the core aspects of the London Declaration of 1909. Under the system of contraband, goods destined for enemy ports were traditionally characterized as being either free goods, conditional contraband or absolute contraband. Conditional items were dual-use goods which could be used for either peaceful or warlike purposes. Items such as food, construction materials, vehicles, and fuel generally fell into this category. Absolute contraband included all items, the primary purpose of which was war fighting. In this category were goods such as ammunition, armaments, explosives and weapons.

The system fell victim to pragmatism during the First World War when the United Kingdom recognized that it could not achieve its goal of severely depriving the German population without abandoning the contraband system. Because of the “involvement of virtually the entire population in the war effort,”<sup>275</sup> it became difficult for belligerents to determine which conditional goods were destined for the enemy armed forces and those that would be used only for civilian purposes. As a result, the “belligerents treated all imports...as contraband, without making a distinction” between the categories.

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<sup>274</sup> Vincent, *supra* note 70 at 30.

<sup>275</sup> *Commander's Handbook*, *supra* note 7 at 7-6.

The re-introduction of foodstuffs as “free goods” into the policy of one of the world’s largest naval powers indicates that the system of contraband can, and should be revisited.<sup>276</sup> There are a limited number of items that are absolutely essential to the survival of a population. By classifying foodstuffs, pharmaceuticals and other items required for the survival of the civilian population as free goods that cannot be subject to capture or seizure, the harshest of blockades’ effects against civilians can be obviated.

While it is correct to observe that the German policy can be made conditional on the availability of a Humanitarian organization that can oversee the distribution of the free goods, in contemporary armed conflict there is virtually always a neutral humanitarian organization that is willing and able to conduct such operations, such as the Red Cross.

The German policy represents an improvement over article 150 of the San Remo Manual. First, the policy, which is triggered by a shortage, permits the passage of all foodstuffs, not just those that are essential. Secondly, the passage is conditional on the availability of a humanitarian organization which can oversee the distribution. This aspect is a crucial departure from the San Remo model. As history has shown, in times of famine, nations at war will invariably ensure that their combat troops are fed before the civilians. Understanding this, the argument that the food provided will simply flow to the military loses its weight. The truth is that when a nation at war is deprived of food, it is the civilian population who starve, not the soldiers. Thirdly, and very importantly, once a blockading

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<sup>276</sup> The provisions of the UN blockade of Libya reflect a shift toward the contraband system. Essentially, any embargo that is focused on prohibiting the import or export of certain items is a form of a contraband system. See also *San Remo Manual*, *supra* note 4 at art 150, which encourages a similar model to that of Germany, but does not include foodstuffs as free goods, or involve the intervention of a Humanitarian organization. Under the San Remo Manual, food can be blocked if it is apparent that it will be used to the advantage of the belligerent armed forces.

power identifies a neutral third party to distribute foodstuffs, and announces its intention to allow free goods to flow, the onus to allow the imports switches to the blockaded power, which then decides whether or not its people will have access to imported goods. By making this move, the blockading power exercises due diligence, showing its intent to distinguish between the civilian population and the military in the effects of its operations.

Although the German manual does include provisions for the application of the proportionality test in blockade, the implementation of the free goods policy can render the test irrelevant. The most significant harm to civilians in blockade is caused through starvation and disease. By nullifying those effects, a blockade should be able to be carried out with minimal collateral harm to the civilian population.

## **CHAPTER 7: CONCLUSION**

Although apparently benign in comparison to other more violent forms of conflict operations, naval blockade has proven to be one of the deadliest methods of warfare in modern history. As a form of warfare whose purpose it is to strangle a belligerent's economy to the point that it can no longer sustain a war effort, its effects have often proven to be as destructive to civilian populations as they have to the disruption of the enemy's war effort. From this perspective, unmitigated blockade can be considered to be a form of warfare that does not distinguish in its effects between the civilian population and military objectives. In this manner, it violates one of the fundamental principles of International Humanitarian Law; distinction.

The fact that a well planned and executed blockade can significantly and adversely affect the military capacity of a blockaded state is undeniable. It has been, and remains a very effective manner in which to wage warfare while reducing the physical damage to a state, its infrastructure, and property. From this viewpoint, it should be considered to be a preferred method of warfare, but only if its deadly effects against civilians can be mitigated.

Existing protections provided in the customary law of blockade and in Additional Protocol One, do not provide sufficient safeguards to ensure that civilians will not be starved or succumb to illness as a direct result of the deprivation of humanitarian assistance caused by a full and complete blockade.

Starvation is inhumane. The fact that civilians can be permitted to die of starvation due to blockade is unacceptable. The very notion that innocent people can be allowed to starve to death incidentally to a long term operation, such as blockade, defies the purposes and principles of IHL and International Human Rights Law.

Over the past two decades, several attempts have been made to mitigate the effects of blockade. While these soft law approaches have been influential, they have not changed customary international law: the *opinio juris* of many nations is that the traditional rules of blockade still apply.

One of the most effective ways to change customary international law is to displace it by creating a treaty that addresses the issues that are most contentious and controversial. Recently, in the cases of anti-personnel landmines and cluster munitions, nations have convened to prohibit the use of weapons systems that had previously been completely legal to use. The driving principle behind the bans on these weapons was that they were indiscriminate weapons that regularly caused more harm to civilians than to military personnel. In this respect, those weapons systems are very similar to blockade.

Blockade remains one of the most lethal forms of warfare that has not been subjected to codification. Because of its continuing use, and its deleterious effects, it is time to address this method of warfare internationally. Blockade is a very effective method of warfare that can and should continue to be used to reduce a belligerent's military capacity while minimizing physical damage to the blockaded nation. However, this method of warfare should only be utilized when the basic requirements for the survival of the civilian population can be assured. If this can be achieved, the problem of discrimination can be nullified.

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