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Starvation in Non-International Armed Conflict Applicable International Humanitarian Law, Practice and Options for Development

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ABSTRACT

Instances of Armed conflict have been recorded since time immemorial. The use of arms or force to resolve disputes has been resorted to repeatedly, when other means of resolution have failed. When States resort to armed conflict in pursuit of a political or military objective, they are obliged to provide protection to the civilian population. Failure to do so leads to death, injury, destruction of property and complete disruption of political, social and economic systems which are essential to maintain peace.

International Humanitarian Law (IHL) is a branch of International Law that is made applicable for acts undertaken during an armed conflict. It must be applied evenly to all parties involved in the conflict. However, it is observed that there are numerous situations that become apparent, during the conflict itself or on investigation once hostilities have ended, that one or more parties might have not respected their obligations, leading to a violation of IHL.

Since time in memorial, Starvation has been used as a means of warfare. In view of widespread employment of this prohibited method of warfare, there is a need to reconsider the existing IHL provisions. This paper seeks to study the provisions of the IHL prohibiting the use of starvation as a method of warfare in a Non-International Armed Conflict. In addition to that, the paper refers to the corresponding provisions of International Human Rights Law (IHRL) and International Criminal Law (ICL) made applicable for a Non-International Armed Conflict. It identifies lacunas in the existing legal framework and suggests possible changes that may be put in place to help achieve effective protection against starvation during a conflict. Lastly, the paper intends to elaborate on the understanding of applicability of Common Article 3 alongside customary practices, while addressing the use of Starvation as a means of warfare.

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***'History teaches us that men and Nations behave wisely once they have exhausted all the alternatives.'*²**

-Abba Eban

I. INTRODUCTION

A State gains acceptance as a valid entity under International Law if it possesses all four essential criteria, namely a permanent population, a defined territory, a government and a capacity to enter into relations with other States.³ The people who occupy a country are referred to collectively as a Nation. As a country develops, the Nation grows. The measure of growth of a Nation is assessed by progressive changes in its political, social and cultural life. In order to have a physically and mentally healthy population, basic needs such as shelter, food and security have to be assured by the State to all its citizens. During an armed conflict, the ability of the State to protect its own citizens faces a challenge. In such a situation social security and health of the people suffer.

Armed conflict has been recorded since times immemorial in world history. The use of arms or force to resolve disputes has been resorted to repeatedly, when other means of resolution have failed. While the cause for armed conflict or war is specific to every dispute, they may range from resolution of family rivalry as seen in the Mahabharat⁴, to differences over civil rights as seen during the American Civil War⁵, territorial disputes and a quest for world domination seen in several wars and involvements of non-state actors in sectarian violence as seen in the recent Syrian Civil War⁶. Armed conflict invariably led to a chaotic and destructive situation that disrupts the development of affected region and seriously affects the civilian population.

Even when States resort to armed conflict in pursuit of a political or military objective, they are obliged to provide protection to the civilian population. Failure to do so invariably leads to death, injury, destruction of property and complete disruption of political, social and economic systems which are essential to maintain peace.

² SUSAN RATCLIFFE, OXFORD ESSENTIAL QUOTATIONS, (4th ed. Oxford University Press) (2016) <<https://www.oxfordreference.com/view/10.1093/acref/9780191826719.001.0001/acref-9780191826719>>

³ Montevideo Convention on the Rights and Duties of States 1933, §1.

⁴ See Wendy Doniger, *Mahabharat: Hindu Literature*, BRITANNICA ENCYCLOPEDIA (2019) (21 Mar. 2020, 10:30 AM), <https://www.britannica.com/topic/Mahabharata>.

⁵ See Warren W. Hassler, Jennifer L. Weber, *American Civil War*, BRITANNICA ENCYCLOPEDIA (2020) (21 Mar. 2020, 10:30 AM), <https://www.britannica.com/event/American-Civil-War>.

⁶ See Adam Zeidan, *Syrian Civil War*, BRITANNICA ENCYCLOPEDIA (2019) (21 Mar. 2020, 10:35 AM), <https://www.britannica.com/event/Syrian-Civil-War>.

One immediate effect of war is disruption in food supply, leading to shortage of food in the affected population. The situation gets aggravated by displacement of civilian, who then strain the food supply of States in which they seek shelter and protection. Loss of livelihood and property results in destitution. Food insecurity leads to mass starvation, diseases and death. While starvation can be an outcome of a natural disaster, it is also used as a tool of warfare targeting civilian populations in both International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC). Mass starvation is seen in conflict that affect large communities and groups of people. People in the extremes of age are most susceptible to the effects of mass starvation.

International legal provisions prohibit involvement of civilians during any armed conflict. It protects them from suffering the effects of war such as starvation and displacement. These provisions seek to ensure that civilians are not exploited to further the political objectives of any conflict. This paper seeks to study the provisions of the International Humanitarian Law (IHL) prohibiting the use of starvation as a method of warfare in a NIAC. It will also refer to the corresponding provisions of International Human Rights Law (IHRL) and International Criminal Law (ICL). It will identify lacunas in the existing legal framework and suggest possible changes that may be put in place to achieve effective protection against starvation during an armed conflict.

II. WHAT IS STARVATION?

Human survival depends on availability of food, drinking water, shelter and clothing. Free accessibility to these resources is of utmost importance. States carry a primary responsibility to ensure that such resources are provided and not misused.⁷ However during war, a number of these basic necessities become scarce for the population. Food is the most important commodity that might be in short supply.

In recent times armed conflict is accepted as a predominant factor responsible for food insecurity.⁸ Food insecurity is defined as the disruption of food intake due to lack of availability and accessibility to food and other resources.⁹ This situation causes food causes food insecurity, which in turn leads to starvation and deaths in many cases. Apart from destruction of basic infrastructural provisions for production and distribution of food, there are chances of looted

⁷ Additional Protocol I 1977 (AP I), § 54(1), Additional Protocol II 1977 (AP II), art 14.

⁸ UNGA, 'One Humanity: Shared Responsibility- Report of the Secretary General for the World Humanitarian Summit' (2016), UN DOC A/70/709, para 25, <https://reliefweb.int/report/world/one-humanity-shared-responsibility-report-secretary-general-world-humanitarian-summit>.

⁹ Mark Nord *et al.*, *Household Food Security in the United States, 2005*, US Department of Agriculture https://www.ers.usda.gov/webdocs/publications/45655/29206_err29_002.pdf?v=41334.

or destruction of food stock. Such incidents can lead to mass starvation.¹⁰

Mass starvation is a process of food deprivation that occurs when actors in a conflict impede the capacity of targeted persons to access food as their means to sustain life.¹¹ An armed conflict can increase the occurrence of famine by disrupting agricultural production, thus hindering food distribution and economic recovery. It can exacerbate conditions seen during a famine. Food shortages linked to conflict can turn into food emergencies, which can continue even after the hostilities end officially.¹² It is a process as well as an outcome.¹³ As a process, it includes various measures taken by an actor to hinder the capacity of the enemy population to gain access to food. As an outcome, starvation leads to weakness, disease and death.¹⁴

Starvation is not limited a 'famine' like situation, where sudden lack of food causes acute hunger resulting in widespread deaths. It includes any deprivation or insufficient supply of food or water required for sustaining life and health. The act of forced starvation includes an act of 'commission' such as the destruction of foodstuff, thereby subjecting people to food shortages.¹⁵ Additionally, starvation can be a result of an act of 'omission' whereby a party to the conflict denies humanitarian aid to people in dire need of food assistance.¹⁶ Therefore, starvation can result from direct destruction and denial of access to food resources as well as indirect hindrance to them overworking, trading or foraging of food resources.¹⁷

(A) Reasons For use of Starvation in War

Use of Starvation as a method of warfare is prohibited under IHL.¹⁸ However, historic records reveal that different actors have repeatedly adopted this strategy as a method of warfare.¹⁹ Starvation can be resorted to after giving due regards to IHL and its principles. They are the principle of military necessity²⁰, principle of humanity and principle of distinction²¹. Civilians

¹⁰ Humanitarian Policy Group at the Overseas Development Institute, *Conflict and Hunger: Breaking a Vicious Cycle* (2017), (20 Mar. 2020, 11:20 AM), <https://www.permanentrepresentations.nl/documents/reports/2017/12/14/report-conflict-and-hunger-breaking-a-vicious-cycle>.

¹¹ Bridget Conley and Alex de Waal, *The Purpose of Starvation: Historical and Contemporary Uses* 17 J of Int'l Cr. Justice, 699-722 (2019), <https://academic.oup.com/jicj/article/17/4/699/5721410>.

¹² Christine Chinkin, *The Protection of Economic, Social and Cultural Rights Post-Conflict* (2007) (20 Mar. 2020, 09:30 AM), http://www.peacewomen.org/assets/file/Themes/paper_protection_escr.pdf.

¹³ A.de Waal, *Mass Starvation: The History and Future of Famine*, (Polity Press 2007). *Also see Supra* note 11.

¹⁴ *Id.*

¹⁵ SIMONE HUTTER, STARVATION AS A WEAPON, 5-9 (Brill/Nijhoff, 2015), http://web.a.ebscohost.com.ezproxy.leidenuniv.nl:2048/ehost/ebookviewer/ebook/ZTAwMHh3d19fMTk0MDAyN19fQU41?sid=c3544efa-8003-4744-b1be-6a32b64e32d5@sidc-v-sessmgr03&vid=0&format=EB&lpid=lp_161&rid=0.

¹⁶ SIMONE HUTTER, STARVATION IN ARMED CONFLICT: AN ANALYSIS BASED ON RIGHT TO FOOD', 17 J of Int'l Cr. Justice 723-725 (2020), <https://academic.oup.com/jicj/article/17/4/723/5721411>.

¹⁷ *Id.*

¹⁸ *supra* note 8.

¹⁹ Example: Siege of Leningrad (1941-1944), the Sudan People's Liberation Army Siege of Juba (1984-2004) etc.

²⁰ *See* AP I, § 52.

²¹ *See* AP I, § 48 and 52.

are not to be subjected to such a strategy. A strategic move to cause starvation in combatants is permitted.²² However, no civilian should be impacted due to this.

In order to understand why parties to a conflict adopt this method, one must look at the objectives that can be achieved by creating a situation of mass starvation. Commonly observed reasons include the following:

Firstly, the primary goal of any party to a war is to weaken the opponent. To create a greater impact on the opposition, the easiest means is to target the civilian population, thereby weakening the socio-economic structure. In doing so, the belligerent party gains not only military advantage but also achieves political objective of undermining the standing of the opponent.

Secondly, deliberately creating conditions of starvation to exterminate targeted population. A specific ethnic, religious or racial group may be targeted. It is an indirect way of killing where a group of people are deliberately subjected to calculated physical destruction leading to change in their living conditions.²³ It is a kind of genocide. It has been rarely used as a method of war. Examples include the Armenian genocide, Ukrainian Holodomor and the Nazi Hungerplan. While being an example of an IAC, the Ukrainian Holodomor is a noteworthy instance of civilian suffering caused by a period of food grain shortage. Stalin strategized to impose policies that prevented movement, removed food and agricultural supplies, blacklisted villages and restricted trade, all leading to a harsh living condition.²⁴

Third, in order to gain territorial control. This is commonly referred to as the ‘surrender or starve’ method. In a situation when a siege is put in place, it is primarily aimed at the combatants. However, when the belligerent party is unable to differentiate between the civilian and the military, it can lead to a situation of starvation.²⁵ This is the reason for imposing various sieges during the Syrian Civil War, since 2005.²⁶

Lastly, to forcefully displace a group of people to influence and control their existence. Deprivation of food can be used to force population out of a remote area into a controlled environment which can fall within the idea of a siege or a counterinsurgency starvation.²⁷ For

²² As the IHL provisions do not prohibit the use of siege and blockade as a tactic of warfare, they both can lead to starvation under various circumstances.

²³ UN Convention on the Prevention and Punishment of Genocide 1948, § 2(c).

²⁴ ANNE APPLEBAUM, *RED FAMINE: STALIN'S WAR ON UKRAINE*, 347 (Doubleday, 2017).

²⁵ Susan Power, *Siege warfare in Syria: Prosecuting the Starvation of Civilians*, 8 *Amsterdam L Forum*, 1-22 (2017).

²⁶ UNHRC ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (1 February 2018) UN Doc A/HRC/37/72, <https://www.refworld.org/docid/5aa164614.html>.

²⁷ *supra* note 16.

example in Guatemala, the Government intensified a long-standing counter-insurgency campaign by targeting the rural Maya villages. They were perceived as being ardent supporter of the guerilla's warriors. This strategy was named as the 'guns and beans' policy and it was developed to restructure rural life.²⁸

Therefore, while starvation is prohibited as a method of warfare, it offers various advantages to the party to a conflict. It helps to achieve political and military objective.²⁹ It is strategically used to impact the conditions in which the war is fought in.

(B) Starvation as a Method of Warfare

While there are many ways by which parties can create conditions of starvation, this paper will focus mainly on two means namely siege and blockage. Inducing starvation is prohibited under IHL. However, instances have come to light where it has been used as a tactic to achieve the objectives of armed conflict in a NIAC. Starvation caused by siege and blockage when it targeted at the combatants to achieve a military objective is acceptable under IHL.³⁰

Siege has been used as a method to induce starvation by cutting supply lines of food items. The military manuals of many States have discussed their approach to the use of starvation as a tool of military strategy.³¹ There is prohibition on use of starvation as a method of war beyond the use of siege to achieve military objective.³² Even during a siege, civilians living in the area are permitted to move out of the region according to most military manuals.³³ As per Rule 55 of the IHL Customary Law Database, the besieging party is required to allow a free passage of foodstuff and other essential supplies as an alternative to the movement of people.³⁴

During a siege, there is complete control over free passage of troops and supplies belonging to the opposing side into the besieged area, till such time that it is either vacated or surrendered. This absolute control has to be endured by the besieged side as long as one or both sides are willing to give a higher priority to political-military goals over humanitarian concern for the besieged population.³⁵ When a siege is imposed on an area or city, it also extends to include

²⁸ Jennifer Schirmir, *The Guatemalan Military Project: A Violence Called Democracy*, (University of Pennsylvania Press) 368 (1998), <https://www.jstor.org/stable/j.ctt3fhv5q>.

²⁹ *supra* note 13.

³⁰ Military objectives in a NIAC have not been stated within AP II. It finds mentions in the Amended Protocol II to the Convention on Certain Conventional Weapons and the Second Protocol to the Hague Convention for the Protection of cultural property.

³¹ The France LOAC Manual and New Zealand, Military Manual allows using siege for achieving military objective. See ICRC, IHL Database, rule 53 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule53#Fn_91BB58A1_00019>.

³² *Id.*

³³ Example: the Israel Manual on Law of Wars mentions such a provision under para 137.

³⁴ *supra* note 31, rule 55.

³⁵ *supra* note 11.

the trapped civilian population. This often leads to a plausible situation where the civilian population is used as a shield by the besieged armed forces.³⁶

During the Second World War, a turning point was the siege of Leningrad (1941-1944). A more recent example of siege has been seen during the Syrian War. It has been a commonly used tactic by all opposing parties during the conflict. The Government Aligned Ground-Forces imposed the policy of surrender or starve on the Syrian Populace.³⁷ There are report which elaborate on various occasions where a siege was imposed. The longest siege lasted for five years from 2013- 2018, in Eastern Ghouta.³⁸ This War turned into an IAC, when Russian forces bombed this area leading to mass destruction of civilian infrastructure. It led to 400,000 people being forced to dig tunnels and paying bribes to get supplies into the area.³⁹

During a siege, a range of reactions are seen by the besieged party. These range from violent retaliate as in Leningrad, punitive actions against the Nazi regime in Germany and social reintegration of the community as has been seen in Nigeria.

Blockade is another known method of warfare which can lead to a situation of mass starvation. It is defined as a belligerent operation that is undertaken to prevent convoys, vessels and aircrafts of the opponent, from entering or exiting specific ports, airports or coastal areas. The purpose of enforcing a blockage is to deny the opponent the ease of transporting personnel and goods which are essential for the sustenance of life.⁴⁰

Blockade has an indiscriminate impact on armed opponent as well as the civilian population living in the blockaded area, under the opponent's control. However, it is observed that there is a lack of international legal scrutiny regarding the use of blockade as a method of warfare.⁴¹ For instance, a Naval blockade can be undertaken to achieve military objective and it is not prohibited under IHL.⁴² However, when such an action indirectly results in causing starvation in the civilian population, it is seen as a violation of IHL.⁴³

This aspect has been addressed in literature such as the San Remo Manual of Naval Warfare. These manuals have emphasized that while such a blockade is in place, the belligerent party is

³⁶ *supra* note 34.

³⁷ *supra* note 26.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Wolff Heintschel von Heinegg, *Blockade*, Max Plank Encyclopedia of Public International Law (2015), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252>.

⁴¹ Junteng Zheng, *Unlawful Blockade as Crimes Against Humanity*, 22 American Soc. of Int'l Law 5 (2018), <https://www.asil.org/insights/volume/22/issue/5/unlawful-blockades-crimes-against-humanity>.

⁴² *supra* note 31.

⁴³ *supra* note 31.

to provide for safe passage of humanitarian relief supplies.⁴⁴

Blockades have been condemned by the United Nations on various occasions such as the conflict in Afghanistan and occupation of West Bank by Israel and the conflict in Iraq.⁴⁵

Therefore, though blockade and siege are known forms of warfare, they are condemned by the international community, because of their indiscriminate impact on the civilian population.

III. INTERNATIONAL LEGAL FRAMEWORK IN PLACE

(A) International Human Rights Law

IHL and IHRL are seen as laws that are mutually complementary and therefore reinforce each other.⁴⁶ Under International Human Rights Law (IHRL), obligation is laid out in relation to direct certain actions of the States. They are acts of commission or omission, which in turn promote and protect human rights and fundamental freedoms of individuals or groups.⁴⁷ IHRL recognized various rights to a standard of living where adequate health and wellbeing is provided for through adequate availability of food, clothing, housing and medical care.⁴⁸

The Universal Declaration of Human Rights (UDHR) recognizes the right to food. It endorses the right to a standard of living is assured when provisions are made for food and other basic necessities, which in turn leads to a healthy well-being of the individual.⁴⁹ The International Covenant on Economic, Social and Cultural Rights, recognizes the right to adequate food as an essential part of the right to achieve an adequate standard of living.⁵⁰ Additionally, it recognizes ‘the fundamental rights of everyone to be free from hunger’.⁵¹

(B) International Criminal Law

The Rome Statute of the International Criminal Court (the Statute), provides that in an IAC, intentional starvation of civilians when used as a method of warfare, amounts to a serious violation of laws and customs applicable to an IAC.⁵² Until 2019, the Statute did not punish individuals for using starvation as a method of warfare in a NIAC. However, in the 18th Session of the Assembly of State Parties of the ICC, an amendment was proposed, which indicated that

⁴⁴ *supra* note 31.

⁴⁵ Example: UNHRC, ‘Question on violation of HR and Fundamental freedoms in any part of the World’ (1994) UN Res. 1994/74, <http://hrlibrary.umn.edu/commission/country51/56.htm>.

⁴⁶ HRC, ‘General Comment No. 29: Derogations during a State of Emergency’ (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11, <https://www.refworld.org/docid/453883fd1f.html>.

⁴⁷ *supra* note 16.

⁴⁸ Universal Declaration of Human Rights 1948, § 25.

⁴⁹ *Id.*

⁵⁰ The International Covenant on Economic, Social and Cultural Rights 1966, § 11(1).

⁵¹ *Id.*, at § 11(2).

⁵² The Rome Statute of International Criminal Court 1998 (The Statute), § 8(2)(b)(xxv).

the use of starvation as a method of warfare in a NIAC is also termed as a war crime and therefore invites strict punishment for individuals who are guilty of such an act.⁵³

The Committee's Special Rapporteur on the Crime of Starvation, Dr Matthew Gillet states that:

‘As conflict continue to plague many areas of the World, the protection of civilians is critical. The Recent amendment of the ICC's statue to include the crime of intentionally starving civilians in non-international armed conflict is a modest but significant step towards ending impunity for this vile practice’⁵⁴

Therefore, with this amendment, accountability is established for using starvation as a method of warfare in a NIAC. Any individual found enforcing any method of starvation as a method of warfare in an IAC or a NIAC will now be held criminally responsible under the Statute.

(C) International Humanitarian Law

1. Basic IHL Principles

Various laws have been put in place to create an obligation on State to take care of the population as a whole. IHRL recognizes various fundamental rights of human beings, whereas ICL tries to hold individuals accountable for violating any such obligation spelt out in IHRL or IHL. IHL specifies obligations which are expected to be respected during an armed conflict. They are expected to maintain a minimum standard in fulfilling their obligations towards the civilian population during an armed conflict.⁵⁵ Depending on the parties to a conflict, i.e., States and non-state actors (NSA), an armed conflict can be regarded as an IAC or a NIAC. With evolution of time and history, IHL now applies to all forms of armed conflict along with its basic principles of military necessity⁵⁶, principle of humanity and principle of distinction^{57, 58}

2. IHL Legal Framework

IHL forms a broad distinction between an IAC and a NIAC. This distinction leads to application of different set of laws for the two situations. Instances of the laws which are made

⁵³ International Bar Association, *IBA Welcomes Decision to Include Starvation in Non-International Armed Conflict in Rome Statute*, (10 December 2019), (21 Mar. 2020, 05:30 PM), <https://www.ibanet.org/Article/NewDetailPreview.aspx?ArticleUid=a9a2c0bf-ce29-49cf-a8c5-f654621347e7>. Also see ICC Assembly of State Parties, ‘Report of the Working Group on amendments’ (29 November 2018), UN DOC. C.N.399.2019.Treaties-XVIII.10.

⁵⁴ *Id.* Also see IBA, *The Next Big Question for International Criminal Justice*, (13 April 2019) (21 Mar. 2020, 05:35 PM), <https://www.ibanet.org/Conferences/conf970.aspx>.

⁵⁵ Civilians, their private and public property are protected under the provisions of IHL. It identifies various vulnerable civilian groups and implements special protection for the same. See ICRC, *Civilian Protected under IHL*, <https://www.icrc.org/en/doc/war-and-law/protected-persons/civilians/overview-civilians-protected.htm>.

⁵⁶ See AP I, § 52.

⁵⁷ See AP I, § 48 and 52.

⁵⁸ OHCHR, *Indiscriminate Attacks and Indiscriminate Weapons in IHL*, (March 2016), <https://reliefweb.int/sites/reliefweb.int/files/resources/pax-siege-watch-final-report.pdf>.

applicable for a NIAC include the following: Firstly, the Common Article 3 of the Geneva Conventions; Secondly, Additional Protocol II to the Geneva Conventions of 1977 (AP II); Thirdly, UN Convention on The Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1976 etc. The AP II specifies various prohibited acts and guarantees in place to make sure that NIAC actors do not harm the civilian population.⁵⁹ The AP II has been ratified by 169 countries.⁶⁰

The 'right to food' finds no mention in the IHL. However, provisions are made which are aimed at ensuring that people who are not participating or no longer taking part in hostilities are not denied food or access to it.⁶¹ In any war, the parties are allowed to choose their methods of warfare and combat as long as it does not violate the prohibition place by the IHL.⁶² Starvation of civilians as a method of warfare is expressly prohibited in both IAC and NIAC.⁶³

The prohibition of starvation is violated when there either a lack of food or denial of access to food. A situation where the population is forced to suffer from hunger due to deprivation of food sources or supplies can lead to diseases and death. The AP II prohibits the use of starvation as a method of warfare/combat in a NIAC.⁶⁴ It states that parties to a conflict are prohibited from attacking, destroying, removing or rendering objects useless that are indispensable to the survival of the civilian population. Such objects include foodstuff, agriculture areas for the production of foodstuff, crops, livestock, drinking water installations and supplies and irrigation works, when the result of action would be to cause starvations.⁶⁵

Additionally, IHL provides that in case civilian population is unable to have basic means of sustenance due to constraints on the State, humanitarian aid is to be delivered to the affected people.⁶⁶ A safe passage is to be given for delivery of Humanitarian aid.⁶⁷ However, the provision does not specify means by which such access can be provided for humanitarian relief.⁶⁸ However, siege and blockage as a means of warfare, which are not prohibited under IHL are undertaken. This resultant disruption in the availability of food for civilians might

⁵⁹ Such as the prohibition of using starvation as a method of warfare in a NIAC.

⁶⁰ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, TREATIES, PARTIES AND COMMENTARIES, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475>.

⁶¹ Example: Common § 3 of the Geneva Conventions 1949 promote the access to humanitarian aid in situations where humanitarian aid is required. It is a duty on the State to provide basis subsistence in every condition.

⁶² The AP II does not provide for any prohibition on means and method of warfare. It imposes obligations as per provisions of IHRL and basic principles of IHL.

⁶³ AP I, § 54(1) and AP II, § 14.

⁶⁴ AP II § 14.

⁶⁵ AP I, § 54(2) and AP II § 14.

⁶⁶ AP II, § 33.

⁶⁷ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, § 23.

⁶⁸ AP II, § 18(2).

result in a situation of distress. This has in many cases been considered as a political-military situation leading to violation of international law.

3. IHL: Customary Practices

Numerous domestic legislations have been adopted to mirror the international provision which prohibit the use of starvation as a method of warfare in a NIAC. State practices are reflected in the military manuals, domestic criminal system⁶⁹ and various opinion juris⁷⁰. Additionally, a sizable number of international documents show an acceptance of the AP II provision and State practice in the international forum. These include documents such as the Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia.⁷¹; Agreement on The Application of IHL Between the Parties to The Conflict in Bosnia and Herzegovina.⁷²

In the war of Yugoslavia, various UN resolutions were passed to condemn use of siege as a means to cause starvation.⁷³ The International Committee of the Red Cross (ICRC) has conducted a deep study of various customary laws around the world and has created a database. The database helps to identify various customs which are crystalizing on the lines of IAC and NIAC.⁷⁴ It recognizes that starvation is prohibited as a method of warfare.⁷⁵ Additionally, it has visualized various scenarios in relation to means that might lead to starvation of the civilians during an armed conflict. These include the following: Firstly, attacking objects that are indispensable to the survival of the civilian population is prohibited.⁷⁶ Secondly, it states that denying access of humanitarian aid intended for civilians in need, including deliberately impeding humanitarian aid is a violation of IHL.⁷⁷ Lastly, it recognizes that restricting the freedom of movement of humanitarian relief personnel is also a violation of IHL.⁷⁸

⁶⁹ Example: Bosnia and Herzegovina's Penal Code, § 173(1)(f); Netherlands' International Crimes Act, § 6(3)(m) etc.

⁷⁰ Jean-Marie Henckaerts, *Customary International Humanitarian Law*, (Vol. 1, Cambridge University Press) Rules 53, 54, at 187,191 (2005). Also see Federica D'Alessandra et al, *The war Crime of Starvation in Non-International Armed Conflict*, 17 J. of Int'l Criminal Justice 4, 815-847 (2019), <https://academic.oup.com/jicj/article/17/4/815/5637827>.

⁷¹ Yugoslavia/Croatia, *Memorandum of Understanding*, (27 November 1991), 6, <https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts>.

⁷² Bosnia and Herzegovina, *Agreement No. 1*, (22 May 1992), 2.5, <https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts>.

⁷³ See UNG, *The Situation in Bosnia and Herzegovina*, (29 December 1993) A/RES/48/88 <https://undocs.org/en/A/RES/48/88>.

⁷⁴ Jean-Marie Henckaerts, *Customary International Humanitarian Law, Vol 2: Practice* (Vol. 2, Cambridge University Press) (2005). Also see *supra* note 69.

⁷⁵ *supra* note 36.

⁷⁶ *Id.*, rule 54.

⁷⁷ *Id.*, rule 55.

⁷⁸ *Id.*, rule 56.

IV. PRACTICAL APPLICATION OF IHL

In order to effectively apply IHL to the above-mentioned situations a few special aspects should be taken into consideration. A few basic immunities and distinctions that are mentioned within the IHL framework will have to be kept in mind while an armed conflict progresses. However, a few lacunas in the application of IHL in a NIAC become noticeable.

One lacuna lies in the scope of application of Common Article 3. This article is equally applicable to an IAC and NIAC.⁷⁹ Though it can be called an all-inclusive article, it is ambiguous. While there is a reference to an armed conflict, there is no definition of what is considered to be an armed conflict. It is up to the State to determine whether or not an armed conflict exists.⁸⁰ This may result in a failure by such a State to acknowledge the existence of an armed conflict within its own borders.⁸¹

It is seen that this article is silent on various aspects. Firstly, the protection provided for doctors while administering humanitarian aid has not been specified. Secondly, there are no provisions for creation of an emblem that can be used to indicate universal protection to certain parties during a conflict such as humanitarian workers. Thirdly, it does not refer to any means or methods of warfare. Due to such ambiguity, starvation is created by enforcing either a siege or a blockage. Fourthly, it has no specific mention of nature of protection that a civilian population is required to be provided. Lastly, it has no mention of forms of hostilities that are prohibited from being undertaken against a civilian population.

Therefore, there is a need to amend the literature of the Common Article 3. The article needs to include parameters and details pertinent to the above-mentioned aspects to ensure a broader application of the law.

Secondly, IHL principles distinguish between a combatant and a civilian.⁸² A civilian is defined as someone who is not a member of the armed forces, including an irregular force.⁸³ In a NIAC, the parties to the conflict are prohibited from making a civilian as object of an attack.⁸⁴ Customary practices have been accounted for within domestic manuals and criminal systems

⁷⁹ John T. Holmer *et al.*, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 *American J of Int'l Law*, 2-11, 9 (1999).

⁸⁰ M. Gandhi, *Common Article 3 of Geneva Convention, 1949 In the Era of International Criminal Tribunals*, *ISIL Year Book of International Humanitarian and Refugee Law* (2001), http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html#Footnote_auth.

⁸¹ Neil Boister *et al.*, *The International Legal Definition of the South African Conflict in the South African Courts: War on National Liberation, Civil War or War at all?* 45 *Netherlands Int'l Rev.* 348-361 (1998).

⁸² AP I, § 48, 51(2) and 52(2).

⁸³ Geneva Convention relative to treatment of Prisoners of War 1949, § 4(A)(1)(2)(3)(6), AP I § 50, 43.

⁸⁴ AP II, § 13(2) and Amended Protocol II to the Convention on Certain Conventional Weapons 1996, §3(7).

of a State.⁸⁵

However, in several instances there have been issues related to the involvement of the civilian population in an armed conflict. On occasions, either a large proportion of the population is either voluntarily involved or forced into becoming a participant. Various arguments have been put forth for such a situation. One view holds that starvation as a military tactic is acceptable in such a scenario as the civilians are involved in manufacturing ammunition and producing food for the soldiers. Therefore, a siege and blockage leading to a mass starvation of the civilians will impact the working of the soldiers, thereby resulting in a military advantage.⁸⁶

Therefore, a strict approach needs to be adopted while deciding the criteria of who is to be regarded as a civilian in a given situation. Civilians maintain their protected status unless they are seen as actively participating in warfare. A civilian maintains its own identity and protected status only as long as he does not participate in hostilities.⁸⁷ Therefore a mechanism to identify such a distinction has to be made by a strict approach towards parties that violate this crucial IHL provision. Should the criteria of being criminally responsible individually as mentioned under ICL be strictly adhered to, there is a brighter chance for reducing opportunity for flouting the IHL principles. There is a need to have a strong mechanism in place to recognize such illegal acts. Fact-finding mechanisms can be put in place in form of a Truth Commission which can help identify individuals and actors who are responsible for disregarding the IHL provisions.

Thirdly, there is a need for quantitative understanding of the situation under which the tactic of starvation might have been resorted to. To do so, the doctrine of double effect can be applied.⁸⁸ In an event of civilian casualties during execution of a military strategy, it can be accepted as a legitimate form of action under three conditions: Firstly, that the act is morally accepted; Secondly, the intention is good and lastly, the intended effect is good enough to compensate for the secondary evil effect.

There is a need for a failsafe mechanism to distinguish between combatants and civilians in any form of armed conflict. During any armed conflict only, a combatant is to be targeted while undertaking any form of action as a part of the conflict. When a siege or a blockage is imposed, there is obligation placed on both the besieged and the belligerent forces. The besieged force

⁸⁵ Example In France, Italy, Israel etc. *See supra* note 31,33.

⁸⁶ Fotion *et al.*, *Military ethics: Guidelines for Peace and War*, (Routledge & Kegan Paul, London, 1986), 2011. Also see Claire Thomas, *Civilian Starvation: A Just Tactic of War?* 4 J. of Military Ethics 2 (2005), <https://doi.org/10.1080/1502757051003081>.

⁸⁷ *supra* note 67, § 15.

⁸⁸ *supra* note 86.

should ensure that civilians are not caught up in the same area as the armed forces.⁸⁹ In assessing the intention, the belligerent army's actions are scrutinized to understand whether the intended target of the attacks were the military or the civilians. In a situation when civilians are facing collateral repercussions of a military tactic aimed at the armed forces of the opponent, such a state of affairs is accepted under IHL.⁹⁰ Lastly for understanding proportionality, there is a need to consider the military necessity for undertaken a form of military tactic such as starvation. To measure proportionality, the foreseeable aspect of civilian harm, plausible outcome and benefit gained as against the opponent army need to be considered.⁹¹

Therefore, application of the above-mentioned parameters will enable clearer understand of the position of the belligerent party. It will in turn help in correctly concluding whether or not a part to a conflict is responsible for violating IHL.

V. CONCLUSION

IHL is a set of law that are applicable during the period of an armed conflict. They must be applied evenly to all aspects and parties involved in the conflict. There are numerous situations that become apparent, during the conflict itself or on investigation once hostilities have ended, that one or more parties might have not respected their obligations, leading to a violation of IHL. These violations might attract criminal liability under ICL.

In the context of use of starvation as a method of warfare, it has been seen either as a common method of warfare or the consequence of armed conflict in IAC and NIAC. In view of widespread employment of this prohibited method of warfare, there is a need to reconsider the existing IHL provisions. Common Article 3 is considered applicable alongside various customary practices for a NIAC in such a situation. However, this Article has a major shortcoming in not specifying the exact means by which humanitarian aid is to be provided for the civilians who are deprived of food and essential supplies during an armed conflict. There is a need for amending the existing literature of the Article to ensure broader application for its provisions. Additionally, though AP II is applicable for a NIAC, it lacks in not specifying the legally permitted means and methods of warfare. Therefore, there is an indiscriminate use of starvation as a form of warfare. It can be created by enforcing restriction in the name of siege and blockade, which can be effectively disguised to show achievement of a military objective as its aim. Therefore, there is a need to make amendments to the literature of AP II to include

⁸⁹ *supra* note 85.

⁹⁰ D.S. ZUPAN, WAR, MORTALITY AND AUTONOMY. AN INVESTIGATION IN JUST WAR THEORY, (Ashgate: Aldershot) (2004). *Also see Supra* note 85.

⁹¹ J. WALL, DEADLY SILENCE, CHRISTIAN CENTAURY, 117(29). *Also see supra* note 85.

the mention of starvation in a broader category of prohibition of methods to warfare.

There is a need to make sure that in a case, where starvation has either been used as a method of warfare or has resulted from use of either a siege or blockade during an armed conflict, the military imperative behind such an action is known. This will help in identifying individuals who might be help criminally responsible for violating IHL. Creation of a Truth Commission or an independent body who can enquire into the true intentions of the involved parties is required to gain a fuller understanding of the issue. Such a body, by virtue of its independent nature can apply the double distinction test to assess whether or not any act of a party to the conflict amounts to a violation of the IHL provisions.

To conclude, while there are various advantages that may be associated with the use of starvation as a tactic for warfare, it is legally wrong to subject civilians to any such military measure during an armed conflict. States parties are under an obligation to ensure that the civilians are taken care of and not tormented indiscriminately. Introduction of certain amendments in international legislature and effective monitoring and enforcement mechanism at an international level will be effective in protecting the life, health and safety of civilians caught up in an armed conflict.
