

# THE PROTECTION OF ACCESS TO FOOD FOR CIVILIANS UNDER INTERNATIONAL HUMANITARIAN LAW: ACTS CONSTITUTING WAR CRIMES

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**Abstract:** The objective of this paper is to examine the specific provisions, within the framework of International Humanitarian Law (IHL), that protect the human right to food of the civilian population and to observe to what extent the protection of access to food is an issue taken into account by IHL during the development of an armed conflict. Answering these questions requires a detailed analysis of this branch of international law, in order to identify the specific rules of IHL that aim, directly or indirectly, to ensure that civilians do not see denied their access to food during the armed conflict, whether international or non-international. In many armed conflicts, a greater number of civilians die from food deprivation than as a direct result of hostilities. In this sense, the Statute of the International Criminal Court criminalizes those acts that, during the armed conflict, violate IHL prohibitions related to food issues, thus we will also mention them, with the aim of clarifying the possible individual criminal responsibility attributed to those who carry out such acts.

The scientific method that has been used in this work is the legal-sociological method, insofar as it is the one that we consider most appropriate for the multidisciplinary approach, always from the legal point of view, regarding the understanding of the rules, the lack of them, their effectiveness, their rationale, etc. This method is based on the idea that law cannot be studied as an isolated domain but must be analysed as part of social reality. The elaboration of this work, with a multidisciplinary object, has also required the use of several methodological techniques, such as social and legal analysis, legal deduction and induction, description and interdisciplinarity.

**Keywords:** Human Right to Food, Food Security, Armed Conflict, International Humanitarian Law, Civilian Population, War Crimes, Justiciability.

**Summary:** 1. THE IMPACT OF ARMED CONFLICT ON THE RIGHT TO FOOD. 2. THE RULES OF INTERNATIONAL HUMANITARIAN LAW THAT PROTECT ACCESS TO FOOD FOR THE CIVILIAN POPULATION DURING THE DEVELOPMENT OF THE ARMED CONFLICT. 2.1. Prohibition of starvation of civilians as a method of warfare. 2.2. Prohibition of attacking, destroying, removing or rendering useless indispensable goods to the survival of civilian population. 3. ASSISTANCE TO PROTECTED PERSONS IN THE CONTEXT OF INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT. 4. CRIMINALIZATION OF SERIOUS VIOLATIONS OF THE RULES OF INTERNATIONAL HUMANITARIAN LAW PROTECTING ACCESS TO FOOD BY THE CIVILIAN POPULATION. 4.1. Acts constituting war crimes. 5. CONCLUSIONS

## 1. THE IMPACT OF ARMED CONFLICT ON THE RIGHT TO FOOD

Contrary to popular belief, during situations of armed conflict more people die directly due to lack of food and illnesses than bullets and bombs. Sometimes starvation is

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used as a political weapon, when crops are destroyed or poisoned and relief supplies are blocked. Other times, populations are displaced from their houses with the explicit aim of depriving people of resources with which to feed themselves.<sup>2</sup>

According to the FAO, “the proportion of who are undernourished is almost three times as high in States in conflict affected by protracted crisis as in other developing countries” (FAO, 2016, p.2).

Also, countries with high levels of hunger and malnutrition are particularly susceptible to war (Pinstrup-Andersen and Shimokawa, 2008, pp. 514-520).

Currently, Western Asia has become one of the regions with the highest rate of food insecurity due to the development of armed conflicts. Likewise, undernourishment increases in countries affected by conflict in sub-Saharan Africa (FAO, 2019, p.10). Furthermore, economic shocks are contributing to prolonging and worsening the severity of food crises caused primarily by conflict (FAO, 2019, p.51).

The International Committee of the Red Cross (ICRC) argues that armed conflict is one of the key reasons for lack of food and violations of the right to food.<sup>3</sup> In this regard, the ICRC maintains that humanitarian law contains many provisions related to the protection of access to food in situations of armed conflict, and therefore these provisions should be considered as an essential component of the legal framework protecting the right to food and food security. Conflicts lead to the development of the most severe forms of famine and place families and communities in a situation of extreme food vulnerability, since conflicts break the cycle of food production and distribution (Rodríguez de Taborda, 2013, p.2).

Hilal Elver, the United Nations Special Rapporteur on the Right to Food, has published, in July 2017, a specific report focused on the right to food in situations of armed conflict, which highlights the resurgence of hunger derived from conflicts and prolonged crises. According to the Report, around 70 million people in 45 States are currently in need of emergency food assistance due to these causes, especially this aid is urgent for Yemen, South Sudan, Nigeria, Syria and Somalia (Elver, 2017, p.4). The report also records that “hunger continues to inflict massive casualties in combat zones”, despite the fact that “the current regulatory architecture of human rights law and the international humanitarian law system has developed elaborate rules to protect the

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<sup>2</sup> See: Ziegler, J. et al. (2011). “The Right to Food in Situations of Armed Conflict”, in Ziegler, J., Golay, C., Mahon, C., Way, S.A. (Coords). *The Fight for the Right to Food*, Palgrave Macmillan, London, pp. 101-102; Pinstrup-Andersen, P. and Shimokawa, S. (2008). “Do poverty and poor health and nutrition increase the risk of armed conflict onset?”, *Food Policy*, 33(6), pp. 514-520.

<sup>3</sup> ICRC, Statement made by ICRC to the Commission on Human Rights at its fifty-seventh session on agenda item 10. Reference found in: General Assembly (2001). UN.Doc. A/56/210, 23 July 2001, The right to food, para. 37-40, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/BF212836491D592685256AE60074C35E>. Accessed: 13 April 2020.

livelihoods of people in times of war”. According to Elver, the rise of hunger in these cases occurs due to the breach of these two areas of law by states and other political agents.

The duration of the conflict affects the subsequent recovery of the population. The prolonged crisis will severely affect the productive bases of food, there will be a greater risk of famine and, consequently, the resilience of the population to its recovery will be lower (Pejic, 2001, pp. 1097-1109).

In the worst case, the situation of hunger among civilian population can be used as a form of weapon of armed conflict, something that is strictly forbidden by the provisions of international humanitarian law,<sup>4</sup> as we will see later.

## **2. THE RULES OF INTERNATIONAL HUMANITARIAN LAW THAT PROTECT ACCESS TO FOOD FOR THE CIVILIAN POPULATION DURING THE DEVELOPMENT OF THE ARMED CONFLICT**

IHL is designed to protect people, civilian property and limit the use of certain methods and means of warfare. Its main objective is to protect persons who do not take part in hostilities, such as civilian population, wounded, prisoners of war, shipwrecked persons, etc. Women and children are automatically covered as persons who are not taking part in the hostilities (if they are not combatants, obviously) and they receive special protection according to the conventions and protocols.

Unlike economic, social and cultural rights, IHL is not subject to progressive realization, but must be implemented immediately. It also binds both State and non-State actors. The fundamental principles of IHL, which protect the civilian population, have a direct impact on the protection of the right to food during armed conflict, as we will see below.

As is known, based on these Principles, parties to an armed conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives,<sup>5</sup> so that direct attacks are only against military objectives. It must be remembered that, with respect to food security and access to food for the civilian population, the protection of civil property is of fundamental importance. These

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<sup>4</sup> See: Hutter, S. (2019). “Starvation in Armed Conflicts: An Analysis Based on the Right to Food”, *Journal of International Criminal Justice*, Volume 17, Issue 4, pp. 723-752.

<sup>5</sup> See: Customary IHL: Rule 1, “The Principle of Distinction between Civilians and Combatants”: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1); Rule 7, “The Principle of Distinction between Civilian Objects and Military Objectives”: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7). Accessed: 13 April 2020.

principles, applicable in any kind of armed conflict,<sup>6</sup> have been known as the principle of distinction<sup>7</sup> and the principle of proportionality.<sup>8</sup>

Since most contemporary rules of IHL are contained in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977,<sup>9</sup> our analysis will focus on studying these sources of IHL, regardless of whether we mention, secondarily, to other sources of IHL.<sup>10</sup>

<sup>6</sup> See: CIJ, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci* (Nicaragua c. Etats-Unis d'Amérique), Arrêt du 27 juin 1986, para. 2018.

<sup>7</sup> The International Court of Justice has considered the fundamental nature of the principle of distinction in its Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996, where it identifies the cardinal principles contained in the sources of IHL, among those that stand out: the protection of the civilian population and civilian objects, the distinction between combatants and non-combatants, the distinction between civilian and military objectives and the prohibition of superfluous injury to combatants. As a general rule, the principle of distinction permits direct attacks only against the armed forces of the parties to the conflict, while the peaceful civilian population must be spared and protected against the effects of the hostilities. See: Dupuy, P.M. (1997). "Analysis of the Advisory Opinion of the International Court of Justice of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons", in Fernández Sánchez, P.A. (Coord.) (1997). *La licitud del uso de las armas nucleares en los conflictos armados*, University of Huelva, Spanish Red Cross, Ministry of Defence, Seville, pp.87-100. See also: ICRC, IHL Database: Rule 1. The Principle of Distinction between Civilians and Combatants, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1). Accessed: 13 April 2020

<sup>8</sup> The proportionality principle determines the fact that belligerents cannot use any means at their disposal to attack the enemy. Its content is included in the Preamble of the Declaration of St. Petersburg of 1868 and in the Hague Regulations of 1907, in which article 22 provides that "belligerents have not an unlimited right in regard to their choice of methods of harming the enemy". So, indiscriminate attacks are prohibited. This principle implies that collateral civilian damage arising from military operations must not be excessive in relation to the direct and concrete military advantage anticipated from such operations. As can be seen, the principle of proportionality is linked to the principle of distinction, which it reinforces in terms of protecting the immunity of the population and civilian property. Article 51(5) (b) of the 1977 Additional Protocol I seems to conventionally express the principle of proportionality by prohibiting attacks against a legitimate objective when "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". In fact, pursuant to Article 8(2) (b)(iv) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects [...] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated". See also: Gaggioli G. (2017). "El Uso de la Fuerza en los Conflictos Armados. Interacción entre los Paradigmas de la Conducción de Hostilidades y del Mantenimiento del Orden", Comité Internacional de la Cruz Roja, Ginebra, pp.9-11.

<sup>9</sup> For a detailed study of international humanitarian law, see: Ramón Chornet, C. (2005). "Demasiado tarde para la población civil. El cometido del Derecho internacional humanitario", in Gutiérrez Espada, C. (Coord.), *El Derecho Internacional: normas, hechos y valores. Liber Amicorum José Antonio Pastor Ridruejo*, Servicio de publicaciones de la Universidad Complutense de Madrid, Madrid, pp.287-299. In relation to the protection of the right to food during armed conflict under international humanitarian law, see: Kracht, U. (2003). "Human Rights and humanitarian action: the right to food in armed conflict", in Bergsmo, M. (Ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Martinus Nijhoff, Leiden/Boston, pp. 261-290.

<sup>10</sup> For example, in the framework of IHL, and as far as we are concerned, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997) has also been relevant because it prohibits the use of anti-personnel mines. The adoption of this Convention

While IHL does not mention the “right to food” or “food security,” as such, many of its provisions are intended to ensure that people are not denied access to food during the armed conflict (Pejic, 2001; Kracht, 2003).

Some of these provisions impose preventive measures, while others apply to humanitarian and relief assistance once preventive measures fail. Additional provisions also provide for access to food by specific groups of people (prisoners of war, internees, etc.). Preventive rules include, for example, the prohibition of starvation of civilians as a method of warfare, the prohibition to destroy foodstuffs, crops, livestock, drinking water installations<sup>11</sup> and other goods that are essential to the survival of the civilian population, the prohibition on forced displacement and the prohibition of attacks against the natural environment.

### **2.1. Prohibition of starvation of civilians as a method of warfare**

The rules of IHL guaranteeing access to food for the civilian population in a preventive manner are based on two fundamental principles: the prohibition of starvation of the civilian population as a method of warfare, and the prohibition of attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population. We must not forget, as we said earlier, that these principles are complemented and reinforced by a more general principle, the principle of distinction between civilian objects and military objectives. According to this principle or rule of customary law, only military objectives can be attacked.

The Additional Protocols explicitly prescribe these rules, whether in the context of an international or non-international armed conflict, as we are going to see.

Current IHL explicitly prescribes the prohibition of the use of hunger against the civilian population. This innovation has been introduced by the 1977 Additional Protocols, both for international and non-international conflicts. Therefore, there is an explicit prohibition of starvation of civilians as a method of warfare in both international and non-international conflicts.

That prohibition is violated not only when denial of access to food causes the death of the population, but also when the population suffers from hunger because of deprivation of food sources or supplies. In this regard, the prohibition of starvation, as a method of warfare, is also implemented through provisions prohibiting attacks on elements necessary for the survival of the civilian population, including food and drinking water.

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was intended to protect the civilian population from the effects of landmines that persist beyond the strict duration of the armed conflict. There is a relationship between landmines and food security to the extent that possible presence of mines, and the fear of mines being detonated, is a factor that can coerce the access and passage of local producers to farmland, and of course the fear of damage to their physical integrity.

<sup>11</sup> In times of conflict, the Geneva Conventions and their Additional Protocols do not expressly mention the right to water; however, water is included *de facto* in food and relief supplies system. Therefore, water benefits from the same protection as that established by humanitarian law for food and other goods essential for the survival of the civilian population.

Let us look at this prohibition in detail:

In the context of an *international conflict*, article 54, paragraph 1, of Additional Protocol I expressly states that: “Starvation of civilians as a method of warfare is prohibited”.

As the International Committee of the Red Cross (ICRC) has commented, the prohibition of starvation as a method of warfare is not only violated by directly starving the population to death, but is also violated when a Party to the conflict deliberately causes the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.<sup>12</sup> By using the term “starvation” as a method of warfare, the aim is to prevent it from being used as a weapon to annihilate or weaken the population.

According to the Rome Statute of the International Criminal Court, the intentional use of starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival is considered a war crime in international armed conflict.<sup>13</sup>

The prohibition of starvation as a method of warfare is applicable both in occupied and unoccupied territories. This rule could have been placed in Title III, Section I, on “Methods and Means of Warfare”, of Additional Protocol I, but as it directly concerns the civilian population, its position seems justified.

The prohibition of starvation of the civilian population is also imperative in the *context of a non-international armed conflict*, according to Article 14 of Additional Protocol II. This article provides that: “Starvation of civilians as a method of combat is prohibited”.

In relation to the preparatory work for Additional Protocol II, it was preferred to use the word “method of combat” instead of “method of warfare” (used in Additional Protocol I) because it was understood that it was a more appropriate term in an instrument related to non-international armed conflicts. In contrast, the term method of warfare was more appropriate in the context of an armed conflict between States.

In any case, Additional Protocol II prohibits starvation when it is used as a weapon to annihilate the civilian population, in the same way as Additional Protocol I prohibits starvation of the civilian population as a method of warfare in the context of an international conflict.

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<sup>12</sup> See: ICRC (1987). Comment of the International Committee of the Red Cross, Additional Protocol I, Article 54, para. 1, section 2089. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=6377CFD2C9D23F39C12563CD00434C81>. Accessed: 14 April 2020.

<sup>13</sup> Article 8.2 (b)(XXV) of the Statute of the International Criminal Court.

An example of this occurred when, from April 1992 to June 1995, Yugoslav federal army units and Serbian militias besieged the city of Sarajevo, imposing a food blockade and causing thousands of deaths. See: UN Doc, Economic and Social Council, E /CN.4/ 2001/53, 7 February 2001, para. 74; UN Doc., A/56/210, 23 July 2001, Note by the Secretary-General \*\*, Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler, para. 46

The prohibition of starvation against the civilian population as a method of combat is a rule that cannot be derogated from. The literal wording of this prohibition makes it clear that it is not possible to make any exceptions in case of imperative military necessity, as it is done in other provisions. It is a rule promulgated for the benefit of civilians.<sup>14</sup> It should therefore be noted that blockade and siege<sup>15</sup> would only be considered lawful methods of combat if they are directed exclusively against combatants. We say this because, according to the prohibition indicated above, it would be necessary to distinguish between the siege of a city (where there are combatants but also civilian population inside) and the siege of a military fortress *stricto sensu*. In the second case, hunger could be used as a method of combat and it would be lawful the systematic destruction of food that could be consumed by besieged combatants, since these actions are directed against combatants. While in the first case, since the civilian population would be directly affected, we understand that it would be forbidden to cause hunger and destroy the essential assets for the survival of the population, even if the enemy combatants also benefit from those.

Moreover even if the population is finally damaged by such methods, we understand that, in the light of article 18 paragraph 2 of Additional Protocol II,<sup>16</sup> relief actions in favor of the population should be authorized when they suffer excessive deprivation due to the lack of essential supplies for their survival.

In this same sense, the ICRC considers that articles 14 and 18 of Additional Protocol II should be read together as complementary measures, so that the argument of military necessity is not used to justify the starvation of the civilian population. As soon as essential goods are missing, international relief actions provided for in Article 18 should be authorized to respect the obligation derived from Article 14 of Additional Protocol II.

## **2.2. Prohibition of attacking, destroying, removing or rendering useless indispensable goods to the survival of civilian population**

Additional Protocol I in its article 54 paragraph 2 prohibits depriving civilians of their assets necessary for their survival *in the context of an international armed conflict*. In this sense, it states that: “It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance

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<sup>14</sup> See: ICRC (1987). Comment of the International Committee of the Red Cross, Additional Protocol II, Article 14, section 4796. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=22A3363FA0482A57C12563CD0043AB5D>. Accessed: 14 April 2020.

<sup>15</sup> The blockade aims to prevent military equipment from reaching enemy forces, for example by impeding maritime trade or one of their coastal provinces, and siege consists of surrounding an enemy location by isolating those within any communication to achieve their surrender.

<sup>16</sup> “If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned”.

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”<sup>17</sup>.

This provision develops the prohibition formulated in Article 54.1 of Protocol I, in relation to the use of starvation of civilians as a method of warfare.<sup>18</sup>

It should be noted that the expression used (“such as...”) in Article 54.2 of Additional Protocol I, shows that the list of protected goods is merely illustrative. An exhaustive list could have led to omissions or arbitrary selection. As the text of the article reveals, reference is made to objects and goods that are indispensable for the survival of the civilian population.

It should also be added that the verbs “attack”, “destroy”, “remove” and “render useless” are used to cover all possibilities, including pollution, by chemicals or other agents, of water reservoirs or destruction of crops by chemicals or products.<sup>19</sup> Therefore, physical destruction includes the destruction of crops, either by chemicals or by contamination of water installations. We consider that, however, there would also be a violation of this prohibition if landmines rendered agricultural areas unusable.

The prohibition in Article 54, paragraph 2, of Additional Protocol I has a number of exceptions. Thus, it is established that:

“The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party: (a) as sustenance solely for the members of its armed forces; or (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement”<sup>20</sup>.

The following ideas can be used to clarify the meaning of this provision:

-First of all, it would be lawful that food supplies intended for the exclusive use of the armed forces could be attacked and destroyed, although we consider that agricultural areas or drinking water facilities would hardly be used exclusively for the benefit of the armed forces.

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<sup>17</sup> Paragraph 4 of Article 54 of Additional Protocol I also recalls that these mentioned and protected assets/ objects may not be subject to reprisals.

<sup>18</sup> The approach of Article 54 of Protocol I responds to a desire for effective protection: the first section has the purpose of establishing the principle by which “it is prohibited, as a method of war, to starve civilians”, and the second and subsequent sections define the modalities of application and the regime of the general rule.

<sup>19</sup> See: ICRC (1987). Comment of the International Committee of the Red Cross, Additional Protocol I, Article 54, *Op. Cit.*, section 2101.

<sup>20</sup> Article 54.3, Additional Protocol I.

-Secondly, when objects are used for purposes other than the subsistence of members of the armed forces and its use is in direct support of military action, attacks on such objects, by The Adverse Party, would be lawful unless that actions have serious effects on supplies to the civilian population that they result in starvation or forced displacement.<sup>21</sup> This is the provision that gives meaning to the reference in Article 54.2 to the adverse Party (it is prohibited to attack or destroy objects indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party in order to starve out civilians, to cause them to). In that sense, if the objects referred to in article 54, paragraph 2 are used in support of military action, the adverse Party could attack or destroy them, provided that the consequence of such attack does not leave the population so deprived of food that the result is eventually starvation or forced displacement. That is, the reference to “The Adverse Party” in article 54, paragraph 2, is necessary to prevent the enemy State from being deprived of such objects indispensable to the civilian population under the exceptions for military necessity.

The same prohibition related to the attacks against objects indispensable to the survival of the civilian population applies *in the context of non-international armed conflicts*. In this regard, Additional Protocol II in its article 14 states that:

“It is prohibited to attack, destroy, remove or render useless, for that purpose (starvation of civilians as a method of combat), objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation Works”.

We can see how this Article 14 gives concrete expression to the general formulation of protection of the civilian population set out in Article 13 of Additional Protocol II, according to which “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”.

In accordance with the terms of Article 14 of Additional Protocol II (“*Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy [...], for that purpose, objects indispensable to the survival of the civilian population [...]*”), it seems that the attack, destruction, removal or rendering useless objects or property indispensable to survival are prohibited only insofar as such actions are carried out with the intent to starve civilians, which may be difficult to prove. In this regard, López-Almansa Beaus believes that this intention could be inferred from the explicit statements of the attacker, or from the factual circumstances of the attack (e.g, whether or not the attacker makes efforts to distinguish between civilian and military objectives, whether or not the attacker gives consent to the access of relief convoys to the affected population, etc.) (López-Almansa Beaus, 2006, p.255).

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<sup>21</sup> See: ICRC (1987). Comment of the International Committee of the Red Cross, Additional Protocol I, Article 54, *Op.Cit.*, Section 2112.

However, we believe that the absolute prohibition of starvation, as a method of combat, for civilians means that the attacks and the indiscriminate destruction of those goods, which are indispensable for the population (food, agricultural areas, livestock, crops, water reserves, etc.), are also considered to be prohibited *de facto*, even if these attacks were launched without the intention of starvation for civilians. Why? Because this violates the principle of distinction and the principle of proportionality, and because these attacks could result in the death of the population, in long-term, from the deprivation of access to these essential goods.

### 3. ASSISTANCE TO PROTECTED PERSONS IN THE CONTEXT OF INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

Although humanitarian assistance can benefit all victims of war, we are only going to analyze the assistance provided to the civilian population in general, which will have different legal regimes depending on whether we are in the context of an international armed conflict or not.

In particular, article 23 of the Fourth Geneva Convention enshrines the obligation of Each High Contracting Party to authorize the free passage of all consignments of medical equipment and objects necessary for religious purposes intended only for civilians of another High Contracting Party, even if it is an enemy. The Parties shall also permit the free passage of all consignments of essential foodstuffs, clothing and tonics reserved for children under fifteen, expectant mothers and maternity cases.

It follows from the above-mentioned article that when humanitarian assistance is provided by impartial organizations, all States (and specifically the Parties to the conflict), have an obligation to allow free passage for humanitarian assistance to access certain categories of people, like pregnant women and children,<sup>22</sup> even though those persons belong to an adversary state or an enemy non-state faction, without offering obstacles to the delivery of the shipments. However, this general obligation does not prevent the State authorizing free passage from determining the technical conditions of such passage.

These ideas can also be seen in Article 59 of the Fourth Convention, according to which:

“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf

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<sup>22</sup> Article 23 of the IV Convention, which specifies that the delivery of food is “reserved for children under fifteen and pregnant women”, was designed to address mainly humanitarian assistance in situations of blockade in which it was required the free passage of essential foods for them.

See: ICRC (1958). Comment of the International Committee of the Red Cross, Article 23, Convention IV. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=660CC3CB70E98F1AC12563CD0042B693> . Accessed: 13 April 2020.

However, Article 70.1 of Additional Protocol I extends this coverage to the entire civilian population that does not have adequate supplies, including food, provided relief measures are humanitarian and impartial.

of the said population, and shall facilitate them by all the means at its disposal. Such schemes [...] shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing. All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection”.

The inclusion of this provision in the Fourth Convention was intended to guarantee the right of the civilian population, in the occupied territories, to receive humanitarian assistance. During the Second World War, unlike prisoners of war and civilian internees, who were covered by the Prisoners of War Convention of 1929,<sup>23</sup> the civilian population of the occupied territories did not have the benefit of any treaty provision authorizing the receipt of assistance. Therefore, there was no obligation for the belligerents to accept, nor to allow the free transit of relief consignments intended for the civilian population (ICRC, 1948).

From the provisions of article 59 of the IV Convention we can deduce that, in cases where the occupied territory is not adequately supplied, the occupying Power has the obligation to accept the relief supplies destined for the population.

Additional Protocol I, Article 70.1, supplements the provision of the Fourth Convention by prescribing that:

“If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69,<sup>24</sup> relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts”.<sup>25</sup>

<sup>23</sup> See: ICRC (1948). Report of the International Committee of the Red Cross on its activities during the Second World War, Part IV, vol. III, Geneva, pp. 359-533. Available at: <https://ia800300.us.archive.org/0/items/ReportOfTheInternationalCommitteeOfTheRedCrossOnItsActivitiesDuring/ReportOfTheInternationalCommitteeOfTheRedCrossOnItsActivitiesDuringTheSecondWorldWarSeptember11939-June301947Vol.3.pdf>. Accessed: 13 April 2020.

<sup>24</sup> Relating to the essential needs of the population in the occupied territory. According to this article, entitled “Basic needs in occupied territories”, “in addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship”.

<sup>25</sup> When it is necessary that the aid provided includes relief personnel, in particular for the transport and distribution of relief shipments, the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties. These relief personnel, on the one hand, will be protected by the Party that has given them their approval and, on the other hand, assisted, in the fulfillment of their mission, by the Party that receives the shipments. Relief personnel activities may only be limited and their movements temporarily restricted, in case of imperative military necessity. See Article 71 of Additional Protocol I, entitled “Personnel participating in relief actions”.

If we look at the wording of article 59 of the IV Convention and article 70.1 of Additional Protocol I, we can see that there is a slight qualification. The provisions of article 59 of the IV Convention mean that when it is an occupied territory, in the event that the population of that occupied territory is insufficiently supplied, the Occupying Power “shall agree” relief actions in favor of said population.<sup>26</sup> However, when Article 70.1 of Additional Protocol I refers to the civilian population of any territory, it is expressly stated that 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”. This raises the following question: does subjection to the agreement of the Parties, established in Article 70.1, imply that the State can deny relief actions when the population is insufficiently supplied with food?

To answer this question, we will refer to the the ICRC’s commentaries on the scope of Article 70(1) of Additional Protocol I. From these comments it follows that the obligation of the Parties is not to accept relief actions in any case, but not to arbitrarily refuse humanitarian assistance (Giles Carnero, 1997, p.46). Specifically, the ICRC uses this expression: “did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement *must do so for valid reasons, not for arbitrary or capricious ones*”.<sup>27</sup>

Therefore, the expression “subject to the agreement of the Parties concerned should not be interpreted as “with the discretionary consent of the Parties”. Given as that Article 70.1 expressly states that relief actions “shall be undertaken”, this expression implies terms of obligation and not of discretion (Fernández Sánchez, 1995, p.37). Therefore, the subjection to the agreement of the Parties must be interpreted in the sense that either they can fix the technical conditions of distribution or that they could only deny humanitarian assistance through well-founded reasons when the assistance does not meet the required conditions, that is, humanitarian and impartial character, carried out without any distinction of an unfavorable nature, etc.

Anyway, we understand that if the civilian population, of any unoccupied territory, is short of food, Parties concerned would necessarily have to authorize the entry of impartial humanitarian agencies for food distribution because otherwise we understand that they would violate the prohibition of Article 54 paragraph 1 of Additional Protocol I, which prohibits using starvation of civilians as a method of warfare.

In this sense, we would be faced with an obligation of behaviour (not arbitrarily refusing humanitarian assistance) and of result (allowing humanitarian assistance to finally reach the underserved population).

<sup>26</sup> Article 59 IV Geneva Convention: “If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal”.

In Spanish the term used is: “aceptará” and in French the word is “acceptera”.

<sup>27</sup> See: ICRC (1987). Comment of the International Committee of the Red Cross, Additional Protocol I, Article 35, Section 2805. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=2F157A9C651F8B1DC12563CD0043256C> Accessed: 14 April 2020.

Non-compliance with these provisions of IHL led to the Security Council's decision on the Yugoslav conflict. Resolution 764 of 13 July 1992 noted the serious violations of IHL during the conflict and reaffirmed the duty of all parties to comply with their obligations under this law.<sup>28</sup> The continuing aggravation of the Yugoslav conflict and the failure to comply with IHL led the Council to take a further position on the matter, declaring in Resolution 770 of 13 August 1992 that the situation in Bosnia and Herzegovina represented a threat to international peace and security, recognising that the provision of humanitarian assistance to that region was an important part of the efforts to restore peace.<sup>29</sup> The Council also adopted a resolution on the situation in Bosnia and Herzegovina. Since conditions hampering the delivery of humanitarian supplies persisted, the Council demanded that the ICRC and other humanitarian organizations be given immediately permanent and unrestricted access to camps, prisons and detention centres to ensure that all detainees are treated humanely, including specifically the distribution of food and medical care. In the same resolution, the Council also urged all States to take the necessary measures to facilitate humanitarian assistance to these areas, in order to ensure humanitarian assistance to Sarajevo and Bosnia. According to the wording of the resolution ("to take all measures necessary to facilitate the delivery"), nothing seemed to prohibit forces protecting a humanitarian convoy the use necessary and proportional force to ensure that humanitarian assistance was delivered.

Within the framework of a *non-international armed conflict*, Article 3 common to all the Geneva Conventions and Protocol II provides the humanitarian assistance to civilians, including persons deprived of liberty.

In accordance with common Article 3:

"An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict".

Therefore, the offer of services of an impartial humanitarian institution is legitimate. Without a doubt, the parties to the conflict can reject it if they can do without it, but the parties can no longer see that aid as a hostile act, nor as an attempt to interfere in the internal affairs of the State,<sup>30</sup> as the Russian authorities intended it to occur in relation to Chechnya.

This provision enshrines a genuine "right of humanitarian initiative".<sup>31</sup> This right can be exercised against all parties to a conflict, including non-State parties. However,

<sup>28</sup> See: UN Doc., S/RES/764 (1992) of 13 de july 1992, para. 10.

<sup>29</sup> See: UN Doc. S/RES/770 (1992), of 13 de august 1992, p. 1.

<sup>30</sup> See: CIJ, Activités militaires et paramilitaires au Nicaragua et contre celui-ci, *Op. Cit.*, para. 242 : « Il n'est pas douteux que la fourniture d'une aide strictement humanitaire à des personnes ou à des forces se trouvant dans un autre pays, quels que soient leurs affiliations politiques ou leurs objectifs, ne saurait être considérée comme une intervention illicite ou à tout autre point de vue contraire au droit international ».

<sup>31</sup> The right to offer services, which is also sometimes called the "right of humanitarian initiative", should not be confused with the so-called "right of humanitarian intervention" or with the "responsibility to protect", two different concepts that have generated a great debate, for example about if international law

when an offer of services is made to a party to a non-international armed conflict, there is no requirement in common article 3 to make an equivalent offer to the other party or parties to the conflict. The services provided by the impartial humanitarian agency shall be intended for persons protected by common Article 3, that is, persons who do not participate directly in hostilities, including members of the armed forces who have deposited weapons and persons placed outside of combat due to illness, injury, detention or any other cause. Therefore, civilians benefit from the protection of common Article 3, except when they actively participate in hostilities.

The willingness and capacity of impartial humanitarian bodies to respond to the humanitarian needs of people affected by a non-international armed conflict does not undermine the fact that, as a matter of international law, based on the principle of subsidiarity, the main responsibility for satisfying those needs fall on the Parties to the conflict. The activities of humanitarian agencies should only complement, where necessary, the efforts of those Parties in this regard. This is why humanitarian organisations are not legally obliged to offer their services, as can be seen from the phrase “may offer” in common Article 3.<sup>32</sup>

In similar terms, Article 18 of Additional Protocol II provides that:

“1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

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

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allows measures such as the threat or use of force when such measures are motivated by humanitarian considerations. See: Lowe, V. and Tzanakopoulos, A. (2011). “Humanitarian Intervention”, Max Planck Encyclopedias of International Law MPIL, Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

Similarly, the analysis of article 3 (2) must be done without prejudice to the actions of the Security Council, in accordance with the Charter of the United Nations, when it deems appropriate to authorize humanitarian assistance actions. This occurred in the case of Somalia, in which Council Resolution 794 of December 3, 1992 authorized, acting in accordance with Chapter VII of the Charter, the Secretary General and Member States to use all necessary means in order to establish a safe environment for humanitarian relief operations in Somalia as soon as possible. See: UN.Doc., S/RES/794 (1992), of 3 december 1992, adopted unanimously, paragraphs 8 and 10.

<sup>32</sup> See: ICRC (2016). Comment of the International Committee of the Red Cross, Geneva Convention I, Article 3, Section 782. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDEFA490736C1C1257F7D004BA0EC> Accessed: 14 April 2020.

We can appreciate, unlike common Article 3, that Article 18 of Additional Protocol II does provide a right of humanitarian initiative by the civilian population. That is, while common article 3 allowed only impartial humanitarian agencies to offer assistance, Additional Protocol II authorizes the civilian population to spontaneously offer its services to collect and care for the wounded, sick and shipwrecked.

Also, Article 18 refers to relief actions of international origin when the civilian population is suffering extreme deprivation due to lack of supplies indispensable for their survival.<sup>33</sup> But in this case the article provides that “relief actions shall be undertaken subject to the consent of the High Contracting Party concerned”. So, Article 18(2) of Additional Protocol II explicitly addresses the requirement to obtain the consent of the “High Contracting Party concerned” with respect to a particular type of humanitarian activities, i.e., relief actions. The logic, then, implies that in the context of a non-international armed conflict, an impartial humanitarian organization may only carry out proposed humanitarian activities if it has consent to do so.

In exceptional circumstances, however, seeking and obtaining the consent of the Party concerned may be problematic. This may be the case, for example, when there is uncertainty regarding the government it controls, or when state authorities have collapsed or have ceased to function. In these cases, since in principle “High Contracting Party concerned” should be interpreted as “Government in power”, when it is not possible to determine which are the authorities concerned, consent will be presumed in response to the urgency and non-delay of assistance to the civilian population.

However, the fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization, which meets the necessary conditions of impartiality and non-discrimination, can remedy this situation, relief measures must be carried out. According to the ICRC, military necessity is not a valid reason under humanitarian law to reject a valid offer of services or to deny in full the humanitarian activities proposed by impartial humanitarian organizations.<sup>34</sup>

In these cases we understand that if the only way to combat hunger is through humanitarian assistance, the Party concerned (in the framework of a non-international armed conflict) has an obligation to authorize such actions, understanding that if it does not do so, such rejection would amount to a violation of the rule prohibiting the use of starvation of the civilian population as a method of combat (article 14 Additional Protocol II).

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<sup>33</sup> It is clear that it is not possible to establish an exhaustive list of criteria to determine when the population is “suffering undue hardship”, but it is appropriate to take into account the usual standard of living of the population in question and the needs provoked by hostilities. See: ICRC (1987). Comment of the International Committee of the Red Cross, Additional Protocol II, Article 18, Section 4881.

<sup>34</sup> See: ICRC (2016), Commentary of the International Committee of the Red Cross, Geneva Convention I, Article 3, *Op.Cit.*, Section 838.

Likewise, Jean Ziegler understands that rejecting the authorization of humanitarian aid that seeks the distribution of food, would imply a violation of the fundamental right to be free from hunger if civilians eventually die because of not receiving such food assistance (Ziegler et al., 2011, p.105).

In the context of non-international armed conflicts in addition to requiring the consent of the State to carry out relief actions (when the population is under-supplied), we find another aspect that differs from international armed conflicts. Unlike IHL applicable to international armed conflicts, no provision specifically addresses the issue of whether the High Contracting Parties, different from those that are part of a non-international armed conflict, have the obligation to allow and facilitate rapid and unimpeded passage of relief shipments. It could be argued, at least tentatively, that this can be considered mandatory on the basis of the due diligence component enshrined in common Article 1 (“to ensure respect for the Conventions in all circumstances”). In any case, when a humanitarian organization can only reach its beneficiaries across the territory of a particular State, the humanitarian spirit on which the Conventions are based suggests a legitimate expectation for that State does not abuse its sovereign rights.

In any case, it could be argued that States have a duty to cooperate to promote universal respect for human rights and the effectiveness of such rights, according to Resolution 2625 (XXV) of October 24, 1970.<sup>35</sup> This Resolution, adopted by *consensus*, of the General Assembly has been pointed out by the International Court of Justice as “a text which provides an indication of the *opinio iuris* (of the States) on customary International Law” (CIJ, 1986, para.191).

In this regard, despite the lack of reference, within the framework of the non-international armed conflict, to provisions that refer to the obligation to allow and facilitate the rapid and unimpeded passage of relief shipments, we understand that this obligation exists on the basis of customary international law concerning concerning Friendly Relations and Co-operation among States.

#### **4. CRIMINALIZATION OF SERIOUS VIOLATIONS OF THE RULES OF INTERNATIONAL HUMANITARIAN LAW PROTECTING ACCESS TO FOOD BY THE CIVILIAN POPULATION**

In addition to the specific provisions, along the route through the four Geneva Conventions and the two Additional Protocols, which specifically regulate food aspects of the civilian population in general, IHL also has complementary mechanisms for repression of those acts that violate the provisions protecting the population’s access and food availability during periods of armed conflict. Although there are doubts about the

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<sup>35</sup> “States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance”. See: UN Doc., Resolution 2625 (XXV), October 24, 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, p. 6.

effective justiciability of the Human Right to Food within the framework of International Human Rights Law, because of its economic, social and cultural character and because its applicability is progressive, in IHL, by contrast, the provisions referring to access to food have immediate application, taking into account the seriousness of the circumstances that cause armed conflicts for the civilian population in general. The norms that guarantee food security during periods of armed conflict are norms whose violation can give rise, simultaneously, to individual criminal responsibility or to a Security Council Resolution, within the framework of Chapter VII, by which mandatory measures are taken to prevent these violations from continuing.

For example, after determining the existence of a threat to peace (Article 39 of the United Nations Charter), the Security Council may adopt a Resolution and can take enforcement measures (Articles 41 and 42 of the Charter) to maintain or restore international peace and security. The fact that a belligerent State does not allow humanitarian or food assistance on its territory, when it is obliged to do so according to IHL, and ends up producing deaths by starvation of the civilian population, could mean that we are facing a threat to international peace and security. The Security Council may determine that such threat exists and decide what action should be taken. If we recall the case of Somalia, the Council determined that the magnitude of the human tragedy caused by the conflict, and further aggravated by the obstacles that were being created for the distribution of humanitarian assistance, constituted a threat to international peace and security. As a result, the Council demanded that all parties, movements and factions in Somalia take all measures necessary to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia.<sup>36</sup> When the Council refers to “take all measures necessary”, we understand that it is authorizing even the use of force, if necessary, to ensure that humanitarian assistance finally reaches all civilian populations in need. In this situation the Security Council can act to impose food assistance and to stop the use of starvation as a weapon of war. Therefore, if the obstacle of humanitarian assistance aggravates the conflict situation and this is determined by the Council as a threat to peace, as happened in Somalia, why not think that a famine situation occurred during the development of an armed conflict is of such magnitude that it could in itself lead to its qualification as a threat to international peace and security.

It could be thought, therefore, that fundamental right to freedom from hunger<sup>37</sup> would be formally more protected in times of war than in times of peace, since its violation

<sup>36</sup> See: UN Doc. S/RES/794, 3 December 1992, para. 2.

<sup>37</sup> At this point it is necessary to clarify the differences between the right to food, the fundamental right to freedom from hunger and the concept of food security.

The right to food is, as its name indicates, a right recognized in international instruments, binding and generating legal obligations. In this sense, it is a legal concept. Specifically, the right to food is formulated in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). To better understand the literal wording of article 11 of the ICESCR, it should be noted that what we call the human right to food is actually an abbreviated expression by which we refer to the two formulations contained in article 11, that is, the right of every person to adequate food (para. 1) and the right to be free from hunger (para. 2). Many analyzes have treated both formulations as practically synonymous, however, both

may give rise to individual criminal responsibility or to a Security Council Resolution adopting coercive measures. According to Philip G. Alston, “the provisions of IHL that protect access to food are detailed and enjoy the extra guarantee offered by this branch of law, due to its wide acceptance by the international community, so it is worth asking why the hungry do not have similar levels of protection when there is no war” (Alston, 1984, p.26). Since it is possible to criminalize acts or omissions that may threaten the food security of war victims, we are going to study and analyze, in this section, the question of the qualification of war crimes when the provisions of IHL that protect the access to food of the civilian population are violated. Within the complementary mechanisms of repression of those acts that may violate the provisions of IHL, in which food security is protected in periods of armed conflict, the provisions of the Statute of the International Criminal Court (ICC), adopted by the 1998, play a fundamental role. The Statute systematizes in a general way the acts that violate IHL, from which individual criminal responsibility could be demanded, once the domestic Courts have failed, including universal jurisdiction (Fernández Sánchez, 2007, pp.333-340).

#### 4.1. Acts constituting war crimes

The term “war crimes” refers to serious violations of IHL that carry individual criminal responsibility. Therefore, there must be an “obvious link” between an alleged criminal act and the armed conflict in order to qualify as a war crime.<sup>38</sup> It is possible to qualify those acts that undermine the right to food, during armed conflicts, as war crimes, both within the framework of an international and non-international armed conflict. There are two specific actions that undermine the right to food described in the ICC Statute as war crimes: The use of starvation of the civilian population as a method of warfare and

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formulations are significantly different, since the first is much broader than the second. Being protected from hunger is specified as a fundamental right. In fact, this is the only human right that the ICESCR classifies as “fundamental”, which denotes that it is given a higher normative status. However, taking into account the right to adequate food as a priority standard has important implications. In this sense, “freedom from hunger” can be achieved by simply supplying the necessary calories to prevent malnutrition or death. While it may be an argument to mobilize public-political opinion and national and international aid, that approach should be seen only as the first step in realizing the primary norm, which is the right to food. This has a quantitative dimension that goes beyond the minimum level of subsistence calories, implying those necessary for a normal and healthy active life. But it also has a qualitative dimension (which the formulation of protection against hunger lacks), which refers to the cultural convenience of food and respect for the value system of the habitual diet.

The concept of food security is not a legal concept per se and therefore does not impose obligations on the parties or confer rights that can be claimed. Food security is the definition of an objective, and therefore it is a term that has been interpreted in a more variable way, until we have arrived at the current concept that has achieved great acceptance by the international community: “Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life” (FAO, 1996). The definition of this objective, however, should not be confused with the means to achieve it; that is, food security is an objective to be achieved that provides the ideal means for the full realization of the human right to food, but food security is not a specific policy agenda. Indeed, the strategies or means to be employed to achieve food security are likely to have to change over time, to address new threats to people’s access of food.

<sup>38</sup> See: ICTY, Case No.: IT-96-21-T, 16 November 1998, Prosecutor v. Zejnil Delali], Judgement, para. 193.

the attack on the personnel or assets indispensable for survival (including food) involved in the framework of a humanitarian assistance mission in accordance with the Charter of the United Nations.<sup>39</sup>

a) *The use of starvation of the civilian population as a method of warfare*

The ICC Statute explicitly criminalizes the act of “Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.<sup>40</sup>

In particular, the elements of this crime are (International Criminal Court, 2002, p.31):

- “1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict”.

The problem arises from the fact that the ICC Statute, in article 8 second paragraph (b), where this type of war crime is inserted (intentionally using starvation of civilians as a method of warfare), specifies that “war crime means [...] b) Other serious violations of the laws and customs applicable in international armed conflict [...]”. The elements of the crime also state that “the conduct took place in the context of and was associated with an international armed conflict”. This implies that, in principle, the acts constituting war crimes in subparagraph (b) do not apply in the context of non-international conflicts. This is despite the fact that Additional Protocol II prohibits, as we have seen, the use of starvation of the civilian population as a method of combat (Article 14).

In particular, in 1998 there was a provision in the draft of Rome Statute that included the criminalization of starvation, as a war crime, within the framework of non-international armed conflicts (World Peace Foundation, 2019).

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<sup>39</sup> Recently the Security Council in its Resolution of 24 May 2018, adopted unanimously, has *strongly condemned* the use of starvation of civilians as a method of warfare in a number of conflict situations and prohibited by international humanitarian law. In the same resolution, it also *strongly condemns* the unlawful denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access for responses to conflict-induced food insecurity in situations of armed conflict. See: UN. S/RES/2417 (2018), 24 May 2018, para.5 and para.6.

<sup>40</sup> Article 8.2b.xxv Statute of the International Criminal Court.

However, for reasons that are difficult to discern, the final draft of the Rome Statute did not include this provision. Unfortunately, it is in the contexts of non-international armed conflicts that many cases of starvation of civilians can be seen, as we have seen in Yemen, Syria, South Sudan, northeast Nigeria and Somalia. This legal gap seriously limits, in practice, the ability of the Rome Statute to effectively prosecute those acts that cause “contemporary hunger” in many parts of the world.<sup>41</sup>

So, would it be a war crime to starve the civilian population when this conduct takes place in the context of a non-international armed conflict? We understand that it would, to the extent that the practice of States fixes this prohibition (starvation of civilians as a method of warfare) as a rule of customary international law, applicable in both international and non-international armed conflicts (Henckaerts and Doswald-Beck, 2007, pp. 2017-211). It is only necessary to observe the practice followed by States in relation to the so-called (by the International Committee of the Red Cross) Rule 53: “*Starvation as a Method of Warfare*”. The ICRC database shows how this prohibition has become a customary rule<sup>42</sup> through its reception in other international instruments as well as in the military manuals of many States. For example, in Spain, the Criminal Code defines (under crimes against the international community) and punishes the conduct of anyone who, in the context of an armed conflict, “haga padecer intencionadamente hambre a la población civil como método de guerra, privándola de los bienes indispensables para su supervivencia, incluido el hecho de obstaculizar arbitrariamente los suministros de socorro, realizados de conformidad con los Convenios de Ginebra y sus Protocolos Adicionales”.<sup>43</sup>

In line with these issues, in 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the case Tadić, noted that serious violations of fundamental provisions of international humanitarian law can be considered as war crimes regardless of whether such actions are committed in the context of an internal conflict. The Chamber held that for a violation of humanitarian law to reach the level of a war crime, four conditions must be met:<sup>44</sup>

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<sup>41</sup> In 2018, Switzerland proposed an amendment to the Statute of the International Criminal Court to include the starvation of civilians within the list of war crimes capable of being committed in a non-international armed conflict. The language used in the proposal is almost identical to the wording of the crime as it appears in Article 8.2 (b)(xxv). Overall, there is strong support for the proposal from the majority of State delegates, although some reservations have been raised. However, the reservations appear to be based on a more general opposition to the jurisdiction of the International Criminal Court, rather than any principled objection to the substantive amendment.

<sup>42</sup> See: ICRC, IHL DATABASE Customary IHL, Practice Relating to Rule 53. Starvation as a Method of Warfare, Available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53) . Accessed: 14 April 2020.

<sup>43</sup> Article 612.8 of the Spanish Criminal Code. Ministry of Justice, Criminal Code and Complementary Legislation. Edition updated to 6 September 2018.

<sup>44</sup> See: ICTY, Case No.: IT-94-1-A, 2 October 1995, Prosecutor v. Du[Ko Tadi], Decision on the defence motion for interlocutory appeal on jurisdiction, para.94.

“(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a “serious violation of international humanitarian law” although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby “private property must be respected” by any army occupying an enemy territory; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule”.

Starvation as a method of warfare in a non-international armed conflict meets these four conditions for it to be qualify as a war crime. First, this prohibition is expressly formulated in IHL; second, the prohibition has become a rule of a customary nature; third, it is a rule protecting a fundamental human right; fourth, the violation of this rule is typified in the ICC Statute and gives rise to the criminal responsibility of the individual who violates it.

In this regard, Antonio Cassese understands that any attack on livelihoods serving the civilian population is prohibited under customary international law (Cassese, 1984, p.91).

On the other hand, the prohibition of starvation of the civilian population as a method of warfare reflects the principle of distinction, which we mentioned at the beginning of this section, according to which attacks may only be directed against combatants, the people who are not taking any active part in the hostilities can not be attacked.

Consequently, using starvation of civilians as a method of warfare is considered, under customary law, as a war crime regardless of the type of conflict in which it is committed.<sup>45</sup> No measure of military necessity can therefore justify the starvation of civilians.

In this order of things, the legal basis that can determine the commission of a war crime, when food security of the civilian population is threatened, can be seen in the following Table 1.

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<sup>45</sup> For example, in the conflict in Bosnia, the Security Council, in Resolution S/RES/787 of 16 November 1992, in paragraph 7, condemned all violations of IHL, including the deliberate obstruction of the delivery of food and medical supplies to the civilian population, reaffirming that those that commit or order the commission of such acts will be held individually responsible in respect of such acts. See: UN Resolution S/RES/787 (1992), November 16, para.7.

Table 1. Legal basis, in International Humanitarian Law, for determining the commission of a war crime in the framework of the protection of access to food for civilians

<b>Rome Statute of the International Criminal Court</b>	<b>International humanitarian law</b>	
	<b>IV Geneva Convention relative to the protection of civilian persons in time of war, 1949</b>	<b>Protocol I Additional to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, 1977</b>
<p><b>Article 8.2(b) (xxv)</b> For the purpose of this Statute, “war crimes” means:</p> <p>“Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”</p>	<p><b>Article 23.1</b> “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 permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases”.</p>	<p><b>Article 54.1</b> “Starvation of civilians as a method of warfare is prohibited”.<sup>46</sup></p> <p><b>Article 54.2</b> “It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive”.</p>
	<p><b>Article 55.1</b> “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate”</p>	<p><b>Protocol II Additional to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts, 1977</b></p>
	<p><b>Article 59.1</b> “If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal”.</p>	<p><b>Article 14</b> “Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.</p>

Source: own elaboration

<sup>46</sup> The violation of article 54 of Protocol I may constitute not only a war crime but also a crime of genocide, if starvation is committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, under the terms of the Genocide Convention of 1948 (Article II c.).

*b) The attack on the personnel or assets indispensable for survival involved in the framework of a humanitarian assistance mission*

In the context of an international armed conflict, it is considered a war crime “intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”.<sup>47</sup> In this regard, in addition to the protection afforded to personnel and material of peacekeeping operations, humanitarian aid personnel and services whose objective is, for example, the distribution of food, are also protected, provided that the service is carried out under conditions of impartiality, neutrality and humanity.

In the context of an international armed conflict, the elements of this crime are the following (International Criminal Court, 2002, p.18):

- “1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict”.

It is qualified as a war crime, in the framework of a non-international armed conflict, serious violations of article 3 common to the four Geneva Conventions, in particular “acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause”.<sup>48</sup> Therefore, attacking humanitarian aid personnel

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<sup>47</sup> Article 8.2 (b)(iii) Statute of the International Criminal Court.

<sup>48</sup> Article 8.2 (c) Statute of the International Criminal Court.

who deliver food in the context of a non-international armed conflict can be considered as a war crime.

Although article 3 common does not directly contain provisions for the protection of food security, unlike Additional Protocol II, it clearly has the advantage of being representative of customary international law (Than and Shorts, 2003, p.90). Therefore the article is binding on all States and, in this sense, mass hunger induced or forced would implicitly fit between the prohibitions it contemplates, especially as a form of cruel and / or inhuman treatment.

For example, Milorad Krnojelac was found guilty of war crime for violating article 3 common of the Geneva Conventions, considering that he gave cruel treatment to non-Serb detainees in Kazneno-Popravni Dom, inflicting inhumane living conditions on them.<sup>49</sup> In particular, the starvation of non-Serbian prisoners was taken into account to assess whether these imposed inhumane living conditions could reach the level of “cruel treatment”.<sup>50</sup> In the Krnojelac case, the International Criminal Tribunal for the former Yugoslavia noted that “perhaps the most marked contrast between the treatment of Serbs and non-Serbs was with regard to food, both in quantity and in quality”.<sup>51</sup>

In the context of a non-international armed conflict, the elements of this crime are practically the same as for the crime committed in the framework of an international armed conflict, with the exception of point number 6, since for this case it is established that “the conduct took place in the context of and was associated with a non-international armed conflict”.

To these typified acts that are directly related to the protection of the right to food and food security, it is appropriate to add those that can indirectly cause food insecurity in times of armed conflict and that are equally criminalized by international law as a war crime. These include:<sup>52</sup>

- a) Grave breaches of the Geneva Conventions, such as extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (Article 8.2 (a)(iv) ICC Statute);
- b) Other serious violations of the laws and customs applicable in international armed conflict, such as:
  - Intentionally directing attacks against civilian objects, that is, objects which are not military objectives (Article 8.2 (b)(ii) ICC Statute),

<sup>49</sup> See: ICTY, Case No.: IT-97-25-T, 15 March 2002, Prosecutor v. Milorad Krnojelac, Trial Chamber II, Judgment, para.499.

<sup>50</sup> *Ibidem*, paras. 440-442.

<sup>51</sup> *Ibidem*, para. 442.

<sup>52</sup> See: International Criminal Court (2002). “Elements of Crimes”, PrintPartners Ipskamp, The Hague. pp. 15, 18, 19, 26, 36.

-Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (Article 8.2 (b)(iv) ICC Statute),

-Pillaging a town or place, even when taken by assault (Article 8.2 (b) (xvi) ICC Statute);

c) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, such as pillaging a town or place, even when taken by assault (Article 8.2 (e)(v) ICC Statute).

As we can see, through the typification of these crimes, civil property is protected during the armed conflict and this can be an important aspect to avoid situations of hunger. The theft of the goods (looting, sacking) and the destruction of civilian property (grain reserves, food production equipment, cultivated plots of land, etc.) are often factors that contribute to generating famine during a period of armed conflict. (DeFalco, 2017, p. 1148.)

## 5. CONCLUSIONS

The development and a specific regulation of access to food take place in “peacetime” through the protection of the human right to food, in its broad version, and the consideration of the fundamental right to freedom from hunger in a universal instrument: International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, numerous legal and political instruments (derived from international plans, agreements, meetings, summits and forums) seek to protect and to clarify the content of food security and the right to food in peacetime.

However, we understand that the provisions of IHL that protect the right to food reinforce the protection provided on food issues by international law, especially international human rights law. It is sufficient to recall the judgment of the International Court of Justice of 9 April 1949, which stated that: “elementary considerations of humanity [...] are even more exacting in peace than in war”. Therefore, since access to food is linked to the dignity of each individual and protected as a fundamental human right, it is clear that what is prohibited in time of war, in relation to food issues, is also, *a fortiori*, prohibited in peacetime.

The protection of the right to food and food security during armed conflict is an issue taken into account by the Geneva Conventions and the Additional Protocols. Although it is true that neither food security nor the right to food is explicitly mentioned (which is logical given the date on which these Conventions and Protocols were created), the Geneva provisions protect both the quantitative dimension of food security and the qualitative dimension by prescribing guarantees of the food diet that certain vulnerable groups of people (such as prisoners of wars, civilian internees, security detainees or pregnant women and mothers) should receive. In this sense, International humanitarian law contains important rules aimed at ensuring that persons affected by armed conflict

have food or have access to it. While the rules are primarily formulated as obligations of parties to an armed conflict, rather than as rights, the results desired by international humanitarian law and international human rights law are similar: the capacity of civilians to obtain or receive adequate food.

The principles of distinction and proportionality underpin the concrete and precise regulation of these provisions.

So that, in any armed conflict, the right of the parties to the conflict to choose methods and means of warfare is not unlimited. Starvation of civilians, as a method of warfare or combat is roundly prohibited in both international and non-international armed conflict. The prohibition is violated not only when a lack of food or denial of access to it causes death of civilians, but also when the population is caused to suffer hunger because of deprivation of food sources or supplies.

The protection of the right to food during armed conflict is reinforced in two aspects: on the one hand, the prohibition of starvation of civilians as a method of warfare has become a customary rule, and must therefore be complied with in all circumstances, whether in an international armed conflict or an armed conflict of a non-international nature; on the other hand, the failure to the provisions of IHL protecting food security may give rise to individual criminal responsibility under the Statute of the International Criminal Court.

In accordance with the jurisprudence of the International Court of Justice, we understand that if food security is protected during armed conflict, *a fortiori*, it must also be protected in times of peace. Therefore, it is possible to argue that IHL provisions protecting food security and the right to food reinforce the protection afforded on these issues by international human rights law.

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Received: February 6<sup>th</sup> 2020

Accepted: April 12<sup>th</sup> 2020