

The right to food in situations of armed conflict: The legal framework

by

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Armed conflict is one of the primary obstacles to realization of the right to adequate food in many parts of the world today. War disrupts all stages of human nutrition — the production, procurement, preparation, allocation, consumption and biological utilization of food — thereby leaving malnutrition, disease and death in its wake. Given that international humanitarian law is the body of rules specifically applicable in situations of armed conflict, and that many of its provisions are moreover food-related, it must be seen as a complement to human rights norms dealing with the right to adequate food.

While the aims of both international humanitarian law and human rights law are the same, namely to protect the life, health and dignity of individuals or groups of people, the manner in which they seek to ensure such protection differs significantly owing to the different circumstances in which they are applied. For the purposes of this review, three features of international humanitarian law are of particular importance: 1) it contains specific and often fairly detailed rules that parties to an armed conflict must implement immediately, and not progressively; 2) it is unequivocally binding on both State and non-State players, so there is no ambiguity with regard to the latter's legal obligations; 3) there can be no derogation from its rules, as this body of

law is specifically designed to deal with the inherently exceptional situation of armed conflict.

While international humanitarian law contains no mention of the “right to food” as such, many of its provisions are aimed at ensuring that persons or groups not or no longer taking part in hostilities are not denied food or access to it. They will be outlined below, subdivided into rules with a preventive function and rules on humanitarian assistance to the civilian population. In closing, mention is made of rules pertaining to specific categories of persons. The outline is non-exhaustive and is intended to highlight the most relevant provisions of international humanitarian law.

Rules with a preventive function

International humanitarian law complements human rights norms on the right to adequate food by prescribing certain conduct and prohibiting certain behaviour in order to prevent lack of food or denial of access to food in situations of armed conflict:

One of its basic principles is that parties to an international armed conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives, and must accordingly direct their operations only against military objectives.¹ Civilian objects are negatively defined as all objects which are not military objectives,² and include foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. In non-international armed conflict, the civilian population and individual civilians are also afforded general protection against the dangers arising from military operations,³ which includes the obligation of the parties to distinguish between civilians and those taking a direct part in hostilities.

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 48.

² Protocol I, Art. 52(1).

³ Protocol II, Art. 13(1).

In any armed conflict, the right of the parties to the conflict to choose methods and means of warfare is not unlimited. Thus, starvation of civilians as a method of warfare/combat is expressly prohibited in both international and non-international armed conflict.⁴ This prohibition is violated not only when a lack of food or denial of access to it causes death, but also when the population is caused to suffer hunger because of deprivation of food sources or supplies.

The prohibition of starvation as a method of warfare/combat is further elaborated by provisions, applicable regardless of the type of armed conflict involved, under which it is prohibited to attack, destroy, remove or render useless objects that are 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, when the purpose of such action is starvation.⁵ The enumeration of the objects listed is clearly not exhaustive. The verbs “attack”, “destroy”, “remove” or “render useless” are intended to cover all possibilities, including pollution by chemical or other agents of water reservoirs or the destruction of crops by defoliant.⁶ The deployment of landmines in agricultural areas or in irrigation works with the specific purpose of precluding their use for the sustenance of the civilian population would likewise constitute a violation of that prohibition.

While certain exceptions to the above-mentioned rules are provided for in international armed conflict, e.g. when foodstuffs are used solely for the sustenance of the adversary’s armed forces,⁷ they do not in any way diminish the essential protection afforded to civilians. Moreover, the rules applicable in international conflict specify that objects indispensable to the survival of the civilian population shall not be the target of reprisals.⁸

Under the Rome Statute of the International Criminal Court (ICC), “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival,

⁴ Protocol I, Art. 54 (1); Protocol II, Art. 14.

⁵ Protocol I, Art. 54 (2); Protocol II, Art. 14.

⁶ Y. Sandoz/C. Swinarski/B. Zimmermann (eds), *Commentary on the Additional*

Protocols of 8 June 1977, Geneva, 1987, p. 655.

⁷ Protocol I, Art. 54(3) and (5).

⁸ Protocol I, Art. 54(4).

including wilfully impeding relief supplies as provided for under the Geneva Conventions”, is a war crime when committed in international armed conflict.⁹ Even though the provision does not expressly refer to it, food is clearly among the objects deemed indispensable for the survival of civilians. While there is no equivalent categorization in the ICC Statute of starvation of civilians as a war crime in non-international armed conflict, it may be argued that this act does constitute a war crime under customary international law.

It is self-evident that population displacement is a major factor contributing to hunger and starvation in times of armed conflict. One of the chief purposes of international humanitarian law is to enable civilians to remain at home, thereby ensuring that their basic needs are met, including those related to food. Provisions prohibiting the displacement of civilians feature prominently among the rules applicable in both international and non-international armed conflict.

Thus, under the Fourth Geneva Convention individual or mass forcible transfers of civilians from occupied territory to the territory of the Occupying Power or to that of another country, occupied or not, are prohibited, regardless of their motive.¹⁰ If partial or total evacuation of a given area is undertaken for the safety of the population or demanded by imperative military reasons, the Occupying Power must, *inter alia*, ensure that the “removals are effected in satisfactory conditions of (...) nutrition”.¹¹ Similarly, international humanitarian law prohibits the Occupying Power from deporting or transferring parts of its own civilian population into the territory it occupies. Unlawful movements of civilians by parties engaged in an international armed conflict constitute grave breaches of the Geneva Conventions and of Additional Protocol I and are war crimes under the ICC Statute.¹²

Rules applicable in non-international armed conflict likewise prohibit the forced movement of civilians. Additional Protocol II

⁹ Rome Statute of the International Criminal Court, 1998, Art. 8(b)(xxv).

¹⁰ Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention), 12 August 1949, Art. 49.

¹¹ *Ibid.*

¹² ICC Statute, Arts 8(2)(vii) and 8(b)(viii).

expressly forbids the displacement of the civilian population except in cases where the safety of civilians or imperative military reasons so require.¹³ If and when such displacements are carried out, all possible measures must be taken by the parties to the conflict to ensure that “the civilian population may be received under satisfactory conditions of (...) nutrition”.¹⁴ The unlawful displacement of civilians in non-international armed conflict also constitutes a war crime under the ICC Statute.¹⁵

Given the importance of the natural environment to the survival of human beings, which includes their ability to produce and consume food, international humanitarian law demands that care be taken in warfare to protect the natural environment against widespread, long-term and severe damage.¹⁶ Rules relating to the protection of the natural environment in international armed conflicts are, in fact, listed right after those protecting objects indispensable to the survival of the civilian population that were mentioned above. The protection referred to includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the environment and thereby to prejudice the health or survival of the population.¹⁷ Chemical weapons, for example, prohibited under international humanitarian law, would clearly fit that description.

The ICC Statute stipulates that under certain circumstances “intentionally launching an attack in the knowledge that such attack will cause (...) widespread, long-term and severe damage to the natural environment” is a war crime in international armed conflict.¹⁸

Also relevant in this context are provisions applicable in both international and non-international armed conflict and relating to the protection of works and installations containing dangerous forces (dams, dykes and nuclear electrical generating stations).¹⁹

¹³ Protocol II, Art. 17.

¹⁴ *Ibid.*

¹⁵ ICC Statute, Art. 8(e)(viii).

¹⁶ Protocol I, Art. 55(1).

¹⁷ *Ibid.* and Art. 35(3).

¹⁸ ICC Statute, Art. 8(b)(iv).

¹⁹ Protocol I, Art. 56, and Protocol II, Art. 15.

Rules on humanitarian assistance to the civilian population

When the principles and rules outlined above are inadequately applied or are not applied at all, or when malnutrition and hunger are otherwise caused by an armed conflict, relief actions become necessary. International humanitarian law contains important provisions designed to ensure the provision of humanitarian assistance to persons in need, both in international and non-international armed conflict.

... in international armed conflict

The Fourth Geneva Convention dealing with the protection of civilians contains a general provision granting protected persons (i.e. those in the power of a party to the conflict or Occupying Power of which they are not nationals) “every facility” to apply to the Protecting Power, the ICRC and other relief organizations.²⁰ The right in question is absolute, possessed by all protected persons whether they are at liberty, detained, interned or in assigned residence. The application provided for in the Convention may have a wide variety of causes, but for the purposes of this review it is important to note that it may also amount to a request for material assistance. The right of communication may be exercised in all circumstances and the competent authorities are obliged to grant relief organizations “all facilities” for communicating with protected persons within the bounds set by military or security considerations. The provisions on the right of protected persons to communicate with relief organizations and to request assistance thereby are further elaborated in the Convention’s provisions defining relief societies and describing their activities. Moreover, “[s]uch societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character”.²¹

The Fourth Geneva Convention obliges States Parties to allow the free passage of certain types of goods intended for specific categories of the civilian population belonging to another State Party,

²⁰ Fourth Convention, Art. 30.

²¹ *Ibid.*, Art. 142.

even if the latter is its adversary. The rule was designed to deal primarily with humanitarian assistance in blockade situations. More specifically, free passage of consignments of essential foodstuffs for children under fifteen, expectant mothers and maternity cases is provided for, albeit under a series of fairly stringent conditions.²²

The obviously limited scope of this provision was remedied to a large extent by Additional Protocol I. It stipulates that relief actions for the entire civilian population of any territory under the control of a party to an international armed conflict (other than occupied territory, considered below), shall be undertaken when the population is not adequately provided with supplies, which of course include food.²³ Relief actions must be humanitarian and impartial in character and conducted without any adverse distinction.

The Protocol does, however, expressly mention that such actions are subject to the “agreement” of the parties concerned — which raises the question of the extent to which a State is obliged to accept humanitarian aid for the benefit of its own population. The generally accepted answer is that a State must accept relief actions when the aforesaid conditions are met, i.e. when the civilian population is not adequately supplied and when relief which is humanitarian and impartial in nature is available. Refusing a relief action or relief consignments is thus not a matter of discretion and agreement could be withheld only for exceptional reasons, “not for arbitrary or capricious ones”.²⁴ The Additional Protocol’s rules on relief actions should, moreover, be read in conjunction with the already mentioned provisions prohibiting the starvation of civilians as a method of warfare and those stating that intentional starvation, including the impediment of relief supplies, is a war crime.

Additional Protocol I specifies that offers of relief shall not be regarded as interference in the armed conflict or as unfriendly acts. The parties to a conflict and each State party to the Protocol must allow and facilitate rapid and unimpeded passage for all relief consignments, equipment and personnel, even if such assistance is destined for

²² *Ibid.*, Art. 23.

²⁴ *Op. cit.* (note 6), pp. 819-820.

²³ Protocol I, Art. 70(1).

the civilian population of the adverse party. The parties to the conflict must protect relief consignments and facilitate their rapid distribution. Along with other States Parties, the parties to the conflict cannot, in any way whatsoever, divert or delay relief consignments. They are allowed to prescribe technical arrangements, including search, under which passage is permitted, and may make such permission conditional on the distribution of relief under the local supervision of a Protecting Power. The above-mentioned States must also “encourage and facilitate” effective international coordination of relief actions.²⁵

Additional Protocol I also contains specific provisions on personnel participating in relief actions which, *inter alia*, stipulate that “relief personnel shall be respected and protected”.²⁶ It should be noted that the protection of relief personnel was strengthened with the adoption of the ICC Statute, under which intentional attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance (or peacekeeping) mission constitute a war crime in international armed conflict.²⁷

Both the Fourth Geneva Convention and Additional Protocol I have a series of provisions dealing with collective and individual relief assistance to civilians in occupied territories. The basic rule, laid down in the Fourth Geneva Convention, is that the Occupying Power has the duty of ensuring the food and medical supplies of the population, and should bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.²⁸ Foodstuffs available in the occupied territory may be requisitioned in very narrowly defined circumstances, in which case the Occupying Power must ensure that fair value is paid for any requisitioned goods.

If, however, the whole or part of the population in an occupied territory is inadequately supplied, the Occupying Power must agree to relief schemes and must facilitate them by all means at its disposal.²⁹ The Fourth Geneva Convention specifies that such relief

²⁵ Protocol I, Art. 70(1)-(5).

²⁶ Protocol I, Art. 71.

²⁷ ICC Statute, Art. 8(b)(iii).

²⁸ Fourth Convention, Art. 55.

²⁹ *Ibid.*, Art. 59(1).

must consist “in particular” of foodstuffs (as well as medical supplies and clothing). All States Parties are obliged to permit the free passage of relief and must guarantee its protection. In addition, the Occupying Power must not divert relief consignments and must facilitate their rapid distribution, which is to be carried out in cooperation with and under the supervision of, *inter alia*, the ICRC or any other impartial humanitarian body. Additional Protocol I further supplements these obligations.³⁰

... in non-international armed conflict

Article 3 common to the four Geneva Conventions applies to armed conflicts not of an international character occurring in the territory of a State Party, either between its armed forces and armed insurgents, or between rebel groups. Its provisions thus bind not only States Parties, but also non-State contenders, i.e. armed insurgents, rebel groups and other formations. Common Article 3 is considered to reflect customary international law; the International Court of Justice has called it an “elementary consideration of humanity” applicable, in fact, to all types of armed conflicts.³¹ Its application does not, however, affect the legal status of the parties to a non-international armed conflict.

Under 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”.³² Parties should also “endeavour” to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions. While the wording of common Article 3 does appear somewhat sparse in this respect, its relevance to relief actions, including those intended to provide food aid, must be interpreted with the following considerations in mind:

- humane and non-discriminatory treatment of persons taking no active part in hostilities or of those placed *hors de combat* are the

³⁰ See Protocol I, Arts 68, 69 and 71.

³¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J.

Reports 1986, para. 218.

³² See Art. 3 common to the Geneva Conventions.

principal obligations imposed by common Article 3. There is no doubt that denial of food or lack of access to food for persons covered by the article would run contrary to the demand for humane treatment;

- the prohibition of starvation of civilians as a method of warfare, and of the destruction of objects indispensable to the survival of the civilian population — including foodstuffs, is a specific expression of the principle of humane treatment. The practice of States and international bodies very widely supports those prohibitions, regardless of the type of conflict involved, and it may consequently be argued that these rules constitute customary international law and their violation a war crime;

common Article 3 legally entitles impartial humanitarian organizations to offer their services to the parties, an offer which cannot be arbitrarily declined. The parties cannot look upon it as an unfriendly act, or resent the fact that the organization making it is trying to come to the aid of the conflict victims. In other words, the offer cannot be interpreted as an inadmissible attempt to interfere in the affairs of the State concerned. It is understood that an offer of services may cover relief actions, including those aimed at providing food aid;

- while common Article 3 expressly allows humanitarian organizations only to offer their services, there is a growing international and State practice which recognizes the right of the civilian population in non-international conflicts to receive humanitarian aid. The extent to which humanitarian assistance in internal conflict is a reality is evidenced by the fact that under the ICC Statute attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance (or peacekeeping) missions in non-international conflict constitute a war crime.³³

Additional Protocol II, which develops and supplements common Article 3 and is therefore also applicable in non-international armed conflicts, has a higher threshold of application. It covers conflicts taking place in the territory of a State Party between its armed

³³ ICC Statute, Art. 8(e)(iii).

forces and dissident armed forces (thereby excluding fighting that involves only rebel groups). It requires that the dissident forces exercise such control over a part of the State's territory as to enable them to carry out sustained military operations and to implement the Protocol. They must also be under responsible command.³⁴ Once the above-mentioned conditions have been met, Additional Protocol II and Article 3 common to the Geneva Conventions apply cumulatively. Protocol II contains more detailed rules and therefore offers stronger protection to victims, who are defined as "all persons affected by an armed conflict".³⁵ They, of course, include civilians and civilian populations, who must be treated humanely and in a non-discriminatory manner.

As stated above, Protocol II expressly prohibits starvation of civilians as a method of combat. It also prohibits the parties from attacking, destroying, removing or rendering 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.³⁶

The Protocol provides that relief societies located in the territory of a State Party, such as Red Cross and Red Crescent organizations, "may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict".³⁷ As was inferred above with regard to common Article 3, an offer of services may include offers of food aid or the taking of other measures to ensure that persons affected by a conflict do not suffer hunger and malnutrition, as there is no doubt that such measures fall within the definition of a relief society's "traditional" functions. The term relief society is understood in its traditional, broad sense to encompass organizations capable of providing effective assistance in an impartial manner.

Importantly, Additional Protocol II also provides: "If the civilian population is suffering undue hardship owing to a lack of supplies essential for its survival, such as foodstuffs and medical supplies,

³⁴ Protocol II, Art. 1(1).

³⁵ *Ibid.*, Art. 2(1).

³⁶ *Ibid.*, Art. 14.

³⁷ *Ibid.*, Art. 18(1).

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.”³⁸ While it would be impossible to draw up an exhaustive list of criteria to determine what constitutes “undue hardship”, any such assessment would have to take into account the usual living standard of the affected population and the needs provoked by the hostilities.³⁹

Furthermore, the fact that consent is required should not be taken to mean that the decision is left to the discretion of the parties and the rule should be read as equivalent to the one applicable in international armed conflicts. Therefore, “if the survival of the civilian population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place (...) The authorities responsible for safeguarding the population in the whole of the territory of the state cannot refuse such relief without good grounds. Such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat as the population would be left deliberately to die of hunger without any measures being taken.”⁴⁰ This interpretation is particularly important in situations where the authorities concerned might not be willing to grant permission for relief actions for territories under the control of dissident armed forces. Refusal of relief could then constitute a violation of the ban on starvation of the civilian population.

Rules on specific categories of persons

International humanitarian law contains numerous rules aimed at ensuring that individuals belonging to specific categories are adequately supplied with food and have the right to individual and collective relief. The sheer volume and the great detail of these rules, which pertain to prisoners of war, civilian internees and detainees in international armed conflict and persons whose liberty has been

³⁸ *Ibid.*, Art. 18(2).

³⁹ *Op. cit.* (note 6), p. 1479.

⁴⁰ *Ibid.*

restricted in non-international armed conflict, are such that they cannot be covered in this brief review. Further references should be sought in the appropriate provisions of the Geneva Conventions and their Additional Protocols.

Concluding remark

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 both humanitarian and human rights law are the same — the ability of individuals to obtain or receive adequate food.

Résumé

Le droit à l'alimentation en période de conflit armé

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La guerre est l'un des obstacles majeurs à la réalisation du droit de chacun à une alimentation adéquate. Cet article examine les dispositions pertinentes des différents traités de droit international, qu'elles appartiennent au droit des droits de l'homme ou au droit international humanitaire. L'auteur conclut que les instruments de droit international humanitaire en vigueur ont codifié un corps de règles suffisant pour assurer une alimentation adéquate aux personnes touchées par un conflit armé. Contrairement aux traités relatifs aux droits de l'homme, les conventions de droit humanitaire ne créent pas des droits subjectifs pour les personnes concernées, mais des obligations qui lient les États.