Global Campus Europe

Ruhr University Bochum

European Master's Programme in Human Rights and Democratisation
A.Y. 2020/2021

THE RIGHT TO FOOD IN CONFLICT SITUATIONS

The fight against hunger from a legal and practical perspective

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Chapter I: The legal framework

Chapter II: The interaction between IHL and IHRL

ABSTRACT

Ensuring that a population under the threat of violence and conflict has an adequate supply of food is an historical problem that still persists today. The number of undernourished people has actually increased in the last years. Achieving food security is still a distant goal, especially in conflict situations. Therefore, it is important to investigate the current protections of the right to food, exposing their weaknesses with the aim to find new solutions to old problems.
This research aims to explore the current legal protection of the right to food and the different types of food aid available.
Firstly, this study examines the international law protecting the right to food, both in international and non-international armed conflicts, under international humanitarian law and human rights law. Secondly, it focuses on the interaction between the two bodies of law with the intent of ascertaining the best possible protection of the right to food in war time. Lastly, this dissertation gives a practical overview of humanitarian assistance, looking at the in-kind aid and cash and vouchers assistance and the specific needs that the different methods are able to meet.

CHAPTER I

THE LEGAL FRAMEWORK

In this chapter, we are going to analyse the existing protections of the right to food in conflict situations according to international law.

1. Introduction

Despite all the efforts of the international community, food insecurity still affects large part of the world's population. In 2015 the United Nations (UN) Member States adopted the 2030 Agenda for Sustainable Development. The Agenda includes 17 Sustainable Development Goals (SDG) that represent the main objectives to reach by 2030 in order to bring peace and prosperity to the world. These aims are a call to action for all the UN Member States that should collaborate in a spirit of global partnership to achieve a better future for the people and the planet. Within these goals there is Zero Hunger that aims to end famine, achieve food security, improve nutrition, and promote sustainable agriculture[1]. Despite these positive premises, Zero Hunger is still far from being reached by 2030. The global trend in fact is toward an increase in the number of the undernourished people instead of the contrary.
At the present moment, the World Food Programme (WFP) estimates that 690 million people, or 8.9 percent of the world population, are facing famine[2]. Among them, it has been estimated that 135 million people suffering from acute hunger, risking starvation[3]. If the current situation does not change 840 million people will be experiencing famine by 2030[4].

One of the main causes of the food insecurity is the war. Armed conflicts, together with climate change and economic crises, represent indeed the main obstacle to the realization of the right to adequate food worldwide. War affects the availability, accessibility, adequacy, and the sustainability of food, leading to food emergencies in the counties concerned, which creates more victims than the direct combat itself. In conflict areas, a higher number of victims derives from famine and the consequent diseases.
In the analysis of a conflict situation, it is often difficult to define its root causes. These are different from one case to another and include a wide range of concurrent factors. However, a connection has been found between food insecurity and conflicts. They are in fact linked in a vicious cycle, war is not only a cause of food emergencies but it

[1] See https://sdgs.un.org/goals
[2] See https://www.un.org/sustainabledevelopment/hunger/
[3] *Ibid.*
[4] *Ibid.*

is also its direct consequence[5]. This dynamic is most likely to occur in case of civil conflicts, that are the most common form of violence in the world today. This vicious cycle makes it clear why fighting food insecurity has to be one of the first concerns for the international community. Improving food security conditions in a country can in fact reduce social tensions, stop the spread of violent riots, contribute to stabilising the environment, and start to rebuild the trust between government and population. For all these reasons, in a situation of food emergency it is important to develop food aid actions, but also long-term strategies aimed at reinforcing the agricultural sector, which is fundamental in the fight to food insecurity in the long run.

In the last report, the Special Rapporteur on the right to food analysed firstly the current legal framework of the protection of the right to food and secondly the impact of protracted conflicts on the enjoyment of this right.
In the conclusions, the report stressed the lack of implementation of the current norms by States and other political actors[6]. Among the other recommendations, it underlined firstly, the necessity of a new legal instrument that could give clear mandates to States to prevent famine and secondly, the urgency to remedy to the failure to address the starvation as an international criminal behaviour[7]. Lastly, the Special Rapporteur analysed the post-conflict rehabilitation of the agricultural sector and suggested to implement the long-term recovery strategies[8].
As we will see below, some steps have been taken but, despite this, the current protection of the right to adequate food has still room for improvement.

2. The international law protection of the right to food

The right to adequate food is protected by both the two main bodies of law international law: the international humanitarian law (IHL) and the international human rights law (IHRL).
For a long time, the body of rules that was considered applicable in situation of armed conflicts was only the IHL while the application of the IHRL was limited to situations of peace time. This strict interpretation has evolved with time. In 1996, the International Court of Justice (ICJ) has stated that the applicability of the International Covenant of Civil and Political Rights "does not cease in case of war[9]", in this way recognizing the applicability of human rights standards in conflict situations. The ICJ

[5] C.S. HENDRIX, H. BRINKMAN, *Food Insecurity and Conflict Dynamics: Casual Linkages and Complex Feedbacks* in International Journal of Security & Development, 2013, 2
[6] HILAL ELVER, *Interim report of the Special Rapporteur on the right to food* (A/72/188) para. 92
[7] *Ibid.*
[8] *Ibid.*
[9] INTERNATIONAL COURT OF JUSTICE, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996, para 25

has confirmed this view also in other two subsequent pronouncements in 2004[10] and 2005[11].
Today, it is almost unanimously recognized that both IHL and IHRL share many principles aimed at defending human life and both apply in war time. This recognition certainly represents a good starting point for the improvement of the legal protection of the right to adequate food but it is still not clear how these two bodies of law should interact.
The current protection under IHL has some important deficits, in particular, regarding its enforcement mechanisms that need to be addressed. In contrast with IHL, IHRL was developed to regulate peace time conditions. The right to food is recognized is several IHRL instruments, among them, in particular the International Covenant of Economic Social and Cultural Right (ICESCR) deals more comprehensively with the right to adequate food. Not only do these IHRL instruments provide higher standards of protection but also a stronger enforcement system to face human rights violations.

There are several core differences between IHL and IHRL. IHL binds both State and non-State actors, differently from IHRL. The binding nature of the IHRL rules to non-State actors is still debated[12]. Furthermore, IHL also obliges parties to the conflict to immediately implement its provisions, while the ICESCR establishes that its norms have to be subject to progressive implementation by member States. It is important to clarify this concept. The "progressive realization" establishes a duty on the States parties "to take all the appropriate measure" to reach the full realization of economic, social and cultural rights "to the maximum extent of their available resources"[13]. A State party has therefore to invest its available resources, even when they are scarce, in the implementation of ESC rights in order to fulfil its obligation under the Covenant. Indeed, According to the Covenant, a lack of resources does not justify a lack of implementation
Among the differences between IHL and IHRL there is also the fact that the rules of IHL have the specific purpose of regulating armed conflicts, so they cannot be derogated in times of war while the ICESCR, except for its core obligations, allow for derogations[14].
Lastly, many provisions of IHL are considered part of Customary International Law (CIL) and recognized also by the International Red Cross Organisation (ICRC),

[10] INTERNATIONAL COURT OF JUSTICE, *Advisory Opinion on The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, para. 106
[11] ICJ, *Democratic Republic of Congo v Uganda*, (2005) paras. 216-220
[12] HILAL ELVER, *supra note 6*, para. 63
[13] UN GENERAL ASSEMBLY, *International Covenant on Economic Social and Cultural Rights*, 1966, A/RES/2200, art 2 (1)
[14] UN GENERAL ASSEMBLY, *International Covenant on Economic Social and Cultural Rights*, 1966, A/RES/2200, art 4

therefore these norms are binding on all the actors regardless of their expressed consent[15].

All things considered, despite their differences, IHRL and IHL should interact in the most effective way to protect the civilians during armed conflict.
Regarding the way in which these two systems should interact, the most common theory suggests to refer to the abstract legal standard of the *lex specialis*. However, part of the doctrine refuses this approach because it is considered limiting and reductive. As we will explain in the next chapter, different theories have been developed to solve this complicate problem.

3. International Humanitarian Law

IHL is the branch of international law that specifically regulates the situation of armed conflicts, and it is based on three main principles: distinction, precaution and proportionality.
IHL aims at reducing the humanitarian consequences of war on civilians, laying down the minimum standards of humanity that have to be respected during situation of armed conflicts. The right to adequate food is not specifically mentioned in IHL, but many of its provisions are food-related.
It cannot be denied that the IHL's protection of the right to food is minimal, but it should be seen as an "essential specific legal framework in times of conflicts" that safeguards people's livelihood and their access to food.
The main body of the IHL is composed of the four Geneva Conventions (GC) and their two Additional Protocols of 1977(AP). The protection of the right to food under the GCs and their APs is focused on two main aspects: the prevention of hunger and humanitarian assistance. The preventive norms aim at prohibiting starvation as a method of warfare, avoiding the destruction of crops, foodstuff and, more in general, objects essential for the survival of civilians. When this prevention fails, humanitarian assistance is needed, and the GCs provide norms regulating the food supply in occupied and non-occupied territories.
The Conventions and the Protocols deal with the protection of civilians both in international armed conflicts (IAC) and in non-international armed conflicts (NIAC).

[15] See https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law#:~:text=Customary%20international%20law%20consists%20of,the%20protection%20offered%20to%20victims.

3.I. International Armed Conflicts

3.I.I Starvation

Starting from the analysis of the preventive norms, IHL prohibits starvation of civilians as a method of warfare. The term "starvation" refers to "intentionally depriving civilians of objects indispensable to their survival (OIS)[16]". This prohibition applies both in IAC, under article 54 of the Additional Protocol I to the four GCs, and in NIAC, under article 14 of the Additional Protocol II to the GCs. Both these legal instruments are widely recognized by the international community. Indeed, The first one, is ratified in 174 countries and the second one in 169. The use of starvation is also prohibited by customary international law under Rule 53[17]. Unfortunately, despite these rules, starvation is still occurring today, especially in the ongoing conflicts in Syria, Yemen and South Sudan. This phenomenon is even broader than it seems. In fact, often official reports do not record starvation deaths into conflict-related victims because of the difficulties in the identification of the casual relationship between the conflict and the starved people[18]. Starvation is therefore considered an unfortunate consequences of war but rarely the chain of causation is recognized and the deaths reported as conflict-related.

(a) The protection under the GC

As stated in the first paragraph of article 54 AP 1, starvation is prohibited as a method of warfare. This principle has a very generic formulation, it refers to the action of deliberately depriving civilians of sources of food and supplies, causing them to suffer from hunger and sometimes compelling them to move. As recognized by the ICRC's interpretation, this norm applies both in occupied and non-occupied territories.
In the second paragraph the norm describes the ways in which the starvation can be carried out. The different verbs "attack, destroy, remove and render useless[19]" are used in order to cover all the possible actions that can cause the deprivation of civilians of their means of survival.
Exactly what objects fall under the protection of this article is unclear due to its wording . In fact, the norm mentions several objects, such as "foodstuffs, crops, livestock, drinking water installations[20]", but the list is merely illustrative. The very use of the expression "such as" indicates that the previous terms are purely indicative.

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[16] GLOBAL RIGHTS COMPLIANCE, *The Starvation Training Manual*, Global Rights Compliance, Netherlands, 2019, 1
[17] See https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule53
[18] LAURA GRAHAM, *Prosecuting Starvation Crimes in Yemen's Civil War* in *Case Western Reserve Journal of International Law* 52 (2020), 268
[19] AP I 1997, art 54 (2)
[20] *Ibid.*

Instead, what it is peculiar, is the absence of any references to the naval blockade in this paragraph. They are in fact one of the most common ways to impede the access to food aid and supplies to the population. This means that this norm does not change the existing regulation on blockades which relies on customary law. Naval blockades are permitted provided that some conditions are fulfilled: it must be preceded by a declaration, indicating its duration and the area interested; it must be effective and applied impartially to all the ships; neutral States must be informed of the blockades against a State party to the conflict[21]. The blockade is a war instrument directed to deprive the enemy of the supplies necessary to conduct the hostilities, it cannot be aimed at starving the population. Despite this, often in practice this instrument ends up prohibiting the access to food aid and supplies, causing great suffering to civilians. In this case, as we will see, art 70 AP I requires relief actions.

The third paragraph establishes some limitations to paragraph 2. The protection of the objects listed in paragraph 2 applies only when these objects are used by civilians to meet their own needs.

When the foodstuffs, crops, livestock and so on are used only as sustenance of the adverse armed forces the prohibitions under paragraph 2 do not apply. In practice, it is very unlikely that supplies are used only by the enemy troops, and it is therefore extremely important to make a careful evaluation before any actions against OIS.

In the event that these objects are used only in direct support of military actions, they can be attacked, destroyed etc, solely if these actions do not leave the population with inadequate food or water. The norm is not very clear on this point but, as explained by the ICRC, the idea of OIS used "in direct support of military action" refers to the case in which these objects lose their civilian designation to gain military status. An example of this can be a food-storage barn which is used as an armed deposit by the adverse Party.

The fourth paragraph explicitly states the fact that the OIS cannot be objects of reprisal and to conclude paragraph 5 gives member States margin of discretion regarding the possibility to derogate from the prohibitions of paragraph 2 in case of imperative military necessity. According to the article, a State can carry out destruction only on the part of its territory that is under its own control. The same actions are therefore prohibited in any part of the territory under enemy control. This gives to the States the possibility to apply a "scorched earth" strategy, in order to slow down the advances of the enemy, while withdrawing from territories when it is considered legitimate under imperative military necessity[22].

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[21] INTERNATIONAL COMMITTEE OF THE RED CROSS, *Commentaries of 1987 protection of objects indispensable to the survival of the civilian population*, < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=6377CFD2C9D23F39C12563CD00434C81 > para. 2092

[22] *Ivi* para. 2121

(b) The enforcement of IHL: the codification of the ICC

Despite the prohibition of the use of starvation of civilians under IHL, there is still a long road to the effective criminal accountability for this crime. Starvation as a method of warfare is also prohibited under International Criminal Law (ICL). This conduct can constitute a crime of genocide under article 7 of the Rome Statute, when the action of starving the population is undertaken with the intent of destroy, in whole in in part, a specific ethnical, racial, or religious group[23]. When this specific intent is missing the starvation of civilians may amount to a war crime, under article 8 (2) (b) (xxv) of the Rome Statute[24].

Despite the crimination of this conduct, in practice there is an accountability gap for this crime and indeed there has never been a prosecution for starvation at the international level. A law that fails to be enforced cannot ensure a real protection. Consequently, the perpetrators continue unpunished with their atrocious conducts and the victims do not receive the protection provided by international law.

There are several reasons for this lack in the protection of the right to food.

First of all, Article 8 applies only to IAC, denying access to justice for the victim of starvation in NIAC. This distinction appears to be illegitimate, not being based on any rational legal basis. Today, most of the conflicts worldwide have non-international nature, like the conflicts in Yemen, south-Sudan, Somalia and Syria[25]. This lacuna seriously limits the ICC sphere of action, leaving civilians in NIAC without the possibility to hope for an effective prosecution. Considering the this gap in the law, and the unwillingness to prosecute an amendment to article 8, aimed at criminalising starvation in NIAC, has already been approved by member States of the Rome Statute in December 2019 but it is not in force yet[26].

Secondly, there is a lack of clarity concerning the meaning of the term starvation and the elements of this crime, in particular the main challenge regarding the criminal intent beyond this crime.

Lastly, there are relevant challenges in the practice. Indeed, It is extremely complicated to identify criminal liability during an ongoing armed conflict[27]. In particular, in the case of starvation, international prosecutors face difficulties in proving criminal intent and chain of causation between the actions of the perpetrators and their consequences upon civilian population.

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[23] The conduct of starving civilians population may be attributed to the actions prohibited by art 2 (c) of the *Convention on the Prevention and Punishment of the Crime of Genocide* 1949

[24] Rome Statute, 1998, A/CONF.183/9

[25] GLOBAL RIGHTS COMPLIANCE, *The Crime of Starvation and Methods of Prosecution and Accountability*, Global Rights Compliance, Netherlands, 2019, 3

[26] ASSEMBLY OF STATE PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *Amendment to article 8 of the Rome Statute of the International Criminal Court*, Resolution ICC-ASP/18/Res.5, 2019. See https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=CE32FC9AFA681FFDC125861B003F22E2&action=openDocument

[27] *Ivi*, 4

Article 8 (2) (b) (xxv) criminalises this action: "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".
According to this norm, this offence is composed of four elements. There are two contextual elements, called also "chapeau elements" that are: the fact that the conduct took place in an armed conflict and the fact that the perpetrators where aware of the existence of an armed conflict[28].
There are also a physical element and a mental element. The *actus reus* is the core of the crime, the fact that the perpetrators deprived civilians of OIS, including by wilfully impeding relief supplies[29]. The *mens rea*, instead, is the intention to starve civilians as a method of warfare that the perpetrators had to have while committing the crime[30].

The general meaning of starvation implies the deprivation of food and water, however the approach of IHL and of ICL is slightly different. According these two laws, starvation is not restricted to causing someone to perish due to hunger or thirst, but the term includes also the deprivation or the insufficient supply of objects indispensable to the survival[31]. While the IHL norm refers also to food and water, in the ICC the reference is only to the OIS, according to the broader sense of starvation. Therefore, the conduct that determines the intent of starving civilians is the deprivation of OIS, not only the deprivation of food and water. Evidence of starvation can also include a range of illness and disease resulting from a lack of food, medicines, or other essential supplies. Furthermore, the distribution of relief supplies is also protected by IHL norms that apply from the moment in which the population starts to be inadequately supplied with OIS not only at the point in which the population is suffering from hunger or severe malnutrition.
Except for the action of "wilfully impeding relief supplies", Article 8 does not specify which act might result in the deprivation of OIS for civilians, in this case a reference can be made to art 54 AP I and its list of actions. The fact that in "The Elements of Crime" there are not any references to the impediment of relief supplies means that this mention has only an illustrative means[32].
The importance of underling the impediment of relief as act that can result in deprivation of OIS may be connected with the IHL provisions of relief supplies in conflict zones. The GCs establish humanitarian obligations both to allow and to provide relief to civilians. It means that the deprivation can occur not only with a positive action like stacking, destroying, or removing OIS but also through an omission. Deliberately refusing humanitarian relief can amount to starvation if the other elements of the offence are fulfilled.

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[28] *Ivi*, 5.
[29] *Ibidem.*
[30] *Ibidem.*
[31] *Ivi*, 6
[32] W. JORDASH QC, C. MURDOCH, J. HOLMES, *Strategies for Prosecuting Mass Starvation* in *Journal of International Criminal Justice* (2019) 853

One of the biggest difficulties for the prosecutor regarding the crime of starvation is to prove the *mens rea*, the intent to starve civilians. Indeed, In practice, it is easy to find an excuse for actions that will cause suffering to the population. In the case of blockades, for example, a legitimate military purpose may be claimed. It is therefore important to analyse the nature of the intent and understand what needs to be proved in order to establish individual liability for this crime. As we said before, in order to allege that someone has committed the crime of starvation, the specific intent has to be proven: the perpetrator intended to starve civilians as a method of warfare. For the purpose of our analysis, this intent can be divided in two essential elements: the intentional deprivation of OIS and the intention to starve civilians as a method of warfare.
Regarding the first element, the main doubt that arises is whether the intent of depriving civilians of OIS requires the willingness of the perpetrator to starve civilians or merely the fact that the perpetrator acted in a way that would ordinary result in the starvation of civilians. In other words, in order to prove the specific intent of this crime do we need the actor to have the knowledge of the virtual certainty of the starvation of civilians as a result of his/her behaviour or do we need the proof of his/her concrete desire to starve the population as a result of his/her actions? Article 8 does not give a specific answer to this question, so the starting point to solve this doubt has to be article 30 of the Rome Statute. This article states that:

"1.Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct; 16 Rome Statute of the International Criminal Court
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3.For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

This article establishes the "default" mental standard required to address criminal responsibility for a crime under the Rome Statute. It provides that the material element is committed with both awareness (knowledge) of the consequences and the intention (desire) to engage in the conduct. Applied to the crime of starvation it requires that the perpetrator must have *intentionally* deprived civilians of objects indispensable to their survival with the awareness that a "circumstance exists, or a consequence will occur

in the ordinary course of events"[33]. This norm applies to all the crimes under the Rome Statute whenever it is not otherwise specified. Article 8 requires that the conduct has to be perpetrated intentionally as a method of warfare, establishes therefore a specific intent, but it does not clarify the nature of this intent. In "The Elements of Crime" the ICC recognizes as mental element of the crime of starvation as the fact that "the perpetrator intended to starve civilians as a method of warfare[34]", without other explanations. Since the drafters did not make the meaning of the word "intentionally" clear, therefore, the interpretation of that term is determined by the ICC. The purpose of Article 30 is to set an alleged mental standard in order to establish a consistency in the standards of culpability required to determine criminal liability for crimes under the Rome Statute. In the case of starvation, since the specific intent is not further defined, there appear to be no reasons to opt for the non-applicability of the standards set in article 30. Thus, according to this article, the conduct of depriving civilians of OIS must be meant (desired) by the perpetrator and he/she must be aware (knowledge) of the circumstances, that the conduct will amount to starvation of civilians in the ordinary course of events[35].

Regarding the second mental element, the intention to starve as a method of warfare, the first question that arises is whether or not the crime of starvation requires proof of the result. From the wording of Article 8 (2) (b) (xxv) and the explanation of the Elements of Crime, the crime does not seem to require proof of result, which is that civilians in fact died of hunger. Therefore, the starvation purpose does not need to be actualized in order for the crime of starvation to be put in place. This approach is also in accordance with IHL that starts its protection from the moment in which the population starts to be inadequately supplied, and does not wait for them to be in a state of hunger or severe malnutrition.
Having said that, the second doubt is whether the intent to starve requires a mere appreciation of virtual certainty (oblique intent) or a concrete desire to achieve the outcome (direct intent)[36].
Article 30 (2) and (3) analyses the intent and knowledge standards and the relationship between the intent, the conduct, and its consequences.
Regarding the intention to starve, the application of Article 30 implies that only a direct intent, the desire to engage in the conduct, can result in criminal responsibility.
In relation to the consequence, instead it provides that the perpetrator means to cause that consequence and is aware that it will occur in the ordinary course of events[37]
Part of the doctrine claims that in the Article 30 the intent and knowledge standards are connected to a conduct, consequence, or circumstance, while the crime of starvation does not require the proof of result. According to the Elements of Crime the

[33] Rome Statute, 1998, A/CONF.183/9, art 30 (3)
[34] INTERNATIONAL CRIMINAL COURT, *Elements of Crimes*, 2001, art 8 (b) (xxv), https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf
[35] W. JORDASH QC, C. MURDOCH, J. HOLMES, *supra* note 31, 854
[36] *Ibidem*
[37] *Ibidem*

intent to starve sits alone, there are not any references to a material element that can be attached to the intent or the knowledge. For this reason, Article 30 is, by some, considered not applicable to the intention to starve civilians as a method of warfare. Having said that, it is important to refrain from jumping to conclusions. The fact that the mental standards provided by Article 30 do not apply, does not mean that the only applicable intent is the direct intent, the desire to achieve the outcome. On the contrary, the fact that the crime of starvation does not require the proof of consequences suggests that a less demanding construction that would be inconsistent with the request of the more demanding direct intent standard has been adopted [38]. In conclusion, an oblique intent seems to be sufficient in order to establish criminal liability.
According to Article 8 (2) (b) (xxv), the intention to starve civilians has to be pursued as a method of warfare. This specification only means that the famine has to be part of a military strategy. In this way the article requires a nexus with the conflicts and it aligns with the IHL principle of distinction between civilians and combatants.

To conclude this analysis of the *mens rea*, the action of depriving civilians of OIS has to be put in place with intention and knowledge of the fact that there will be consequences. The intention to starve instead, does not require the desire to achieve the outcome but it needs the oblique intent, the awareness that the act of deprivation would lead to the starvation of civilians, and this has to be part of a military strategy.

(c) Practice

The investigation and prosecution for the crime of starvation faces enormous difficulties in practice. At the international level indeed there has yet to be a prosecution for starvation. The only two existing trials on this crime are at national level[39]. The lack of jurisprudence regarding this offence also means a lacuna in the judicial interpretation of the elements of this crime that impedes clarifying some uncertainties.
As the above analysis suggests, the most challenging aspect of this crime is its *mens rea*.
Often the starvation of civilians happens in territories that are already facing food insecurity and malnutrition. It is therefore difficult to prove the chain of causation between the actions of the perpetrators and the consequent famine. Even if, as we already said, this crime does not require a proof of result, in a trial it would be necessary to bring evidence of the harm caused. The prosecutor would need the evidence to establish a connection between the conduct of perpetrators and there adverse outcomes. Despite the pre-existing conditions, they would have to analyse the reasons for the deprivation of OIS and then ascertain the foreseeability of the consequent starvation of civilians. What is most challenging in this process is to

[38] *Ivi* 860
[39] ETHIOPIAN FEDERAL HIGH COURT, *Special Prosecutor v. Col. Mengistu Hailamariam et al*., File No. 1/87 (2006) and DISTRICT COURT IN ZADAR, *Public Prosecutor v M.P. et al*., K. 74/96 (1997)

exclude lawful purposes of the deprivation, which are established under art 54 (3) of AP1 and in the regulations on sieges and blockades.
Often perpetrators may pursue both criminal and lawful purposes, as it happened in Yemen in 2007 where a blockade was established with the aim of stopping the smuggling of weapons[40]. Despite the lawful purpose the blockade violated also numerous IHL decrees on humanitarian aid access. In that case, the Security Council recognized the intention behind the blockade was to threaten civilians as an instrument of war[41]. Therefore, the fact that the perpetrators can give a lawful explanation for the blockade does not exclude the existence of a criminal intent either . A blockade or a siege that starts with a lawful explanation and develops unlawfully represents a significant challenge for tribunals . An ICC Chamber prosecutor will have to analyse the various purposes in order to ascertain the existence, among others, of the intent to starve. In this case the criminal liability of the perpetrator can be recognized. The factors that can be taken into account as indicators of a criminal intent may be for example the efforts of the perpetrators to ameliorate the conditions of the populations or the respect for the full range of IHL norms as much as possible. An examination of these and other similar practical circumstances will give the tribunal useful indicators of the allege perpetrator's *mens rea*.

As has become clear from the analysis above, the prosecution of starvation has to be implemented, starting from the absence of justiciability in NIAC.
One solution can be to refer to alternative crimes, that involves to a greater or lesser degree the deprivation of OIS, with the scope of ensuring that this misconduct is effectively prosecuted[42]. There can be three cases in which is possible to find a connection between the physical element of the alternative crimes and the starvation. The first one is the narrow case in which the deprivation occurs in the context of a finite number of attacks against civilian objects[43]. Indeed, it can be easier to demonstrate the elements of "intentionally directing attacks against civilians", *ex* Article 8 (2) (b) (ii), than those of starvation. The second is the broad case in which the deprivation of OIS occurs among other violations that can amount to crimes against humanity. Famine is usually the outcome of several violations. Persecution, for example, may act as an umbrella offence that can assess criminal liability for several infringements of fundamental rights, among them, the deliberate starvation of civilians. The last one is the consequent case in which the deprivation of OIS is aimed at unlawful forced displacement[44]. This offers an alternative legal framework for prosecuting starvation.

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[40] GLOBAL RIGHTS COMPLIANCE, *supra* note 24, 17
[41] *Ivi*, 20
[42] W. JORDASH QC, C. MURDOCH, J. HOLMES, *supra* note 31, 875
[43] *Ivi*, 876
[44] *Ibidem.*

These attempts to increase the accountability for starvation referring to the other existing provision of the Rome Statute are however unable to capture the full scope of the crime of starvation.
These alternative solutions may be useful in increasing the accountability for starvation but first of all it is desirable that the proposed amendment to the Rome Statute of 2019 would finally be enforced.
Despite all these helpful tools, encouraging the international criminal prosecution for this crime is not the panacea. The protection of the right to food under ICL seems to be insufficient. Action should be taken to raise public awareness on these problems in order to push global leaders to avoid mass starvation instead of facilitate or inflict it. Furthermore, in order to monitor and enforce the protection of this right we should look at all the tools available, specially the IHRL instruments. Indeed, there are a variety of alternative options that should be taken into account.

3.I.II Food supplies

During an armed conflict, the lack of food and medical supplies, together with the unhygienic conditions that often occur in this scenario, led to the spread of epidemics and contribute to an escalation in the number of the victims. Given the importance of this aid, Article 55 of the GC IV regulates the food and medical supplies for the population in occupied countries. This article establishes the responsibility of the Occupying Power for the provision of supplies for civilians, it sets the duty of this Power to ensure the availability of food and medicines to the population of the occupied territories "to the full extent of the means available to it"[45]. The inclusion of this sentence shows that the drafters of the GC took into consideration the material difficulties that the Occupying Power may face during an armed conflict.
This article significantly extends the responsibility of the Occupying Power under the Hague Regulations. The latter merely recognizes the obligation to ensure, as far as possible, public order and safety, while the GC not only establishes the obligation of the Occupying Power to ensure the supplies, but also the obligation to do this using all the means at its disposal.
The occupying authorities have freedom of action in regards to the method used to ensure the supplies get to the civilians[46]. Article 55 also suggests the possibility to import the resources from other territories or countries when they are insufficient in the occupied area. The Occupying Power has different obligations. First of all, it has

[45] INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.htm, art. 55

[46] ICRC, *Commentary of 1958 Convention IV relative to the Protection of Civilian Persons in Time of War* < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=B11A237E0C281E5DC12563CD0042C7FF > Art. 55.

to permit to the authorities or private persons to import goods from third states or from unoccupied parties of the country[47]. Secondly if this is not sufficient, it has to provide the required supplies itself, and thirdly it must permit relief actions by third states.
The requisitioning of foodstuff and medical supplies is strictly regulated under this article. It is possible for the Occupying Power to request such goods only for use of the occupation forces and administration personnel if the needs of the civilians have been met. In case of requisitioning, the Occupying Power has to pay fair value of the requisitioned supplies.
To conclude, the last paragraph of this article establishes the duty of the Protecting Power to verify at any time the state of food and medical supplies in occupied territories. This provision, involving a neutral agent, is a valuable safeguard for civilians in occupied territories[48]. The Protecting Power is indeed in the position to give an objective picture of the situation. Considering its importance, this neutral supervision can be suspended only in case of imperative military necessities and for the time strictly necessary.

3.I.III Basic needs and Relief actions

Article 69 and 70 of AP1 deal with the basic needs of the civilians. The former broadens the protection of Article 55 in establishing the duty of the Occupying Power to provide to the population of occupied territories the supplies necessary for the survival and objects necessary for religious worship, to the maximum extent available. The latter, "when the civilians are not adequately provided with the supplies mentioned in Article 69[49]", sets the duty of the Parties to the conflict and each High Contracting Party to "allow and facilitate rapid and unimpeded passage of all relief consignments[50]" destined to the civilians in a territory "under the control of a Party to the conflict, other than occupied territory[51]".
In order to fall within the scope of Article 70 the relief actions must have a humanitarian nature, impartial character and must have been accepted by the Parties concerned. These requirements have to be interpreted in good faith, they cannot be used as pretext to impede the access of reliefs to victims. The passage should be stopped for example when the supplies would be at risk, but not for arbitrary reasons.

[47] H.P. GASSER, K. DORMANN, *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2013, para 563 (4).
[48] *Ibidem.*
[49] AP 1, (1977) Art. 70 (1).
[50] AP 1, (1977) Art. 70 (2).
[51] AP 1, (1977) Art. 70 (1).

In addition to this, the article establishes priorities in distribution for people with special needs, such as children, expectant mothers etc. The responsibility to ensure that this order is applied falls upon those responsible for the distribution of the relief[52].
To conclude, the parties not only have the duty to allow the passage of relief supplies through their territories, but they also have the right to supervise this passage. Article 70 (3) (4) (5) regulates this oversight activity and the subsequent relief distribution.

3.II Non International Armed Conflicts

3.II.I Humane Treatment

For a long time, the regulation of NIAC was not considered a matter of international concern. States in fact were reluctant to recognize the belligerency because they were concerned about their sovereignty. Recognizing internal conflicts as war would have meant to subjecting them to international law and therefore elevate the status of their opponent. Common Article 3 of the GCs is the first norm of IHL that moved NIAC from the domestic realm to the international one. With the inclusion of this article in the Conventions, the States agreed to regulate under IHL a type of conflict that until that point was only considered an internal concern for the State involved.
Since then, the regulation of NIAC has notably developed, but Common Article 3 is still the core provision of treaty law regarding NIAC. In fact in 1977 the Additional Protocol II (AP II) to the GCs was adopted . This regulates the protection of victims in armed conflicts of a non-international character. However, while the Article 3 as part of GCs is binding worldwide and applies to all NIAC, the AP II is not universally ratified, and its application is more limited. Article 3 is considered a "convention in miniature[53]" for NIAC. It has been recognized as a "minimum yardstick" binding in all armed conflicts, that imposes a core consideration of humanity[54]. The fundamental rules set in Article 3 are therefore considered as general principles of law.

Under Common Article 3, there are not any specific provisions regarding the right to adequate food.
However, this article establishes that "persons taking no active part in hostilities…shall in all circumstances be treated humanely[55]". This obligation binds both States and non-State actors in NIAC.

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[52] ICRC, *Commentaries of 1987 Relief Action* < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1CE88A93ED9B85B6C12563CD004361FC >
[53] ICRC, *Commentary of 2020 Article 3: Conflict not of an international character* < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096#_Toc44265117 > para. 356
[54] *Ibidem.*
[55] GC (1949) Article 3 (1).

Can the right to adequate food fall within the right to humane treatment? The meaning of this expression is not further specified. However, the lack of explanation allows a more comprehensive definition of humane treatment. In fact, this kind of treatment would necessarily change depending on the concrete circumstances of each case and on the specific needs of the people. Women, men, and children are in fact affected in different ways by conflicts and their necessities differ significantly. A specific definition of humane treatment would have made the scope of application too narrow and inflexible. The list of prohibitions in Article 3 (1) are then only illustrative, as the formulation "to this end" suggests.
The law does not explain the concept of "humane", but its common meaning is compassionate or benevolent[56]. Based on this, states have elaborated their interpretation of this norm and many of them included the provision of adequate food and drinking water in their concept of humane treatment[57]. Therefore, according also to the ICRC commentaries, the provision of adequate food can be considered part of the principle of human treatment.
This obligation under Article 3 is absolute and makes no exceptions. No one shall ever be threated less than humanely "in all circumstances". This means that not even military necessity or the principle of reciprocity can be invoked to justify a violation of this duty by State and non-State actors. In addition to this, Article 3 prohibits any adverse distinctions in the humane treatment of people not taking part in hostilities.
In conclusion, this article gives a broad protection to a non-combatant. It ensures a humane treatment in all circumstances and in all types of conflicts. However, the amplitude of this protection goes along with its vagueness and lack of enforcing methods.

3.II.II Starvation

The prohibition of starvation in NIAC is provided by Article 14 of AP II. It establishes the protection of OIS for the population, addressing the "starvation of civilians as a method of combat". The term "combat" was chosen instead of "warfare", as used in Article 54 AP I, because it was considered more appropriate for a NIAC scenario.
As the rest of the AP II, this norm applies only to the conflicts of non-international character that meet the criteria defined in its Article 1. Those armed conflicts that do not fall under the AP II are covered by customary law.
The ICRC Commentary defined Article 14 as a "simplified version of Article 54[58]", the two articles indeed are worded in similar terms and share a common scope. The prohibition of starvation, as in article 54, does not introduce derogations, not even in

[56] ICRC, *supra* note 52, para. 556.
[57] *Ivi*, 558.
[58] ICRC, *Commentary 1987 Protection of OIS of the Civilian Population* < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=22A3363FA0482A57C12563CD0043AB5D >

case of military necessities. In the second sentence, there is an illustrative list of conducts that can amount to starvation. This list is not exhaustive, criminal conduct can also result from omissions.

The starvation of civilians in IAC is not only prohibited under IHL but also criminalized as war crime by ICL. In case of NIAC instead, the same conduct does not amount yet to a crime under Rome Statute. The amendment proposed by the Switzerland is still not in force. It mirrors the structure of the crime of starvation in IAC under Article 8 (2) (b) (xxv) thus it should be interpreted in a consistent way with the existing crime[59]. The similarities between the structures of the two crimes are also introduced with the intent to avoid a fragmentation between the two offences. Considering that starving civilians during conflict is a horrible but frequent practice in conflicts and that NIAC are the most common types of warfare, it is unacceptable that the Rome Statute does not cover yet the full extent of this offence.

4. International Human Rights Law

The legal instrument that deals more specifically with the right to adequate food in international law is the ICESCR. The Covenant, adopted in 1966 by the UN General Assembly, has been ratified by 171 States[60]. There are also other four States, among them the United States, that have signed the treaty but not yet ratified it. Similar to the AP I and AP II for IHL, this treaty has been largely approved by the international community. The ICESCR, like the other UN human rights treaties, has its monitoring body, the Committee of Economic Social and Cultural Rights (CESCR). This committee, formed by independent experts, has the duty to monitor the implementation of the treaty, by different means.
The right to adequate food is considered by the CESCR "of crucial importance for the enjoyment of all the rights[61]". Despite this recognition, there still is a consistent difference between the standards of protection set in the Covenant and the situation worldwide. The Committee, through its reporting activity, has accumulated much data regarding the implementation of the right to adequate food in State parties. However, it noticed that many states do not provide information comprehensively and precise enough to understand the actual situation in their countries. This is a clear indication of the existence of several unsolved issues in food security at global level.

[59] F. D' ALESSANDRA, M. GILLETT, *The War Crime of Starvation in Non-international Armed Conflict* in *Journal of International Criminal Justice* 17 (2019), 834.
[60] https://www.ohchr.org/Documents/HRBodies/CESCR/OHCHR_Map_ICESCR.pdf
[61] CESCR, *General Comment No. 12: The Right to Adequate Food 1999*, E/C.12/1999/5, para. 1.

Article 11 of ICESCR deals more specifically with the right to an adequate standard of living. It encompasses the right of everyone to adequate food and the "fundamental right of everyone to be free from hunger[62]".
The Committee explains that "the right to adequate food is realized when every man, woman and chid, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement[63]". Therefore, the enjoyment of this right cannot be compared with the minimum package of calories or nutrients. It requires a broader interpretation.
The right to adequate food is characterized by adequacy and sustainability. The latter refers to the fact that the food has to be accessible and available for the present and the future generations. This right has to be fulfilled in a sustainable way, with a long-term perspective. Adequacy is a characteristic that includes several different aspects (social, economic, religious, etc.) that have to be taken into account in considering if the accessible food are is not appropriate for the scope of Article 11.
First of all, in order to comply with these features the food has to be available in sufficient quality and quantity necessary to satisfy the needs of individuals. This implies that the dietary needs of different people has to be taken into account. The mix of nutrients that a person needs changes based on the gender, the age, and the physical activity of the subject. The right to adequate food in IHRL can be considered fulfilled only if all these aspects are taken into account.
The food has to be free from adverse substances. Often in areas where the problem of food security is more acute, food safety is also a big concern. For this reason, is important that much attention is given to the quality of food. Actions should be taken in order to prevent the contamination of foodstuffs and water sources.
Another aspect of food is its cultural or religious acceptability. This prospect has to be considered in the assessment of food supplies.
To conclude, food has to be available and accessible.
Available means that everyone should have the possibility to feed themselves either by directly producing their own food or through the market system. Therefore, the required accessibility of food is both economic and physical. Economic accessibility implies that people should have the resources needed to buy the foodstuff necessary for an adequate diet without compromising their other basic needs. The most vulnerable part of the population may require the elaboration of special programmes[64].
Physical accessibility of food implies that the access to food has to be guaranteed to everyone, including in cases of natural disaster and other circumstances that can make the access to food more difficult.
These are the normative contents of the right to food, according to the analysis of the CESCR. The scope of the right to adequate food in IHRL is broader than in IHL, it encompasses aspects which would be difficult to find in a body of law created for a situation of war. The GCs and their APs are more focused on the food supplies and the

[62] ICESCR (1966) Article 11 (2).
[63] CESCR, *General Comment No. 12: The Right to Adequate Food 1999*, E/C.12/1999/5, para. 5.
[64] *Ivi*, para. 13.

prohibition of starvation, in a short-term strategy to protect civilians; while the ICESCR considers a core characteristic of the right to adequate food its sustainability in a long term perspective. These ways of understanding the right to food are both necessary and have to cooperate in order to ensure a broader and more comprehensive protection.

The obligations of the States parties under the Covenant are to take steps to achieve progressively the ESCR[65]. With regards to the right to food, the meaning of this formula is that states have the duty to take measures toward the realization of this right to the maximum of their available resources. A lack of means therefore cannot justify inaction or postponement of measures to implement the enjoyment of the right to food[66]. Even when the resources are insufficient, states must prove their commitment making every effort toward the full realization of that goal.
States have therefore the duty to ensure that everyone under their jurisdiction has access to essential food in a quantity that is sufficient, nutritionally adequate, and safe to guarantee their freedom from hunger.
Differently from IHL, IHRL establishes three specific obligations for states becoming parties of international human rights treaties: the duty to protect, respect and fulfil.
Regarding the right to food, the obligation to protect implies that States have to take any measures to ensure that enterprises or individuals do not impede the access to adequate food to anyone[67]. Therefore, States have to prevent others from interfering in the enjoyment of this right.
The obligation to respect instead, is the obligation of the States to refrain from interfering with the enjoyment of this right. They, thus, have the duty not to take any measures that can prevent the access to food for the population.
Finally, the obligation to fulfil can be divided in two separated duties. The obligation to facilitate and to provide. The first one is a proactive obligation; it establishes the duty for states to take actions in order to facilitate and strengthen people's access to food and utilization of resources[68]. The second one, instead, is the obligation to directly provide the access to food in those cases where people, for reasons beyond their control, are facing famine, malnutrition or food insecurity.

If State parties do not comply with their obligations under the Covenant, they occur in a violation of it. A violation of the right to food happens when states fail to guarantee the minimum standard of protection requested to be free from hunger.
Often states claim that due a lack of resources they were unable to comply with the protection under the Covenant and therefore to ensure the access to food to the population. The inability cannot be used as an excuse. For this reason, in this case the

[65] *Ivi*, para 14.
[66] UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights*, December 2008, No. 33, < https://www.refworld.org/docid/499176e62.html >
[67] *Ivi*, para. 6.
[68] CESCR, *supra* note 62, para 15.

state will need do prove firstly that every effort has been made and that all the available resources have been invested in the attempt to comply with its obligations. Secondly, where these efforts have not been successful, the state will have to prove that it has also unsuccessfully looked for international support aimed at ensuring access to food. While Article 70 of AP I, dealing with a situation of conflict, establishes an order in the distribution of relief, IHRL does not set out priorities in the enjoyment of the right to adequate food. Furthermore, any discrimination in the access to food constitutes a violation of the treaty[69]. This does not mean that under IHRL specific actions to ensure the access to food for the most vulnerable persons are not provided. The only difference is that IHL, dealing with particularly critical situations, sets priorities in the enjoyment of the food supplies, while the right to food under the ICESCR is specifically defined as the right to adequate food for everyone. This difference in the formulation of these norms reflects the original different scope of the two bodies of law.

The States parties to the Covenant are the only accountable for its violations but also the private business sector and the civil society have to collaborate in order to guarantee the enjoyment of the right to food for everyone. While states have to comply with their obligations, the private sector, companies and industries etc, has to pursue its activity according to a code of conduct aimed at guaranteeing the respect of the right to food[70]. The resultant responsibility to ensure that the members of society act in conformity with this aim falls on the states.
Even if under IHRL states have the duty to take steps to ensure that everyone is free from hunger, they also have a margin of appreciation in choosing their national strategies. Despite this discretion, the improvements made by the states have to be verifiable. For this reason, states have to monitor their progress by making periodical reports to the CESCR. In addition to this, the Committee calls States parties on setting verifiable benchmarks and a framework legislation on the right to adequate food[71].
To conclude, states have also the responsibility to guarantee the access to effective judicial remedies for victims of a violation of the right to food. Implementing the accountability for such violations indeed would strengthen the effectiveness of the current protection and would be a strong deterrent for the future.

The article 23 and 2.1 of the ICESCR also establishes international obligations for states. They should refrain from using food for political and economic scopes. They have instead the duty to cooperate to the full realization of the right to adequate food in a perspective of international assistance. According to the CESCR they should respect the enjoyment of the right to food in other countries, protect that right, facilitate

[69] *Ivi*, para. 18.
[70] *Ivi*, para. 20.
[71] *Ivi*, para. 29.

the access to food and provide aid to them when necessaries[72]. Despite this, too often these words are easily forgotten and remain mere declarations of intent.
In conclusion of this analysis of the IHRL protection of the right to food, according to the Charter of the UN, States have a joint and individual responsibility to cooperate in providing humanitarian assistance in times of emergencies. In these cases, like in IHL, food aid has to be given prioritizing people most in need. It should also be provided in a sustainable way for the local producers, facilitating the return to self-reliance of the beneficiaries[73].

CHAPTER II

THE INTERACTION BETWEEN IHL AND IHRL

In this chapter, we are going to analyse how IHL and IHRL should interact and how human rights treaty bodies should deal with this interaction in order to guarantee the best possible protection of the right to food in case of war.

1. *The theory of complementarity and the theory of separation*

The right to food and human rights in general are at risk during armed conflicts. In order to strengthen the protection of the population, it is necessary to find the best possible way to guarantee these rights even in cases of war.
Classic approach to international public law claimed that IHL and IHRL were completely separate and the application of the law of peace or the law of war depended on the scenario. With the adoption of the United Nations Charter in 1945 and the other human rights treaties, this strict separation was soon replaced by a new point of view on this matter. The human rights documents adopted in that period often have their origin in the reaction of the international community to the atrocities of the world wars. For these reasons, they take into account the conflict situation and indeed set out some minimum standards for protection of human rights in those circumstances.
On the other hand, IHL also opened the door to further inclusion of IHRL. In the ICRC Commentaries to Common Article 3 of the Geneva Conventions the existence of "few essential rules of humanity[74]" shared in all civilized countries and applied both in war and in peace times is recognized. In the preamble of Protocol II of 1977, the international human rights instruments and their fundamental role in the protection of

[72] *Ivi*, para. 36.
[73] *Ivi*, para. 39.
[74] ICRC, *Commentary of 1958 Convention IV relative to the Protection of Civilian Persons in Time of War, supra* note 46, Art. 3.

the human person are mentioned[75]. Lastly, article 72 of 1977 Protocol I determined its area of application establishing that its norms are additional to the "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflicts[76]", recognizing in this way the co-existence of the two bodies of law.

From the recognition of the applicability of human rights norms in war times some criticisms arose.

In particular, on one hand, the advocates of the separation theory completely disagreed with this new perception and argued the impossibility to apply both bodies of law at the same time. Since the IHRL guaranteed higher standards of protection, they claimed that it is not possible ensure that human rights principles are respected in a war scenario. This position can lead to the undesirable outcome of lowering the current parameters. Furthermore, this theory is in contrast with the classic international public law, which indeed recognizes in the natural law the existence of natural human rights that have to be protected and respected both in times of peace and in times of war[77].

The jurisprudence of the ICJ has lately confirmed the simultaneous applicability of IHL and IHRL, as we have already seen in the first chapter, and it was followed by numerous regional human rights instruments that have recognized the application of human rights norms during armed conflicts.

On the other hand, the theory of complementarity recognizes the simultaneous applicability of the two branches of law and their interrelation[78]. In particular, it states that they complement one another whilst remaining separated. If this is certainly true, this theory does not clarify the complex dynamics between IHL and IHRL in practice.

Going deeper, the interaction between these two laws can be analysed in terms of convergence[79]. The idea of convergence implies that IHL and IHRL sometimes overlap, this happens because they share part of the scope of application[80]. These two regulations are thus distinct, however sometimes a cumulative application of their norms in order to guarantee the best protection of the people is necessary.

Having said that, the main doubt now is how to deal with these situations, in particular in case of conflicts between norms of the two different branches.

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[75] INTERNATIONAL COMMITTEE OF THE RED CROSS , *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: https://www.refworld.org/docid/3ae6b37f40.html, *Preamble*.

[76] INTERNATIONAL COMMITTEE OF THE RED CROSS, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977,1125 UNTS 3,available at: https://www.refworld.org/docid/3ae6b36b4.htm, art. 72.

[77] H. J. HEINTZE, *On the relationship between human rights law protection and international humanitarian law* in *International Review of the Red Cross* 2004, (Vol. 86) 789.

[78] *Ivi, 793.*

[79] *Ibidem.*

[80] *Ibidem.*

2. *Lex specialis*

Once it has been recognized that IHL and IHRL share the aim of protecting human beings and are both cumulatively applicable to conflict situations, it is necessary to define the nature of their convergence and how human rights tribunals can deal with this simultaneous application in practice. Indeed, human rights tribunals have the jurisdiction to solve the human rights disputes. Since the two bodies of law interact and often overlap, better clarification is needed.

According to the ICJ, the relationship between the two branches of law is explained through the *lex specialis derogat legi generali* maxim[81]. The IHL, being the *ius in bello*, is considered the law specific to armed conflicts while the IHRL is considered as a wider set of norms that can be derogated in favour of the other.
The ICJ expressed its opinion in the Nuclear Weapons Advisory Opinion, dealing with the definition of "arbitrary deprivation of life". In this occasion, the Court stated that the right to life, article 6 of ICCPR, is a fundamental human right that applies also in armed conflicts. Therefore, even in armed conflicts it is prohibited to deprive someone of his/her life arbitrarily but, in order to define what this adverb means in this context, the ICJ referred to IHL. The definition of "arbitrarily" has, thus, to be given according to the IHL, in this way recognizing its primacy over IHRL[82].
Actually, the Court, in this Opinion, didn't comment on the relationship between IHRL and IHL but it only examined the formulation of one particular right according to one human rights treaty and the IHL norms[83]. From this very specific opinion there was an academic extrapolation of the broader relationship between the two branches of international law[84].
According to this interpretation, the IHRL's influence on IHL is limited. The protection accorded to the civilians cannot overcome the standards set by the latter[85]. Indeed, human rights exist and are applied in armed conflicts but only with the framework of the IHL. This is the way in which the ICJ tried to harmonize the relationship between the two laws.
The Court has later reiterated its view in the *Wall case,* concluding that it would "have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law[86]". This time the Court

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[81] S. TABAK, *Ambivalent enforcement: International Humanitarian Law at Human Rights Tribunals* in *Michigan Journal of International Law*, 2016 (Vol. 37) 674.
[82] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Report 1996, para. 25.
[83] M.MILANOVIC, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law* in *Journal of Conflict & Security Law*, 2010 (Vol 14) 463.
[84] *Ibidem*.
[85] *Ibidem.*
[86] Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 2004, para.112.

considered not only specific norms but it analysed the interaction between the two international laws, recognizing the IHL as a specialized version of IHRL.
However the ICJ does not give further explanations of the concept of *lex specialis*, which is vague and can be interpreted in at least three different ways.
According to the first one, when the IHL is applicable it is the sole legal basis[87]. This would in effect mean that IHL replaces the human rights law. This is contrary to the assumption that IHRL is applicable in armed conflicts. Indeed, the two spheres of law are complementary and not mutually exclusive[88]. This statement, even if it is reasonable, however does not provide practical solutions. Saying that the two bodies of law are complementary is equivalent to saying that they are not mutually exclusive[89]. It does not solve any doubts.
The second hypothesis is that, in case of simultaneous application of IHL and IHRL norms, the humanitarian law prevails when it contains an express provision which addresses a similar field to that of the human rights norm[90].
This interpretation can be explained referring to the opinion of the ICJ regarding the right to life. There are several IHL norms regulating attacks and targeting groups during armed conflicts, to name one: the principle of distinction between civilians and combatants. According to this second hypothesis, a killing in a warfare can be considered arbitrary and therefore a violation of human rights norm only if it violates international humanitarian law norms.
This solution creates two major problems.
Firstly, IHL does not cover all the scopes of IHRL, therefore it would affect IHRL norms differently. Some human rights norms would be severely restricted by the humanitarian regulation while others would be completely unaffected. For example, IHL does not deal with the freedom of expression, could we directly apply the IHRL regulation of the freedom of expression in an armed conflict?
It would be difficult to ensure the enjoyment of the full freedom of expression in a war scenario, and this has to be taken into account both by human rights tribunals and human rights bodies that deals with situations of conflict. In some cases this problem could be solved referring to the limitation clauses included in some human rights norms. However, not all the norms contain this kind of clause, therefore, this solution would be available only for some specific rights.
Secondly, another doubt arises regarding the definition of IHL. The right to food for example, it is poorly regulated by the IHL treaties, especially in cases of NIAC, but it has a stronger protection according to customary IHL. Should the customs and treaties prevail over IHRL or only the treaties? This second solution also leaves questions unanswered.

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[87] F. J. HAMPSON, *The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body* in *International Review of the Red Cross*, 2008 (Vol 90), 559.
[88] M.MILANOVIC, *supra* note 82, 464.
[89] *Ibidem.*
[90] F. J. HAMPSON, *supra* note 86.

The third option seems probably the most functional and consists of referring to the precise issue on trial. Since it is assumed that IHL and IHRL are complementary, in order to apply the *lex specialis* in practice the relationship between specific norms in a specific case has to be investigated, not those between the two bodies of law in general. In the determination of the specialized norm among IHL and IHRL rules, it should be taken into account the precision and the clarity of a norm and how it fits into the specific context[91]. The decision regarding the relevant norm to apply has therefore to be taken on a case by case basis. This way of solving the antinomies among IHL and IHRL, even if it is supported by an eminent doctrine[92], is however in contrast with the concept of *lex specialis* in itself. Indeed, it does not recognize the existence of a special and a general norm. This interpretation is therefore inconsistent with the opinion of the ICJ that the principle of *lex specialis* regulates the relationship between the two branches of law. In addition to this, this solution identifies the applicable law only *ex post*, in relation to the facts and, according to another part of the doctrine, this is nevertheless not admissible[93].
Among these solutions it is therefore impossible to find an explanation of how this principle can be applied in practice. The first option is definitely the one that offers less guarantees of protection of human rights, while the last one is so focused on ensuring that the HR standards are guaranteed, that it goes astray. The second option is instead more moderate but it still does not give a comprehensive solution.

Identifying the practical implication of the ICJ's statement is extremely complicated and courts find themselves in difficulties when they have to deal with the intersection of IHL and IHRL's norms.
Considering all these complications, part of the doctrine has questioned the opinion of the ICJ, claiming that the use of the principle of *lex specialis* does not clarify the complementarity nature of the relationship between IHL and IHRL[94]. These scholars suggested changing the perspective on the norm conflict among these international laws and referring to other methods of norm conflict resolution, which are the *ius cogens*, the conflict clauses in treaties, and the *lex posterior* rule.
Starting with the *ius cogens*, it is an attractive concept but still vague at least as much as *lex specialis* in its practical application.
The conflict clauses are instead used in treaties to solve *ex ante* potential norm conflict, giving priority directly to one treaty over another. This type of clause, however, cannot be found in the main IHL and IHRL regulations, and even if there was the willingness

[91] K. CASLA, *Interactions Between International Humanitarian Law and International Human Rights Law for the Protection of Economic, Social and Cultural Rights* in *Revista Electronica de Estudios Internacionales*, 2012, 11.
[92] M. SASSOLI, *The Interplay between International Humanitarian Law and International Human Rights Law*, International and Comparative Law Research Center and International Institute of Humanitarian Law, 2019, 10.
[93] F. J. HAMPSON, *supra* note 86, 562.
[94] M. MILANOVIC, *supra* note 82, 464.

to make an amendment, the criteria according to which the priority should be given should be elaborated first.
Lastly, the *lex posterior* rule states that the law that has been enacted later prevails on the previous regulation on the same matter. This principle can be used in domestic law and is not supposed to be used in the international system.
In conclusion, except for the conflict clause, these methods are unlikely to be applied in a situation of norms conflict among IHL and IHRL. Instead, what can be more useful is referring to the norm avoidance methods. Often a norm conflict can be easily solved by means of interpretation. In this way, two apparent conflicting norms can be reconciled effortlessly. Nevertheless, when the conflict cannot be avoided, the remaining solutions are: rewriting a particular provision, hardly likely in the international system, or looking for a political solution to the norm conflict[95]. In order to better understand the concept of political solution of a norm conflict we can refer to the *Soering case*[96]. According to the principle of non-refoulment *ex* art 3 of ECHR, the UK should have impeded the transfer of the detainee to US, because of a real risk of inhuman or degrading treatment. This option was therefore in contrast with the extradition treaty between the two countries. Here the decision of UK was merely political. However, when speaking of the protection of human rights, a political solution may not be the best option, such approach is at least questionable.

All things considered, two fixed points can be identified, on which everyone can agree. The first is the fact that human rights law remains in force during armed conflicts and the second is that the two bodies of law are therefore complementary and not mutually exclusive. However, apart from that, the relationship between IHL and IHRL and also its practical implications are still unclear. The ICJ referred to the use of the *lex specialis.* Even if this principle referred to the derogation of one norm in favour of the other, maybe in this particular scenario it would be more correct to speak about flexibility. IHL and IHRL do not mesh perfectly together and this creates norms conflicts. When a reconciliation among the two norms cannot be found, in a war scenario IHRL standards may have to be applied in a flexible way, and in this flexibility it can be recognized the interaction between the two set of norms.
The use of this principle, that now is still partly obscure, should be developed in the direction of humanizing, as much as possible the IHL[97]. Indeed, the complementarity of these two branches of international law should lead to the humanization of IHL through the use of human rights norms to fill the gaps left by humanitarian law or simply introducing human rights standards of protection, as much as possible, into IHL regulations.
This outcome, although favourable, inevitably leads to a watering down of the human rights standard of protection. Despite this, the current protection of the right to food

[95] *Ivi*, 470.
[96] EUROPEAN COURT OF HUMAN RIGHTS, *Soering v United Kingdom* (1989) EHRR 439.

[97] *Ivi*, 460.

under the Geneva Convention would definitely improve if it is interpreted in the light of the ICESCR, even at the cost of diminishing the human rights standards.
Another desirable outcome of the interaction between IHRL and IHL is the enforcement of IHL through human rights mechanisms.

3. Implementing IHL trough HR mechanisms

The IHL has important deficits, in particular it lacks of monitoring and enforcement mechanisms.
The means of implementation of humanitarian law are in fact missing or dysfunctional while the human rights law has a particularly developed system. Since, the substantive intersections between IHL and IHRL and the convergency among their scopes of application, it is possible to consider the use of the tools of IHRL to strengthen the weaknesses of humanitarian law system. Giving more space to IHRL would in fact open the door to HR monitoring bodies and enforcement mechanism. However, there is still a long way to go in this direction.
Starting with the UN human rights treaty bodies, the monitoring mechanisms that are most interesting for the purpose of this discussion are the periodical report and the general comments.
Through the reporting procedures the treaty bodies monitor the progress made by State parties in the implementation of the treaties. Each treaty has indeed its committee, composed of independent experts, that periodically receive and analyse the report of the State parties regarding the application of the provisions of the treaty in their territories. The State parties in this way are encourage to analyse the level of protection of human rights in their countries and compare them with the minimum standard of protections establish by the treaties. The committee examines the state report and it makes recommendation encouraging state parties to fulfil their international obligations. Through this simple process, committees has elaborated practices and procedures that have been proven highly effective in reviewing the accordance of the legislations and the policies of state parties to their obligations under the treaties.
The problem of this monitoring mechanism is that, as usual, it is based on the collaboration of the States parties. Due to the huge quantity of work behind each report, often states cannot meet the set deadlines. Sometimes the length of the process or the lack of resources are used as an excuse to cover the unwillingness to reveal certain serious human rights violations. Thus, this process while it is useful to raise awareness at the international level of the human rights situation in each country it has also its criticalities. For these reasons, the idea of duplicate the reporting procedure for the IHL treaties is unfeasible, it would probably lead to further delays or to the proliferation of not-detailed reports.

The existing human rights committee instead, despite its usual focused on human rights only, in different occasions have referred to humanitarian law[98].
Among the existing committee, the Committee on the Rights of the Child has often faced issues deriving from conflict situations. This Committee in fact finds itself in a particular position, because article 38 of the Convention on the Rights of the Child (CRC) expressly established that the State parties are obliged to respect the binding IHL norms regarding children soldier in armed conflicts[99]. For this reason the Committee referred to IHL in its General Comments and also it found several IHL violations in conjunction with article 38 CRC in its Concluding Observation to state's reports. For example, Regarding the war in Uganda the Committee express its concern that "the rules of IHL applicable to children in armed conflict are been violated in the northern part of the country, in contradiction with article 38 of the Convention[100]".
The CESCR is instead the treaty body that most often has to deal with situation of overlap between HRL and IHRL[101]. In its Concluding Observation regarding Israel the Committee stated that human rights must be respected even in armed conflicts and that "basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by IHL. A part from that, it has been little incisive regarding IHL.
Treaty bodies indeed during the reporting process must control the compliance of the state with its obligations under the respective human rights treaty, they are not required to express their opinion regarding specific findings of IHL violations. At the most, they make general pronouncement regarding humanitarian law in their general comments.
A part from the practice of the Committee on the right of the child, the current contribution of the HR treaty bodies to the implementation of IHL is thus limited but it should be improved. Creating new monitoring process dedicated to IHL seems to lead to repetitions and length. What instead could be done is broaden the field of application of the existing mechanisms. The system used in the CRC, for example, seems to provide a useful tool to enabling committees to investigate and therefore in some ways monitoring on the compliance with IHL.

Another international HR monitoring mechanisms is the Universal Periodic Review (UPR) of the Human Rights Council. The mandate of the latter includes the protection of human rights in situation of violation of them, especially when they are gross and systematic[102]. This mandate is therefore broad enough to cover conflict situations that implies HR violations. In the UPR institutive document indeed it is specified that, due to the complementarity of IHL and IHRL, the mechanism "takes into account" the

[98] G. OBERLEITNER, *The Development of IHL by Human Rights Bodies* in *International Humanitarian Law and Non-state Actors*, 2020
[99] *Ibidem.*
[100] UN Committee on the Rights of the Child 1997, para. 34
[101] G. OBERLEITNER, *supra* note 93, 303.
[102] *Ivi*, 298.

situation of armed conflict and also the applicable international humanitarian law[103]. This expression is rather vague but it includes the IHL in the UPR revision, which means that the UN Council and the states can claim violations of IHL and states their concerns.
Despite this, until now the previous UPR cycles did not focused on this aspect, not revealing any practice in this regard.

Turning to the enforcement mechanisms, these are the Achilles heel of the international law in general, but the situation of IHL is particularly serious. The humanitarian law in fact lacks of enforcement mechanisms. There is not a specific international tribunals specifically charged with enforcing IHL[104]. The implementation of the IHL treaties is therefore left to different fragmented judicial bodies, as the ad hoc tribunals[105].
Over the years instead, the IHRL has developed a number of judicial and quasi-judicial bodies to address violation of human rights law. This phenomenon was part of the so-called human rights revolution and it was undoubtedly part and it contributed to the advancement of the human rights law.

While the IHL treaties lack of individual complaint procedures for the victims of violations of their norms, the UN treaty bodies developed a quasi-judicial procedures of individual complaints. Some of the treaties bodies, among them the Committee of Economic Social and Cultural Rights, under certain circumstances, can receive and consider individual complains. Committee can only addresses violation of the human rights set forth in their respective treaty. This procedure does not include the international humanitarian law, thus, the victims of its violation cannot refer to the UN committees.
The individual complaints procedure of the UN treaty bodies is not a binding mechanism. It is based on the willingness of the states to comply with the opinion expresses by the committee. The only strength of this opinion is represented by the "public blame effect[106]" that push states to act.
Considering the lacunas in IHL mechanisms, the question that arises is if it is possible for the human rights bodies to address IHL violations.
The mandate of the treaty bodies is to monitor and enforce the implementation of the treaty, the IHL is not really considered. However, in some regional individual complains procedures the role of IHL is instead recognized. For example, the European Convention of Human Rights (ECHR) explains that the emergency measures cannot

[103] HUMAN RIGHTS COUNCIL, *5/1. Institution-building of the United Nations Human Rights Council*, 2007, annex
[104] S. TABAK, *supra* note 80, 662
[105] *Ibidem.*
[106] H. J. HEINTZE, *supra* note 77, 801.

dismiss the other obligations of the states under international law[107]. The Convention therefore make it possible a referral to IHL. The European Court of Human Rights (ECtHR) during the years has changed its approach to IHL from an indirect approach, as a means of interpretation, to a direct application. Often in its judgments the Court underlined the existence of a close connection between IHRL and IHL and in *Engel* v *The Netherlands* case it also explicitly referred to the latter, showing that a direct application of IHL by a HR body is possible[108]. On 2013 continuing with this approach, in the *Benzer and Others v. Turkey* the Court established that bombing civilian villages repeatedly and in an unselected way is clearly against the right to life *ex* Article 2 of the ECHR and the customary rules of IHL and any international treaty regulating the armed conflicts[109]. The position of the Court became even clearer in 2014 with the *Hassan v. UK* case[110]. The case is about the capture of the brother of the applicant by the British armed forces and his detention in camp Bucca in Iraq. The applicant claimed that the arrest and detention violated the procedural safeguards and were unlawful and arbitrary. The applicant's question was if the arrest and detention could be considered lawful under article 5 ECHR, considering that there wasn't any request of derogations under article 15 ECHR. The decision would have completely changed if the ECtHR had applied the IHL or not.

The ECtHR did not recognize any alleged violation of article, basing its decision on the application of the IHL criteria. The Court stated that even in situation of armed the ECHR continue to apply. Regarding the specific case, it explained that in case of arrest and detention the guarantees under article 5, especially lett. e and f, should be ensured as much as possible. Despite this, in IAC it must be taken into account the provisions of IHL. The Court specified that the ECHR must be interpreted in line with the other rules of international law, among which IHL. It highlighted that among the states parties there is not the practice of derogating from Article 5 when detaining a person according to GC during IAC. In addition to this, the absence of a formal derogation *ex* article 15 do not have any influence on the possibility for the Court to taking into account the provisions of IHL when judging on allege violations of article 5[111]. The ECtHR concluded stating that, in context of IAC, article 5 has to be interpreted according to the context and the provisions of IHL[112].

Moving to the Inter-American HR system, article 27 of the American Convention on Human Rights (ACHR) expresses a concept similar to ECHR[113]. The Inter-American Commission on Human Rights in its practice was in favour of the referral to IHL. One

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[107] COUNCIL OF EUROPE, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950,ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html, art 15, para 1.

[108] EUROPEAN COURT OF HUMAN RIGHTS, *Engel v. The Nederlands* (1976) Application No 5370/72.

[109] EUROPEAN COURT OF HUMAN RIGHTS, *Benzer and Others v. Turkey* (2013) Application no. 23502/06.

[110] EUROPEAN COURT OF HUMAN RIGHTS, *Hassan v. UK* (2014) Application no. 29750/09.

[111] J. TENENBAUM, *Application of IHL by the ECtHR*, ICRC, 2020, 3.

[112] *Ibidem.*

[113] H. J. HEINTZE, *supra* note 77, 802.

of the most significant examples of this was the *Abella* case regarding the right to life[114]. A group of 42 people attacked the Argentinian barrack of La Tablada. During the conflict many attackers were killed and the survivors applied to the Commission. The latter considered fundamental in this case applying the IHL principle of distinction among combatants and civilians[115]. In this case, thus, the regional human right body based its decision on IHL, the Committee did not used the humanitarian law as a mere tool for the interpretation of IHRL but it directly applied it in solving the case.

If the Commission had an open position regarding the use of IHL, suggesting a direct application, the Inter-American Court had a different approach. The Court indeed maintained that its jurisdiction is limited to the rights of the ACHR and it can make only an indirect use of the IHL as a tool of interpretation.

All HR bodies encounter difficulties concerning the application of IHL[116]. However, for the HR judicial and quasi-judicial bodies ,this problem is even more complicated as compared with the HR monitoring mechanisms. The courts indeed do not make general pronouncements, they have to deal with specific cases and therefore they have to decide on the applicability of IHL norms or not.

One possible solution, likewise for the monitoring mechanisms, could be to duplicate the existing HR mechanisms, creating new judicial and quasi-judicial IHL bodies, and coming back to the separation theory. This solution not only would oppose the ICJ's statement on the *lex specialis* but it would not solve the problem. Since this two branches of law shares the scope of application, there would be the problem of finding the correct fora for those cases in which there is an interaction among the two laws.

In conclusion, instead of creating new problems, it would be more efficient working with the dispute settlement that are already existing. The benchmarks should be the recognition that the IHRL is applicable in armed conflicts, subjected to derogation, and that in case of simultaneous applicability of IHL and IHRL, it should be applicated the *lex specialis* rule. Starting from this clear points, all the legal or advocacy-based tools of IHRL should be harnessed in order to implement and humanize IHL, filling the gaps in its existing procedures.

The Inter-America Commission gave us a clear example of the possibility for the HR bodies to deal with the direct application of IHL, on this path we should walk.

In filling the IHL gaps, main importance should be given to the crime of starvation. One of the main objectives of the international community should be ensuring the accountability of starvation both in IAC and NIAC. Opening the IHRL mechanisms to the IHL would not only allowed a better monitoring of the situation worldwide but also it would encourage the accountability, making the labelling of this crime easier and bringing the perpetrators to justice. Hopefully this changes would also lead to raise the awareness of the international community on this problem and it would ender mass starvation ethically toxic[117]. Only in this way, as it happened in the human rights

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[114] INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *Abella v. Argentina* (1998) case 11.137
[115] S. TABAK, *supra* note 80, 688.
[116] F. J. HAMPSON, *supra* note 86, 572.
[117] GLOBAL RIGHTS COMPLIANCE, *supra* note 16, 24.

revolution, the global leaders would feel the public blame for this crime and would really put their commitment in preventing and prosecuting mass starvation.

CHAPTER III

THE RIGHT TO FOOD FROM A PRACTICAL PERSPECTIVE

In this chapter, we are going to analyse the concept of food insecurity and the different ways in which the food assistance is delivered. To conclude we will reflect on the needs that each kind of aid can meet.

1. Food insecurity and armed conflicts

The food shortage can take different forms. In this moment, across the world, there are people that are suffering from hunger, people that are unable to regularly access food, people that are fasting for one day or more and people that are forced to skip a meal a day. Some people that have access to food but that can afford only the cheap junk food. All this situations are extremely serious and have strong impacts on the health of the people involved. If starving is a situation incompatible with life, also eating cheap food, that unfortunately amounts to processed food, leads to the development of severe diseases, that can lead to death and places a high burden on the already damaged health system. The junk food is indeed high in fat, sugar and salt and lacking of nourishment. People that for economic needs are obliged to consume regularly this kind of products

are more likely to develop illness, specially obesity, cardiovascular disease, and diabetes.

At the 1996 World Food Summit, it was stated that "food security exists when all people, at all times, have physical and economic access to sufficient safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life"[118]. According to the Food and Agricultural Organisation (FAO), food security is characterized by four aspects. The first one is the physical availability of food that derives from the level of food production, the stock level and the net trade[119]. The second is the economic and physical access to food, this depends on the functioning of the markets, the incomes of the people and the prices of food. The third is food utilisation, meaning the choice of the food and its preparation. Utilisation should ensure that the individual meets its nutritional needs with a varied diet. The last requirement is the stability of all of the previous three. These requirements must co-exist in order to reach food security.
In order to better understand the different aspects of the lack of nourishment, the first point to cover is the definition of food insecurity.
Food insecurity is the lack of regular access to sufficient safe and nutritious food necessary for normal growth and development and an active and healthy life[120]. This lack of access can derive from a scarcity of food or a lack of resources to access it. Food insecurity can have different intensities, it can be moderate or severe[121]. In the first case, the persons involved have insufficient resources for a healthy diet and therefore may find themselves in the position of skipping meals or relying on junk food. Severe food insecurity is characterized by the inability to consume food on a daily basis. In this situation a person is undernourished and is facing hunger. Both these situations have a serious impact on the well-being of the person.

In order to develop a food aid project, it is important to have a deep knowledge of the situation in the country. With the aim of classifying the level of food insecurity in an area, the Integrate Food Security Phase Classification was created[122]. According to this index there are five levels of food insecurity: minimal, stressed, crisis, emergency, and famine[123]. The first level is minimal, it happens when the 80% of households can meet their basic dietary needs[124]. Stressed occurs when at least 20% of the households have to reduce their food consumption, the situation turns to a crisis when 20% of the households have serious deficiencies in their food consumption, leading to acute

[118] World Food Summit, 1996 see http://www.fao.org/3/al936e/al936e.pdf
[119] FAO, *An Introduction to the Basic Concept of Food Security*, 2008 < http://www.fao.org/3/al936e/al936e.pdf >
[120] http://www.fao.org/hunger/en/
[121] *Ibid.*
[122] HILAL ELVER, *supra* note 6, para 6.
[123] *Ibidem.*
[124] *Ibidem.*

malnutrition[125]. If the percentage rises the situation turns to emergency and finally the famine status is characterized by the absolute necessity of food for the entire population or its subgroups. In this tragic case people die in short term.
These desperate situations often arise as a result of different convergent factors. Among these, one of the main relevant causative events is the war. International and non-international conflicts cause the loss of human lives, destruction of houses, assets, cultivations, and means of survival. These disruptions lead to the weakening of the community, generating social unrest and contributing to the start of new conflicts or the continuation of the existing ones.
Nowadays, civil conflict and urban unrest are the most common forms of conflict, they are far more widespread than intra-state wars. Usually, these kinds of violence have more than one root, such as political discontent, social tension, or economic reasons. Therefore, they are even more difficult to stop. The number of protracted conflicts worldwide has indeed increased. The Democratic Republic of Congo (DRC), South Sudan, Afghanistan, Somalia and the Syrian Arab Republic have experienced decades of conflict that have devastated the countries[126]. According to a research of the Global Network Against Food Crisis, the 60% of the population in Syria and the 50% in South Sudan suffer from severe food insecurity[127].Given that normally war leads to a situation of crisis, a prolonged conflict exasperates this state of emergency, this has a seriously detrimental effect on the countries involved at a political, economic and social level..
As a consequence of these conflicts, the number of people in a situation of acute food insecurity has increased from 135 million people in 2019, 74 million of which were living in conflict affected area[128], to 155 million people in 2020[129]. This incredible raise is due to the ongoing conflicts that have devasted crops, destroyed houses and therefore damaged the local economies of the affected countries but also due to the COVID-19 pandemic that has widened the fragilities and the vulnerabilities of territories in already present in difficult conditions.

2. *Types of support: cash and in-kind aid*

As consequence of natural disasters or in case of armed conflicts, the availability of food for the local population can be insufficient. There are different strategies to address these situations. The most common way of delivering food assistance is

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[125] *Ibidem.*
[126] FAO, WFP, *Monitoring Food Insecurity in Country with Conflict Situations: a joint FAO/WFP update for the United Nations Security Council*, < file:///C:/Users/f_gal/Downloads/FAO_report_Monitoring%20food%20security_2019.pdf>, 2019, 8.
[127] GLOBAL NETWORK AGAINST FOOD CRISIS, *Global Report on Food Crisis 2021*, < https://reliefweb.int/sites/reliefweb.int/files/resources/GRFC%202021%20050521%20med.pdf > 2021, 4
[128] FAO, WFP, *supra* note 119, 8.
[129] GLOBAL NETWORK AGAINST FOOD CRISIS, *supra* note, 120, 4

thought in-kind aid. Providing food to people in need has been the usual way of delivering food assistance in the humanitarian sector. For example the WFP has defined the in-kind aid as the cornerstone of their work[130]. The in-kind assistance is so far a fundamental way of supporting the local population in humanitarian interventions but it has also some drawbacks.

The first thing that should be considered in organizing an in-kind food distribution is the customs of the population involved. For example, delivering pork meat in a predominant Muslim region not only would lead to a waste of resources but it would amount to an insulting behaviour, ruining the trust relationship between the humanitarian agency and the local population, necessary to deliver this type of projects. This is only the most common and easy example of the variety of factors to take into consideration before delivering in-kind food assistance.
Another aspect instead to take into account is the eating habits of the population and their dietary needs. These two elements do not always correspond. Often, communities focus their cultivations on one cereal, delivering a standard diet that inevitably is lacks diversification and therefore cannot ensure the nutritional needs of an individual. In the DRC, a country torn by civil conflicts and in which there are large areas characterized by high levels of malnutrition, for example, the 90,36% of the farmers cultivate maize[131]. Delivering food can facilitate the introduction of different products and thus different nutrients, that can be necessary, but these changes need to be accepted by the community.
In this process of instituting change, it can be easy to clash with prejudice or beliefs. Sometimes, in order to overcome this issue, can be important to combine the distribution of in-kind aid with food-training, in order to raise the awareness and spread best practices. In DRC, for example, according to a report from AMKA, a non-profit organisation active in the Congo and in Guatemala, the perception of the local population of the symptoms of some common diseases, deriving from malnutrition, are sometimes seen as a consequence of evil eye or bad fortune[132]. In this report, more than one interviewed mother declared to rely not only to the doctors but also on the witch-doctors to heal their babies[133]. The 17% of the interviewed mothers considers witchcraft as a cause of the malnutrition-related illness of their children[134].
In other cases, instead, the problems are not prejudice or folk medicine but the lack of basic knowledge regarding the dietary habits and needs of individuals. In the same report, one of the interviewed mothers declared that, according to her, the cause of the malnutrition in her son is the lack of oil in his bones. Other mothers, instead, consider

[130] FAO, *In-kind food distribution*, <https://www.wfp.org/in-kind-food-distribution> .
[131] AMKA, *Inchiesta Nutrizionale*, 2019, 15.
[132] AMKA, *Indagine sulla Sicurezza Alimentare, Cure e Alimentazione dei bambini da 0 a 5 anni*, 2015, 35
[133] *Ibid.*
[134] *Ibid.*

the malnutrition consequences, like a swollen belly or the lack of energies, as normal events in the first phase of the growth of a child[135].
A real change can be achieved only actively involving and empowering the local community through a raising awareness campaign. The first phase of an in-kind food aid project is of the utmost importance. This is a phase of preparedness, assessment and analysis of the targeted area and its population, that leads to a deep knowledge of the territory and its needs.
The other problems of the in-kind distribution are related to the timing and the cost of the operation. Organizing massive delivery requires huge amounts of work and efficient organization. Collecting food, organizing its transfer and its distribution is an intense undertaking that require a lot of personnel, expenses for the packing and the moving of the goods. All of this has to be done as quickly as possible, in order to meet the immediate needs of the affected population, and in the cheapest way, ensuring that the major part of the funds are used to support the locals and do not end wasted in the cost of organizing.
In projecting the delivering of food, it has to be taken into account that often problems may arise along the way, like roads become difficult to traverse infrastructure is damaged or militia groups form blockades, especially in a war scenario. Lines of trucks delivering humanitarian aid do not go unnoticed and sometimes humanitarian goods are hijacked along the street by armed groups. In certain cases, local communities, that had already been sacked and raided by armed groups, have refused aid because it would have reattracted the looters[136].
Lastly, delivering food assistance can damage the local production and distort local markets, leading to a lowering of the prices of the locally produced goods. By entering a product on the market the local producers can suffer for a reduced demand of that good and this could have a negative impact on an already fragile local economy.
Despite all these drawbacks, in-kind aid in case of conflicts or emergencies remains a fundamental part of humanitarian assistance and is sometimes the best choice to assist people in need.

The in-kind aid is not the only way to deliver food assistance. In the humanitarian setting, resources are delivered also through cash or vouchers. The use of cash and vouchers assistance (CVA) has increased significantly in the last decade. In the humanitarian sector indeed, there has been a shift from the in-kind food aid to the food assistance through cash transfer programming (CTP)[137].
According to the ICRC the definition of CTP is "the provision of cash and/or vouchers to individuals, households or communities to enable them to access the goods and services that they need[138]".

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[135] *Ivi 35, 21.*
[136] B. BARBER, *Feeding Refugees or war? The dilemma of the humanitarian aid* in *Foreign Affairs*, 1997, 5
[137] FAO, *supra* note 119
[138] ICRC, *Cash Transfer Programming in Armed Conflict: the ICRC's experience* < https://shop.icrc.org/cash-transfer-programming-in-armed-conflict-the-icrc-s-experience-en-pdf >, 6.

This way of supporting people in need is not recent, it was used for the first time in 1871 during the Franco-Prussian war by the American Red Cross[139]. Despite this, for a long time in kind assistance has been favoured over CTP, reducing its utilization
In the lasts ten years, several factors have contributed to the increase of CTP.
The first one, is a substantial change in the way of conceiving humanitarian aid. The international community used to consider humanitarian assistance as a way to deliver aid to the population in need, in this way the beneficiaries were seen only as recipients of the aid. This mindset has changed, shifting to the idea of empowering and dignifying the local community and help it to reach its independency, specially from humanitarian aid. Cash transfers dignify individuals giving them the possibility to choose what, in their opinion they need most, becoming active subjects of their survival strategies instead of being merely passive objectives, receiving only what agencies have thought is best for them[140].
Another important fact that has contributed to the growing importance of the CTP was the development of the digital technology[141]. In order to develop cash programmes, certain tools are necessary, like ATMs, bank accounts, mobile phones. The development and availability of this kind of technology allows people and organisations to deliver and receive money using only a mobile. Technology has made it far easier to reach people, even those in conflict areas to deliver aid
In addition to this the spread of armed conflicts in the Middle-East, particularly in middle-income countries with sophisticated economies has facilitated the use of cash aid, because these territories had all the necessary characteristics for this kind of intervention[142].
The turning point for the use of cash and vouchers was the Indian Ocean Tsunami in 2004, from that moment the large-scale use of CVA started [143].

In 2016, due to the growing importance of CTP, the Grand Bargain was made, an agreement among the most influential donors and humanitarian organizations, aimed at improving the efficiency of the humanitarian assistance[144]. According to the Grand Bargain, the states and the donors aimed to increase the use of cash assistance beyond the current level but also improve both the in-kind and vouchers aid and to invest in the development of new delivery models, in order to reach more people[145]. The parties to the agreement also expressed their commitment to collecting data regarding their interventions in order to make it easier to assess the costs, benefits and impacts of the cash and in-kind assistance[146]. To conclude they express their willingness to cooperate

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[139] *Ivi*, 14.
[140] *Ivi*, 22.
[141] *Ibidem.*
[142] *Ibidem.*
[143] B. VOGEL, K. TSCHUNKERT, I. SCHLAPFER, *The Social Meaning of Money: Multidimensional Implications of Humanitarian Cash and Voucher assistance* in *Distasters*, 2021, 3.
[144] <https://interagencystandingcommittee.org/grand-bargain>
[145] ICRC, *supra* note 127, 12.
[146] *Ibidem.*

and sharing information, to develop standards and guidelines for the use of cash in order to understand its risks and benefits[147].

There are different ways of developing a cash transfer programme. Once it has been decided to use CVA, on the basis of the needs of the targeted community, the first choice is the use of cash or vouchers or a combination of both. Cash is more flexible compared to vouchers or in-kind. It s people to buy what they need in any shop, without restrictions. Vouchers instead are based on an agreement with certain traders and can only be spent for specific goods. In this way people have a limited choice but this instrument can be used to guide the purchases of the consumers, when this is needed.
The cash transfers can be conditional/unconditional, restricted/unrestricted.
Starting with the first differentiation, conditionality implies demands on beneficiaries before receiving assistance. Unconditional cash or vouchers means that the beneficiaries do not need to take any action in order to receive assistance. Sometimes cash and vouchers are conditional, this implies that people must complete activities, usually trainings, or fulfil obligations to obtain the transfers.
The activities that the targeted people are required to complete aim at sharing knowledge and best practices in order to help people in the development of their community, increasing the chances of success of the programme[148].
The restricted assistance, instead, refers to the next step, when the assistance has already been delivered. It implies restrictions of the use of the sum received, these limitations can refer to the types of purchases or to the retailers. Vouchers are a form of restricted cash, since they are exchangeable in predetermined shops for the equivalent cash value with a choice of specific items. This measure can be useful for example to implement the purchase in the local market, strengthening the local economy.
The frequency and the duration of the delivering of cash and vouchers can be different from programme to programme and it depends on the needs of the people affected and on the overall budget.

3. Focus on cash and vouchers assistance

As stated above, in the lasts ten years there has been a significant increase in the use of cash. Even if this can be considered a positive phenomenon, there is the risk of a "rush to cash"[149] and CVA is not always the best option.

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[147] *Ibidem.*
[148] *Ivi*, 20
[149] OVERSEAS DEVELOPMENT INSTITUTE (ODI), *Doing Cash Differently: how cash transfers can transform humanitarian aid*, ODI, 2015, 23.

Indeed, in order to be delivered effectively, CVA needs specific conditions that make the targeted area "cash ready". If these conditions are not met, introducing money into the area can even have adverse effects, creating moreover a waste of resources.
It has to be kept in mind that cash is a tool not an objective in itself. Delivering cash is only one part of a humanitarian intervention, cash transfer is an instrument to reach the scope of the programme, that can be fight the food insecurity or provide shelter or improving the living conditions of the targeted area.
Taking into account the above, cash may represent a significant opportunity to make a positive change in the humanitarian sector, making the programmes more responsive, flexible and supportive of the local communities.

There are several reasons for choosing cash and they can be divided into human and pragmatic.
Firstly, from a human point of view, choosing cash gives the capacity to dignify the participants. Money is indeed the common tool used worldwide to buy goods and to pay for services. This does not change in a war scenario. Cash and vouchers still represent a concrete possibility to meet the basic human needs even in conflicts. CVA allows beneficiaries to be seen as consumers and not as victims and in this way it dignifies people, empowering their capacity to provide for themselves. This type of aid is in line with the new idea of humanitarian aid, developed in the last decade, that shifted from a paternalistic approach, focused on the vulnerability of the individuals to the idea of empowering and dignifying the recipients, enabling them to make their own choices.
Among the first type of reasonings, there is also its flexibility to the people and to the humanitarian organizations. People involved in armed conflicts or affected by natural disasters are not a homogeneous group, they differ in age, gender and abilities, therefore they have different needs. Cash assistance empowers people, giving them the possibility to choose according to their needs.
It has been proven that cash not only improves the access to food but also the diversity of food consumed by individuals[150]. It goes beyond the limitations of the in-kind aid, that it is restricted to the types of goods already selected by humanitarian agencies. Often in case of in-kind intervention, recipiens had to sell some of the food received in order to buy other essentials, like soap or medicines. Cash gives to the targeted people the autonomy to address their specific needs, it would be difficult to reach this independence with a different method. Using CVA, the beneficiaries are therefore directly engaged in the program and are given their chance to rebuilt their lives. This individualization of the humanitarian sector is perfectly in line with the shift to a more individual-centred approach that has occured in the last decade.
Regarding humanitarian organizations, flexibilities means that cash is usually more adaptable in a long-term program[151]. CVA can adjust more quickly to the new

[150] ODI, *supra* note 128, 20.
[151] ICRC, *supra* note 127, 27.

necessities than an in-kind operation, allowing humanitarian agencies to intervene in a more responsive way to a changing conflict.
In addition to this, CVA has a strong social impact.
In the first place, it has been proven to reduce negative coping mechanisms. As Aissa, a young woman interviewed by ICRC in Cameroon, said " The rations of rice, beans and bottles of oil distributed by the ICRC are valuable help, but sometimes it is simply money that is missing"[152]. In these cases, sometimes people seek a solution the 'wrong' way, prostitution, sale of children or other awful methods.
Not only does CVA lead to a reduction in the use of negative coping mechanisms but secondly it has been proved a reduction in the intra-household tension and gender-based violence. There is a connection between the economic situation of the family and domestic violence and cash assistance could control this[153]. Furthermore, CVA gives more space to the special needs of people with disabilities, supporting them not only with their nutrition but also facilitating the elaboration of a more inclusive assistance. The amount given to the beneficiaries can be easily adapted to include the cost of assistive devices or medications[154].
To conclude the cash transfer programming may contribute to the financial inclusion of people that live in fragile areas, that are characterized by the absence of banks and therefore excluded from basic financial services[155].

The pragmatic reasons to choose cash are instead connected to the market's dynamics. First of all, the biggest advantage in using CVA is its support to the local markets. When the markets are functioning, despite the fragility of a war scenario, it is important to support them as much as possible. In this context, the word "market" assumes a broader meaning, not only the physical place but it includes the whole supply chain from the producers to the consumers. When considering the delivery of cash aid, it is important therefore to analyse the whole supply chain. Factors to be considered include; where the products come from, if the crops have been damaged or completely disrupted, if the roads, the bridges and the infrastructures in general are still viable. If not, another solution may be needed. It is useless to distribute cash if the shelves of the shops are empty. The in-kind distribution of food can have a negative effect on local production and consequently on the local market. The entrance of free food, for example wheat, in the local market implies a reduction in the purchase of that product, disincentivizing the production of that good and the similar varieties. This can lead to an increase of poverty in an already fragile scenario. For these reasons, when it is possible, it is important to support the community and its economy.
In case of displaced people, CVA can also facilitate their integration in the hosting community. The beneficiaries, enabled to make purchases for food and services, can

[152] *Ivi*, 22.
[153] ODI, *supra* note 128, 23.
[154] ICRC, *supra* note 127, 24
[155] *Ivi*, 25.

be seen as a resource for the local market of the hosting community and not as a mere weight for it. As we will see below sometimes the opposite reaction can happen.
Another reason why using cash is that it reduces the cost of operations, cutting the expenses of transportation and storage of goods. Transferring cash is cheaper and quicker than delivering goods and therefore, using CVA, a bigger part of the budget can directly reach the beneficiaries. According to a research of the ODI, based on the comparison of data from four countries, using cash instead of in-kind assistance can can increase by up to 18% the number of people that can be assisted with the same budget[156]. According to an evaluation by UNICEF, in 2012 only the 35% of the budget of an in-kind based project arrived to the beneficiaries, while the 85% of the budget reached the beneficiaries in the cash based project[157].
Not only the CVA is less costly, but it enables a better control of the resources. Indeed, The cash transfer can be easily monitored and this allows an improvement in transparency. These movements of cash require a partnership between the humanitarian and the private sectors. The humanitarian agencies rely on the private sector to manage the delivery of the payments on a large scale. There are indeed several aspects connected to money transfers, like the anti-money laundering, privacy or the financial regulations that cannot be addressed without a partnership
In addition to this, CVA has a multiplier effect. An injection of cash in the local market stimulates the local economy by increasing the availability of money of the consumers and therefore their purchase power. This has a positive impact not only for the beneficiaries but for the community in general, even in sectors that are not directly targeted by the specific project. An example of these multiplier effects is what happened in Zimbabwe in 2011 where it was estimated that each dollar given to beneficiaries generated 2.59 dollars[158]. In Kenya in 2019, cash aid has generated a local fiscal multiplier or 2.5[159].
To conclude, through virtual payments, CVA enables humanitarian agencies to reach a wider targeted group, even in conflict areas where the access for the international staff is more difficult.

4. Criticalities of cash and vouchers assistance

Despite the undisputed advantages of using CVA, this method also has some concerns. The first one is the risk of inflation that can be caused by money entering into the market. A high inflation rate can impact the actual value of the sum received and therefore can limit its purchase power[160]. In this case, the consequence would be an

[156] ODI, *supra* note 128.
[157] UNICEF, Final Evaluation of the Unconditional Cash and Voucher Response to the 2011-2012 Crisis in Southern and Central Somalia, UNICEF, 2012 <https://reliefweb.int/sites/reliefweb.int/files/resources/SOM_resources_cashevalsum.pdf>
[158] ODI, *supra* note 128, 20.
[159] B. VOGEL, K. TSCHUNKERT, I. SCHLAPFER, *supra* note 132, 9.
[160] *Ivi*, 4.

increase in the level of instability of the area. In contexts already characterized by a high inflation rate it is preferable to use vouchers instead of cash in order to diminish the possibility of these negative outcomes.
Cash transfers can easily generate the risk of corruption and theft. Before deciding to defer to this type of aid it is important to look at the level of corruption and security of the targeted area. Indeed, delivering money in an unsafe context can lead to spread conflicts and violence.
Another risk of using CVA is the counterpart of the freedom of choice given to the beneficiaries. Enabling people to buy what they believe is necessary for meet their needs means giving to them not only the freedom of making their own choices but also the responsibility forthem. One of the problems that may arise is the waste of resources, for example, this can happen for if they are spent on vice goods. However, the reality has shown that this fear is misplaced. Despite some exceptions, the majority of the beneficiaries of cash programmes have spent the money received in a responsible way. Sometimes the resources have been used to cover different basic needs, money has been spent to buy materials to repair shelter instead of food for example or vice versa, but rarely have they been wasted[161].
Regarding the social effects of money injections in a fragile context, first of all, there is the risk that inside the household the resources will be controlled only by the man, leaving the women disadvantaged. In order to prevent this phenomenon, it is important to take into consideration this risk from the beginning of the preparedness activities and developing an adequate risk management plan.
In addition to this, as we anticipated, CVA can alter the dynamics between the host communities and the displaced people, with negatives outcomes. For example, the case of the Syrian refugees in Lebanon. Thanks to the cash aid, they developed small new shops in Lebanon.
In 2018, in the area of Majdal Anjar, the number of Syrian shops greatly overcame the number of the Lebanese shops[162]. The hosting community felt the pressure of this new situation and this led to the development of tensions in the area. Lebanese sellers complained that the cash aid given to the Syrian refugees to support their business influenced the normal dynamics of the markets[163].
This tension also influenced the buying decisions of the Syrian community. The purchase of some products, not of primary necessity, by the refugees were considered by the hosting community as a waste of resources and this worsened the already tense situation[164].
In the context of the Syrian refugee crisis another “injustice” was claimed. The refugees perceived a favourable treatment for the people living in the camps than people with different accommodations[165].

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[161] ODI, *supra* note 128, 21.
[162] B. VOGEL, K. TSCHUNKERT, I. SCHLAPFER, *supra* note 132, 10.
[163] *Ivi*, 11.
[164] *Ivi*, 12.
[165] *Ivi*, 13.

In light of the above, it is clear that money is not simply a tool but also it also has the power to influence social dynamics, more deeply than the in-kind aid. CVA can indeed have implications for the relationship between the hosting communities and the refugees but also among the refugee groups. It is therefore of fundamental importance before implementing a cash aid programme, to not only analyse the actual inequalities that CVA can cause but also the perceived ones. The sense of injustice indeed could trigger new fights or prolong the existing conflicts.

5. *Is there a best option?*

As is evident in the above results, determining the best option between cash or in-kind aid can be extremely difficult for humanitarian agencies due to the multitude of different aspects that must be taken into account.
Even if cash and voucher aid has proven to be effective and quicker than in-kind aid, there isn't one best option that fits every context. Conflict scenarios are extremely unstable, the circumstances may change very quickly. In these contexts, cash can be preferable, due to its flexibility that allows a prompt response but sometimes in the targeted area there can be damaged infrastructure, that undermines the supply chain, or no functioning ATMs. In these cases, it would be necessary to resort to the in-kind aid.
CVA for food assistance, therefore, can be inappropriate sometimes in armed conflicts but the situation may change rapidly and in an unpredictable way. For this reason, it is fundamental that the humanitarian agencies are prepared and ready to switch from in-kind to cash whenever it is needed or more appropriate. It has to be considered that the two instruments can be complementary. For example, in a context where the majority of the basic goods but not all of them are present on the local market, a cash strategy can be integrated with the supply of the goods needed. This flexibility, both in switching from one method to the other and in the cooperation of both, can facilitate the success of the humanitarian intervention.
In addition to this, it is important to consider the type of assistance needed in the area. In a program developed with the aim to fight food insecurity the two instruments, cash and in-kind, are more interchangeable. If the needs of the population are instead vaccines or medicines, it is clear that cash would not be the suitable tool. As mentioned before, cash is only an instrument, not an aim in and of itself. People in need do not simply require sums of money, humanitarian interventions are instead characterized by other elements, as presence, proximity, and practical assistance, that cannot be replaced by a bank transfer[166]. Often cash assistance has to be supported by other forms of humanitarian action. For example, cash transfers can help the beneficiaries to meets their needs but at the same time an investment aimed at rebuilding the infrastructures damaged in the conflict can be required.

[166] ODI, *supra* note 128, 21

Regardless of the type of assistance provided, the local community has to be involved as much as possible in the humanitarian interventions. Firstly, people should have the possibility to express their preferences among cash or in-kind whenever possible. Secondly, communities should be involved in the identification of beneficiaries, collection of data before the intervention and after in order to evaluate it and, in case of cash, in its distribution[167]. The participation of the community in these activities can help the humanitarian organizations in decreasing the cost of the intervention but especially it may encourage the creation of a trusting relationship between the international agencies and the beneficiaries and prevent abuses.
The roots of the humanitarian intervention are in the lessons learned from the previous experiences. For this reason, collecting data is fundamental in order to evaluate and improve humanitarian interventions, both for cash and in-kind assistance. The international community needs evidence to determine the best practices and the weaknesses that needs to be solved[168]. This information is also useful to guide the choice among the different types of assistance that can be delivered.
The last point to address is linked to the regulation of conflict settings. In delivering humanitarian aid, both in-kind or through CVA, it is fundamental to comply with the principles of impartiality and neutrality. Cash assistance, as well as commodity aid, cannot be used to fund or support armed groups but only to give assistance to civilians.

In conclusion, developing a humanitarian programme is extremely complicated and there are no unique practices valid in every context.
Cash and vouchers are effective instruments that allow humanitarian responses to crisis to be flexible, quicker and inclusive. As stated above, cash can enable humanitarian agencies to address more efficiently the specific needs of the people with disabilities and vulnerable groups. Usually, it has also a positive impact on the reduction of gender-violence and it helps to raise the school attendance rate. Considering all these positive impact of CVA, it is desirable that international humanitarian organizations would continue to rely on this instrument and find new ways to improve its efficiency.
Each conflict, however, is different as each territory and each community. Sometimes in-kind assistance can be the best solution to support the affected community. Only analysing in deep the context it is possible to understand the appropriate way to act and deliver the right assistance to people in crisis.

[167] M. GARCIA, M. T. MOORE, *The Cash Dividend: the rise of cash transfer programs in Sub-Saharan Africa*, The World Bank, 2012, 30.
[168] S. LEVINE, S. BAILEY, *Cash, Vouchers or In-kind? Guidance on evaluating how transfers are made in emergency programming*, ODI, 2015, 1

CONCLUSION

This analysis shows that there is an ongoing process of amelioration of the protection of the right to food in conflict situations both from the legal and the practical perspectives. It is undeniable that the situation is not static and that some progress has been made. Despite this, currently 800 million people are suffering from hunger and looking at a such an alarming number it becomes clear that the road is still long[169].
As previously said, there is a vicious cycle that connects war and food insecurity, 60% of the hungry people in the world live in conflict zones[170]. Since 2015, when the SDGs and in particular Zero Hunger were adopted, the number of undernourished people has actually increased. One of the reasons for this alarming data is that starvation is still a common weapon in armed conflicts[171]. Not only does war lead to disruption, but war in combination with mass starvation can have devastating consequences.
As examined above, in wartime the majority of the casualties are due to malnutrition, not to the conflict itself. It is sadly a common practice, especially in NIAC, that the belligerent parties raid the villages, destroy crops and livestock with the intent to starve the population. Often militias attack the humanitarian workers in order to impede the delivery of humanitarian aid, with the aim of exhausting the population and weakening the enemy[172]. At this point the civilians have only two options, stay or leave. If they stay they are likely to be trapped inside the village by the adverse militia until they surrender. If they leave, becoming refugees, they are likely to face food insecurity and consequent diseases as well.

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[169] WFP, *Facts Sheets: Hunger and Malnutrition*, WFP, 2019, 1.
[170] *Ibidem.*
[171] https://www.nationalgeographic.org/article/hunger-and-war/
[172] *Ibidem.*

In 2018, the UN Security Council condemned the use of food insecurity and starvation as a method of war, but this is only the first step, substantial changes need to be made[173]. What is essential is breaking the vicious circle of war and food insecurity. Indeed, famine triggers conflict and it easily increases social tension. This leads to the start of new conflicts or the extension of the existing ones. Since preventing the war in general is an utopic goal to reach, the international community should work instead on preventing food insecurity and encouraging accountability for the crime of starvation. The conflict dynamics that we analysed above are extremely significant and should move the international community to a more effective protection of the right to food and therefore the right to life in conflict situations. Recently, member states of the Rome Statute have recognized starvation as a war crime, also in NIAC, but this amendment cannot be the ultimate resolution of this problem[174]. Despite the fact that starvation was recognized as a war crime in IAC in 2002, the ICC's jurisprudence regarding this crime is still missing. It has clearly been shown that allowing international criminal prosecution for starvation, even if it is a due amendment to the Rome Statute, probably is not going to bring an important change into practice.
Considering the spread of this phenomenon and the suffering that it is causing, the international community should use all the possible tools to fight starvation. Since the protection against starvation according to ICL and IHL is not sufficient, relying on the IHRL mechanisms is essential. The individual communications to the treaty bodies can provide a quasi-judicial remedy and periodical reporting can help to spread the awareness regarding this problem. In addition to this, the commissions of inquiry and the special procedures can collect important material to fight starvation and its perpetrators. Starvation has already been included in investigations but this trend needs to be implemented. The aim should be to spread awareness as much as possible regarding the wide use of this illegal war method in order to shape public opinion and inform the international community that the situation is unbearable. Action should be taken to raise public awareness on this problem in order to push global leaders to avoid mass starvation instead of facilitate or inflict it.
Hopefully, the general moral condemnation of this crime will push global leaders to avoid this tactic and to put their efforts in preventing mass starvation, encouraging its accountability.

It is now generally accepted that IHRL applies not only in peace time but also in armed conflict.
The right of the civilian population to have access to food is recognized both by IHL and IHRL. The two sets of norms are interrelated and sometimes overlap, they are complementary and share the common aim of protecting and safeguarding people. Even if IHL and IHRL share a common objective, they are thought to regulate two

[173] UN SECURITY COUNCIL, resolution 2417 (2018)
[174] ASSEMBLY OF STATE PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *Amendment to article 8 of the Rome Statute of the International Criminal Court*, Resolution ICC-ASP/18/Res.5, 2019

different scenarios and therefore they have some differences. IHRL can be considered more protective than IHL and its standards of protection may sometimes be unrealistic to apply them during war.
In case of norms conflict, it is still not clear if the principle of *lex specialis* can be the correct solution and how it has to be applied. There are different interpretations of this principle and all of them have some critical issues. Among the different theories, the one that suggests to focus debate not on the relationship between the two bodies of law but between the particular norms involved in the conflict, on a case by case basis, deserves particular attention. In this way the *lex specialis* would be determined according to the specific situation, taking into account the concrete circumstances and the overall purposes of international law[175]. As shown above, this theory is not free of criticalities.
In this complicated situation, the necessity of flexibility in addressing this issue can be considered fixed. Even if the *lex specialis* rule refers to the derogation of one norm in favour of the other, maybe in this particular scenario it would be more correct to speak about flexibility. When a reconciliation among IHL and IHRL norms cannot be found through interpretation, human rights standards may have to be applied in a flexible way, and with this flexibility the interaction between the two set of norms can be recognized.
The jurisprudence of the ECtHR and of IACtHR offers a clear example of the interpretation of IHRL according to IHL, but the solution of such a delicate problem cannot be left to the courts. In this way there would be the risk of developing different regional approaches to the matter that would lead to unjustified differences in treatment.
The interaction of these two sets of norms should be developed in the direction of the humanization of IHL through the application of IHRL. The complementarity of these two branches of law should lead to humanizing humanitarian law through the use of IHRL norms to fill in its lacunas or trying to introduce IHRL standards of protection into IHL regulations.
Another scope of the interrelation of IHL and IHRL is the enforcement of IHL through human rights mechanisms. The biggest weaknesses of humanitarian law are the lack of enforcement mechanisms and of independent information. Indeed, this body of law was created with the idea of being self-regulated by states and, since then, a forum specifically responsible for enforcing IHL has not been created. One solution could be to develop new IHL tribunals and monitoring mechanisms in order to improve its effectiveness. This option would take a very long time and it would probably create even more confusion. Since the two bodies of law interact, there would be the inverse problem: to what extent the IHL judicial bodies can take into account IHRL. The

[175] M. SASSOLI, *The Interplay between International Humanitarian Law and International Human Rights Law*, International and Comparative Law Research Center and International Institute of Humanitarian Law, 2019

proliferation of new mechanisms is therefore not convincing. In this case, it seems necessary to look at the means that already exist.
Differing from humanitarian law, due to the "human right revolution[176]", human rights law has developed monitoring mechanisms and several judicial and quasi-judicial bodies to address HR violations. Considering the overall situation, an efficient solution would be relying on the existing IHRL mechanisms to fill the gaps of IHL. A body of law that cannot be enforced is extremely weak. Considering the importance of humanitarian law and the delicacy of the situations that it regulates, it is necessary to work to make this existing practice more clear and widespread. The IHRL mechanisms, as inquiry procedures of the treaty bodies or the special procedures of the Human Rights Council, can also have a fundamental role in getting information regarding occurring IHL violations.

From a practical perspective, the access to food is guaranteed through different modalities: in-kind aid and cash and voucher assistance. As stated above, there is not a unique method that can fit all the contexts. Both of them have their advantages and disadvantages. However, it has to be considered that cash is the most common means used to have access to goods or services worldwide and this does not change even in a war scenario. If the markets are functioning, cash aid should be taken into account by humanitarian agencies and, if the context is "cash ready"[177], it should be preferred. Indeed, CVA has proved not only to have a beneficial multiplier effects for the economy but also to have a positive social impact. Usually, it not only reduces harmful coping mechanisms and gender violence but also it allows the assistance to be more inclusive.
Having said so, the ultimate choice between cash or in-kind type of aid should be made only after a careful analysis of the context, the people and their needs.
Also in this case flexibility has a key role. In war times the situation tends to change rapidly. When developing a humanitarian project it is therefore important to take a step back and change approach, from cash to in-kind or vice versa, or decide to use both instruments, if the situation has changed and new needs have to be met.

To conclude, guaranteeing the protection of the right to food in conflict situations is an extremely difficult goal to reach. There are various aspects to cover and issues to address. Humanitarian agencies through in-kind and cash assistance play a fundamental role in the fight against famine but they cannot stand alone. Preventing hunger and malnutrition, especially in already fragile contexts as on the battlefields, should be the priority of the global community. Steps should be taken to maximize the

[176] S. TABAK, *Ambivalent enforcement: International Humanitarian Law at Human Rights* Tribunals in *Michigan Journal of International Law* 2016 (Vol. 37), 663.
[177] ICRC, *Cash Transfer Programming in Armed Conflict: the ICRC's experience* < https://shop.icrc.org/cash-transfer-programming-in-armed-conflict-the-icrc-s-experience-en-pdf >

legal protection of the right to food, particularly in NIAC, and to ensure accountability for its violations. Unfortunately, the majority of the recommendations of the Special Rapporteur in the last report in 2017 have not been followed up. Among these, it is important to underline the necessity of a global convention that would bind states to the goals of preventing famine and protecting the right to adequate food worldwide. Not only would this convention prove the commitment of the international community to eradicating hunger, but also it would encourage the states to implement the existing protection of the right to food in their national legislation.
Despite the good intentions of the UN, Zero Hunger is still a distant goal and the number of undernourished people is still increasing. In the coming years, the world is also going to face the consequences of the COVID-19 pandemic. If the international community wants to avoid a catastrophic outcome, it needs to engage seriously in changing the global trend and finding new solutions to ensure the access to food in fragile contexts.

ACKNOWLEDGMENTS

In conclusion of this research, I would like to take the opportunity to thank my supervisor, professor Heintze, for his precious help. Even if due to the pandemic we couldn't meet in person his valuable support guided me through these months.

I would also like to thank all the professors and the EMA staff. Despite the difficulties of this singular year they put all their efforts to make our experience at the Global Campus as normal as possible. Their commitment allowed us to have in-class lessons, sharing meals and creating soling connections among us. I truly appreciate these opportunities.

I would like to express my gratitude to my family. In particular, I would like to thank my parents for the opportunity they gave to me and for supporting me in my path. I would also thank my grandmother for our long talks.
Lastly, special thanks goes to my friends. I would like to thank my friend Alanah for her true friendship. I am also grateful for the new friendships that I built during this months. Francesca, I am extremely lucky to have met you, your friendship is the greatest gift of this adventure. Valeria, I couldn't have asked for a better friend and flatmate, I am waiting for our next Disney night. Doloreza and Alessandra, thank you for all the time we spent together, I hope to meet you soon around the world again.

You ALL made my time in Venice unique, thank you.

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