

International Humanitarian Law as a Part of International Law with Special Reference to Its Implementation in the West and South Asian Region

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Abstract: *From the time immemorial in the history of mankind there have been some basic tenants governing warfare in every religion and culture but it would be pertinent to say that the contemporary sets of rules and norms have evolved since the mid of 19th century and have consolidated in the form of International Humanitarian Law. ICRC post the Battle of Solferino and the United Nations and some regional politico-security organisations like NATO post World War II have been involved actively in Humanitarian Relief and Intervention and have different perspectives for core principles and pillars of Humanitarian Law during the conduct of any warlike Distinction, Military Necessity, Proportionality, Neutrality, and R2P etc. In this context long drawn conflicts like Israel-Palestine and Sri Lanka-Ethnic Tamils of our times warrant a careful study by the exponent and proponents of International Law of various rules and regulations of IHL, Laws of War and Occupation to provide legal as well as humanitarian relief to both the combatants and civilians.*

Key Words: *International Law, International Humanitarian Law, Laws of War, legal Corpus, Geneva and Hague Conventions, Case Law, Customary International Law, Jus in Bello, Jus ad Bellum, Just War, ICRC, Hors de Combat, ICC, Rome Statute, International Tribunal on War Crimes for Former Yugoslavia and Rwanda, Sui Generis, Injuria Non Oritur Jus, Pacta Tertis Nec Nocent Nec Prosunt, Omnibus, Jus Cogens, Opinio Juris, Diuturnitas, Corpus Juris, Lessons Learnt and Reconciliation Commission.*

This research paper is divided in to four parts the first part covers the historical evolution of the International Humanitarian Law and where it is found and what it covers while the second part touches upon the main corpus and character of Humanitarian Law and how is it a part of International Customary Law with special reference to 'War on Terror' and 'Nuclear War' it also covers ICRC's role and activities in relation to IHL and key questions on Humanitarian Intervention and International Law as well as lack of legitimization of military action in the Law of War the penultimate section gives the different perspectives from experts of Humanitarian Law and the last section of the paper touches upon the humanitarian crises in the West and South Asian region with special reference to provisions of International Humanitarian Law invoked in the long drawn Israel-Palestinian and Sri Lanka-Ethnic Tamil conflict.

I. Introduction

International Humanitarian Law (IHL), often referred to as the laws of war, the laws and customs of war or the law of armed conflict, is the legal corpus "comprised of the Geneva Conventions and the Hague Conventions, as well as subsequent treaties, case law, and customary International law." It defines the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in warfare, in relation to each other and to protected persons, usually meaning civilians.

The law is mandatory for nations bound by the appropriate treaties. There are also other customary unwritten rules of war, many of which were explored at the Nuremberg War Trials after World War II. By extension, they also define both the permissive rights of these powers as well as prohibitions on their conduct when dealing with irregular forces and non-signatories.¹

The term Humanitarian Law is of relatively recent origin. The Geneva Conventions of 1949 did not use the term humanitarian law they mentioned only humanitarian activities and humanitarian organisations. Although publicists started using the term humanitarian law in the early 1950's. The term appeared perhaps for the first time in 1965 in Resolution XXVIII of the XXII International Red Cross Conference held in Vienna. Humanitarian Law deals with those matters which have an impact of armed conflicts on the life personal integrity and liberty of human being. Thus, humanitarian law may be referred to that body of law which defines those principles and rules which limit the use of violence in times of war. The aims of humanitarian law are (a) to protect persons who are not or are no longer, directly engaged in hostilities the wounded, shipwrecked,

prisoners of war and civilians; and (b) to limit the effects of violence in fighting to attainment of the objectives of the conflict. Humanitarian Law protects the right of certain persons in certain circumstances. These rules are inspired by principles of humanity and they are meant to avoid human sufferings, barbarism and brutality in armed conflicts.

Humanitarian law is different from the law of war in the sense that the former does not cover all those matters which according to a traditional view belongs to the law of war. Thus, the impact of war on the diplomatic and treaty relations of the parties to a conflict, the rules regarding economic warfare and those concerning relations to neutral States are outside the scope of humanitarian considerations or motivations. Thus, it would not be inappropriate to refer humanitarian law as a branch of rules of warfare.

Historical Genesis of International Humanitarian Law

Modern International Humanitarian Law is made up of two historical streams: the Law of The Hague referred to in the past as the Law of War proper and the law of Geneva or Humanitarian law. The two streams take their names from a number of International conferences which drew up treaties relating to war and conflict, in particular The Hague Conventions of 1899 and 1907, and the Geneva Conventions, the first which was drawn up in 1863. Both are branches of Jus in Bello, International Law regarding acceptable practices while engaged in war and armed conflict.

The Law of The Hague or the Laws of War proper "determines the rights and duties of belligerents in the conduct of operations and limits the choice of means in doing harm." In particular, it concerns itself with the definition of combatants, establishes rules relating to the means and methods of warfare, and examines military objectives.

II. Humanitarian Norms in History

IHL has generally not been subject to the same debates and criticisms of "cultural relativism" as have International human rights. Although the modern codification of IHL in the Geneva Conventions and the Additional Protocols is relatively new, and European in name, the core concepts are not new, and laws relating to warfare can be found in all cultures

Systematic attempts to limit the savagery of warfare only began to develop in the 19th century. Such concerns were able to build on the changing view of warfare by states influenced by the Age of Enlightenment. The purpose of warfare was to overcome the enemy state and this was obtainable by disabling the enemy combatants. Thus, "(t)he distinction between combatants and civilians, the requirement that wounded and captured enemy combatants must be treated humanely, and that quarter must be given, are some of the pillars and principle of modern humanitarian law.

However, even in the midst of the carnage of history, there were expressions of humanitarian norms to protect the victims of armed conflicts, i.e. the wounded, the sick and the shipwrecked which date back to ancient times.

In the Old Testament, the King of Israel prevents the slaying of the captured following the prophet, Eliza's admonition, to spare enemy prisoners: In answer to a question from the King, he said, "You shall not slay them. Would you slay those whom you have taken captive with your sword and with your bow? Set bread and water before them, which they may eat and drink and go to their master."

In ancient India there are records, for example the Laws of Manu, describing the types of weapons that should not be used. "When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire. There is also the command not to strike the enemy "who folds his hands in supplication....Nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight..."

Islamic law indicates that "non-combatants who did not take part in fighting such as women, children, monks and hermits, the aged, blind, and insane" were not to be molested. The first Caliph, Abu Bakr, proclaimed "Do not mutilate and Do not kill little children or old men or women. Do not cut off the heads of palm trees or burn them. Do not cut down fruit trees. Do not slaughter livestock except for food." Islamic jurists have held that a prisoner should not be killed as he "cannot be held responsible for mere acts of belligerency." Islamic law did not spare all non-combatants. In the case of those who refused to convert to Islam or pay an alternative tax (Jaziya), "were allowed in principle to kill any one of them, combatants or non-combatants, provided they were not killed treacherously and with mutilation."

Codification of Humanitarian Norms

However, it wasn't until second half of the 18th century that more systematic approach was initiated. In the United States, a German immigrant, Francis Lieber, drew up a code of conduct in 1863, the Lieber Code, for the Northern army which included the humane treatment of civilian populations in the areas of conflict. It also forbade the execution of POWs. At the same time, the involvement of a number of individuals such as Florence

Nightingale during the Crimean War and Henri Dunant a Genovese businessman who had worked with wounded soldiers at the Battle of Solferino led to more systematic efforts to try and prevent the suffering of war victims. Dunant wrote a book, *A Memory of Solferino*, which described the horrors he had witnessed. His reports led to the founding of the International Committee of the Red Cross (ICRC) in 1863 and the convening of a conference in Geneva in 1864 which drew up the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.

The Law of Geneva (Geneva Conventions) is directly inspired by the principle of humanity. It relates to those who are not participating in the conflict as well as military personnel hors de combat. It provides the legal basis for protection and humanitarian assistance carried out by impartial humanitarian organizations such as the ICRC.²

Where is International Humanitarian Law to be found?

A major part of International Humanitarian Law is contained in the four Geneva Conventions of 1949. Nearly every State in the world has agreed to be bound by them. The Conventions have been developed and supplemented by two further agreements: the Additional Protocols of 1977 relating to the protection of victims of armed conflicts.³

Other agreements prohibit the use of certain weapons and military tactics and protect certain categories of people and goods. These agreements include:

- (1) First Hague Declaration of 1899—The Declaration of July 29 1899 prohibited the employment of projectiles, by the Contracting Parties, where object is the diffusion of asphyxiating and deleterious gases.
- (2) Second Hague Convention of 1907—Article 23(a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of October 18, 1907 stated that “it is especially forbidden...” to employ poison or poisoned weapons. However, the terms “poison or poisoned weapons” were not defined.⁴
- (3) The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, plus its two protocols;
- (4) The 1972 Biological Weapons Convention;
- (5) The 1980 Conventional Weapons Convention and its five protocols;
- (6) The 1993 Chemical Weapons Convention;
- (7) The 1997 Ottawa Convention on Anti-Personnel Mines and
- (8) The 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

Many provisions of International Humanitarian Law are now accepted as customary law – that is, as general rules by which all States are bound.

III. When does International Humanitarian Law apply and cover?

International Humanitarian Law applies only to armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.

International Humanitarian Law distinguishes between International and non-International armed conflict. International armed conflicts are those in which at least two States are involved. They are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional Protocol I.

Non-International armed conflicts are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. A more limited range of rules apply to internal armed conflicts and are laid down in Article 3 common to the four Geneva Conventions as well as in Additional Protocol II.

While International Humanitarian Law covers two areas: a)The protection of those who are not, or no longer, taking part in fighting and b)Restrictions on the means of warfare – in particular weapons – and the methods of warfare, such as military tactics.⁵

IV. Main Corpus of Humanitarian Law

Geneva Conventions

The Geneva Conventions are the result of a process that developed in a number of stages between 1864 and 1949 which focused on the protection of civilians and those who can no longer fight in an armed conflict. As a result of World War II, all four conventions were revised based on previous revisions and partly on some

of the 1907 Hague Conventions and readopted by the International community in 1949. Later conferences have added provisions prohibiting certain methods of warfare and addressing issues of civil wars.

The Geneva Conventions are:

- First Geneva Convention "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" (first adopted in 1864, last revision in 1949);
- Second Geneva Convention "for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea" (first adopted in 1949, successor of the 1907 Hague Convention X);
- Third Geneva Convention "relative to the Treatment of Prisoners of War" (first adopted in 1929, last revision in 1949) and
- Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War" (first adopted in 1949, based on parts of the 1907 Hague Convention IV).

In addition, there are three additional amendment protocols to the Geneva Convention:

- Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. As of 12 January 2007 it had been ratified by 167 countries.
- Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. As of 12 January 2007 it had been ratified by 163 countries.
- Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. As of June 2007 it had been ratified by 17 countries and signed but not yet ratified by an additional 68 countries.

While the Geneva Conventions of 1949 can be seen as the result of a process which began in 1864, today, they have "achieved universal participation with 194 parties." This means that they apply to almost any International armed conflict.

Women and Children Perspective

IHL emphasizes, in various provisions of the GCs and APs, the concept of formal equality and non-discrimination. Protections should be provided "without any adverse distinction founded on sex."

The reality of women's and men's lived experiences of conflict has highlighted some of the gender limitations of IHL. A study of the 42 provisions relating to women within the Geneva Conventions and the Additional Protocols found that almost half address women who are expectant or nursing mothers. Others have argued that the issue of sexual violence against women in conflict has not yet received the attention it deserves.

Soft-law instruments have been relied on to supplement the protection of women in armed conflict:

- UN Security Council Resolutions 1888 and 1889 (2009), which aim to enhance the protection of women and children against sexual violations in armed conflict; and
- Resolution 1325, which aims to improve the participation of women in post-conflict peace building.

Read together with other legal mechanisms, in particular the UN Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) can enhance interpretation and implementation of IHL.

In addition, International criminal tribunals (like the International Criminal Tribunals for the former Yugoslavia and Rwanda) and mixed tribunals (like the Special Court for Sierra Leone) have contributed to expanding the scope of definitions of sexual violence and rape in conflict. They have effectively prosecuted sexual and gender-based crimes committed during armed conflict. There is now well-established jurisprudence on gender-based crimes. Nonetheless, there remains an urgent need to further develop constructions of gender within International Humanitarian Law.⁶

Character of Humanitarian Law

A treaty is binding on a State when it has become a part to it. In other words, rights and obligations arising from a treaty are binding only to the parties to a treaty and not to a third State without its consent. This customary law principle has been expressed in a Latin maxim which is called *pacta tertiis nec nocent nec prosunt*. The above implies that the conventions adopted on humanitarian law shall be binding on all the States irrespective of ratification by the States if the conclusion is drawn that they have acquired the status of customary rules of International law. Further, these fundamental rules are to be observed by all the States whether or not they have ratified the conventions that contain them, because they constitute fundamental principles of International Customary Law. The above observation has been made by the highest authority, and therefore, it is beyond doubt that the Humanitarian Law acquires the customary rules of International Law and therefore is binding on all the States. These Conventions contain the fundamental rules of humanitarian

character from which no derogation is possible by any State. Following are the main features of these conventions.

1. Protection and Care of Wounded and Sick Persons.
2. Protection to Medical Units and Establishments, Materials and Vehicles.
3. Treatment of Dead Bodies: Dead bodies shall not be disgracefully treated and, in particular, they shall not be mutilated. They shall be collected and buried or cremated on the battle field by the victor. Belligerents are also required to take measures to search for the dead and prevent their despoilment. Protocol I to the Geneva Conventions of 1949 also provided that each party to a conflict permit teams to search for, identify and recover the dead from battlefield areas and the remains of the dead are to be respected maintained and marked.
4. Treatment of prisoners of war: Prisoners of War are status which is given to a person captured by a belligerent during a war or in an armed conflict. All the persons captured by the belligerent do not acquire this status. Geneva Convention relative to the Treatment of Prisoners of war of August 12, 1949 lays down under Article 4 that certain Category of persons who have fallen into the power of the enemy shall be known as prisoners of war. They are firstly, members of the armed forces of belligerents as well as members of militia or volunteer corps forming part of such armed forces. They acquire the status of prisoners of war when captured while performing their normal military duties during the course of hostilities. Secondly, members of military and other volunteer corps including those of organized resistance movements (i) if they have a commander; (ii) if they wear a distinct uniform; (iii) if they carry arms openly, and (iv) if they observe laws and customs of war. Thirdly, non-combatant persons, i.e., civilian personal such as correspondents, supply contractors, labour, cooks, barbers, engineers: provided they accompany the arms unit under authority. Fourthly, members of crews including masters, pilots and apprentices who do not benefit by more favourable treatment under any other provisions of International Law, and fifthly, other inhabitants of town who take up arms to resist the invading forces without having had time to form themselves into regular armed units: provided they carry arms openly and respect the laws and customs of war. The above implies that persons such as traitor's, deserter's, mercenaries' and those members of the armed forces who at the commencement of hostilities are found within the territory of the enemy do not acquire the status of prisoners of war.

International Law protects the prisoners from punishment for their hostile acts committed prior to capture. They have been guaranteed various privileges during captivity. Once the claim of a prisoner of being a prisoner of war is recognized, the Captor State is not free to enforce its own municipal law or policies except as permitted by International Law. Its hands are tied in many ways, and further, it is obligated to certain positive actions in terms of providing protection, medical care, food and other facilities. The moral and legal justification for providing this preferential status lies in the fact that the prisoners of war, prior to capture, performing obligations and duties arising out of their connections with the enemy State are of the same kind and quality which the captor demands of its own nationals or individuals owing or assuming allegiance to it.⁷

V. Is there a legal significance to the term "global war on terror?"

When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as International criminal law and human rights govern.

Whether or not an International or non-International armed conflict is part of the "global war on terror" is not a legal, but a political question. The designation "global war on terror" does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict.

As mentioned above, a member of the armed forces of a State engaged in an International armed conflict or of an associated militia that fulfils the requisite criteria is a combatant, and, as such, entitled to POW status upon capture by the enemy. For example, the armed hostilities that started in Afghanistan in October 2001 or in Iraq in March 2003 are International armed conflicts.

In non-International armed conflict, combatant and prisoner of war status are not provided for, because States are not willing to grant members of armed opposition group's immunity from prosecution under domestic law for taking up arms.

From an IHL perspective, the term "combatant" or "enemy combatant" has no legal meaning outside of armed conflict.

Does Protocol I Additional to the Geneva Conventions treat "terrorists" the same as it does soldiers?

While traditionally the wearing of a uniform or of a distinctive sign and the carrying of arms openly was required, States party to the Protocol agreed that in very exceptional circumstances, such as wars of national liberation, this requirement could be less stringent. The carrying of arms openly would be sufficient as a means of distinction.

The Protocol thus provides recognition and protection only to organizations and individuals who act on behalf of a State or an entity that is a subject of International Law. It excludes "private wars", whether conducted by individuals or groups, in the same way that the 1949 Geneva Conventions and the 1907 Hague Regulations concerning the laws and customs of war on land had done. Therefore, "terrorist" groups acting on their own behalf and without the requisite link to a State or similar entity are excluded from prisoner of war protections.⁸

Application of Humanitarian Law in Nuclear War

The use of nuclear weapons may cause indiscriminate sufferings and destruction to mankind and civilization. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a wide area. International Law in the past has not remained silent on the prohibition on the use of nuclear weapons. The use of some of these weapons has been expressly prohibited by treaties.

It is to be noted that the use of those weapons which are not caught under the existing prohibition shall be legally unobjectionable mainly because the law of war is a prohibitive law which means that International Law forbids rather than authorizes certain manifestations of force. The consequence is that belligerents are at liberty to use those weapons which are not prohibited. The above proposition may lead to the conclusion that the use of nuclear and other weapons shall not be unlawful as they have not been prohibited by the rules of International Law. Atomic bombing of Hiroshima on August 6, 1945 and Nagasaki on August 9, 1945 by the United States was held to be illegal by the Tokyo District Court in Shimoda case. However the case was confined itself to passing judgment upon the lawfulness of the specific case of the bombing of Hiroshima and Nagasaki. The judgment did not claim to make a general pronouncement concerning atomic or nuclear weapons. The court concluded that bombing was unlawful for it was contrary both to the principle prohibiting indiscriminate attack on undefended towns, and to the principle forbidding the use of weapons causing unnecessary suffering. Moreover, the decision of the municipal court of one State cannot be regarded as a rule of International Law.

General Assembly of the United Nations in 1961, had adopted the Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons wherein it was declared that the use of nuclear and thermo-nuclear weapons would, in particular, cause indiscriminate sufferings and destruction to mankind and civilization and, as such, is contrary to the rules of International Law and to the laws humanity. Although the above declaration does not constitute a rule of International Law, the adoption by a large majority in the General Assembly of the resolutions requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveal the desire of a very large section of the International community for the complete nuclear disarmament. It can be concluded that International Law does not lay down any express prohibition for the use of nuclear weapons, but rules of war restricting the means and modes of violence for injuring and killing the enemy, prohibits the use of nuclear weapons. Some of such rules are as follows:

- (1) Attack or bombardment on non-combatants member of the armed forces who do not take part in the fighting, wounded or sick combatants and civilian person is forbidden as is bombardment by any means whatsoever of undefended towns, village or dwellings is forbidden.
- (2) Territories of the neutral States are inviolable. Radioactive fall outs from the use of nuclear weapons do into respect boundaries and therefore territories of the neutral States shall also be affected.
- (3) The principles of proportionality are also disregarded by the use of nuclear weapons and
- (4) Reprisals, which are disproportionate to the provocation, are prohibited. It would be difficult to regard this principle as consistent with the use of nuclear weapons in relation to an attack with conventional weapons.

The above prohibitions shall be substantially affected with the use of nuclear or other weapons. Thus, International Humanitarian Law shall be violated if nuclear weapon in used in the war. It can be said, therefore, that the use of nuclear weapons is violative of humanitarian law despite the fact that International Law does not impose any specific prohibition for their use.

The advisory opinion given by the International Court of Justice on the Legality of the Threat or the Use of Nuclear Weapons observed by way of introduction that neither International customary and treaty law contain any specific prescription authorising the threat or use of nuclear weapons or any other weapons in

general, nor is there any principle or rule of International law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on specific authorisation. Further, the Court observed that the use of nuclear weapons is not specifically prohibited by the certain provision of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or by the Geneva Protocol of 1925. However, the Court stated that the principles and rules of humanitarian law applies to nuclear weapons... it is applicable to all International armed conflicts, whatever type of weapons might be used. The Court concluded that the use of nuclear weapons would be illegal in any circumstances owing to their inherent and total incompatibility with the law applicable in armed conflict.⁹

What are the ICRC's role and activities in relation to International Humanitarian Law?

The ICRC is the only institution explicitly named under International Humanitarian Law (IHL) as a controlling authority. The legal mandate of the ICRC stems from the four Geneva Conventions of 1949, as well as its own Statutes.

“The International Committee of the Red Cross (ICRC) is an impartial, neutral, and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance.”

—Mission of ICRC.¹⁰

The ICRC is recognized in International public law and has signed a headquarters agreement with Switzerland as if it were a public International organization. Nevertheless, the ICRC was formed as a voluntary private medical aid society. It has never taken formal instructions from, or officially reported to, any public authority. In truth the ICRC is *sui generis* with both public and private characteristics. The private aspects are fundamental.

Both the ICRC and UNHCR depend for their operations on the voluntary contributions of the wealthy liberal democracies. These governments contribute more than 85% of the ICRC's total operating expenses, and more than 95% of UNHCR's. The public/private distinction does not matter very much in this regard.

The International community has long recognized the ICRC's role in working for the understanding and dissemination of International Humanitarian Law. The institution also works towards its faithful application by, among other things, reminding parties to armed conflict of their legal obligations as reflected in treaties to which they are party, such as the Geneva Conventions, and under customary International law. Two further treaties relating to armed conflict are Protocol I Additional to the Geneva Conventions of 1949 and Protocol II Additional to the Geneva Conventions of 1949 that were negotiated by States from 1974-1977.

Protocols I and II are International treaties to which the great majority of States are party (164 to Additional Protocol I and 160 to Additional Protocol II). The ICRC does not claim and has never claimed that any State that is not a party to these treaties is bound by them. However, significant portions of these Protocols are considered by States to reflect customary International law, which is binding on States regardless of whether or not it is contained in any treaty to which the State is party.

The ICRC itself cannot ensure the application of International Humanitarian Law, but rather urges States and parties to an armed conflict to respect and ensure respect for it.¹¹

According to Adam Roberts (Montague Burton Professor of International Relations) at Oxford University and a Fellow of Balliol College, Oxford, United Kingdom in a paper presented at the 600th Wilton Park Conference, May 2000 any development that seems to associate International humanitarian workers and organizations, and indeed International Humanitarian Law, with demands or justifications for military action poses a serious problem for the Red Cross and Red Crescent Movement. For the ICRC in particular, the statutory requirements of impartiality and neutrality are fundamental to its effective performance of the tasks in armed conflicts that are assigned to it in International conventions.

The ICRC's understandable caution about being associated with positions and actions of the United Nations was indicated during the negotiations that led to the conclusion of the 1994 Convention on the Safety of UN and Associated Personnel. The ICRC stated that it did not want its personnel to be protected under this Convention. This was partly because ICRC personnel already have International legal protection deriving from the 1949 Geneva Conventions, and partly because the ICRC's role as neutral humanitarian intermediary might be jeopardized if the ICRC were perceived as closely linked with the United Nations.

The dilemmas all this poses for the ICRC were well expressed by Jakob Kellenberger, President of the ICRC, in an address at Wilton Park on 15 May 2000. He referred to "the confusion caused by the mixing of humanitarian aims with political and/or military aims in action taken by the International community in armed conflicts." He went on:

"My point is not to criticize military intervention, which can, under extreme circumstances, become the only possibility to prevent a humanitarian situation from worsening or to create the conditions for humanitarian organizations to do their work. But we should be careful with words. Whereas an intervention can well be motivated by humanitarian reasons, 'humanitarian intervention' is a problematic expression."

While it is certainly right to be sceptical about the term "humanitarian intervention", the remarkable trend of the 1990s for humanitarian issues to be cited as a basis for Security Council action is not likely to be reversed. For better or for worse, military and humanitarian issues are now intertwined. The ICRC, to maintain its distinct identity, must necessarily put emphasis on its unique character and on the special roles that it performs: it simply cannot be a typical humanitarian organization, if such a thing exists.¹²

VI. "Humanitarian Intervention" and International Humanitarian Law

In a keynote address by Jacques Forster, Vice President of the International Committee of the Red Cross, presented at the Ninth Annual Seminar on International Humanitarian Law for Diplomats accredited to the United Nations, Geneva, 8-9 March 2000 explored on the following questions.

1. Can International Humanitarian Law justify armed intervention?

The law of the right to wage war (which is also known as *Jus ad Bellum* and embedded in the United Nations Charter) and the law of the way of waging war (also known as *Jus in Bello* or International Humanitarian Law) should always be kept clearly distinct. I believe it was essential to clarify this first point concerning the irrelevance of International Humanitarian Law as a basis to justify armed intervention.

2. Is there any armed intervention to which International Humanitarian Law does not apply?

The Geneva Conventions and their Additional Protocols expressly provide that (first) their rules apply to all cases of armed conflict and (second) these rules must be respected by all the parties to the conflict in all circumstances.

There is no doubt that armed intervention constitutes a situation of armed conflict in terms of International Humanitarian Law, as would any situation in which armed forces enter the territory of a State or use force against it.

In time of armed conflict, International Humanitarian Law must be respected by all the parties to the conflict, which means by those who may have violated general International law as much as by those acting within its framework. In other words, humanitarian law disregards whether the cause being defended by each of the parties to the conflict is just and whether the use of armed force is lawful.

Therefore the old concept of "just war" cannot be invoked today to exempt intervention forces from the scope of application of International Humanitarian Law under the pretext of legitimacy of the cause that they are defending. The legitimacy of armed intervention has no effect on the obligations resulting from humanitarian law. This is true of any kind of armed intervention, be it those authorised by the Security Council or those undertaken without a United Nations mandate.

It should be emphasised, however, that the Bulletin applies only to United Nations forces conducting operations under the command and control of the United Nations. It does not apply to operations authorised by the Security Council which are placed under the command of a State or regional organisation, or to operations undertaken by a regional organisation without a United Nations mandate. In such cases, individual States or groups of States concerned must nevertheless comply with the customary and treaty-based rules of International Humanitarian Law by which they are bound. Whatever the legitimacy of armed intervention, its submission to the *lex communis* of armed conflict must be upheld.¹³

Is humanitarian military intervention against International law, or are there exceptions?

Matthew C. Waxman, Adjunct Senior Fellow for Law and Foreign Policy at the Council of Foreign Relations and Professor Columbia Law School stated that as a matter of International law, humanitarian intervention—such as the use of military force to protect foreign populations from mass atrocities or gross human rights abuses—is permissible if authorized by the United Nations Security Council (UNSC). Although many Western governments have taken the position that such intervention may in some cases be morally justified even if not authorized by the Security Council, most states and International legal experts do not regard that as lawful.

The main source of International law on this issue is the United Nations Charter, which prohibits the use of military force against or in another state without its consent except when authorized by the UNSC or in self-defence against armed attack. The UNSC has authorized humanitarian interventions in cases such as Somalia and Haiti, but it is often difficult to obtain the necessary votes in the UNSC and to overcome resistance by permanent members Russia and China, which are generally opposed to these actions.

In the 1999 Kosovo crisis, NATO launched military strikes to stop Serbian ethnic cleansing, despite opposition from Russia, China, and many States of the global South. Although many Western States regarded the action as morally legitimate under the circumstances, many other States criticized it as violating the principle of State Sovereignty.

In recent years, States have reached general consensus that they have a "**Responsibility to Protect**" populations from mass atrocities, and that when a government fails in this responsibility towards its own people,

International action is appropriate. Many States, however, maintain the position that only the UNSC can authorize armed intervention.¹⁴

VII. Lack of legitimization of military action in the law of war

It is been stated by Adam Roberts (Montague Burton Professor of International Relations) at Oxford University and a Fellow of Balliol College, Oxford, United Kingdom in a paper presented at the 600th Wilton Park Conference, May 2000 that there is no treaty that explicitly recognizes a general right of States or International bodies to take military action in response to gross violations of humanitarian norms, including those in the law of war. The nearest to a legal basis for such action is the UN Charter. The wording of Article 2(4) and 2(7), while basically non-interventionist, appears to leave some scope for the Security Council to take enforcement action within a State; and Chapter VII recognizes the Security Council's right to take a wide range of actions, some of which can be military, in cases where there is a threat to International peace and security. Chapter IX, on International economic and social cooperation, contains a pledge by members to "take joint and separate action" to achieve, inter alia, universal observance of human rights, but it has never been suggested that this phrase in Chapter IX legitimizes specifically military action.

Some International agreements concluded since 1945 contain provisions pointing towards a possible right of military action in response to violations. The clearest example (which belongs equally to both the human rights and armed conflict branches of International law) is the 1948 Genocide Convention, Article VIII of which specifies that any contracting State "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide". Another possible example (which is not in the strict sense a laws of war treaty) is the 1994 Convention on the Safety of United Nations and Associated Personnel, Article 7 of which contains a provision that States will cooperate in its implementation, "particularly in any case where the host State is unable itself to take the required measures". Both of these agreements have been cited frequently in the course of UN Security Council resolutions authorizing the use of force.

As to humanitarian interventions (in the classical sense of military interventions on humanitarian grounds) not authorized by the UN Security Council, there is a dearth of any binding legal text that supports such action. Treaties in the fields of Human Rights and International Humanitarian Law do require States to observe well-defined standards, and to prevent and punish certain violations of those standards. Further, common Article 1 of each of the four Geneva Conventions of 1949 famously calls on States "to ensure respect for the present Convention in all circumstances". This phrase, while open to considerable interpretation, does not go so far as to imply that forcible military action is among the means of implementation.

A number of treaties in the field of the law of war appear to exclude the idea that a State's violations of their terms could provide a basis for military intervention. The 1977 Protocol additional to the Geneva Conventions, which relates to International armed conflicts (Protocol I), contains the following caveat in the Preamble:

"Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations..."

The 1998 Rome Statute of the International Criminal Court contains a similar provision in the Preamble, emphasizing that "nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State." Finally, the 1999 Second Hague Protocol on Cultural Property, in its chapter on non-International armed conflicts, reaffirms State sovereignty and non-intervention in Article 22(3) and (5), in terms virtually identical to those of Additional Protocol II.

In the 1990's, the increased interest in how International Humanitarian Law can be implemented inevitably resulted in a shift away from a rigid insistence on the non-intervention rule in favour of a limited (and far from uniform) acceptance that sometimes International military enforcement action may be needed. However, in those cases where military action is without the consent of the government concerned and lacks UN Security Council authorization, International Law offers some conflicting principles. In an International crisis the balancing of these principles against one other is a subjective process that cannot always lead to agreed conclusions.¹⁵

Different Perspectives and Observations

Following are some of the perspectives of different speakers at the 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4-6 September 2008. International Institute of Humanitarian Law in collaboration with the International Committee of the Red Cross.

Gert-Jan VAN HEGELSOM, Legal Advisor to the Council of the European Union touched upon the Attribution of Conduct in the Context of Multilateral Operations. He mentioned as stated by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the "Legality of the Threat or Use of Nuclear Weapons":

“The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.” In a subsequent opinion, the ICJ noted further: “There are thus three possible situations: some rights may be exclusively matters of International Humanitarian Law; others may be exclusively matters of Human Rights Law; yet others may be matters of both these branches of International Law.”

As an initial matter, it is important to bear in mind that the question of whether an actor’s conduct is attributable to a State is Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 [hereinafter Wall opinion], and analytically distinct from the question of whether that conduct is internationally wrongful. The rules of attribution form part of the law of State responsibility. These rules are of a framework nature and are thus unconcerned with the separate question of whether the conduct at issue conforms to what is required by substantive norms of International Law. The first rule of attribution is that the conduct of an organ of a State, including that of any individual who is an official part of the machinery of the State, or of an entity legally empowered by a State to exercise elements of governmental authority is considered to be an act of that State. This would also include situations in which an organ is placed at the disposal of a State by another State and the organ is acting in the exercise of elements of the governmental authority of the former State. The conduct of such actors is attributable to the State even where an actor’s conduct is *ultra vires*, or beyond the scope of his or her authority, as long as he or she was acting in an official capacity.

VIII. Is there legal room for IHL given all the other sources of law governing ITAs?

Steven RATNER Law Faculty, University of Michigan, USA at the San Remo Conference 2008 touched upon whether IHL is directly or indirectly applicable to a UN operation, he stated that “we know it is not the only body of law for these operations – mandates from the Security Council, International HR Law, the Law of International Organizations (e.g. immunities of officials), and Domestic Law are also involved in a UN administration”. Moreover, these different laws can actually conflict, as where HR law offers one set of norms for detention and IHL offers another; or, more relevantly, HR law says change the local law and IHL says preserve it. One possibility is for IHL to be the main governing body of law – if the law of occupation is the starting point for all foreign occupation of territory, and then why not build on the similarities, especially if the operation is under Chapter VII like Kosovo? So IHL would be applied as the default body of law.

So it is better to speak of practical guidelines:

1. If the UN Security Council has directed the UN under Chapter VII to administer territory in a way that is not consistent with IHL, that resolution must either control the interpretation of the IHL or, if truly irreconcilable, must override it. However, I think the possibility of the Security Council running afoul of Jus Cogens norms is more in the realm of academic speculation than actual Security Council practice. Perhaps there is a danger that the Security Council will pick a side in a way that IHL does not, but this is part of its special authority under the UN Charter, and political mechanisms on the Council will probably correct for the worst abuses;
2. To the extent that IHL norms conflict with those of HR law in terms of completing obligations, then IHL should be limited to those situations of serious security threats; otherwise HR law, as the law governing the normal order of State – individual relations, should be the controlling law; and
3. Reliance by UN forces on IHL in some situations does not mean that all of IHL applies – for instance, if it’s relying on other aspects of IHL to address security situations but domestic institutions and laws are clearly incompatible with human rights norms, the UN should be able to change domestic law beyond what would be allowed under occupation law. This change to the status quo is especially defensible in the case of the UN because there is less risk that the UN’s changes will be part of an effort leading to annexation, whereas occupation law’s constraints on the occupier in this area are meant to preserve the status quo for the returning sovereign – one clear way that ITA differs from traditional occupation.

The implications of ‘responsibility’ in terms of ‘automatic’ use of force

Like in the Annan Report, the issue is considered not in the part devoted to the use of force, but in a section entitled “human rights and the rule of law”. Outcome is an important result, witnessing that there is a trend away from a rigid conception of sovereignty and towards a limited notion of it, at least as far as the protection of ‘human security’ is concerned. This could be included in the more general transformation of International Law from a “State and governing-elite-based system of rules into a framework designed to protect certain human and community interests”. And – as a beginning of a practice by States – it could represent the origin of a development in the field of International Law. International Human Rights Law, International Humanitarian Law, International Criminal Law and Justice in these last couple of decades have greatly contributed to opening and preparing the way. States and their political and military leaders are no more left free

to consider individuals as mere objects of their sovereign power within a domestic jurisdiction shielded from external scrutiny. They have a major responsibility, and they may be called to account for their behaviour before a judge, even an International judge. Their responsibility has become one 'under International Law'. This is not simply one view or perspective. This is already International Law in force. Hermann Goering the day before yesterday, Slobodan Milosevic yesterday and Radovan Karadzic today have been brought before International tribunals because they failed to protect, because they did not fulfil their obligations under International Law, because they did not accept the real key burden of sovereignty, which is connected to responsibility. The future is left in the hands of States and International Institutions. These are the only subjects who can make the 'emerging norm' emerge. The future will tell if there is the political will.

As far as Customary International Law is concerned, two elements are necessary: the *opinio juris* and *diuturnitas*. The Outcome Document can be considered an important expression of a widely spread *opinio juris*. This element has to be strengthened by consensus in the literature and by determinations of the ICJ or other International tribunals. It is also an important achievement in the field of International practice. But we still lack *diuturnitas*, which is a robust "evidence of a general practice", according to Article 38 of the ICJ Statute. The material sources of custom are numerous: "diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, State legislation, International and National judicial decisions, recitals in treaties and other International instruments, a pattern of treaties in the same form, the practice of International organs, and resolutions relating to legal questions in the United Nations General Assembly".

Interaction of the legal regimes in peace operations

Ben KLAPPE speaking on the United Nations Perspective at the San Remo Conference 2008 reminded that International jurisprudence has recognized the parallel application of Human Rights Law and IHL in situations of armed conflict, including occupation. However, it seems that the content of human rights law applicable in times of armed conflict still needs to be fleshed out.

The protection of peace forces' personnel was ensured by a combination of International legal instruments including Status of Forces Agreements (SOFAs), IHL, and the 1994 UN Convention (the so-called Safety Convention), as well as the host State's domestic law. The efficiency of the protection sought relies not on one instrument alone, but on the interplay between these instruments, in particular between IHL and the 1994 UN Convention. In this respect, emphasis was put upon article 2(2) of the 1994 Convention, interpreted as a "switch clause". However, it should be pointed out that this clause does not make the two legal regimes mutually exclusive in situations of non-International armed conflict. This means that actions not prohibited under IHL may still be rendered unlawful under the 1994 Convention's regime.

The law of occupation: a corpus juris relevant for peace operations.

The question of the applicability of occupation law still raises some points of contention, but it seems that some of the arguments aimed at denying the applicability of occupation law may be overcome in particular by the fact that they find their basis in *jus ad bellum* and not in *Jus in Bello*.

IHL and the administration of territories by the UN generally, occupation by States and administration by International organisations have been regarded as distinct legal and political phenomena. However, this distinction may not survive close scrutiny, and various participants emphasised their common traits and challenges. Despite the similarities, IHL and occupation law were identified only as default regimes, as providing "good ideas": *de facto* solutions, as opposed to a *de jure* application. It was once again stressed that their relevance should not be exaggerated and that human rights law remains the main legal framework of reference for internationally administered territories. On this issue, the point was made – and this also in comparison to the former trusteeship regimes – that International administrations should not be above the law, and that a system of accountability is necessary in order to ensure that individual rights are preserved. In situations of armed conflicts, the ICRC and Red Cross/Red Crescent National Societies (NS) enjoy a special role and status under IHL, whereas other NGOs benefit from lesser facilities. In this respect, "privileged" humanitarian actors such as the ICRC and NS were encouraged to be more proactive in promoting their special status under IHL.¹⁶

The ICRC's position on "humanitarian intervention"

Anne Ryniker Deputy Head of the ICRC's Legal Division have stated in her article in the International Review of the Red Cross No.482, 30.6.2001 that International Humanitarian Law cannot serve as a basis for armed intervention in response to grave violations of its provisions; the use of force is governed by the United Nations Charter.

- It is not for the ICRC to pronounce on the legality or legitimacy of such intervention.

- International Humanitarian Law applies when intervention forces are engaged in hostilities with one or more of the parties to the conflict.
- The ICRC seeks to promote the term “armed intervention in response to grave violations of human rights and of International Humanitarian Law”.^{17.}

IX. The Humanitarian Challenge in the Middle East an Overview

In Gulf War II (2003), the coalition forces led by the United States invaded Iraq and a large number of Iraqi were made prisoners of war. They were kept in different camps such as Abu Gharib Correctional Facility, Al Baghdadi, and Heat Base Habbania Camp. On a number of occasion prisoners of war were treated inhumanely in violation of the Geneva Convention III The International Committee of the Red Cross (ICRC) in the Report of February 2004 on the Treatment by the Coalition Forces of Prisoners of War and other protected Persons in Iraq drew the attention of the Coalition, forces to a number of Serious violation of International Humanitarian Law Committed between March and November 2003.^{18.}

Off lately the popular uprisings sweeping through North Africa and the Middle East, from Tunisia in the west to Syria in the east, and the generally violent response to them from state authorities, are challenging humanitarian organisations and policymakers in new ways. These are not ‘classic’ humanitarian emergencies, which are often associated with hunger, epidemics, displacement and a desperate daily struggle for survival. These crises are happening mainly in middle-income countries, in urban settings with functioning basic social services, and affecting a cross-section of the population. These crises have not developed into large-scale humanitarian emergencies – at least not yet. But they do demand new ways of thinking and working.

Access restrictions on humanitarian agencies have prevented us from assessing needs in areas of concern. This lack of accurate information – especially for the most vulnerable groups such as children, the elderly, and the sick and disabled and female-headed households – is an issue across the region. A common problem in these countries is that social unrest has resulted in the national security apparatus taking charge, overriding the normal entry points for International humanitarian responders and diminishing their operational space. An effective humanitarian response is built on independently assessing needs, responding to them in accordance with humanitarian principles and upholding International Humanitarian Law (IHL) and Human Rights Law. But we do not have the needs assessments we require to respond, and IHL cannot always be invoked in situations of civil unrest. This is why, apart from Libya, Syria, Iraq and Yemen where IHL clearly applies, humanitarians have had to use human rights advocacy as the main instrument for trying to increase the protection of civilians and gain humanitarian access.^{19.}

X. IHL implications in the Israel-Palestine Conflict

In recent past 415 Palestinians were deported on Dec 17, 1992 by Israel from the occupied West Bank and Gaza Strip in the Southern Lebanon after making allegations that the deportees were the members of the radical Muslim fundamentalist Hamas and Islamic Jihad movement. The deportees were stranded in a tent camp in a no man’s land north of Israel’s security zone in Southern Lebanon. The above act was strongly condemned by the Security Council on Dec 18,1992 when it adopted a resolution.

However, Israel’s High Court in a case filed by the association of the civil rights in Israel held that the government could expel Palestinians accused of belonging to Islamic groups of Lebanon. The Chief Judge Mir Shamjer announced the ruling without elaboration. Later the Israel’s Supreme Court upheld the deportation, wherein it demanded that Israel, the occupying power should ensure the ‘safe and immediate return of all those deported’.

While Under the resolution 799(1992), the Secretary General was asked to dispatch a representative to help resolve the impasse. The Secretary General, in accordance with the resolution of the Security Council, sent three missions to Israel and presented his report to the Council on Jan 25,1993 wherein he stated that the deportation of Palestinians was a serious violation of the Geneva Convention for the protection of civilians in time of war. He recommended to the Council to take ‘whatever measures’ to ensure the safe and immediate return of the deportees. It is desirable that the council takes enforcement action under chapter 7 as the deportation constituted a form of collective punishment and is a violation of Geneva Convention of 1949, which has detrimental effect on International peace and security.

In Feb 1994 a Jewish settler in Jerusalem opened fire on Muslim worshippers in the Hebron Mosque which killed at least 52 Palestinians. Settlement of its own population by the occupant in the occupied territory is a violation of the Geneva Convention of 1949, which under article 49 lays down that the occupant has a duty not to transfer parts of its own civilian population in to the territory occupied by it.

The incident was condemned worldwide. The Security Council by adopting a resolution strongly condemned the massacre in Hebron and its aftermath which took the life’s of more than 50 Palestinian civilians and injured 100 others. The Council also called upon Israel, the occupying power to continue to take and implement measures, including, confiscation of arms, with the aim of preventing illegal acts of violence by

Israeli settlers. Although Security Council postponed action on the massacre on Feb 27, 1994 following the agreement between the USA and Islamic members on the text of the resolution condemning the killings, Israel announced that it would disarm Jewish settlers in the occupied territories.

The Israeli decision to build the 6500 units 'HarHoma' housing development in east Jerusalem for the settlement of Jews is again a violation of the article 49 of the Geneva Convention of 1949. Which prohibits the settlement of its population by the occupier in the occupied territory. When the matter was brought before the Security Council on March 7, 1997 for refraining all actions and measures including settlement activities by UK, France, Sweden and Portugal it was vetoed by USA despite the support of all the remaining members of the Security Council. On March 21, 1997 when another draft resolution was sponsored by Egypt and Qatar before the Security Council which would have demanded that Israel immediately cease construction of the Jew settlement in East Jerusalem, as well as other Israeli settlement activity in the occupied territory, it was again vetoed by USA as a result the Council could not take any action against Israel.

Israel since 1977 has conducted a policy and developed practice involving the establishment of settlement in the occupied Palestinian territory. It started construction of the wall in the part of the west bank which involved some 80% of the settlers laying the occupied territory. The construction of the wall and the creation of enclaves have imposed substantial restriction on the freedom of movement of the inhabitants of the occupied territory. There have also been serious repercussions for agricultural production, and increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. Further, the construction of the wall would also deprive a significant number of Palestinians of the freedom to choose their residence. The construction of wall is likely to alter the demographic composition of the occupied territory which is a violation of article 49 para 6 of the fourth Geneva Convention which provides that 'The Occupying Power' shall not deport or transfer parts of its own civil population in to the territory it occupies. The International Court of Justice in the advisory opinion given due to the legal consequences of the construction of a wall in the occupied Palestinian territory in 2004 observed that Israel is obliged to comply with the International obligations, it has breached by the construction of the wall in the occupied Palestinian territory. Consequently, Israel is bound to comply with its obligations under International Humanitarian Law and International Human Rights Law. Further, it must ensure freedom of access to the holy places that came under its control following the 1967 war. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the occupied Palestinian territory including in and around East Jerusalem. In the view of the court, cessation of Israel's violation of its International Obligation entails in practise the dismantling forthwith of those parts of that structure situated within the occupied Palestinian territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated regime, must forth be repealed or rendered ineffective, except whereof continuing relevance to Israel's obligation of reparation.

The Court further found that Israel has the obligation to make reparation for the damage caused to all natural or legal persons concerned. The Court recalls the established jurisprudence that "The essential principle contained in the actual notion of an illegal act...is that reparation is a must and as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the occupied Palestinian territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damaged suffered. The court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of International Law to all natural or legal persons having suffered any form of material damage as a result of wall's construction.²⁰

XI. Gaza and Israel – A Case for International Humanitarian Law, Not R2P

James P. Rudolph attorney in Washington, D.C. and California specializing in International Law in his article Gaza and Israel – A Case for International Humanitarian Law, Not R2P elaborates on the notion of sovereignty adopted by the International community, which is now enshrined in the so-called "three pillars" of R2P. First, the State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing; second, the International community has a responsibility to encourage and assist States in fulfilling this responsibility; and finally, the International community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the International community must be prepared to take collective action in accordance with the Charter of the United Nations.

With respect to the ongoing conflict in Israel and Gaza and applying the first pillar, the issue is whether any of this is dispositive. Are we, in other words, witnessing genocide, war crimes, and crimes against humanity or ethnic cleansing? If we are not, R2P does not apply. Notwithstanding comments from Turkish Prime Minister

Recep Erdogan that Israel is “committing genocide”, most people would likely conclude that Israel is not engaged in any kind of genocidal behaviour. In the same vein, it appears doubtful that anybody would seriously claim that ethnic cleansing is occurring. Thus, the question is whether Israel is (or has) engaged in war crimes or crimes against humanity, the two remaining crimes recognised under the R2P rubric.

A crime against humanity requires that certain acts — murder, enslavement, deportation, imprisonment, torture, rape — must be directed against a civilian population, and that they be part of a widespread or systematic attack. Widespread means massive, large-scale action, whereas systematic means part of a preconceived policy. Israel’s response to the rockets from Gaza certainly has had consequences for Palestinian civilians, many of whom have been children. But none of these acts are occurring in Israel itself (if, indeed, they are occurring at all). R2P means that Israel has a responsibility to protect its own population from crimes against humanity. We are thus left with war crimes.

With respect to pillar two, moreover, the International community has been assisting both Israel and the Palestinians to fulfil their obligations under R2P, as evidenced by the recent Egyptian-sponsored cease-fire that was rejected by Hamas. Interestingly, this assistance has included diplomatic, humanitarian and other means to protect populations from these crimes. Accordingly, the use of force, which is contemplated under pillar three, is altogether inappropriate at this juncture, as it is to be used as a last resort after the State has manifestly failed to protect its own population. This is all to say that R2P has not, and likely will not, be triggered by this recent conflict.

Now the question arises who has the responsibility to protect civilians in this ongoing war?

Civilians are, of course, protected by R2P. Indeed, the *raison d’être* of R2P is the protection of civilians. But, as noted above, R2P probably does not apply to the current conflict in Israel and Gaza. This is not to say, however, that civilians are devoid of any protection. International Humanitarian Law, the purpose of which is the protection of those who do not or cannot take part in armed hostilities is considered the human rights component of the law of war. The Fourth Geneva Convention, to which Israel is a party, deals with the protection of civilians during war. In each of the four Geneva Conventions, the High Contracting Parties assume a large number of obligations for the benefit of the protected persons. Article 33 of the Fourth Geneva Convention, for example, outlaws collective punishment, defined as mass punishment without an individual assessment of guilt. The Fourth Geneva Convention also imposes on signatories various due process requirements for trials and sentencing. Furthermore, the Geneva Conventions provide for a system of supervision administered by the so-called Protecting Powers, which, by and large, means the International Committee of the Red Cross. In the current conflict, civilians in Gaza are bearing the brunt of the hostilities. The UN Office for the Coordination of Humanitarian Affairs has reported that 77 percent of the people killed in Gaza have been civilians. And UN High Commissioner for Human Rights, Navi Pillay, has stressed Israel’s obligation to “ensure full respect for the principles of distinction, proportionality and precautions in attack.” Israel must, Ms Pillay said, avoid targeting civilians. By implication, though, Ms Pillay surely meant to encourage Hamas to fulfil its obligations as well. To date, comparatively few Israeli civilians have died, but this low number is mostly because of Israel’s sophisticated anti-missile system, not because Hamas has shown restraint. On the contrary, Hamas has fired into Israel thousands of indiscriminately targeted rockets.

It is clear that Israel, as a signatory to the Fourth Geneva Convention and the party with the “smartest” technological weaponry, has the primary responsibility for the protection of civilians, especially in light of Israel’s plans to send troops and tanks into Gaza itself. But if, as suggested by the Washington Post, Hamas “calculates that more deaths will prompt Western governments to pressure Israel to grant Hamas’s demands,” Hamas will also have to answer for its transgressions. Having said this, it is also obvious that the Security Council and the UN more broadly, has a duty to offer more than just platitudinous pronouncements.

On the question of does the asymmetrical loss of life matter? It would suffice to say that for the purpose of R2P, the quantitative loss of life does seem to matter. It has been stressed, for instance, that R2P applies only to large-scale loss of life or to massive, widespread atrocities. But the locus of the atrocities, as highlighted above, matters as well. One might argue that Israel actually occupies Gaza and therefore is, for all intents and purposes, the “State” in which the human rights violations are occurring. Israel vehemently denies that it occupies Gaza, as it “disengaged” in 2005. Most International law scholars, however, would argue that the test for determining whether an occupation exists is effective control by a hostile army. Resolving this question is beyond the bounds of this article; thus, it will be assumed, *arguendo* that Gaza is not occupied and thus R2P does not apply.

R2P has shifted forever and fundamentally the debate about sovereignty and intervention. This is a positive development. Humanitarian intervention, after all, focused too intently on the right of the State to intervene, whereas R2P gives pride of place to civilians. In this respect, then, R2P is a helpful frame through which to view the conflict in Gaza. Hundreds of civilians, let us not forget, have perished in the past years; yet R2P’s application to the conflict is tenuous. Therefore, the frame should more appropriately be International Humanitarian Law. The Security Council should, and theoretically could, offer a more robust response, but the

chance of a U.S. veto vis-à-vis Israel is an ever-present reality and one which also means that a referral to the ICC would be dead on arrival. But defeat in the Security Council would nevertheless be a useful exercise, drawing International attention and condemnation on any party found to be in violation of the laws of war.

So though R2P is viscerally attractive as a theoretical framework. But given that it might not even apply to this conflict, International Humanitarian Law, including the prohibition on collective punishment and the mutually obligatory requirements vis-à-vis civilians, is the more practical and appropriate paradigm.²¹

IHL in the South Asian Region an Overview

The commissioned paper by Radha Kumar, "Sovereignty and Intervention: Opinions in South Asia," noted that, while attitudes regarding intervention and sovereignty in South Asia are changing, such notions are still largely defined within the context of de-colonization. Positions taken on International issues have been rather formal and not deeply felt, unlike sentiments regarding regional South Asian issues that are of interest to the International community. Two prime examples are Bangladesh (East Pakistan) and Sri Lanka (lessons learned in the latter are seen as applicable to Bosnia and Kosovo). When peacekeeping turns to king making, however, disaster happens.

In Pakistan, a previous emphasis given to alliances over unilateralism and sovereignty is changing due to the experience over Afghanistan. It was also noted that Indian policy is one of strong support for sovereignty as a cornerstone of the UN, while also actively involved in UN peacekeeping missions, as well as unilateral peacekeeping with the concurrence of the target State (Nepal –1950; Sri Lanka-1971 and 1987; Maldives-1988). While mistakes were made in Sri Lanka, the intervention was requested by the Sri Lanka government, and India's aim was to maintain Sri Lanka as unitary state. Recently, India has become very uneasy with mission creep in UN operations that verge more on peace enforcement than consensual peace-keeping. Yet if the UN can only undertake peacekeeping with the consent of the target country, how can it respond to a situation like Rwanda?²²

Crisis in Sri Lanka

Sri Lanka's recent history has been dominated by civil war. In 1983, ethnic tensions between the majority Sinhalese (mainly Buddhist) population and the Tamil (mainly Hindu) minority in the North led to a devastating civil war. For over a quarter of a century, the Sri Lankan government clashed with the Liberation Tigers of Tamil Eelam, known as the LTTE or Tamil Tigers, who fought in pursuit of an independent state.

The Norwegian government also stepped in to facilitate peace negotiations, successfully establishing a Ceasefire Agreement (CFA) in February 2002. Norway led six further rounds of talks, but the process broke down in April 2003. Additionally, Norway hosted another round of peace talks in Geneva in February 2006, but by April both sides were engaging in "major military operations." By August, there was "full-scale war."

A steady government offensive, beginning in the east, characterized the final period of the war. By July 2007, the government had "seized control of the country's east", and made a "decisive shift" toward the north. Fighting continued, and in January 2008 the Sri Lankan government officially withdrew from the CFA.

In March 2009, both sides reported a "bloody escalation in the fighting in the country's north-east." Even as the fighting entered April, and the LTTE continued to suffer defeats, they refused to surrender. On 15 May 2009, the Sri Lankan President Rajapakse declared the war to be in its final stage, with the final offensive sure to end within 48 hours, declaring the following day that the LTTE had been defeated. This claim was substantiated when, on 17 May, the Tigers announced that the battle had "reached its bitter end." The final stage of the conflict resulted in approximately 40,000 deaths and over 280,000 internally displaced people. As noted both the Government and the LTTE committed war crimes and crimes against humanity during the end of the war.

On 31 March 2011, Secretary General Ban Ki-moon released the report of the Panel of Experts on accountability in Sri Lanka commissioned in 2010. The Panel concluded that "a wide range of serious violations of International humanitarian and human rights law were committed by the government of Sri Lanka and the LTTE, some of which would amount to war crimes and crimes against humanity." The government was found responsible for the killing of civilians, including through the shelling of hospitals in three consecutive No Fire Zones, the denial of humanitarian assistance, forced displacement and torture. The LTTE was found responsible for using civilians as a human buffer, killing civilians attempting to flee, firing artillery in proximity to civilians and firing from civilian installations, forcibly recruiting children, forced labour, and indiscriminate suicide attacks.

On 13 March 2013, the Secretary-General also produced a report on sexual violence in which he highlighted the necessity to investigate violations of International Humanitarian Law and International Human Rights Law in Sri Lanka including allegations of sexual violence.

Recently, the United Nations has also taken further steps to address accountability and human rights in Sri Lanka. On 24 February 2014, the Office of the UN High Commission for Human Rights produced a report on Promoting reconciliation and accountability in Sri Lanka. The report asserted that the Government of Sri Lanka has neglected to have credible investigation into violations of International law. The report also recommended the establishment of an International inquiry.

In March 2014, the UN Human Rights Council adopted a resolution on Promoting reconciliation, accountability and human rights in Sri Lanka. The resolution reiterated the need for the Sri Lankan government to investigate violations of International Humanitarian Law and International Human Rights Law and hold perpetrators of these violations accountable for their actions. The resolution also launched an international inquiry to investigate the crimes committed by all sides of the conflict. On 25 June 2014, the UN appointed three International experts to advise the investigation in Sri Lanka. Nonetheless, on 19 August 2014, President Mahinda Rajapakse announced that Sri Lanka will refuse entry to the UN investigators.²³

XII. International Humanitarian Law - How it relates to Sri Lanka

Senior Lecturer in International Law, University of Colombo, Nishara Mendis, talking to Ceylon Today about the application of IHL to the Sri Lankan context stated that as we are not a party to the Additional Protocol II we don't have enough protection but through the Common Law of the country we use Customary International Law as a norm. We only get the protection of the Geneva Conventions through the Geneva Conventions Act and even in regard to the Geneva Conventions Act; we can't apply the provisions of the Geneva Conventions without regulations by the Minister. In the case of International norms applied to armed conflicts, it can be either legal or political motives as well that come into play. Firstly, it is the domestic criminal law that has to be applied for violations and if the domestic criminal law fails to prosecute in a proper manner then only the International Law probes in to the situation. It's the Attorney General's Department that is vested with the power of prosecuting the criminals but practically they don't prosecute just after the armed conflict or they won't prosecute any high level militia. Therefore, it mainly is a political problem rather than a legal issue.²⁴

XIII. Eelam War IV and Issue of Collateral Damage & Civilian Deaths in International Law

Neville Laduwahetty, in *The Island*, 19 April 2015 summarizes Desmond De Silva's 'Treatise' as follows stating that the essence of International Humanitarian Law is the protection of civilians during conflicts. Since the conflict in Sri Lanka was an Armed Conflict and the LTTE was a party to the conflict they were required by provisions of International Humanitarian Law to ensure the protection of the civilians in their midst. Attempts by the Sri Lankan Government to create mutually agreed No Fire Zones for the protection of the civilians was rejected by the LTTE. Consequently, the entire area became a zone of conflict. By shooting any civilians who attempted to escape, the entire conflict zone was transformed into one where combatants and non-combatants were forced to coexist with the latter as hostages becoming a protective shield for the LTTE in violation of ICRC Rules 96 and 97.

The feasibility of meeting the threshold set by the core principles of International Humanitarian Law namely, Distinction, Military necessity and Proportionality must be realistically evaluated within such a context. The executive Summary of the UN Panel of Experts report states: "From February 2009 onwards, the LTTE started point-blank shooting of civilians who attempted to escape the conflict zone, significantly adding to the death toll in the final stages of the war. It also fired artillery in proximity to large groups of internally displaced persons (IDPs) and fired from, or stored military equipment near, IDPs or civilian installations such as hospitals". The tactics deployed by the LTTE is a clear violation of ICRC Rules 23 and 24. Furthermore the fact that such activities were carried out behind protective bunds and barriers erected at the command of the LTTE means it is humanly not possible to ascertain the likely extent of incidental civilian injuries that would result in the event the security forces responded to the artillery fire of the LTTE. Even the deployment of aerial reconnaissance or other technologies would not help to ascertain possible extent of collateral damage due to lack of distinction between combatants and non-combatants. Under these circumstances principles of proportionality has no relevance.

The allegation of killing civilians through widespread shelling has to originate from those who survived. They would not be in a position to know whether the response to the artillery fire from the LTTE was in proportion or not. Considering the fact that 4 categories outside the regular LTTE cadres participated in the military operations means that once dead no one would be in a position to know who was a combatant and who was not, who directly participated in hostilities and who did not. Under circumstances where distinctions are blurred the tendency would be to categorize all dead who were not in uniform as a "civilians". Such attempts to establish the number of dead "civilians" under these circumstances would lead to seriously flawed estimates. Charges of War Crimes have been levelled for depriving humanitarian aid to those in the conflict zone. According to ICRC Rule 55, parties to a conflict are not expected to furnish humanitarian aid – only "allow and

facilitate rapid and unimpeded passage of humanitarian relief”, and that too only to the civilians meaning non-combatants. Since it is not possible to establish who were non-combatant and how many of them were there, a charge of War Crimes on grounds of depriving humanitarian aid becomes baseless.²⁵

XIV. Lessons Learnt and Reconciliation Commission

The Sri Lankan government has consistently defended its approach for addressing human rights violations occurring at the end of the conflict. The president of Sri Lanka, Mahinda Rajapakse, appointed the Lessons Learnt and Reconciliation Commission (LLRC) in May 2010. Nevertheless, in November 2011, the LLRC produced a report that argued that the Sri Lankan Security Forces did not deliberately target civilians and took proportional actions, whereas the LTTE committed grave violations of International Humanitarian Law. Additionally, in July 2012, the Sri Lankan government created a national plan of action for the implementation of the LLRC's recommendations.²⁶

C. R. De Silva, PC (chair) - Attorney General (2007–2009); Solicitor General (1999–2007); Deputy Solicitor General (1992–97) headed the eight member team of the commission. Following are the cardinal observations made:

"What needs to be done for reconciliation and nation-building is that the State has to reach out to the minorities and the minorities, in turn must, re-position themselves in their role vis a vis the State and the country. There must be willingness on the part of all political parties to give up adversarial politics and have consensual decision-making on national issues. In order to meet the challenges of this opportunity there has to be courage and political will on the part of all political parties."

— Report by Lessons Learnt and Reconciliation Commission (p. 368)

"The process of reconciliation requires a full acknowledgement of the tragedy of the conflict and a collective act of contrition by the political leaders and civil society, of both Sinhala and Tamil communities. The conflict could have been avoided had the southern political leaders of the two main political parties acted in the national interest and forged a consensus between them to offer an acceptable solution to the Tamil people. The Tamil political leaders were equally responsible for this conflict which could have been avoided had the Tamil leaders refrained from promoting an armed campaign towards secession, acquiescing in the violence and terrorist methods used by the LTTE against both the Sinhala and Tamil people, and failing to come out strongly and fearlessly against the LTTE, and their atrocious practices."

— Report by Lessons Learnt and Reconciliation Commission (p. 387)²⁷.

XV. Conclusion

International Humanitarian Law is a part of International Law and has evolved from the Lieber Code (1863), Hague Declarations/Convention (1899/1907) to the four Geneva Conventions of 1949 and its additional protocols of 1977.

International Law is contained in agreements between States – treaties or conventions – in customary rules, which consist of State practice considered by them as legally binding. International Humanitarian Law mainly relies on the Geneva Convention's its Additional Protocols and Customary International Law.²⁸

To place the aggressor and the victims of that aggression on an equal footing as regards the application of humanitarian law appears to contravene the general principles of law that no one should obtain a legal benefit from his own illegal action *ex injuria non oritur jus*, yet the principle that humanitarian law does not distinguish between the aggressor and the victim is well established.

International Humanitarian Law obviously has much in common with the Law of Human Rights since both the bodies of rules are concerned with the protection of the individuals; nevertheless there are important differences between the two. However once it is established that a humanitarian law treaty is binding upon states on both sides in a conflict, the application of the treaty is not dependent upon reciprocity. The fact that one side of a conflict violates humanitarian law does not justify its adversary in disregarding that law.

The International court of Justice in Nicaragua case had observed that the principles of humanitarian law are identical with the elementary consideration of humanity. The General Assembly of the United Nations has adopted quite a number of resolutions regarding humanitarian law under the title of Respect of Human Rights in Armed Conflicts, thus emphasizing for obvious reasons the close inter-relationship existing between them. Due to their diverse historical origins and their different fields of application, it neither can be regarded that the protection of human rights is a special field of humanitarian law nor humanitarian law as a branch of human rights law.

Given that this body of law applies during times of extreme violence, implementing the law will always be a matter of great difficulty. That said, striving for effective compliance remains as urgent as ever. Measures must be taken to ensure respect for International Humanitarian Law. States have an obligation to teach its rules to their armed forces and the general public. They must prevent violations or punish them if these nevertheless occur. In particular, they must enact laws to punish the most serious violations of the Geneva Conventions and

Additional Protocols, which are regarded as war crimes. The States must also pass laws protecting the Red Cross and Red Crescent emblems.

Measures have also been taken at an International level: tribunals have been created to punish reprehensible acts/war crimes committed in two recent conflicts (Rwanda and the former Yugoslavia) and an International criminal court, with the responsibility of repressing inter alia war crimes, was created by the 1998 Rome Statute.²⁹

Military interventions by the International community in response to grave and large-scale violations of International Humanitarian Law or of human rights have now become a reality.

This new challenge leads us to make the following concluding observations

1) The use of force by the International community should come within the scope of the United Nations Charter. International Humanitarian Law cannot be invoked to justify armed intervention because it has nothing to do with the right of States to use force. Its role is strictly limited to setting limits to armed force irrespective of the legitimacy of its use.

2) In the event of armed intervention, despite the fact that its legal justification lies beyond the frontiers of International Humanitarian Law, this body of law must be respected by all the parties to the conflict in all circumstances. The legitimacy of armed intervention has no effect on the obligations of the parties under International Humanitarian Law and therefore cannot be invoked to exempt intervention forces from these obligations. In this context, the ICRC welcomes the promulgation and entry into force of the Secretary-General's bulletin on observance by United Nations forces of International Humanitarian Law by which the United Nations has made a solemn commitment to abide by the highest standards of this law.

3) Humanitarian action is designed not to resolve conflicts but to protect human dignity and save lives. To maintain its neutral and impartial character and, consequently, the trust of all the parties to the conflict, it must be clearly dissociated from political and military measures the International community may take in search for conflict resolution. Only by strictly respecting the specificity of each other's mandates can military and humanitarian actors work "separately together" in a way that leads to the shared goal of peace.

It is a truism that the best alternative to intervention is prevention. It is also necessary to recognise that any armed intervention or humanitarian relief operation is itself a result of the failure of prevention. What is more, they cost far less than any military intervention or humanitarian relief operation. As the former UN Secretary-General Kofi Annan stated in the introduction to his 1999 annual report on the work of the United Nations, "Today, no one disputes that prevention is better, and cheaper, than reacting to crises after the fact. Yet our political and organisational cultures and practices remain oriented far more towards reaction than prevention". As remedies, he recommended, in particular, greater use of the early warning mechanisms of United Nations humanitarian agencies and more frequent deployment of mediators and peacekeeping troops to prevent crises from escalating into war.

The challenge of preventive action goes far beyond the capacity of the ICRC. A sustained commitment has to come in the first place from the respective governments and from the International community as a whole. As for the ICRC, its role in the field of prevention mainly consists in spreading knowledge of International Humanitarian Law and promoting respect for its fundamental principles.³⁰

Coming to West Asia though the perennial scenario of turmoil and internecine conflict in the region between different actors present a huge challenge to the International Community the Israel-Palestine case stands out because of its sheer complexity of humanitarian concerns.

There may be a convincing argument that Israel's self-defence has become excessive, and this would have ramifications under the laws of war (Geneva Conventions and Customary International Law). But, if anything, this is being directed at Hamas and Gaza. Stated differently, neither Israel nor Gaza is engaging in excessive force against its own population, so R2P, while an attractive prism through which to view the conflict, seems not to apply. Though Geneva Conventions III and IV will apply in the appropriate situations.³¹

The 3 core principles of International Humanitarian Law are: (1) Distinction; (2) Military Necessity; (3) Proportionality. Violation of International Humanitarian Law could be serious enough to reach the threshold of War Crimes. If as the experts say "violation of International humanitarian law only occurs if there is an intentional attack directed against civilians", and if it is not practically possible to distinguish combatants from non-combatants (civilians), there is no basis for any inquiry, national or International, to establish that "intentional attacks were directed at civilians" in violation of International Humanitarian Laws.

Nearer home all the principles mentioned above were put to a test during the final stages Eelam War IV. The conflict zone consisted of a mix of 6 categories other than the security forces. **No one however astute would be in a position to ascertain the relative proportion of each category due to the absence of distinction between combatants and non-combatants.** Under such circumstances, the principle of proportionality is only a theoretical concept without practical relevance in the particular context of Sri Lanka. However, the need to respond to LTTE artillery fire was a military necessity purely on grounds of self-defence, without the ability to ascertain the consequences involved due to the particularities of the situation.

The exercise of counting how many “civilians” died in the final stages of the conflict becomes meaningless due to the inability to distinguish combatants from non-combatants. **Therefore, except for those in uniform, all others dead would be erroneously counted as civilians.** All that could be ascertained with any degree of certainty is the Total Number (i.e., combatants plus non-combatants/civilians) who perished during the final stages of the conflict.³²

The case report by Lessons Learnt and Reconciliation Commission became the basis for the discussion on Sri Lanka at the United Nations Human Rights Council 19th session in March 2012. The council adopted a resolution on promoting reconciliation and accountability in Sri Lanka, urging the Sri Lankan government to implement constructive recommendations made in the LLRC report. The resolution welcomed the constructive recommendations contained in the report and noted with concern that the report did not adequately address serious allegations of violations of International law.

Two last-minute changes to the resolution, pressed by India, made it "unobtrusive" in nature and "non-judgemental" in approach. These amendments gave the Government of Sri Lanka, a veto over any future recommendations by the OHCHR. There was no reference to alleged war crimes or an International investigation, as called for by the various human rights groups which if taken up would have served the future of peace and reconciliation in more effective manner in the Island State.³³

End Notes

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- Note:** Actors-Shia-Sunni's, Kurds (Peshmerga), Yazidi's, Houthi's, Hezbollah ,different Government forces and the new dimensions added to the West Asian Geo-Politics by the recent entrant Islamic State of Iraq and Levant.