

DEFENCES TO CRIMES UNDER THE
ROME STATUTE OF THE
INTERNATIONAL CRIMINAL
COURT

RULES OF APPLICATION AND INTERPRETATION WITH A
SPECIAL EXAMINATION OF THE POSITION OF THE
DEFENCE OF BELLIGERENT REPRISALS

by

Sean Anthony Bogan

B.Ec. LL.B. (Hons) (Macquarie), LL.M. (Edinburgh)

Doctor of Philosophy
The University of Edinburgh
2005

signed declaration

I declare that this thesis has been composed by me; that the work herein is my own; and that it has not been submitted for any other degree or professional qualification.

abstract

The topic of defences to crimes under international law has been described as the “most confused and contentious area of international criminal law” (M. Lippman, “Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War”, (1996) 15 *Dickinson Journal of International Law* 1, pp. 1-2). While the Rome Statute of the International Criminal Court offers, for the first time in the history of conventional international criminal law, a codification of available defences, this codification is only partial. Defences not enumerated within the Rome Statute may still be considered by the International Criminal Court where they derive from a defined set of “applicable law”. It is the purpose of this thesis to assist in the process of arriving at a comprehensive understanding of which defences may be raised and relied upon by defendants appearing before the International Criminal Court. This thesis seeks to assist in that process through two means:

In Part One, this thesis examines the principal norms which govern the application and interpretation of law under the Rome Statute of the International Criminal Court in so far as they are relevant to determining the admissibility and content of defences to crimes under the Statute. Part One examines: (1) *The “applicable law” of the Rome Statute.* Defences not enumerated within the Statute must derive from the “applicable law”, as defined in Article 21 of the Statute, in order to be considered by the International Criminal Court. Therefore, a comprehensive understanding of which defences may be considered by the Court can only follow from an understanding of precisely which sources of law belong to the “applicable law” in Article 21 of the Statute. This thesis examines whether the “applicable law” of the Statute includes the entire *corpus* of general international law, and which, if any, treaties, considered *qua* treaty law, are included; (2) *The principle nullum crimen sine lege.* This principle incorporates both rules of application and interpretation. It is argued that the principle (which is incorporated, *inter alia*, in Article 22 of the Rome Statute) is applicable to defences, and entails certain corollaries including a prohibition on the *ex post facto* repeal of pre-existing defences and a prohibition on the narrow construction of such defences contrary to the interests of defendants; (3) *The extent of permissible judicial discretion under the Rome Statute.* Where a defence, not enumerated within the Rome Statute, derives nevertheless from the “applicable law” of the Statute and upon its proper interpretation would operate to exculpate the defendant, there is a question as to whether the International Criminal Court *must* admit that defence, or whether the admissibility of the defence is only discretionary. Article 31(3) of the Rome Statute states merely that the International Criminal Court “may” consider defences not enumerated within the Statute, a provision which is ostensibly discretionary. This thesis argues that the power of the International Criminal Court to consider and apply non-enumerated defences is not discretionary, but rather is a power to be exercised *de jure*. Where certain preconditions are met, the International Criminal Court *must* admit the relevant defence. This conclusion follows not merely from the principle *nullum crimen sine lege*, but also from the ordinary rules of construction of treaties as located in the Vienna Convention on the Law of Treaties.

Part Two of this thesis examines these rules of application and interpretation *in concreto* in the context of one particularly controversial defence, the defence of belligerent reprisals. Part Two incorporates an in-depth examination of the status of the defence under customary and conventional international law. Many of the arguments located in academic writings and (in *obiter*) in case law, seeking to deny the admissibility of the defence in certain or all circumstances, are juridically weak and, in some cases, inconsistent with the principle *nullum crimen sine lege*. This thesis concludes, however, that at least one of these arguments (positing a prohibition on the right to engage reprisals against persons and objects protected under the Geneva Conventions of 1949 and Protocol I Additional to the Geneva Conventions of 1977, on the basis of an obligation on parties to those conventions to respect the conventions “in all circumstances”) while juridically weak, nevertheless is not violative of the principle *nullum crimen sine lege* and may therefore be relied upon by the International Criminal Court, consistently with the rules of interpretation and application of the Rome Statute, as a basis for denying the defence of reprisals.

acknowledgments

This research was funded by means of a faculty PhD scholarship, and I wish to thank the University of Edinburgh Faculty of Law and its members for their generous financial support and their encouragement. I would also like to thank the staff of the Law Library of the University of Edinburgh for all their assistance, as well as librarians in a number of other facilities who helped me along the way. In particular, I am grateful to the staff of the National Library of Scotland, the British Library, the Library of the Law School of Aristotle University in Thessaloniki and the University of New South Wales Law Library in Sydney. I am also grateful for the exceptional help I received from the librarians at the United Nations Library, and the Library of the Judge Advocate General – both in London. Some of the ideas in this PhD were developed through helpful discussions with a number of individuals. I would like to thank my second supervisor, Professor Alexander McCall Smith, for the interesting discussions we had on aspects of criminal law; Professor William Schabas for his helpful insight on certain aspects of the law of armed conflict as we spent a few hours trying to hunt down a holocaust memorial in the streets of Thessaloniki; Judge David Hunt for his insight into certain procedural aspects of international criminal law, particularly in the context of the Yugoslav Tribunal; and my fellow tutor in international law at the University of Edinburgh, Dimitra Nassimpian, for many lively discussions in the area of international law generally. Most of all, I wish to thank my Supervisor, Professor Bill Gilmore, whose passionate and humour-laden approach to international criminal law inspired me to stay on at the University of Edinburgh after completion of my LLM in order to pursue doctoral research. I wish to thank Professor Gilmore for his supervision of this thesis, including his attention to detail, his extremely helpful offerings or suggestions of additional source material, his help with structure (structural deficiencies here reflect departure from Bill's advice rather than strict adherence to it!) and general comments and advice relating to all aspects of the thesis. And of course, thank you to my family – mum, dad and Kieran – for supporting me through the long (and seemingly endless) process of completing a PhD and for always being there – even if on the other side of the world.

table of contents

Signed Declaration	2
Abstract	3
Acknowledgments	4
Table of Contents	5
Abbreviations	9

<u>Introduction</u>	12
----------------------------	----

Part One: Rules of Application and Interpretation

<u>Ch. 1: Applicable Law</u>	21
-------------------------------------	----

i.	Introduction	21
ii.	The Three Tiers of Applicable Law	23
	1. The First Tier (Art. 21(1)(a))	23
	2. The Second Tier (Art. 21(1)(b))	25
	3. The Third Tier (Art. 21(1)(c))	36
iii.	The Hierarchy of Applicable Law	43
iv.	Internationally Recognised Human Rights	50

<u>Ch. 2: <i>Nullum Crimen Sine Lege</i></u>	54
---	----

i.	Introduction	54
ii.	Emergence of <i>Nullum Crimen Sine Lege</i> as a Principle of International Law	
	1. At Nuremberg	56
	2. After Nuremberg	63
	3. A General Principle of Law?	66
	4. An Internationally Recognized Human Right?	73
	5. Congruence Between the ICC Statute and Customary Law	74
iii.	Applicability of <i>Nullum Crimen Sine Lege</i> to Defences	80
iv.	Limits to <i>Nullum Crimen Sine Lege</i> in Practice	88

1. Introduction	88
2. Strict Construction	92
3. Interpretation in Favour of the Accused	101
4. Prohibition on Analogy	106
5. Requirement of Specificity	110
v. Inconsistency Between Nullum Crimen Sine Lege and the Vienna Convention on the Law of Treaties?	115

Ch. 3: Judicial Discretion 121

Part Two: The Defence of Reprisals

Ch. 4: Reprisals under Customary International Law 136

i. Introduction	136
1. Retorsions	138
2. Reciprocity	139
3. <i>Tu Quoque</i>	140
4. Justification	141
5. Requirement of Explicit Prohibition or Desuetude	142
6. Reprisals in Non-International Armed Conflicts	142
ii. General Limitations on Recourse to Reprisals under Customary Law	144
1. Introduction	144
2. Prior Violation	145
3. Proper Purpose	148
4. Subsidiarity	149
5. Proportionality	152

Ch. 5: Prohibitions on Reprisals under Treaty Law 164

i. Introduction	164
ii. 1929 Geneva Prisoners of War Convention	166
iii. 1949 Geneva Conventions	168
iv. 1954 Hague Cultural Property Convention	171
v. 1977 Additional Protocol I	173

1. Wounded, Sick and Shipwrecked	174
2. Civilian Population	174
3. Civilian Objects	178
4. Cultural Objects and Places of Worship	180
5. Objects Indispensable to the Civilian Population	184
6. Natural Environment	186
7. Works and Installations Containing Dangerous Forces	189
8. Conclusion	191
vi. 1980 UN Convention on Certain Conventional Weapons	196
<u>Ch. 6: Customary Law Status of Treaty Prohibitions</u>	200
i. Introduction	200
ii. Codification or Crystallisation	201
iii. Subsequent Generation	203
1. The North Sea Continental Shelf Cases	203
a. Norm-Creating Character	204
b. State Practice and <i>Opinio Juris</i>	210
c. Active Undertakings	212
d. Restraint as State Practice	214
e. Treaty Practice as State Practice?	215
2. Beyond the North Sea Continental Shelf Cases	218
a. Lack of Alternative Evidence	222
b. Treaty Practice as State Practice	223
c. Treaty Law as Clarification of Pre-Existing Custom	224
3. Conclusion as to Customary Status of Reprisal Prohibitions	226
4. Persistent Objector Rule and <i>Jus Cogens</i>	228
<u>Ch. 7: Additional Bases of the Illegality of Reprisals</u>	230
i. Introduction	230
ii. The Prohibition on Collective Punishment	230
iii. The Principles of Humanity	235
1. Is “Humanity” a Formal Source of Law?	243
a. The <i>Corfu Channel</i> Case	245
b. The <i>Nicaragua</i> Case	248
2. Humanity and the Requirements of Specificity	250
iv. Humanity and the Generation of Customary law	252
v. Humanity as an Interpretative Criterion	253

vi.	The Obligation to Respect the Geneva Conventions and Protocol I in “All Circumstances”	256
	1. The <i>Travaux Préparatoires</i>	258
	2. Reciprocity v Reprisals	261
	<u>Conclusion</u>	268
i.	Applicable Law	268
	1. The First Tier of Applicable Law	269
	2. The Third Tier of Applicable Law	271
	3. The Battleground for Reprisals: The Second Tier of Applicable Law	273
ii.	“Applicable” Treaties / Customary Law	275
	1. Express Prohibitions on Reprisals	275
	2. Implied Prohibitions on Reprisals	278
	a. The Prohibition on Collective Punishment	279
	b. “In All Circumstances” and Analogous Provisions	280
iii.	The Principles of “Humanity”	285
iv.	Discretionary Barriers	286
	Bibliography	288

abbreviations

AC	<i>Appeals Cases</i>
AD	<i>Annual Digest and Reports of Public International Law Cases</i>
AIDI	<i>Annuaire de l'Institut de Droit International</i>
AJIL	<i>American Journal of International Law</i>
AI	Amnesty International
All ER	<i>All England Reports</i>
App. Cas.	<i>Appeals Cases</i>
Art.	Article
Arts	Articles
B&Ad.	<i>Barnwell & Adolphus' Reports</i>
BCLC	<i>Butterworths Company Law Cases</i>
BCR	<i>British Columbia Reports</i>
BYIL	<i>British Yearbook of International Law</i>
Can	Canada
CBR (NS)	<i>Canadian Bankruptcy Reports (New Series)</i>
CCL10	Control Council Law No. 10
Ch.	<i>Chancery Division</i>
Chan. Cas.	<i>Chancery Cases</i>
Ch. D.	<i>Chancery Division</i>
CLR	<i>Commonwealth Law Reports</i>
CJ	Chief Justice
Cmd	Command Papers (United Kingdom)
Co.	Company
Consol. T.S.	<i>Consolidated Treaty Series</i>
Co. Rep.	<i>Cooke's Reports</i>
Cro. Jac.	<i>Croke's King's Bench Reports (tempore James I)</i>
Ct.	Court
Cth	Commonwealth of Australia
D.C.	District of Columbia
Dept.	Department
DLR	<i>Dominion Law Reports</i>
Doc.	Document
Dow&Cl	<i>Dow & Clark's Reports</i>
Ed.	Edition (when preceded by a number), otherwise editor
Eds	Editors
Eg.	Exempli gratia
EHRR	<i>European Human Rights Reports</i>
ER	<i>English Reports</i>
Esp.	Especially
Et al.	Et alii
Etc.	Et cetera
Exch.	<i>Exchequer Reports</i>

Ex. D.	<i>Exchequer Division</i>
F.	<i>Federal Reporter</i>
G.A.	General Assembly (of the United Nations)
GAOR	General Assembly Official Records
HK	Hong Kong (British Colony era)
HLC	<i>House of Lords Cases</i>
HMSO	Her/His Majesty's Stationery Office
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep.	<i>International Court of Justice Reports</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
Id.	<i>Ibidem</i>
ILC	International Law Commission
ILA	International Law Association
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
Ind. Rep.	<i>Indian Reports</i>
J	Justice
JA	Justice of Appeal
JJ	Justices
JPL	<i>Journal of Planning and Environment Law</i>
Jr.	Junior
KB	<i>King's Bench Division</i>
LJ	Lord Justice
LJ Ch.	<i>Law Journal Reports (Chancery Division)</i>
LM&P	<i>Lowndes, Maxwell & Pollocks Reports</i>
LNTS	<i>League of Nations Treaty Series</i>
LR Eq.	<i>Law Reports: Exchequer</i>
LRQB	<i>Law Reports Queen's Bench</i>
LRTW	Law Reports of Trials of War Criminals
Ltd.	Limited
MA	Massachusetts
Minn.	Minnesota
MR	Master of the Rolls
M&W	<i>Meeson & Welsby's Reports</i>
N.	Note
NBR	<i>New Brunswick Reports</i>
No.	Number
NSW	New South Wales
NY	New York
NZ	New Zealand
OAU	Organization of African Unity

P.	Page
Par.	Paragraph
Pars	Paragraphs
PCIJ	Permanent Court of International Justice
PD	<i>Probate Division</i>
PP	Pages
QB	<i>Queen's Bench Division</i>
R	Rex or Regina
Res.	Resolution
Rev.	Revised
RIAA	<i>Reports of International Arbitral Awards</i>
Salk.	<i>Salkeld's King's Bench Reports</i>
SC	<i>Sessions Cases</i>
SCR	<i>Supreme Court Reports</i>
Ser.	Series
Sess.	Session
Smith KB	<i>Smith's King's Bench Reports</i>
Stat.	<i>United States Statutes at Large</i>
Supp.	Supplement
S. (or §)	Section
SS	Schutzstaffel
Trans.	Translated
TWC	Trials of War Criminals before the Nuremberg Military Tribunals
UCLA	University of California, Los Angeles
UK	United Kingdom of Great Britain and Northern Ireland
UKTS	<i>United Kingdom Treaty Series</i>
UN	United Nations
UNWCC	United Nations War Crimes Commission
UNTAET	United Nations Transitional Administration in East Timor
UNTS	<i>United Nations Treaty Series</i>
US	United States
Vaugh.	<i>Vaughan's Reports</i>
VLR (L)	<i>Victorian Law Reports (Law)</i>
WR	<i>Weekly Reporter</i>
WWR	<i>Western Weekly Reports</i>

introduction

One of the fundamental principles asserted as a basis for limiting the prescription and interpretation of criminal laws is the principle of legality.¹ At its core lies the descriptive assumption that the subject of the law is capable of exercising free will,² and the normative corollary that unless the subject is given a fair opportunity to adjust his behaviour to the law its penalties ought not to apply to him.³ The principle of legality, expressed in its most abstract sense, requires the non-arbitrary prescription and interpretation of law,⁴ but is more typically expressed through concretised corollaries requiring, for *e.g.*, that criminal laws be prescribed non-retroactively and in unambiguous form and that they be construed strictly and (in the case of ambiguity not extensive enough to be fatal to the law's applicability) to the benefit of the accused.⁵ Of the various criticisms that have been levelled against prosecutions for crimes under international law, the most serious is the claim that those prosecutions infringe the principle of legality.⁶

Issues pertaining to legality arise in the context of the definitional elements of crimes, but also arise in the context of general principles relating to criminal responsibility, including defences. The scope and definition of defences to crimes under international law remains uncertain, and where uncertainty over substantive criminal law exists, the risk that the principle of legality will be infringed

¹ The principle of legality is asserted as a fundamental principle of criminal law in both common law and civil law systems (*see* Chapter 2, *nullum crimen sine lege*, below).

² *See* A. Ashworth, *Principles of Criminal Law*, 3rd ed., Oxford University Press, Oxford, 1999, p. 27.

³ H.L.A. Hart, *Punishment and Responsibility*, Clarendon Press, Oxford, 1968, p. 181.

⁴ A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, Butterworths, London, 1993, p. 10.

⁵ *See* Chapter 2, *nullum crimen sine lege*, below.

⁶ G.J. Simpson, "War Crimes: A Critical Introduction", in T.L.H. McCormack and G.J. Simpson, *The Law of War Crimes: National and International Approaches*, Klumer Law International, The Hague, 1997, p.11. *See, e.g.*, L.C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Manchester University Press, Manchester, 2000, p. 41, who argues that "crimes against humanity" and "crimes against peace" were both defined as crimes within the Charter of the International Military Tribunal at Nuremberg, even though they had not been formerly defined as crimes under international law.

is heightened. The topic of defences to crimes under international law has been described as the “most confused and contentious area of international criminal law”.⁷

This thesis seeks to examine the principal norms which govern the application and interpretation of law under the Rome Statute of the International Criminal Court (hereinafter ICC Statute),⁸ in so far as they are relevant to determining the admissibility and content of defences to crimes under the Statute. It is hoped that such an examination could be of assistance to others in the determination of which defences are potentially applicable under the ICC Statute, and the scope of those defences.

Prior to the 1990’s, there was no authoritative, conventional⁹ provision for the admissibility of any defences to crimes under international law, other than the right of the defendant to offer a factual refutation of the prosecution case.¹⁰ Explicit recognition of the availability, definition and scope of separate defences occurred for the first time, in the history of conventional international criminal law, within the ICC Statute. The ICC Statute addresses the matter of defences by enumerating and defining a number of defences within the Statute (*ne bis in idem*;¹¹ exclusion of jurisdiction over persons under eighteen;¹² mental incapacity;¹³ intoxication;¹⁴ self-defence and defence of others and property;¹⁵ duress;¹⁶ mistake of fact or law;¹⁷ and superior orders¹⁸) yet leaving open the possibility of the Court’s consideration of other, non-enumerated, defences where those defences derive from a defined set of

⁷ M. Lippman, “Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War”, (1996) 15 *Dickinson Journal of International Law* 1, pp. 1-2. See, also, A. Eser, “‘Defences’ in War Crime Trials” in Y. Dinstein and M. Tabory (eds), *War Crimes in International Law*, Martinus Nijhoff Publishers, The Hague, 1996, p. 252.

⁸ Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (1998) as corrected by UN Doc C.N.577.1998.TREATIES-8 (1998), UN Doc C.N.604.1999.TREATIES-18 (1999) and UN Doc C.N.1075.1999.TREATIES-28 (1999).

⁹ The term *conventional* as employed in this thesis means by way of international treaty (except when used to refer to a class of weapons).

¹⁰ See V. Morris and M.P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 1, Transnational Publishers Inc., Irvington-on-Hudson, 1995, pp. 103-4; P. Krug, “The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation”, (2000) 94 *American Journal of International Law* 317, p. 317.

¹¹ Art. 20, ICC Statute.

¹² Art. 26, ICC Statute.

¹³ Art. 31(1)(a), ICC Statute.

¹⁴ Art. 31(1)(b), ICC Statute.

¹⁵ Art. 31(1)(c), ICC Statute.

¹⁶ Art. 31(1)(d), ICC Statute.

¹⁷ Art. 32, ICC Statute.

¹⁸ Art. 33, ICC Statute.

applicable law.¹⁹ The ICC Statute therefore offers, for the first time in the history of conventional international criminal law, a codification of defences, albeit only a partial one. The ICC Statute has been criticised on the basis that it is not a “dogmatically refined” international criminal code.²⁰ Dogmatic, or rational, coherence was necessarily compromised by the need to merge aspects of the criminal justice systems of over 150 States into one Statute acceptable to all delegations represented at the Rome Diplomatic Conference of Plenipotentiaries which promulgated the ICC Statute.²¹ The “General Part”²² of international criminal law elaborated within the ICC Statute nevertheless represents “an ambitious attempt at codifying general principles of international criminal law”.²³

This thesis is divided into two Parts:

Part I considers the principal norms which govern the application and interpretation of law by the ICC, in so far as those norms are relevant to the application and interpretation of defences to crimes under the ICC Statute. There is no intent here to delve into the theoretical dimensions of the scope of “application” in its formal sense as a function for relating prescriptive norms to the facts of a particular case.²⁴ While “interpretation” is sometimes treated as an aspect of the broader function of “application”,²⁵ this thesis works on the assumption that a distinction can clearly be drawn between the process of determining which norms are operative in the context following rules of “application”,²⁶ and the process of determining the meaning of those norms following rules of “interpretation”.²⁷ This is

¹⁹ See Art. 21, ICC Statute.

²⁰ See K. Ambos, “General Principles of Criminal Law in the Rome Statute”, (1999) 10 *Criminal Law Forum* 1, p. 1.

²¹ *Id.*

²² On the distinction between the “General Part” and “Special Part” of criminal law, see, e.g., J. Gardner, “On the General Part of the Criminal Law”, in A. Duff (ed), *Philosophy and the Criminal Law: Principles and Critique*, Cambridge University Press, Cambridge, 1998.

²³ W.A. Schabas, “General Principles of Criminal Law in the International Criminal Court Statute (Part III)”, (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 400, p. 428.

²⁴ M.S. McDougal, H.D. Lasswell, & J.C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure*, New Haven Press, New Haven, 1994, p. xxv, n. 1.

²⁵ See *id.*

²⁶ See entry for “apply” in J.R. Nolan and J.M. Nolan-Haley, *Black’s Law Dictionary*, 6th ed., West Publishing Co., St. Paul, Minn., 1990 (hereinafter *Black’s Law Dictionary*), p. 99.

²⁷ See entry for “interpretation” in *Black’s Law Dictionary*, pp. 817-818.

a distinction which is incorporated into the structure and terms of the ICC Statute,²⁸ and is therefore adopted here.

Part II of this thesis considers these rules of application and interpretation in the context of one specific defence, namely the defence of belligerent reprisals. This defence has been chosen for two reasons: (1) Its current status under international law is uncertain and the object of considerable controversy.²⁹ Thus, there is some benefit in a work on defences to war crimes in assessing the admissibility of this defence under the ICC Statute; (2) there is certainly sufficient basis for concluding that at least up until very recently, the defence of belligerent reprisals was clearly recognised as a defence to war crimes under international law.³⁰ Nevertheless, the institution of belligerent reprisals is often viewed with abhorrence. As the ICTY Trial Chamber stated in its Judgment in *Prosecutor v Kupreškić*:

It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation.³¹

²⁸ See, e.g., Article 21(1) of the ICC Statute which identifies the relevant sources of law to be applied by the ICC, but does not identify any means for ascertaining the meaning of law falling within the enumerated sources; see, also, Article 21(3) of the ICC Statute which refers to the “application and interpretation” of law, thus distinguishing the two processes.

²⁹ See, e.g., E. Mezzetti, “Grounds for Excluding Criminal Responsibility”, F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute*, Editoriale Scientifica, Naples, 1998, p. 157.

³⁰ Eser stated, for instance, in his well-cited work on defences to war crimes, that in relation to belligerent reprisals “we are on comparatively safe ground since international law, in principle, recognizes retributive measures against another State or its nationals, at least in so far as the measures are intended to force the adversary to conduct himself according to international law.” (A. Eser, “‘Defences’ in War Crimes Trials”, *Israel Yearbook on Human Rights* 201, p. 217). In *R v Finta* (1994), the respondent was charged with the commission of war crimes and crimes against humanity directed against the Jewish population in Hungary during the Second World War under §7(3.71) of the *Canadian Criminal Code*. By §7(3.73) an accused may rely upon any justification, excuse or defence available under international law or the laws of Canada when charged under §7(3.71). La Forrest J, in his dissenting judgment stated that “[t]he inclusion of the international justifications, excuses and defences will allow any recognized doctrines peculiar to the international context to be included. An example of a peculiar form of international defence is reprisals” ((1994) 104 ILR 284, p. 331). The Supreme Court of the Federal Republic of Germany held, in its 1969 Judgment in the *Norwegian Resistance Case*, that “a reprisal in time of war is undeniably an act recognized by international law” ((1969) 61 ILR 663, p. 667).

³¹ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 528.

Mezzetti stated that it would be “completely inappropriate” if belligerent reprisals were to “surreptitiously find their way into the [ICC] Statute through unenumerated grounds – applied and interpreted by the ICC”.³² An examination of the defence of belligerent reprisals enables us, therefore, to examine whether those rules of application and interpretation under the ICC Statute which are aimed, in part, at achieving some level of normative consistency in international criminal law,³³ nevertheless permit sufficient flexibility to facilitate the development of the law in certain respects.

PART I

Article 21 of the ICC Statute, which is examined in Chapter 1 of this thesis, elaborates the Statute’s principal rules of application. It sets out the relevant sources of law which may be applied by the ICC. This is of particular relevance to the admissibility of non-enumerated defences under the ICC Statute where the condition precedent to their admissibility is that they are “derived from applicable law as set forth in article 21.”³⁴

Chapter 2 examines the principle *nullum crimen sine lege* which is incorporated in Article 22 of the ICC Statute. It comprises both rules of application and interpretation. The principle *nullum crimen sine lege*, when applied to defences, protects individuals against the repeal of pre-existing defences derived from applicable law, and the narrow construction of such defences contrary to the interests of the accused. To the extent *nullum crimen sine lege* sets up rules of interpretation, there is a potential inconsistency with the Vienna Convention on the Law of Treaties which governs the ICC Statute. Both standards of interpretation are examined, as is the meaning and effect of their mutual operation.

The final Chapter in this Part, Chapter 3, concerns judicial discretion. Article 31(3) of the ICC Statute empowers the ICC to consider non-enumerated defences in ostensibly discretionary terms (“the Court *may* consider” such

³² E. Mezzetti (1998), p. 157.

³³ L.S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, Kluwer Law International, The Hague, 1997, p. 332.

³⁴ Art. 31(3), ICC Statute.

defences).³⁵ Chapter 3 examines whether the ICC's power to consider and apply non-enumerated defences is in fact discretionary or whether it must be exercised according to law. The extent of judicial discretion that exists in relation to the consideration of non-enumerated defences is determined in part by the operation of the principle *nullum crimen sine lege*. An accused can only be considered to possess a right to raise non-enumerated defences deriving from the applicable law where the power of the ICC to apply defences is non-discretionary,³⁶ or discretionary only in the "weakest" sense.³⁷

PART II

Chapter 4 of this thesis examines the doctrine of belligerent reprisals under customary international law. It examines the prerequisites to the legality of reprisals as well as rules governing the manner in which they are employed.

Chapter 5 examines the express prohibitions on reprisals against specific targets under conventional law. The treaties in force leave a number of *lacunae*, thus potentially there are a number of targets that could theoretically be attacked in reprisal.

Chapter 6 examines the customary law status of these treaty provisions. This examination must take place against the backdrop of the rules of application and interpretation. Certain interpretative criteria under the ICC Statute apply to the determination and interpretation of customary law.

³⁵ Art. 31(3), ICC Statute (emphasis added).

³⁶ According to Hart's view of discretion, where judges possess discretion no party in the proceedings has a pre-existing legal right to prevail. This observation derives from Dworkin's reading of Hart (R. Dworkin, "The Model of Rules I", in *Taking Rights Seriously*, Harvard University Press, Cambridge, 1977, p. 17). Although Hart later complained that Dworkin misrepresented his views on a number of accounts, Hart did not object to this particular observation (see B. Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence", (2003) 48 *American Journal of Jurisprudence* 17, p. 20).

³⁷ According to Dworkin's view of discretion, discretion can be divided into "strong" and "weak" varieties. Where judges are accorded "weak" discretion, parties with pre-existing legal rights retain the right to prevail. While strong discretion involves the absence of standards that govern the process of decision-making, weak discretion (in one of the two senses identified by Dworkin) means that there are applicable standards, but they cannot be applied mechanically and require the use of judgment (Dworkin (1977), pp. 31-32).

The final Chapter, Chapter 7 examines additional bases of the illegality of reprisals. The fact that reprisals are a strongly entrenched institution of customary international law, and that prohibitions on reprisals have occurred in a largely piecemeal fashion leaving a number of *lacunae*, means that international jurists seeking to posit the general outlawry of reprisals, or at least a wider set of prohibitions, must often rely on highly innovative or constructive legal arguments, or alternatively, on judicial discretion. The permissibility of these forms of arguments, and the extent of judicial discretion, is assessed in light of the rules of application and interpretation under the ICC Statute with a view to determining the scope of the admissibility of reprisals as a defence under the Statute.

**

“DEFENCES”

A final word on terminology: This thesis is concerned with “defences” under the ICC Statute. The term “defence” is of common law origin, though it is a term commonly employed in works on international criminal law,³⁸ including those by civil law lawyers.³⁹ In its common law usage, the term “defence” has both narrow and wide meanings. In its narrow or “technical”⁴⁰ sense the term is only used to cover those circumstances precluding criminal responsibility despite the presence of both *actus reus* and *mens rea*.⁴¹ Thus the argument that a crucial element of the offence is missing is often termed a “failure of proof” argument and distinguished from a “defence” *stricto sensu*.⁴² Nevertheless, there have been some conceptual

³⁸ E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, The Hague, 2003, p. 229.

³⁹ See, e.g., van Sliedregt (2003); G.J.G.J. Knoops, *Defenses in Contemporary International Criminal Law*, Transnational Publishers, Ardsley, NY, 2001; A. Eser, “‘Defences’ in War Crime Trials” in Y. Dinstein and M. Tabory (eds), *War Crimes in International Law*, Martinus Nijhoff Publishers, Boston, 1996.

⁴⁰ A. Ashworth, *Principles of Criminal Law*, 3rd ed., Oxford University Press, Oxford, 1999, p. 209.

⁴¹ See *id.*

⁴² *Id.*

difficulties in distinguishing defences *stricto sensu* from other “defences”.⁴³ Glanville Williams, for *e.g.*, has stated that the distinction between the definitional and defence elements of a crime is impossible to draw satisfactorily.⁴⁴ The term “defence” is therefore commonly used in academic writings in its wide or “casual”⁴⁵ sense to refer (according to Robinson) to “any set of identifiable conditions or circumstances which may prevent a conviction for an offense”.⁴⁶ This thesis does not seek to enter into the debate on the categorisation and definition of the term “defences”, and the term will be employed here in its wide or non-technical sense. Thus any exonerating condition arising under the ICC Statute or its applicable law is potentially captured by the term “defence” as employed in this thesis.

⁴³ *See, e.g., generally*, D.N. Husak, “The Serial View of Criminal Law Defenses” (1992) 3 *Criminal Law Forum* 369.

⁴⁴ G. Williams, *Textbook of Criminal Law*, 2nd ed., Stevens and Sons, London, 1983, p. 138.

⁴⁵ P.H. Robinson, “Criminal Law Defenses: A Systematic Analysis” (1982) 82 *Columbia Law Review* 199, p. 203.

⁴⁶ *Id.*

Part I

Rules of Application & Interpretation

1

applicable law

i. INTRODUCTION

Article 21 of the ICC Statute is entitled “Applicable law” and sets out a hierarchy of three sources of law which are to be applied by the ICC in the adjudicative process.⁴⁷ The specification of the sources of international criminal law satisfies, in part, the requirements of the principle of legality (a requirement further satisfied by the incorporation of separate provisions on *nullum crimen sine lege*,⁴⁸ *nulla poena sine lege*,⁴⁹ and non-retroactivity,⁵⁰ within the ICC Statute),⁵¹ but is of especial importance in the determination of the admissibility of criminal defences. Certain defences are expressly enumerated and defined within the ICC Statute, but these enumerated defences are not exhaustive of all defences admissible before the ICC. A number of defences are expressly set out in Article 31(1) of the ICC Statute (where they are referred to as “grounds for excluding criminal responsibility”, a term not employed in relation to the defences expressly set out within other articles of the Statute).⁵² Other defences are expressly provided for in Articles 20, 26, 32 and 33 of the ICC Statute.⁵³ Article 31(3) of the ICC Statute provides, however, that “[a]t trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law

⁴⁷ Art. 21, ICC Statute.

⁴⁸ Art. 22, ICC Statute.

⁴⁹ Art. 23, ICC Statute.

⁵⁰ Art. 24, ICC Statute.

⁵¹ In fact, Art. 21 of the ICC Statute constitutes the first codification of the sources of international criminal law (M.M. deGuzman, “Article 21: Applicable Law”, in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 438, margin 6).

⁵² Art. 31(1), ICC Statute.

⁵³ Arts 20, 26, 32 & 33, ICC Statute.

as set forth in article 21.”⁵⁴ Article 21 of the ICC Statute is therefore a central referent in the determination of the admissibility of non-enumerated defences under the ICC Statute. An understanding of which non-enumerated defences are potentially applicable under the ICC Statute can only follow from a comprehensive examination of precisely which sources of law belong to the applicable law set out in Article 21 of the ICC Statute. Article 21 provides as follows:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion, or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.⁵⁵

The elaboration of three hierarchical tiers of applicable law in Article 21 of the ICC Statute raises a number of issues. The first relates to the determination of which sources of law are captured within each tier, and is essentially a question of both definition and demarcation. The second issue relates to the operation of the hierarchical relationship between each tier. Hierarchical rules relating to sources of law (e.g. the rule *lex posterior derogat priori*),⁵⁶ often involve the application of one norm in place of another in the case of a direct inconsistency, but Article 21 of the ICC Statute appears to envisage the simultaneous application of numerous legal sources which may operate without any conflict whatsoever (each source complimenting or clarifying the other). Article 21 of the ICC Statute states that the

⁵⁴ Art. 31(3), ICC Statute.

⁵⁵ Art. 21, ICC Statute.

⁵⁶ A later statute takes away the effect of a prior one (Black's Law Dictionary, p. 912).

ICC shall apply the first tier of applicable law “[i]n the first place”,⁵⁷ the second tier “[i]n the second place, where appropriate”,⁵⁸ and the third tier “[f]ailing that”.⁵⁹ There is, however, no clear indication of the circumstances in which recourse may be had to second or their-tier sources of applicable law; nor is it clear whether recourse to those additional sources of law is a power to be exercised by the ICC at its discretion, or whether it is instead, a power to be exercised *de jure*. The determination of whether a defendant may raise a particular non-enumerated defence in accordance with Article 31(3) of the ICC Statute will depend, therefore, not only on whether that defence derives from one of the three tiers of applicable law under Article 21 of the ICC Statute, but also whether that defence may be applied by the ICC in light of the hierarchical rules that govern which sources of applicable law may be applied by the ICC in the circumstances. The final issue to be examined in this chapter concerns the effect of Article 21(3) of the ICC Statute which states that the application and interpretation of law pursuant to Article 21 must be consistent with internationally recognised human rights.⁶⁰ Although Article 21(3) exists outside of the three-tiered hierarchy of applicable law elaborated in Article 21(1), the body of law referred to in Article 21(3) – *i.e.*, internationally recognised human rights – appears to effectively trump all other potentially applicable law under the ICC Statute, including the terms of the ICC Statute itself.

ii. THE THREE TIERS OF APPLICABLE LAW

1. THE FIRST TIER (ART. 21(1)(A))

The first tier of applicable law comprises the ICC Statute, the Elements of Crimes and the Rules of Procedure and Evidence.⁶¹ Article 21(1)(a) of the ICC Statute states that these sources shall be applied “[i]n the first place”,⁶² which has been interpreted as indicating the “primacy”,⁶³ or “superiority”,⁶⁴ of the Statute and its related

⁵⁷ Art. 21(1)(a), ICC Statute.

⁵⁸ Art. 21(1)(b), ICC Statute.

⁵⁹ Art. 21(1)(c), ICC Statute.

⁶⁰ Art. 21(3), ICC Statute.

⁶¹ Art. 21(1)(a), ICC Statute.

⁶² Art. 21(1)(a), ICC Statute.

⁶³ deGuzman (1999), p 439, margin 8.

instruments over the other sources of law which the ICC may apply. Nevertheless, other sources of law may act by way of clarification, or even operate as an exception to the terms of the ICC Statute. A relevant defence, for *e.g.*, which is located in the second or third tier of applicable law, and admitted under Article 31(3) of the ICC Statute, is effectively given primacy over that part of the ICC Statute which enumerated and defined the relevant crime. The defence, though not expressly provided for in the ICC Statute, acts as an exception to the terms of the Statute itself. Of course, given that the ICC Statute and its related instruments are to be applied “[i]n the first place”, this would suggest that other sources of law (*i.e.* those deriving from the second or third tier of applicable law) can only be applied to the extent that they are compatible with the ICC Statute (for *e.g.*, by clarifying ambiguity in the Statute or filling a *lacuna*), or else, to the extent that departure from the terms of the Statute is expressly provided for (for *e.g.*, in relation to defences located in the second or third tier of applicable law, as provided for in Article 31(3)).

Article 21(1)(a) of the ICC Statute lists the ICC Statute, the Elements of Crimes and the Rules of Procedure and Evidence as each falling within the first tier of applicable law without setting out a hierarchy that applies between them in the case of inconsistency. Nevertheless, other provisions in the ICC Statute clearly indicate the primacy of the ICC Statute over the Elements of Crimes and the Rules of Procedure and Evidence. Article 9(1) of the ICC Statute states that the Elements of Crimes “shall assist the Court in the interpretation and application of articles 6, 7 and 8”,⁶⁵ indicating that the ICC Statute shall be the starting point in the interpretation and application of the provisions relating to core crimes, and that the Elements of Crimes operate by way of clarification. In addition, a supremacy clause is implied in Article 9(3) of the ICC Statute which states that “[t]he Elements of Crimes and amendments thereto shall be consistent with this Statute”,⁶⁶ suggesting that any inconsistent Elements are *ultra vires* and inapplicable. In relation to the Rules of Procedure and Evidence, Article 51(5) of the ICC Statute expressly states that in the

⁶⁴ A. Pellet, “Applicable Law”, in A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, vol. 2, p. 1078.

⁶⁵ Art. 9(1), ICC Statute.

⁶⁶ Art. 9(3), ICC Statute.

event of a conflict between the Statute and the Rules of Procedure and Evidence, “the Statute shall prevail”.⁶⁷

2. THE SECOND TIER (ART. 21(1)(B))

The second tier of applicable law comprises, “where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”⁶⁸ There are two questions, in particular, that arise here. The first relates to the meaning of “applicable” treaties: Article 21 does not specify which treaties (outside of the ICC Statute and its related instruments)⁶⁹ are to apply. It appears entirely circuitous in a provision on “applicable law” to state that treaties apply where “applicable”. The second question relates to the meaning of “the principles and rules of international law”, and whether this category includes the entire *corpus* of general international law, or only a segment thereof.

In relation to “applicable treaties”, this category could include provisions in human rights treaties to the extent that they are applicable as “internationally recognized human rights” for the purpose of Article 21(3) of the ICC Statute.⁷⁰ As discussed below, however, it is unlikely that “internationally recognized human rights” in Article 21(3) includes human rights norms applicable only as a matter of treaty law.⁷¹ It could be argued, then, that “applicable treaties” includes those treaties relevant to determining the content of norms to be applied by the ICC. It has been suggested, for instance, in support of this proposition, that:

widely ratified treaties may be viewed as evidence of the “rules and principles of international law.” In this regard, for example, the Genocide Convention, along with its *travaux*, and the Hague and Geneva Conventions may be relevant to the determination of an issue before the Court.⁷²

⁶⁷ Art. 51(5), ICC Statute. No provision is made in the ICC Statute for the resolution of inconsistencies between the Elements of Crimes and the Rules of Procedure and Evidence. As both were adopted and can be amended by a two-thirds majority of the members of the Assembly of States Parties (Arts 9(1)-(2), 51(1)-(2), ICC Statute), Schabas has suggested that they are of equal value and that neither takes precedence over the other (Schabas (1998), p. 404).

⁶⁸ Art. 21(1)(b), ICC Statute.

⁶⁹ As provided for in Art. 21(1)(a), ICC Statute.

⁷⁰ Art. 21(3), ICC Statute.

⁷¹ See below.

⁷² deGuzman (1999), p 440, margin 10.

The problem here is that the three-tiered hierarchy of applicable law in Article 21(1) of the ICC Statute is a hierarchy of formal sources of law. Where treaties are referred to for their evidential value in ascertaining the content of other norms (*e.g.* customary international law, or the meaning of similarly worded provisions in the ICC Statute), those treaties are not applied as such, but are rather subsidiary means for the determination of applicable law. The fact that “applicable treaties” appears in Article 21(1) of the ICC Statute – as opposed, for instance, to Article 21(2),⁷³ which refers to case law, which is clearly applicable only for its evidential value – indicates that the drafters envisaged the possibility of treaties (outside of the ICC Statute) being applied by the ICC *qua* treaty law.

One suggestion is that the reference to “applicable treaties” leaves open the possibility of the ICC acting according to some special jurisdiction specifically conferred on the ICC by two or more States.⁷⁴ It may be, for instance, that the international community wishes the ICC to deal with a number of atrocities that took place in a newly emergent State prior to that State’s accession to the ICC Statute. The problem with this view is that if the jurisdiction of the ICC were to be expanded for some narrow purpose, this would require an amendment to the ICC Statute itself (rather than simply an agreement between States).⁷⁵ Any such amendment would confer the necessary powers to exercise the expanded jurisdiction, leaving the reference to “applicable treaties” in Article 21(1)(b) redundant.

Another possibility as to the meaning of “applicable treaties” is that it refers to the Geneva Conventions of 1949 in so far as those conventions form a directly applicable component of the definition of war crimes within the ICC Statute.⁷⁶ Article 8(2)(a) of the ICC Statute confers jurisdiction over “[g]rave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention...”;⁷⁷ Article 8(2)(c) confers jurisdiction, in the case of

⁷³ Art. 21(2), ICC Statute.

⁷⁴ Pellet (2002), p. 1069.

⁷⁵ The ICC’s jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis* are each tightly circumscribed within the ICC Statute (*see* Parts 2-3, ICC Statute).

⁷⁶ *See* Pellet (2002), pp. 1069-70.

⁷⁷ Art. 8(2)(a), ICC Statute.

an armed conflict not of an international character, over “serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause...”.⁷⁸ It could be asserted that the reference to the Geneva Conventions does not result in the ICC applying those Conventions as such – the ICC Statute only incorporates a number of its principles which apply as elements of the ICC Statute. The position could be analogous to the applicability of a treaty incorporated into the domestic law of a dualist State: the treaty applies *qua* domestic law, even where the legislation incorporating the treaty makes express reference to the treaty itself.⁷⁹ Certainly this assertion could hold in relation to Article 8(2)(c) of the ICC Statute, which, by referring to the persons protected, the factual preconditions to jurisdiction (namely conflict not of an international character), as well as the prohibited acts, makes it unnecessary to refer to Article 3 common to the Geneva Conventions of 1949, let alone to apply common Article 3 as such. Conversely, Article 8(2)(a) of the ICC Statute refers to the “grave breaches” provisions of the Geneva Conventions in such a manner as to require detailed reference to the Geneva Conventions themselves. It is not entirely clear in this context whether it is the ICC Statute alone that is being applied, or whether the Geneva Conventions are also being “applied”. The determination of whether relevant persons or property are protected under the Geneva Conventions (a precondition to the ICC’s subject-matter jurisdiction under Article 8(2)(a) of the ICC Statute),⁸⁰ does at first appear to involve the “application” of those Conventions. Article 8(2)(a) of the ICC Statute is based on the similarly worded Article 2 of the ICTY Statute.⁸¹ In relation to the latter article, the Appeals Chamber of the ICTY in its Decision on Defence Motion for Interlocutory Appeal on Jurisdiction in *Prosecutor v Tadić* stated that:

⁷⁸ Art. 8(2)(c), ICC Statute.

⁷⁹ See, e.g., H. Lauterpacht, *Oppenheim’s International Law*, 8th ed., David McKay Co., New York, 1955, vol. 1, pp. 37-39.

⁸⁰ Art. 8(2)(a), ICC Statute.

⁸¹ Art. 2, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 (1993) (hereinafter ICTY Statute).

the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as “protected” by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of “protected persons or property” must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict.⁸²

In light of the need to engage in extensive consideration of the terms of the Geneva Conventions, the Appeals Chamber referred to the “interplay” between the ICTY Statute and the Geneva Conventions.⁸³ In its Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence in the case of *Prosecutor v Rajić*, the ICTY Trial Chamber’s decision appears to involve the simultaneous application of Geneva Convention IV and the ICTY Statute:

The Trial Chamber therefore finds that the property of Stupni Do became protected property for the purposes of the grave breaches provisions of Geneva Convention IV. The Trial Chamber notes this for the sole purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused.⁸⁴

Even still, it could be asserted that there is no “application” of the Geneva Conventions as such. The Secretary-General of the United Nations, in his report on the ICTY Statute, took the view that the ICTY should only apply rules of international humanitarian law which were beyond any doubt part of customary law (so as to avoid the problem of adherence of some but not all States to specific conventions), and that the law applicable in armed conflict as embodied in the Geneva Conventions of 1949 was such an example of customary law.⁸⁵ The Geneva

⁸² *Prosecutor v Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 81.

⁸³ *Id.*, par. 83.

⁸⁴ *Prosecutor v Rajić*, Case No. IT-95-12-R61, Trial Chamber, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, par. 42. This decision is cited by Pellet as evidence of the direct application of the Geneva Conventions by the ICTY (Pellet (2002), p. 1069, n. 107).

⁸⁵ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), pars 34-35.

Conventions could therefore be referred to, both in the ICTY and ICC Statutes, as an evidentiary source of applicable customary law. In this sense, there would be no “application” of any treaty (other than the statute of the court).⁸⁶ It is almost certain, for instance, that if there was a party to the ICC Statute which was not a party to the Geneva Conventions, the crimes contained within Article 8(2)(a) of the ICC Statute would still be prosecuted in relation to atrocities carried out by nationals of that State. There could be no argument that the Geneva Conventions did not directly protect the affected persons or property: either Article 8(2)(a) of the ICC Statute would be taken as incorporating customary rules reflected in the Conventions, or the terms of Article 8(2)(a) would be taken as an independent basis of consent for the application of the provisions of the Geneva Conventions, with the ICC Statute being the only treaty directly applied as such. It should be noted that in relation to the jurisprudence of the ICTY, that tribunal has not endorsed the view of the UN Secretary-General that the ICTY should only apply rules of humanitarian law which are beyond any doubt part of customary law. The ICTY Appeals Chamber has taken the view that Article 3 of the ICTY Statute (which confers jurisdiction *ratione materiae* in respect of violations of the “laws or customs of war”) confers jurisdiction over “violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, *i.e.*, agreements which have not turned into customary international law.”⁸⁷ There is, of course, no equivalent provision within the ICC Statute. The jurisdiction *ratione materiae* of the ICC is limited to the crimes enumerated within the Statute.⁸⁸ On the other hand, the ICC Statute does allow for the application of external sources of law through Article 31(3) (allowing for non-enumerated defences). Thus, it could be argued, provisions located in treaty law and applicable *qua* treaty law could be applied by the ICC as provisions of “applicable treaties” if they relate to a ground excluding criminal responsibility not enumerated in the ICC Statute. It could be, for *e.g.*, that a ground of exculpation is recognised under treaty law that has no customary counterpart, or alternatively, that a ground of exculpation

⁸⁶ The ICTY Statute is not strictly speaking a treaty of course, having been promulgated as a resolution of the Security Council.

⁸⁷ *Prosecutor v Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1 October 1995, par. 89.

⁸⁸ Art. 5, ICC Statute.

recognised under customary law has been narrowed or removed by treaty provisions not yet binding as customary law.

A further explanation for the reference to “applicable treaties” is that it is simply a place-holder for the introduction of treaty crimes into the subject-matter jurisdiction of the ICC at a later date. The negotiating history of the ICC Statute indicates that a significant number of States originally supported the incorporation of various treaty-based crimes into the subject-matter jurisdiction of the ICC. At its forty-fifth session in 1993, the ILC’s Working Group on the Question of an International Criminal Jurisdiction transmitted its report to the ILC which contained a Draft Statute for an International Criminal Tribunal.⁸⁹ In the 1993 draft, three categories of crimes were envisaged: (1) crimes under general international law; (2) crimes under a list of treaties in force (*e.g.* various “terrorism” conventions directed at acts such as hijacking and hostage taking); and (3) a further category of crimes giving effect to what were described as “suppression conventions”.⁹⁰ This third category was meant to cover conventions such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of December 20, 1988, which in terms envisages that the crimes punishable in accordance with the convention are crimes under national law.⁹¹ Nevertheless, the role of these treaty crimes and suppression conventions within the framework of the ICC diminished throughout the ICC’s negotiating process. Thus, in the ILC’s 1994 Draft Statute for an International Criminal Court, the distinction between crimes under listed treaties and crimes under suppression conventions was abandoned. In effect, the two categories merged, combining the more restrictive elements of each.⁹² During further negotiations, several delegations expressed opposition to the inclusion of drug trafficking among the crimes under the jurisdiction of the ICC, primarily on the ground that cases involving such crimes were better handled by national legal

⁸⁹ See Report of the Working Group on the Question of an International Criminal Jurisdiction, Report of the International Law Commission on the Work of its Forty-Fifth Session, 3 May-23 July 1993, UN GAOR, 48th Sess., Supp. no. 10, UN Doc. A/48/10 (1993).

⁹⁰ *Id.*, par. 287.

⁹¹ See, *e.g.*, Art. 3(1), United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, UN Doc. E/Conf.82/15 (1988) (“Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law...”).

⁹² J. Crawford, “The ILC Adopts a Statute for an International Criminal Court”, (1995) 89 *American Journal of International Law* 404, p. 412.

systems and international co-operation.⁹³ At the same time, a number of delegations opposed the inclusion of the crime of terrorism within the ICC Statute.⁹⁴ Other delegates, however, were adamantly in favour of the inclusion of one or more treaty crimes within the subject-matter jurisdiction of the ICC.⁹⁵ While those States ultimately lost out, a number of them nevertheless clung to their agenda right to the end of the negotiating process. Thus Denmark suggested in the *Ad Hoc* Committee (and repeated its suggestion during the sessions of the Preparatory Committee) that, if agreement could not be reached on aggression or treaty crimes, the ICC Statute could provide for a review after a number of years to determine whether other crimes should be added to the ICC's jurisdiction.⁹⁶ Several delegations welcomed this proposal, although New Zealand and others had some doubts about the effectiveness of treaty review clauses, citing the experience of the review clause in Article 109 of the UN Charter.⁹⁷ In addition to the amendment procedures in Article 121 and 122,

⁹³ United Nations Press Release, 4 April 1995, UN Doc. GA/8869 (1995) (hereinafter GA/8869) (Comments of Sweden, United Kingdom, The Netherlands, United States and Thailand); United Nations Press Release, 4 April 1995, UN Doc. GA/8870 (1995) (hereinafter GA/8870) (Comments of Japan). Likewise, some delegations argued that to include drug trafficking crimes under the jurisdiction of the ICC would be contrary to the aim of complementarity between the ICC and national systems, and would overburden the Court (GA/8869 (Comments of Thailand, Germany and Mexico)). It was also predicted that to include drug trafficking crimes in the Statute would probably deter many countries from ratifying or acceding to the ICC Statute (GA/8869 (Comments of Sweden)).

⁹⁴ One delegation argued that to extend the Court's jurisdiction to crimes related to terrorism would increase the burden on the Court (GA/8870 (Comments of Germany)). Another delegation reserved its position on terrorism, but expressed concern that exercising jurisdiction over acts of terrorism would undermine national jurisdiction (GA/8870 (Comments of United States)). Similarly, it was stated that crimes of terrorism were already covered by an effective network of multilateral conventions, which allocated jurisdiction among States concerned (GA/8869 (Comments of United States)), and it was suggested that crimes of terrorism should be handled through international co-operation (GA/8869 (Comments of Thailand, The Netherlands)).

⁹⁵ One delegation, for instance, argued that drug trafficking and associated crimes were of great concern, especially when those crimes posed a threat to an entire nation or region, and should be included within the Court's jurisdiction (GA/8869 (Comments of Trinidad and Tobago)). Similarly, it was observed that the involvement of the Court would help the prosecution efforts of small states (GA/8870 (Comments of Antigua and Barbuda)). Another delegation observed that the inclusion of drug trafficking crimes could help remove any political factors that might arise, such as in a case involving extradition (GA/8870 (Comments of Russian Federation)). Others stated that only the most serious drug trafficking crimes should be included under the jurisdiction of the Court (GA/8869 (Comments of Canada, Australia)). Support was also expressed for including the crime of terrorism within the ICC Statute (GA/8869 (Comments of Algeria); GA/8870 (Comments of Turkey)). In supporting the inclusion of both terrorism and drug-trafficking crimes, one delegation described terrorism as an exceptional crime, and noted that terrorism was internationally recognized as often being supported by drug trafficking (GA/8870 (Comments of Turkey)).

⁹⁶ C.K. Hall, "The First Two Sessions of the UN Preparatory Committee on the establishment of an International Criminal Court", (1997) 91 *American Journal of International Law* 177, p. 179.

⁹⁷ *Id.*

the ICC Statute provides for an automatic review of the Statute after seven years,⁹⁸ and optional additional reviews thereafter.⁹⁹ This was courted particularly by those States who were of the hope that the subject-matter jurisdiction of the Court would be expanded over time to include additional crimes such as terrorism and drug offences.¹⁰⁰ The drafting of the amendment procedure was therefore influenced in part by a number of States that wanted to retain the opportunity to add offences to the list of crimes within the jurisdiction of the ICC at a later date, including certain treaty-based offences.¹⁰¹ The fact that treaty crimes were ultimately not included in the ICC Statute does not mean that they were given up on, or precluded. Many States simply deferred the issue. It is possible that the reference to “applicable treaties” in Article 21(1)(b) of the ICC Statute simply acts as a place-holder, awaiting the possible future introduction of treaty-based crimes into the subject-matter jurisdiction of the ICC through amendment procedures.

In addition to “applicable treaties”, Article 21(1)(b) of the ICC Statute refers to “the principles and rules of international law, including the established principles of the international law of armed conflict.”¹⁰² The phraseology here is certainly clumsy. There is no indication as to precisely what is intended by the reference to “principles and rules of international law”.¹⁰³ Given that “applicable treaties” have been referred to separately, it is clear that the “principles and rules of international law” extends to the entire *corpus* of customary international law,¹⁰⁴ but not conventional law. What is uncertain is the extent to which the “principles and rules of international law” includes general principles of law. Ordinarily it might be thought that any reference to the principles and rules of international law would include general principles of law, as they are recognised as a formal source of international law in Article 38(1)(c) of the Statute of the ICJ. The source of the

⁹⁸ Art. 123(1), ICC Statute.

⁹⁹ Art. 123(2), ICC Statute.

¹⁰⁰ See R.S. Clark, “Article 123: Review of the Statute”, in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 1277.

¹⁰¹ See *Id.*, p. 1266.

¹⁰² Art. 21(1)(b), ICC Statute.

¹⁰³ Or why, in light of the reference to the “principles and rules” of international law, Article 21(1)(b) of the ICC Statute should include, by way of illustration, the established “principles” of the international law of armed conflict, with no reference to the established “rules”.

¹⁰⁴ deGuzman (1999), pp. 441-2, margin 14.

confusion, however, is that the third tier of applicable law, set out in Article 21(1)(c) of the ICC Statute, comprises:

general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.¹⁰⁵

If the above reference to general principles of law corresponds to that category of general principles recognised as a formal source of international law (as a result of Article 38(1)(c) of the Statute of the ICJ), then it could be concluded that the reference to the “principles and rules of international law” in Article 21(1)(b) of the ICC Statute is a reference to the entire *corpus* of general international law with the exception of general principles of law; *i.e.*, it is a reference to customary international law. General principles of law would be included only if they had the status of customary international law. The reason for the exclusion of general principles of law lies in the rule *expressio unius est exclusio alterius*, which is one of the canons of interpretation recognised by international courts and tribunals.¹⁰⁶ According to this rule, where something is expressly included in one provision, its absence in a parallel provision implies an intent to negate it.¹⁰⁷ Given the express reference to general principles of law in the third tier of applicable law (Article 21(1)(c) of the ICC Statute), the omission of any reference to general principles of law as such in the second tier of applicable law (Article 21(1)(b)) could imply its exclusion from that tier. While there is certainly a reference to the “principles” of international law in the second tier of applicable law (as well as specific reference to the established “principles” of the international law of armed conflict), the term “principles” here is not necessarily in any sense a reference to general principles of law as such. The term “principles” is often used in reference to “principles” of customary international law,¹⁰⁸ which may be distinguishable from “rules” of

¹⁰⁵ Art. 21(1)(c), ICC Statute.

¹⁰⁶ See *Abu Dhabi Arbitration (Petroleum Development Ltd v Sheikh of Abu Dhabi)* (1951) 18 ILR 144, p. 150; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 166.

¹⁰⁷ See, e.g., *Clinchfield Coal Co. v FMSHRC*, 895 F.2d 773, 779 (1990).

¹⁰⁸ See, e.g., A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, pp. 1-26.

customary international law on the basis of the normative determinacy and generality of the norms in question.¹⁰⁹ Thus relevant “principles” of customary international law include (in relation to the law of armed conflict) the principles of proportionality, distinction, military necessity and humanity.¹¹⁰ It can safely be said, therefore, that there is no reference to general principles of law as such in the second tier of applicable law, but they are expressly referred to in the third tier. The *expressio unius* rule could therefore be appropriately applied. The alternative interpretation whereby general principles of law are not excluded from the second tier, but are rather applicable equally under the second tier (as “principles and rules of international law”) as well as the third would appear to be precluded by the hierarchical nature of Article 21(1) of the ICC Statute.

Nevertheless, it could be possible to assert that *certain* general principles of law are applicable under the second tier of applicable law, and certain other general principles of law are applicable under the third tier. Thus it could be possible to divide general principles of law up into second and third tier general principles. The third tier of applicable law under Article 21(1)(c) of the ICC Statute comprises “general principles of law *derived by the Court from national laws of legal systems of the world*”.¹¹¹ According to Cheng, however, there are in fact two possible approaches to understanding general principles of law under Article 38(1)(c) of the Statute of the ICJ. The first approach views general principles of law as deriving from principles inherent in extant national laws (which corresponds to the approach adopted within the third tier of applicable law in the ICC Statute),¹¹² whereas the alternative approach views general principles of law as deriving from legal conscience generally, including international law.¹¹³ The first approach may be

¹⁰⁹ See Pellet (2002), p. 1072. Fitzmaurice has suggested that a “rule” answers the question *what*, whereas a “principle” in effect answers the question *why* (G. Fitzmaurice, “The General Principles of International Law Considered from the Standpoint of the Rule of Law”, (1957-II) 92 *Hague Recueil* 1, p. 7).

¹¹⁰ Rogers (1996), p. 3.

¹¹¹ Art. 21(1)(c), ICC Statute (emphasis added).

¹¹² Lauterpacht was of the view that Article 38(1)(c) of the Statute of the ICJ referred only to principles of municipal law (H. Lauterpacht, *Oppenheim’s International Law*, 8th ed., David McKay Co., New York, 1955, vol. 1, p. 29). This is a view which was endorsed by the Supreme Court of Canada in *Reference Re the Seabed and Subsoil of the Continental Shelf Off-Shore Newfoundland* ((1984) 5 DLR 4th 385, p. 411).

¹¹³ B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Grotius Publications, Cambridge, 1987, pp. 2-4.

thought of as positivist, whereas the second approach appears to be grounded in natural law theory.¹¹⁴ One suggestion of a general principle of law grounded in international legal conscience, as opposed to municipal law, is the rule that a State or government cannot plead the provisions or deficiencies of its own internal laws or constitution as a ground or excuse for non-compliance with its international obligations.¹¹⁵ If general principles of law exist in the sense of principles deriving from sources outside of national laws, then those principles have not been excluded from the second tier of applicable law in the ICC Statute as a result of the rule *expressio unius est exclusio alterius*. *Expressio unius* can only exclude from one provision that which was expressly included in another. The third tier of applicable law refers only to general principles deriving from national laws; it makes no reference to general principles deriving from any other source. To the extent that general principles of law, in the sense of principles deriving from sources outside of national laws, in fact form part of the “principles and rules of international law”, then they must be applicable under the second tier of applicable law in the ICC Statute. Of course, the possibility that these natural-law-based general principles of law exist may be entirely moot. The Martens clause with its invocation of “the principles of the law of nations, as they result from usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”¹¹⁶ may be an

¹¹⁴ G. von Glahn, *Law Among Nations*, 6th ed., MacMillan Co., New York, 1986, pp. 22-24.

¹¹⁵ G. Fitzmaurice, *Symbolae Verzijl*, Martinus Nijhoff Publishers, The Hague, 1958, pp. 164-5. This principle, however, is probably merely a specific restatement of a more general principle which can be located in municipal laws. The internal law or rules of any organ or entity do not absolve that organ from the laws of the greater polity of which the organ is merely one among many subjects. Corporations, for *e.g.*, cannot raise internal instruments in defence to violations of the laws governing corporations (*see, e.g., Corporations Act 2001* (Cth)).

¹¹⁶ Preamble, Regulations concerning the Laws and Customs of War on Land, annexed to Convention IV respecting the Laws and Customs of War on Land, 18 October 1907, [1910] UKTS 9 (hereinafter Hague Regulations of 1907). This clause within the Preamble to the Hague Regulations of 1907 is a slightly modified version of the one that appeared in the Preamble to the Regulations Concerning the Laws and Customs of War on Land, *annexed to* Convention II with Respect to the Laws and Customs of War on Land, 29 July 1899, [1901] UKTS 11 (hereinafter Hague Regulations of 1899). The Preamble to the 1899 Hague Regulations provides, *inter alia*, that:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience...

example of such a general principle,¹¹⁷ although it probably operates in contemporary international law as a material, rather than formal, source of law.¹¹⁸

3. THE THIRD TIER (ART. 21(1)(C))

As indicated above, the third tier of applicable law comprises general principles of law in the positivist sense of general principles derived from national laws of legal systems of the world. It has been suggested that the determination of such principles requires a triple calculation: a comparison between national systems, the search for common principles, and their transposition to the international sphere.¹¹⁹ It has also been suggested that the reference to “national laws of legal systems of the world” makes it unnecessary to engage in a systematic comparison of *all* national legal systems, but only to poll a number of representative national systems from the principal legal systems of the world.¹²⁰ In the Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, in the case of *Prosecutor v Tadić*, his Honour stated that “where a substantial number of well-recognised legal systems adopt a particular solution to a problem it is appropriate to regard that solution as involving some quite general principle of law”.¹²¹ The reference here to “well-recognised” legal systems probably renders the effect of Article 38(1)(c) of the Statute of the ICJ into a more palatable form. The Statute of the ICJ recognised, as a source of law, “the general principles of law recognized by *civilized nations*”.¹²²

See, also, the decision of the ICJ in the *Corfu Channel* case which referred to “certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war” (*Corfu Channel Case (UK v Albania)* [1949] ICJ Rep. 1, p. 22); *see, also*, the decision of the ICTY Trial Chamber in *Prosecutor v Furundžija* which referred to “the general principle of respect for human dignity [which] is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law” (*Prosecutor v Anto Furundžija*, Case No. IT-95-17/1-T, Trial Chamber II, Judgment, 10 December 1998, par. 183).

¹¹⁷ deGuzman (1999), p. 441, margin 12, n. 35.

¹¹⁸ *See* Chapter 7 below.

¹¹⁹ Pellet (2002), p. 1073.

¹²⁰ *Id.*

¹²¹ *Prosecutor v Tadić*, Case No. IT-94-1-T, Trial Chamber, Decision on Prosecution Motion for Production of Defence Witness Statements, Separate Opinion of Judge Stephen, 27 November 1996, p. 6.

¹²² Art. 38(1)(c), Statute of the International Court of Justice, annexed to the Charter of the United Nations, 26 June 1945, 3 Bevans 1153 (hereinafter Statute of the ICJ) (emphasis added).

The most controversial feature of Article 21(1)(c) of the ICC Statute is its suggestion of the potential relevance of the national laws of particular States in the determination of general principles of law. Article 21(1)(c) refers to the general principles of law derived from national laws of legal systems of the world, “including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”¹²³ Presumably a “general” principle of law retains its generality regardless of the circumstances of the case in which it is applied. It is puzzling therefore that the determination of general principles in any one case should depend in any sense on which States would normally exercise jurisdiction over the crime.

The original predecessor of Article 21 of the ICC Statute (namely Article 33 of the ILC’s draft Statute for an International Criminal Court, submitted to the General Assembly in 1994) had set out three sources of applicable law, the last of which comprised “to the extent applicable, any rule of national law.”¹²⁴ Even the 1951 and 1953 draft statutes for a permanent international criminal court – products of the UN’s first attempts at the creation of an international criminal court – both provided (in Article 2) that “[t]he Court shall apply international law, including international criminal law, and *where appropriate, national law.*”¹²⁵ There is, therefore, nothing new in the ICC Statute’s reference to national laws. But whereas the earlier draft statutes had envisaged the direct applicability of certain national laws, the ICC Statute provides for their indirect applicability as component elements of general principles of law. The reference to the direct applicability of national law in the ILC’s 1994 draft Statute was heavily criticised.¹²⁶ The drafters of the 1995

¹²³ Art. 21(1)(c), ICC Statute.

¹²⁴ Art. 33, Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994, UN GAOR, 49th Sess., Supp. no. 10, UN Doc A/49/10 (1994).

¹²⁵ See Report of the Committee on International Criminal Jurisdiction on its Session held from 1 to 31 August 1951, UN GAOR, 7th Sess., Supp. no. 11, UN Doc. A/2136 (1952); Report of the 1953 Committee on International Criminal Jurisdiction on its Session held from 27 July to 20 August 1953, UN GAOR, 9th Sess., Supp. no. 12, UN Doc. A/2645 (1954).

¹²⁶ See, e.g., the response of the International Criminal Tribunal for the former Yugoslavia, which had been invited by the Secretary-General of the United Nations to provide written comments on the ILC’s draft Statute. The ICTY noted that some judges of the Tribunal found Article 33 troubling inasmuch as it provided for the application of “any rule of national law” (Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary-General, 20 March 1995, UN Doc A/AC.244/1).

Siracusa Draft Statute for an International Criminal Court (a private initiative by a number of experts in international criminal law), opposed the reference to national laws in the ILC's draft Statute in the following terms:

Article 33 of the ILC Draft statute should not be interpreted to permit the Court to substitute the laws of any nation or general international law for a proper "general part" of an applicable substantive criminal law. Accordingly, such a General Part must be elaborated, and to be suitable for international use, it should reflect principles from the major criminal law systems of the world in language that is as neutral or universal as possible.¹²⁷

When delegates began meeting in UN circles around the same time, they offered views of similar purport. Delegates to the *Ad Hoc* Committee expressed the view that in order to satisfy the onerous requirements of precision and certainty that prevail in criminal proceedings, the law to be applied by the ICC should be clearly determined by the Statute, rather than by national conflict-of-law rules.¹²⁸ National law, it was argued, was far from uniform.¹²⁹ The suggestion was therefore made that the provision on national law within Article 33 of the ILC's draft Statute should either be amended so as to make it clear that national law is a *subsidiary* means for the determination of general principles of law common to the world's major legal systems, or else that the provision should indicate what national law was relevant, the State whose national law would apply, and the circumstances in which it would apply.¹³⁰ A number of States urged the abandonment of the direct applicability of national law altogether.¹³¹ Chief amongst these were Colombia, the Netherlands, and the United States.¹³² It was remarked that in view of the divergences in national criminal laws and in the absence of precise rules in the provisions of article 33 as to which national law should be applied, a direct reference to national law would lead to inequality of treatment of the accused in criminal proceedings and inconsistent

¹²⁷ Draft Statute for an International Criminal Court, Suggested Modifications to the 1994 ILC-Draft (hereinafter Siracusa Draft Statute), reproduced in J. Holmes Armstead Jr, "The International Criminal Court: History, Development and Status", (1998) 38 *Santa Clara Law Review* 745, Annex A, p. 798.

¹²⁸ Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. no. 22, UN Doc. A/50/22 (1995), par. 52.

¹²⁹ See *id.*, par. 53.

¹³⁰ *Id.*

¹³¹ See *id.*, par. 88.

¹³² United Nations Press Release, 28 March 1996, UN Doc. L/2767 (1996).

jurisprudence.¹³³ The final wording in Article 21(1)(c) of the ICC Statute appears to involve a strange compromise between the position that individual national laws should be directly applicable and the position that there is no relevant role for individual national laws. The laws of specific States (those that would normally exercise jurisdiction over the crime) are made indirectly relevant in the determination of general principles of law. Of course, the law of these States would in any event have been indirectly relevant for that purpose, but not in a manner that granted to those States any particular relevance beyond other States (except, of course, where they were paradigmatic examples of particular legal systems).

In the end it may be that the reference to the national laws of particular States in the determination of general principles of law will enable the ICC to bridge the gap between theory and practice. While general principles of law are, in theory, arrived at after a multitudinous examination of the legal systems of the world, in practice international courts and tribunals often apply, as general principles of law, laws unique to a small number of States.¹³⁴ Given that most legal systems share at least some ancestry, or “common roots”,¹³⁵ it may be possible to derive, at some general and abstract level, a number of features or principles, common to the major legal systems of the world. Glaser has attempted to construct just such a system of principles of international criminal liability on the basis of a comparative study of criminal law.¹³⁶ But at the level of detailed rules, differences in detail within major legal systems (let alone between them) make the process of abstracting detailed common rules for the purpose of positing “general principles of law” almost impossible.¹³⁷ A project at the Max-Planck-Institute has revealed, in particular, that we are far from being able to arrive at a system of defences by way of an analysis of comparative law.¹³⁸ One response to this problem is to assert that it is not the task of international courts and tribunals to discover common rules and institutions, for the

¹³³ See Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. no. 22, UN Doc. A/50/22 (1995), par. 88.

¹³⁴ See below.

¹³⁵ See, e.g., J. H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed., Stanford University Press, Stanford, 1985, pp. 1-5.

¹³⁶ See S. Glaser, “Culpabilité en Droit International Penal”, (1960-II) 99 *Recueil des Cours* 467, cited by E.M. Wise, “General Rules of Criminal Law”, (1997) 25 *Denver Journal of International Law and Policy* 313, p. 316, n. 9.

¹³⁷ See Wise (1997), p. 316.

¹³⁸ See A. Eser, “The Need for a General Part”, (1993) 11 *Nouvelles Études Pénales* 43, p. 51.

purpose of positing general principles of law, but only general indications of “policy and principles” throughout the legal systems of the world.¹³⁹ But general indications of policy and principles, as opposed to concrete working rules, are entirely unhelpful in determining issues relating to criminal responsibility. A judge would generally be loathe to formulate concrete working rules based simply on abstract policy concerns common to legal systems. The concretisation of highly abstract principles into technical rules is not a mere formality, but is in fact likely to be determinative of the outcome in the case. Very often the general “policy” of two criminal jurisdictions will be identical, but minor differences in technical rules may lead to an acquittal in one jurisdiction and a conviction in another.¹⁴⁰ Were the judge to construct his own technical rules at will, guided only by abstract policy and principles common to legal systems, such construction would scarcely be reconcilable with the principle *nullum crimen sine lege*.¹⁴¹ The fact that it is rarely possible to derive working rules from a process of comparative induction of principles from across legal systems, coupled with the natural tendency of judges (steeped in the habit of legality) to search out pre-existing rules, has often meant that international courts or tribunals will latch on to the concrete rules applicable in one particular national or legal system for the purpose of positing general principles of law. Examples can be cited from the war crimes trials conducted under Control Council Law No. 10 in the aftermath of World War II – for *e.g.*, the cases of *Masao Kudo and others* and *Daijiro Yamasaki*, both conducted by Australian Military Courts at Rabaul, where a number of accused were charged with murder as a war crime yet found guilty of “manslaughter”,¹⁴² a lesser-included offence that is made out on the basis of certain partial defences recognised in a number of common law jurisdictions.¹⁴³ Examples can also be cited from the

¹³⁹ See *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep. 128, Separate Opinion of Judge McNair, p. 148.

¹⁴⁰ Consider for instance rules relating to the admissibility of evidence improperly obtained by investigators. While some jurisdictions follow a mandatory rule of exclusion of such evidence, other jurisdictions follow a discretionary rule. The difference may be determinative of the outcome in any one case. Compare the discretionary approach in Australia (*see, e.g. R v Ireland* (1970) 126 CLR 321, p. 335 per Barwick CJ) and Canada (*see, e.g. R v Collins* [1987] 1 SCR 265, p. 282) with the mandatory approach in the United States (*see, e.g. United States v Leon*, 468 US 897 (1984)).

¹⁴¹ See below.

¹⁴² Discussed in UNWCC, “The Sources of International Criminal Law” (1949) XV LRTWC 5, p. 8. See also *Trial of Carl Krauch (I.G. Farben Trial)* where a United States Military Tribunal cited with favour, the notion of guilt upon a charge of “conspiracy” ((1948) X LRTWC 1, p. 40).

¹⁴³ See Ashworth (1999), pp. 263-317.

decisions of the ICTY – for *e.g.* *Prosecutor v Deliać*,¹⁴⁴ where the Trial Chamber defined “diminished responsibility”, a specific partial defence, derived from the law of England and Wales.¹⁴⁵ In *Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin*, the ICTY Appeals Chamber held that it possessed the power to punish the crime of “contempt”,¹⁴⁶ a power inherent in the jurisdiction of superior courts of record in common law States.¹⁴⁷ The judgment illustrates the futility of looking to abstract principles and policies for the purpose of ascertaining general principles of law, and the need to pinpoint concrete rules. The crime of contempt is not expressly provided for in the ICTY Statute. The Appeals Chamber noted that there was no specific customary international law that hinged directly on the question of whether the Appeals Chamber possessed the power to punish contempt.¹⁴⁸ It was therefore “of assistance to look to the general principles of law common to the major legal systems of the world”.¹⁴⁹ The Court noted that the law of contempt originated as, and remained, a creature of the common law; it appeared to be unknown to the civil law.¹⁵⁰ Nevertheless, many civil law systems had legislated to create offences that criminalised acts similar to those criminalised by the law of contempt.¹⁵¹ Thus, if the Appeals Chamber were looking for the general principle or policy common to legal systems it had found it in the conclusion that a crime of contempt *of sorts* existed in the major legal systems. It was often not contempt as such, but it produced “a similar result”.¹⁵² The problem, however, was that this general policy or principle had to be translated into something concrete that could be applied by the Court. If the concrete rules found in common law systems were applied, the conclusion would be that the ICTY Appeals Chamber possessed an inherent jurisdiction to try and punish contempt irrespective of the fact that there was no Statutory basis for doing so. If the

¹⁴⁴ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998.

¹⁴⁵ *See, e.g.*, Ashworth (1999), p. 288.

¹⁴⁶ *Prosecutor v Duško Tadić*, Case No. IT-94-1-A-R77, Appeals Chamber, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, *affirmed in Prosecutor v Duško Tadić*, Case No. IT-94-1-A-AR77, Appeals Chamber, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001.

¹⁴⁷ *Prosecutor v Duško Tadić*, Case No. IT-94-1-A-R77, Appeals Chamber, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, par. 17.

¹⁴⁸ *Id.*, par. 14.

¹⁴⁹ *Id.*, par. 15.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

concrete approach of the civil law were adopted, however, the conclusion would be that in the absence of a Statutory basis for trying contempt (or its equivalent) there was no jurisdiction to do so. The general policy or principle that held across legal systems was incapable of bringing the Court any closer to a resolution of the case. The course adopted by the ICTY was to follow the concrete approach of the common law. The conclusion here is that in order to give effect to general principles of law it is very often necessary to apply the concrete rules of a specific legal system. Perhaps Article 21(1)(c) of the ICC Statute, in its reference to the national laws of States that would normally exercise jurisdiction over the crime, seeks to direct the Court's attention to the concrete rules of those States when attempting to give effect to general principles of law – rather than, for instance, the rules of the States of which the judges are nationals. If the concrete rules that applied in the territory where the crime was committed, for *e.g.*, were (indirectly) given effect to as general principles of law, that approach would be more consistent with *nullum crimen sine lege* than giving effect to the concrete rules of a third State.¹⁵³ Of course, concerns with the consistency of jurisprudence and equality of treatment of persons before the Court may mean that it is very often not “appropriate” to give any special consideration to the laws of States that would normally exercise jurisdiction. Article 21(1)(c) of the ICC Statute calls for the derivation of general principles of law from such States only “as appropriate”,¹⁵⁴ and it goes without saying that issues of consistency and equality of treatment would be paramount in this calculation. In fact Article 21(3) of the ICC Statute (discussed further below) requires that the ICC only interpret and apply law to the extent such interpretation and application is consistent with internationally recognised human rights, and is without any adverse distinction on grounds such as national origin.¹⁵⁵ Where an accused faced the prospect of being deprived the benefit of the application of some favourable law which had been applied as a general principle of law in earlier cases, on the basis that he lives in or is a national of State *x* which would ordinarily exercise jurisdiction over the crime and which does not

¹⁵³ See, *e.g.*, Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994, U.N. G.A.O.R., 49th Sess., Supp. no. 10, U.N. Doc A/49/10 (1994), p.104 (“The dictates of the *nullum crimen* principle...require that the Court be able to apply national law to the extent consistent with the Statute, applicable treaties and general international law.”)

¹⁵⁴ Art. 21(1)(c), ICC Statute.

¹⁵⁵ See below.

recognise such law, this would amount to adverse distinction and be precluded by the operation of Article 21(3).

iii. THE HIERARCHY OF APPLICABLE LAW

The relationship between the three tiers of applicable law in Article 21(1) of the ICC Statute is clearly hierarchical in the sense that there is some level of ordering between the three tiers (“[i]n the first place”, “[i]n the second place”, “[f]ailing that”). To assert, without adding more, that there is a normative hierarchy between the three tiers in which the ICC Statute is supreme in all instances,¹⁵⁶ may be, however, to invite confusion. It implies, for instance, that where the terms of the ICC Statute appear clear on their face, there need be no reference to (or application of) additional sources, whereas in fact reference to general international law may reveal an ambiguity in the Statute (that does not appear on its face), or a recognised exception to a general rule in the Statute (that has not been expressly repealed). Treaties do not exist in a legal vacuum, as recognised for instance, in the general rule of interpretation in the Vienna Convention on the Law of Treaties, which requires that the interpretation of terms shall take into account, *inter alia*, “any relevant rules of international law applicable in the relations between the parties.”¹⁵⁷ While a treaty may appear to state quite clearly that parties are under obligation x, when interpreted in light of governing rules of international law the conclusion may be that parties are in fact under obligation y. The ICC Statute cannot ultimately be applied independently of other governing rules.

To make sense of the hierarchy of applicable law in Article 21(1) of the ICC Statute then, it probably needs to be pointed out that almost all applications of law by the ICC would take place under Article 21(1)(a). Where the ICC Statute is interpreted in light of governing rules of international law – whether governing treaties, customary law, or general principles of law – it is still the Statute that is ultimately being applied. Thus, there need be no recourse to Article 21(1)(b) or 21(1)(c) which only relate to the direct application of additional sources of

¹⁵⁶ Subject, of course, to Art. 21(3), ICC Statute.

¹⁵⁷ Art. 31(3)(c), Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (hereinafter Vienna Convention).

international law, as opposed to their use in the process of interpretation.¹⁵⁸ It could be argued that when *interpreting* the ICC Statute, the Court is necessarily *applying* the Vienna Convention on the Law of Treaties.¹⁵⁹ Even this application of treaty law however, would appear to take place prior to and as part of the application of law pursuant to Article 21(1)(a) of the ICC Statute. The Vienna Convention would not appear to be an “applicable treat[y]” within the meaning of Article 21(1)(b). The reason for this is that Article 21(1)(a) states that the Court shall apply “[i]n the first place, this Statute...”.¹⁶⁰ Whenever the terms of the Statute themselves are given effect to, that process of the application of the Statute involves a number of steps, including the application of relevant rules of interpretation whether deriving from (and governing as) general international law or treaty. Where Article 21(1)(b) states that the Court shall apply “[i]n the second place, where appropriate, applicable treaties...”,¹⁶¹ the premise here is that the ICC Statute has already been interpreted and applied as law.

In what circumstances, then, may the ICC exercise its powers under Article 21(1)(b) or 21(1)(c) of the ICC Statute? There are in fact two such situations. The first is where the ICC Statute expressly provides for the application of rules of international law extrinsic to the Statute. The principal example here is Article 31(3) which provides that the ICC may consider a ground for excluding criminal responsibility not provided for in the Statute where such a ground derives from the applicable law in Article 21.¹⁶² Where an Article 31(3) defence is accepted as admissible in the circumstances by the ICC, the Court applies both the Statute (Article 31(3)) and the relevant source of law which grounds the defence. On its face, the ICC Statute classifies the conduct in question as a crime, but sources extrinsic to the ICC Statute indicate that it is not. It would be untenable to assert that as the ICC Statute must be applied “[i]n the first place” the defence must fail as it is based on normatively inferior sources of law that directly conflict with the Statute. Certainly

¹⁵⁸ In this sense there is some question as to the appropriateness of including the Elements of Crimes within the hierarchy of applicable law (Art. 21(1)(a)), as the Elements of Crimes are merely a material source aimed at assisting the Court in the interpretation and application of the ICC Statute (Pellet (2002), pp. 1077-78).

¹⁵⁹ On the application of the Vienna Convention on the Law of Treaties, see Chapter 3 below.

¹⁶⁰ Art. 21(1)(a), ICC Statute.

¹⁶¹ Art. 21(1)(b), ICC Statute.

¹⁶² Art. 31(3), ICC Statute.

the defence sets up a direct inconsistency with either Article 6, 7 or 8 of the ICC Statute (*i.e.* the provisions defining the crimes within the jurisdiction of the Court), but at the same time such inconsistency is provided for in Article 31(3). Thus, the question is whether the ICC will apply Article 6, 7, or 8 to its full extent, or whether it will apply, instead, Article 31(3). The inconsistency thus relates to an inconsistency between Statutory norms and the hierarchy of applicable law in Article 21(1) of the ICC Statute does not indicate how this conflict is to be resolved. Whether the defence is ultimately accepted or not, the ICC has still applied the ICC Statute “[i]n the first place” – either because they have applied the relevant definition of the crime to its full extent (Article 6, 7, or 8) or because they have applied Article 31(3). In the latter case they will also apply a second or third tier source; in the case of a customary law defence for *e.g.*, the customary defence will be applied “[i]n the second place”. The second situation in which the ICC may directly apply sources of law extrinsic to the ICC Statute as provided for in Article 21(1)(b) and 21(1)(c) is where the ICC Statute is silent on a relevant matter. An example from the jurisprudence of the ICTY is where the ICTY Appeals Chamber directly applied a general principle of law in holding that it possessed the power under its inherent jurisdiction to try and punish contempt despite the silence of the ICTY Statute on the matter.¹⁶³ It may be concluded, then, that in order to move from the first tier of applicable law to the second and/or third tier when applying law, the ICC must either be permitted to do so by the ICC Statute (as is the case, for *e.g.*, with Article 31(3)), or else the ICC Statute must not constrain the application of second or third tier sources in the circumstances – which is to say that the ICC Statute should be silent on the question of whether a particular power, for *e.g.*, may be exercised, and such power must not be otherwise precluded by the Statute.

The principal question that arises in examining the power of the ICC to apply second or third tier sources of applicable law is whether that power is discretionary, or whether it is to be exercised according to law. Article 21(1) of the ICC Statute states that the ICC shall apply second tier sources in the second place,

¹⁶³ *Prosecutor v Duško Tadić*, Case No. IT-94-1-A-R77, Appeals Chamber, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, par. 18; *affirmed* in *Prosecutor v Duško Tadić*, Case No. IT-94-1-A-AR77, Appeals Chamber, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001.

where appropriate;¹⁶⁴ third tier sources shall be applied *failing that*.¹⁶⁵ The phrase “where appropriate” has been viewed as indicating that the Court enjoys discretion in determining whether “applicable treaties” or “the principles and rules of international law” (*i.e.* second tier sources) are to be applied.¹⁶⁶ Interestingly, there does not appear to be a similar grant of discretion in relation to third tier sources: “Failing that” (*i.e.* failing the application of the first two sources),¹⁶⁷ the Court “shall”¹⁶⁸ apply general principles of law. While the phrase “shall apply”, which is ostensibly mandatory in nature,¹⁶⁹ precedes the reference to each of the three tiers of applicable law in Article 21(1) of the ICC Statute, that mandatory term is muted in relation to the reference to second tier sources where the full effect is “shall apply...where appropriate”. No such watering down of the term “shall” exists in relation to the third tier of applicable law. Failing the application of the first two tiers the ICC is ostensibly duty-bound to apply general principles of law. Of course it may be asked precisely what is meant by “failing” the application of the first two tiers. The assumption behind the ICC Statute appears to be that there is some concrete end that the Court has tried to achieve, and has failed in that end in relation to both the Statute (and its related instruments) and the second tier sources of applicable law. That end is almost certainly a concrete and final determination of the law. The purpose behind Article 21(1)(c) of the ICC Statute would appear to be as a final safety net in order to avoid a *non liquet*.¹⁷⁰

The overall structure of Article 21 of the ICC Statute is highly similar to that in Article 38 of the Statute of the ICJ,¹⁷¹ (with the exception that the Statute of the ICJ merely enumerates each of the formal sources as opposed to explicitly setting out a hierarchy between them). The purpose behind Article 38(1)(c) of the Statute of the ICJ (concerning general principles of law) was understood by its drafters to involve the avoidance of a *non liquet*.¹⁷² The prevailing view that there can be no *non*

¹⁶⁴ Art. 21(1)(b), ICC Statute.

¹⁶⁵ Art. 21(1)(c), ICC Statute. Third tier sources comprise general principles of law including, “as appropriate” the national laws of States that would normally exercise jurisdiction over the crime (*id.*).

¹⁶⁶ deGuzman (1999), p. 440, margin 9.

¹⁶⁷ Art. 21(1)(c), ICC Statute.

¹⁶⁸ Art. 21(1), ICC Statute.

¹⁶⁹ See Chapter 3 below.

¹⁷⁰ deGuzman (1999), p. 443, margin 17; Pellet (2002), p. 1067.

¹⁷¹ Pellet (2002), p. 1076.

¹⁷² deGuzman (1999), p. 443, margin 17.

liquet in international law means, in essence, that “every international situation is capable of being determined *as a matter of law*.”¹⁷³ There are in fact two approaches that are adopted in support of the rejection of *non liquet*. The first argues that *lacunae* in international law are impossible as international law is logically complete.¹⁷⁴ The second admits of the possibility of gaps, but maintains that the system possesses built-in mechanisms to close these gaps.¹⁷⁵ To the extent that the ICC Statute does not admit the situation of *non liquet*, it adheres to the second theory. General principles of law, which may be developed by the Court (as evidenced for instance by the power of the ICC to give consideration to the national laws of States that would normally exercise jurisdiction over the crime in deriving general principles), are the primary mechanism through which a *non liquet* may be avoided. The first approach to *non liquet* – *i.e.* that there are no gaps in international law – was clearly expressed by the Permanent Court of International Justice in the *Lotus* case, which held that whatever is not explicitly prohibited by international law is not left in a state of uncertainty, but is in fact perfectly permissible.¹⁷⁶ This view has since been overtaken by a countervailing jurisprudence evident in the decisions of the ICJ. In the *North Sea Continental Shelf Cases*, for *e.g.*, the ICJ held that the absence of relevant conventional or customary law governing the delimitation of the continental shelf did not create (or leave) unfettered rights in the parties on the question of delimitation; there were in fact general principles that could be applied in the form of equity.¹⁷⁷ In the *Barcelona Traction Case* international law was silent on the rights of certain shareholders in a company.¹⁷⁸ The ICJ therefore found that it was required to apply general principles of law which were addressed to the rights of shareholders in the circumstances:

If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no

¹⁷³ R.Y. Jennings and A.D. Watts, *Oppenheim's International Law*, 9th ed., Longman, London, 1992, vol. 1, p. 13.

¹⁷⁴ P. Weil, “‘The Court Cannot Conclude Definitively...’ Non Liqueur Revisited”, (1997) 36 *Columbia Journal of Transnational Law* 109, p. 110.

¹⁷⁵ *Id.*

¹⁷⁶ *S.S. Lotus (France v Turkey)*, 1927 PCIJ (Ser. A) No. 10, p. 18.

¹⁷⁷ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Federal Republic of Germany v Netherlands)* [1969] ICJ Rep. 3, pp.46-47.

¹⁷⁸ *Barcelona Traction, Light and Power Co. (Belgium v Spain)*, [1970] ICJ Rep. 3, par. 52.

corresponding institutions of international law to which the Court could refer. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it.¹⁷⁹

Nevertheless, the ICJ has not always viewed itself as duty-bound to avoid the situation of a *non liquet*. In the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ held in its Advisory Opinion that “in view of the current state of international law, and of the elements at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the State would be at stake”.¹⁸⁰ Weil has suggested, however, that the result in that case may be justified on the basis that it is only in its contentious jurisdiction that the ICJ is duty-bound to avoid a *non liquet*:

In contentious proceedings, *non liquet* is eclipsed by the principle of consensual jurisdiction and the necessity to abide by the will of the parties to resort to the judicial settlement of their dispute. That is why the Tribunal is obliged in contentious proceedings to avoid finding *lacunae* in the law and therefore, to deny *non liquet*. In advisory proceedings, *non liquet* is an expression of the principles of self-interpretation and polynormativity that are characteristic of the international legal system. Therefore, when in response to a request for an advisory opinion, the ICJ concludes “that it cannot conclude,” such a response appropriately may reflect the state of the law and the specific role the Court plays in such matters.¹⁸¹

The jurisdiction exercised by the ICC is analogous to the contentious jurisdiction of the ICJ. Cases concern the concrete disposition of rights. Thus, where Article 21(1) of the ICC Statute states that “[f]ailing that” (*i.e.* the application of the first two tiers of applicable law) the Court “shall apply...general principles of law”,¹⁸² this would tend to suggest an obligation to avoid the situation of a *non liquet*. This is suggested not simply by the use of the ostensibly mandatory term (“shall”), but the general duty of international courts to avoid a *non liquet* in the disposition of rights.

The fact that the ICC is duty bound to arrive at a concrete and final determination of the law in relation to any issue that genuinely presents itself, would suggest that any “discretion” that the ICC possessed in relation to the application of

¹⁷⁹ *Id.*, par. 50

¹⁸⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, par. 105.

¹⁸¹ Weil (1997), p. 119.

¹⁸² Art. 21(1), ICC Statute.

any of the sources of applicable law is highly constrained. The reference to “where appropriate” in relation to the second tier sources of applicable law may simply indicate that the application of treaties or customary law is contingent upon a number of preconditions being satisfied – for *e.g.*, the ICC Statute permitting recourse to additional sources (as in the case of Article 31(3)); the ICC not precluding recourse to additional sources (where the ICC is silent on a matter); the consistency of the norm with “internationally recognized human rights” (in Article 21(3)); as well as the satisfaction of tests of legal validity relating to the continued operation of the law in question and the resolution of inconsistencies between it and conflicting treaties or rules of general international law. The phrase “where appropriate” may also relate to the need to resolve the question of law in the first place: where, for instance, it is suggested that a convicted person should have recourse to *partial* defences (*e.g.*, provocation, diminished responsibility), the conclusion may be that such recourse is unnecessary as the ICC Statute already makes sufficient allowance for the possibility of lesser forms of criminal responsibility through its provisions on sentencing (for *e.g.*, by reference to “the gravity of the crime and the individual circumstances of the convicted person”).¹⁸³

There is of course some discretion that is necessarily involved in the determination of which second and third tier sources of applicable law to apply in order to arrive at a concrete and final determination of the law. This is particularly evident in Article 21(1)(c) of the ICC Statute which recognises that general principles of law include “as appropriate, the national laws of States that would normally exercise jurisdiction over the crime”.¹⁸⁴ This suggests the need to fashion general principles in certain cases, in order to avoid a *non liquet*. Where particular general principles are already recognised within international jurisprudence the scope for discretion is diminished, but where the law in force appears to be silent on the matter in question then the process of “deriv[ing]”¹⁸⁵ general principles necessarily involves judgement – as does the process of ascertaining customary international law, for the purpose of Article 21(1)(b) of the ICC Statute. Nevertheless, there is an element of discretion in every exercise of judicial power (with the exception of those

¹⁸³ Art. 78(1), ICC Statute.

¹⁸⁴ Art. 21(1)(c), ICC Statute.

¹⁸⁵ *Id.*

instances involving the purely formulaic application of clear rules).¹⁸⁶ In fact, if anything, the discretion exercisable by the ICC in determining which law to apply would have to be viewed as *more* constrained (and thus a “weaker” form of discretion)¹⁸⁷ than the discretion exercisable by the ICJ in that same process. The Statute of the ICJ merely *lists* the various sources that may be applied, whereas the ICC Statute lists the order in which they are to be applied. There is, therefore, by no means an unfettered discretion inherent in the ICC to pick and choose which sources of law will be applied at will. The ICC is required to arrive at a concrete and final determination of the relevant law, which may require supplementing the rules found in the ICC Statute and its related instruments with additional sources. The task of determination is not necessarily straightforward, and some element of judgement may be required. Nevertheless, the ICC does not possess the power to ignore or exclude a relevant source of law that completes the legal equation. If Article 21 of the ICC Statute is to be described as conferring “discretionary” powers on the ICC, it is only discretionary in the sense that any powers of legal determination are discretionary.

iv. INTERNATIONALLY RECOGNISED HUMAN RIGHTS

Article 21(3) of the ICC Statute provides that the “application and interpretation” of law pursuant to Article 21 must be “consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other

¹⁸⁶ I. Weinstein, “The Discontinuous Tradition of Sentencing Discretion: Koon’s Failure to Recognize the Reshaping of Judicial Discretion under the Guidelines”, (1999) 79 *Boston University Law Review* 493, p. 497.

¹⁸⁷ The notion of “weak” discretion comes from Dworkin’s formulation of three classes of discretion. Dworkin identifies two forms of “weak” discretion: the first describes the situation where the applicable standards cannot be applied mechanically but demand the use of judgement; the second describes the situation where the decision-maker cannot be reviewed or reversed by any authority. The third class of discretion is “strong” discretion which exists where the decision-maker is not bound by any standards set by the authority in question (Dworkin (1977), p. 69). Dworkin’s formulation differs from the classic notion of discretion, described by Hart and Sacks, as involving “the power to choose between two or more courses of action, each of which is thought of as permissible.” (H.M. Hart & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Foundation Press, Westbury, N.Y., 1994, p. 144 (W.N. Eskridge, Jr., & P.P. Frickey eds).

status.”¹⁸⁸ Article 21(3) implies that the process of applying and interpreting applicable law shall occur consistently with human rights norms. This rule extends to the application and interpretation of all sources of applicable law, including those within the ICC Statute itself. Thus, where a provision in the ICC Statute governing the process of application or interpretation of law is currently, or over time comes to be, inconsistent with an “internationally recognized human rights” norm, then that statutory provision shall be inapplicable (at least to the extent of the inconsistency).

“Internationally recognized human rights” have been described by Pellet as acting, within the context of the ICC, as a species of “super-legality”, akin in some respects to the operation of *jus cogens* within international law.¹⁸⁹ Article 21(3) of the ICC Statute renders inapplicable (or inoperative) any provision of the ICC concerned with the application or interpretation of law which is inconsistent with “internationally recognized human rights”. But what “internationally recognized human rights” put into slumber, *jus cogens* puts to its death: the Vienna Convention on the Law of Treaties renders a treaty “void” if, at the time of its conclusion, it conflicts with a peremptory norm of general international law,¹⁹⁰ or if a new peremptory norm emerges rendering an existing treaty in conflict.¹⁹¹ Nevertheless, the “super-legality” created in Article 21(3) of the ICC Statute is, in another respect, of wider effect than the law relating to *jus cogens*. *Jus cogens* relates to *fundamental* human rights, whereas Article 21(3) of the ICC Statute relates to *all* “internationally recognized human rights”.¹⁹²

Article 21(3) of the ICC Statute, however, fails to expressly identify those sources of human rights norms which are to stand as an overriding limit upon the ICC’s capacity to interpret and apply law. “Internationally recognized human rights” is not a legal term of art. Article 21(3) does make reference to a number of grounds of non-discrimination, however these grounds do not appear to be listed as *illustrations* of “internationally recognized human rights” as such, but rather, as independent bases of review (Article 21(3) states that the application and

¹⁸⁸ Art. 21(3), ICC Statute. Art. 7(3), ICC Statute defines “gender” as “the two sexes, male and female, within the context of society.”

¹⁸⁹ Pellet (2002), p. 1081.

¹⁹⁰ Art. 53, Vienna Convention.

¹⁹¹ Art. 64, Vienna Convention.

¹⁹² Pellet (2002), p. 1081.

interpretation of law by the ICC must be consistent with “internationally recognized human rights, *and* be without any adverse distinction...”¹⁹³ Nevertheless, many, if not all, of the listed grounds of discrimination would certainly be prohibited by “internationally recognized human rights”, however defined, such that the reference to adverse distinction in Article 21(3) of the ICC Statute sets up a redundancy.¹⁹⁴ Discrimination on the basis of age, however, does not appear in the primary human rights instruments,¹⁹⁵ and it is possible that this ground alone adds to the requirement that the ICC interpret and apply law consistently with “internationally recognized human rights”.

The phrase “internationally recognized human rights” would suggest that those sources include, at minimum, customary human rights norms, as well as human rights principles which have the status of general principles of law, as both sources are dependent upon either recognition or practice of the international community.¹⁹⁶ What is less certain is the extent to which human rights norms contained only within international treaties are to be considered a limit upon the ICC’s capacity to interpret and apply law, given that those norms are recognised only by the contracting parties. A question arises as to whether a treaty-based human rights norm which has recently been adopted by a large number of States but is not yet strictly customary law is an “internationally recognized” norm for the purpose of Article 21(3) of the ICC Statute, or whether the norm must have entered into general international law. If the norm were binding only as a matter of treaty law, then presumably that norm could only limit the capacity of the ICC to apply law where the treaty in question would otherwise have governed the adjudicative process, for *e.g.*, where the State which would otherwise have exercised jurisdiction over the matter was a party to the treaty. The problem with giving effect to treaty norms which are binding only *qua* treaty law is that that approach would give rise to the inconsistent application of law by the ICC. This is not in itself a basis for ruling out that approach: Article 21(1)(c) of the ICC Statute, for instance, requires the application “as appropriate” of “the national laws of States that would normally exercise jurisdiction over the crime”,¹⁹⁷ a

¹⁹³ Art. 21(3), ICC Statute (emphasis added).

¹⁹⁴ deGuzman (1999), pp. 445-6, margin 24.

¹⁹⁵ Schabas (1998), p. 406.

¹⁹⁶ See Art. 38(1)(b)-(c), ICJ Statute.

¹⁹⁷ Art. 21(1)(c), ICC Statute.

provision that may require the application of inconsistent law in different cases. But the direct applicability of national laws as envisaged in that sub-paragraph engendered great debate and was strongly opposed by a number of States who were concerned that it would, amongst other things, give rise to the inconsistent application of criminal law.¹⁹⁸ No such debate attended Article 21(3)'s reference to "internationally recognized human rights", which was virtually unanimously supported by delegates to the 1998 Rome Diplomatic Conference.¹⁹⁹ A provision containing the gist of Article 21(3), namely that the application and interpretation of law be consistent with "internationally recognized human rights" including certain prohibitions on adverse distinction, appeared for the first time, and in unbracketed form, in the draft statute attached to the final Report of the Preparatory Committee in 1998,²⁰⁰ though support for such a provision had been voiced in principle at the Inter-Sessional Meeting in Zutphen earlier that year.²⁰¹ Although the provision in the Preparatory Committee's draft statute gave rise to considerable debate at the 1998 Rome Diplomatic Conference, the source of the debate surrounded the inclusion of "gender" as one of the impermissible bases of adverse distinction, an inclusion that was viewed by some delegates as condoning homosexuality.²⁰² The phrase "internationally recognized human rights", however, remained free of controversy, suggesting that delegates did not view the phrase as a reference to strictly conventional human rights norms, but rather as a reference to only those human rights norms which had properly entered into general international law.

¹⁹⁸ deGuzman (1999), p. 439, n. 25.

¹⁹⁹ *Id.*, p. 445, margin 23.

²⁰⁰ Art. 20(3), Draft Statute and Draft Final Act, Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1 (1998), p. 56.

²⁰¹ See Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zutphen, The Netherlands, U.N. Doc. A/AC.249/1998/L.13 (1998), p. 64, n. 117.

²⁰² See P. Saland, "International Criminal Law Principles", in R.S. Lee (ed), *The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer, Dordrecht, 1999, p. 216.

2

nullum crimen sine lege

i. INTRODUCTION

The application and interpretation of defences under the ICC Statute are subject to the principle *nullum crimen sine lege*, which finds expression in Article 22 of the Statute.²⁰³ The principle *nullum crimen sine lege* prohibits the retroactive application of criminal laws. It operates alongside the principle *nulla poena sine lege*, found in Article 23 of the ICC Statute, which prohibits the retroactive application of criminal penalties.²⁰⁴ Together, the two principles comprise what is generally referred to as “the principle of legality”.²⁰⁵ The principle *nullum crimen sine lege*, as with the principle of legality generally, is not one unified principle, but rather a collection of related principles, each limiting or guiding the exercise of governmental power. Thus, while *nullum crimen sine lege* may act as a jurisdictional limit on both legislative and judicial powers,²⁰⁶ other aspects of the principle may impact upon the

²⁰³ Art. 22, ICC Statute.

²⁰⁴ Art. 23, ICC Statute: “A person convicted by the Court may be punished only in accordance with this Statute.”

²⁰⁵ See, e.g., A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, pp. 139-158. In some common law States, the principle of legality is more commonly referred to as “the rule of law” (see, e.g., Ashworth (1999), p. 70).

²⁰⁶ For an example of the former, see Art. I, §9(3), Constitution of the United States of America (prohibiting Congress from passing *ex post facto* laws or Bills of Attainder). For an example of the latter, see *Prosecutor v Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment and Opinion, 5 December 2003, Separate and Partially Dissenting Opinion of Judge Nieto-Navio, pars 108-113 (concluding that the offence of inflicting terror on a civilian population did not fall within the jurisdiction of the ICTY as there was insufficient evidence to indicate that it attracted individual criminal responsibility under customary international law). It would appear, however, that neither the bringing of an indictment that is violative of the principle *nullum crimen sine lege* by a prosecutor, nor the approval of such an indictment by a judge amounts to an abuse of process (see *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-PT, Trial Chamber, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process due to Infringement of the Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, 31 March 2004, par. 30).

exercise of powers in non-judicial ways, for *e.g.*, through rules of judicial interpretation.²⁰⁷ *Nullum crimen sine lege* is generally divided into primary and corollary principles. Thus while the primary import of the principle is the general notion that a criminal conviction may only be affixed where law provides for it (*i.e.* “no crime without law”),²⁰⁸ a number of corollaries follow. These include the principle of non-retroactivity (prohibiting the application of criminal laws that were enacted or came into being subsequent to the conduct in question),²⁰⁹ and the principles that criminal laws be strictly construed and any ambiguity be resolved in favour of the accused.²¹⁰

While the principle of legality is said to exist and be recognised in all of the world’s major criminal justice systems,²¹¹ the principle does not apply across systems in an undifferentiated form. The Latinised formulation of the principle of legality which we employ today (*nullum crimen sine lege, nulla poena sine lege*) owes its origins to Paul Johann Anselm Feuerbach who, in his 1801 work, *Lehrbuch des peinlichen Rechts*, enunciated three principles which he coined as follows: *nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali*.²¹² It is accepted that *lege*, or *legali*, in this formulation indicates written law.²¹³ The principle of legality, therefore, in its classical formulation, requires criminal conduct to be explicitly spelled out in advance in statutory form.²¹⁴ Yet this is a formulation suited only to those legal systems employing exhaustive criminal codes. Common law jurisdictions, with definitions of crimes and general liability rules developing over time through the accretion of judicial decisions, necessarily fall short of this strict standard of legality; as do crimes under international law wherever the

²⁰⁷ M.C. Bassiouni (ed.), *International Criminal Law*, Transnational Publishers, Ardsley, 1999, p. 123.

²⁰⁸ *Prosecutor v Sabino Gouveia Leite*, Case No. 04a/2001, District Court of Dili, Special Panel for the trial of Serious Crimes, Judgment, 7 December 2002, par. 60.

²⁰⁹ *See, e.g., Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, pars 402 & 408.

²¹⁰ *See, e.g., id.*, pars. 402 & 408-413.

²¹¹ *Id.*, par. 403; *see also Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, par. 25.

²¹² J. Hall, “*Nulla Poena Sine Lege*”, (1937) 47 *Yale Law Journal* 165, pp. 169-70.

²¹³ S. Glaser, “*Nullum Crimen Sine Lege*”, (1942) 24 *Journal of Comparative Legislation and International Law* 29, p. 30.

²¹⁴ The requirement known to civil law systems that criminal offences be enumerated and defined in written, statutory, form, is known by the maxim *nullum crimen sine lege scripta* (Cassese (2003), p. 141).

existence and definition of the crime is a product of customary international law rather than multilateral treaty. According to the ICTY Trial Chamber in *Prosecutor v Delalić*, it could be postulated that the principle of legality under international law is different, with respect to its applications and standards, than its counterpart in national legal systems.²¹⁵ For the purpose of crimes within the jurisdiction of the ICC Statute, the primary test is that set out in Article 22, which provides, *inter alia*, that:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.²¹⁶

Nevertheless, the principle *nullum crimen sine lege*, as it applies under general international law, may still govern the application and interpretation of the provisions of the ICC Statute (including relevant defences), even where the general international law standard of *nullum crimen sine lege* appears to differ from the standard in Article 22: Firstly, general international law may provide an interpretative background from which the effect of Article 22 of the ICC Statute may be inferred; and second, if the principle *nullum crimen sine lege*, as it applies under general international law, is an “internationally recognized human right” for the purpose of Article 21(3) of the ICC Statute,²¹⁷ then the application and interpretation of the ICC Statute will have to be in accordance with the general international law standard of legality wherever it is wider than the standard encapsulated in statutory form in Article 22.

ii. EMERGENCE OF NULLUM CRIMEN SINE LEGE AS A PRINCIPLE OF INTERNATIONAL LAW

1. AT NUREMBERG

²¹⁵ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 405.

²¹⁶ Art. 22, ICC Statute.

²¹⁷ Art. 21(3), ICC Statute (discussed in Chapter 1 above).

Although the principle *nullum crimen sine lege* has antecedents reaching back, at least to Roman law,²¹⁸ and has long been recognised as a maxim of domestic law in various states,²¹⁹ its recognition as a principle of general international law occurred only in the second half of the Twentieth Century.²²⁰ The principle had not yet crystallised in international law at the time it was raised by the Nazi defendants appearing before the International Military Tribunal at Nuremberg (IMT).²²¹ There, the Charter of the IMT, which was annexed to the London Agreement of 8 August 1945,²²² contained a number of elements of an arguably novel or innovative nature. Article 6 of the IMT's Charter made provision for three crimes which were deemed to fall within the jurisdiction of the Tribunal: Crimes Against Peace (Article 6(a)),²²³ War Crimes (Article 6(b)),²²⁴ and Crimes Against Humanity (Article 6(c)).²²⁵ Article 8 of the Charter expressly excluded the defence of obedience to superior orders, although it recognised that the defence could be considered by the Tribunal in mitigation of punishment.²²⁶ As the Tribunal was convened in order to try the major

²¹⁸ Bassiouni (1999), p. 130.

²¹⁹ See, e.g., J. Hall (1937), pp. 168-9; Glaser (1942), pp. 30-31.

²²⁰ Nevertheless, even before its crystallization as a rule of international law, the principle *nullum crimen sine lege* influenced the outcome of negotiations over international criminal prosecutions. On 25 January 1919, at the Preliminary Peace Conference at Paris, the Allied and Associated Powers appointed a 15-member commission to consider questions relating to criminality arising out of the First World War. The Report, which was presented to the Preliminary Peace Conference on 29 March 1919, made a number of recommendations, including that criminal responsibility should lie, not merely for violations against the "laws and customs of war", but also for violations against the "laws of humanity". The United States delegation, however, expressed concern over the prosecution of individuals for violations against the "laws of humanity" on the basis that, unlike the "laws and customs of war", the "laws of humanity" lacked an objective and certain standard of measurement. Ultimately, no provision was made for the prosecution of individuals for crimes against the "laws of humanity" in the Treaty of Versailles. (See, generally, M.C. Bassiouni, "World War I: 'The War to End All Wars' and the Birth of a Handicapped International Criminal Justice System", (2002) 30 *Denver Journal of International Law and Policy* 244).

²²¹ See *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 1, p. 219. The principle *nullum crimen sine lege* had earlier been the subject of judicial consideration by the PCIJ in its Advisory Opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (1935 PCIJ (Ser. A/B) No. 65, p. 51). However in that case, the Court was not concerned with the question of whether the principle was recognised under international law; instead its sole consideration was whether, in light of the principle, certain legislative decrees of the Free City of Danzig were consistent with the guarantees in the City's Constitution (*id.*, p. 52).

²²² Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 82 UNTS 79 (hereinafter Nuremberg Charter).

²²³ Art. 6(a), Nuremberg Charter.

²²⁴ Art. 6(b), Nuremberg Charter.

²²⁵ Art. 6(c), Nuremberg Charter.

²²⁶ Art. 8, Nuremberg Charter.

war criminals of the European Axis for acts committed during the Second World War,²²⁷ the promulgation of the Tribunal's Charter on 8 August 1945, was viewed by some, in light of the novelty of certain of its inculpatory, and limited exculpatory, features, as an *ex post facto* prescriptive act. It was urged on behalf of the defendants, for instance, during the course of the proceedings, that no sovereign power had made aggressive war (criminalised as a crime against peace under Article 6(a) of the Charter) a crime at the time that the then-alleged Nazi aggressions were committed and that no statute had defined aggressive war.²²⁸ A similar lack of prior criminalisation (at least in an explicit sense) and prior definition existed in relation to crimes against humanity under Article 6(c).²²⁹ The removal of the defence of obedience to superior orders also posed problems from the perspective of retroactivity. The theoretical admissibility of obedience to superior orders as a defence in war crimes proceedings was clearly recognised within international law prior to the promulgation of the Nuremberg Charter. Expressions of the principle at the start of the twentieth century tended to recognise an unqualified defence of superior orders in the case of members of the armed forces following orders of their commanders.²³⁰ While the defence soon came to be qualified by the introduction of subjective and objective tests of the subordinate as to the lawfulness of the order, the enduring legality of the defence was affirmed.²³¹ In fact, the negotiating record of the Charter of the IMT indicates that superior orders were originally viewed by a number of experts as theoretically admissible as a defence under international law.²³² The express exclusion of the defence in Article 8 of the IMT Charter – a position that was replicated in Article 6 of the Charter of the International Military Tribunal for the Far

²²⁷ Art. 1, Nuremberg Charter.

²²⁸ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 1, p. 219. It was also urged that no penalty had been fixed for the commission of aggressive war and that no court had been created to try and punish offenders (*id.*), although these issues are more closely related to the principle *nulla poena sine lege*.

²²⁹ Attempts to try individuals after the First World War for crimes against the "laws of humanity" failed for the very same reason (see footnotes above). No treaty was promulgated in the inter-war period to fill the *lacuna* as a matter of positive law.

²³⁰ See, e.g., L. Oppenheim, *International Law: A Treatise*, Longmans, London, 1906, vol. 2, p. 264.

²³¹ See, e.g., *R v Smith*, (1900) 17 SC 561, pp. 567-8 (per Solomon J); *The Dover Castle*, (1921) 16 AJIL 704; *The Llandoverly Castle*, (1921) 16 AJIL 708.

²³² See H.S. Levie, "The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders", (1991) 31 *Revue Internationale de Droit Militaire et de Droit de la Guerre* 183, p. 183ff.

East (IMTFE) and Article II(4)(b) of Control Council Law No. 10 (CCL10) – therefore appears to be an innovation in international law.

The IMT responded to the defendants' pleas of *nullum crimen sine lege* in three ways: The IMT's principal position was that it was bound to apply the terms of the Charter, irrespective of its conformity with the principle *nullum crimen sine lege*. The IMT stated in its judgment that "[t]he law of the Charter is decisive, and binding upon the Tribunal."²³³ The basis of this decision appears to rest upon an analogy with the doctrine of the sovereignty of parliament.²³⁴ The IMT took the view that the making of the Charter was a sovereign legislative act by those countries to which the German Reich unconditionally surrendered.²³⁵ But as if to hedge its bet, the IMT then declared a secondary position: that the Charter is in conformity with international law anyway. The IMT stated that the Charter "is not an arbitrary exercise of power on the part of the victorious Nations," but rather, "the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law".²³⁶ The view was taken that the Charter did not

²³³ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 1, p. 218; see also *id.*, pp. 174, 219 & 253; see also the submissions of Mr Justice Jackson (*id.*, vol. 2, p. 143) and Sir Hartley Shawcross (*id.*, vol. 3, p. 93). The cases heard under Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50 (hereinafter Control Council Law No. 10 or CCL10) adopted the same view with respect to the binding nature of Control Council Law No. 10 (Bassiouni (1999), p. 156; see, also, *United States v Flick*, 174 F.2d 983 (D.C.), cert. denied, 338 U.S. 879 (1949)).

²³⁴ See, e.g., A.V. Dicey, *The Law of the Constitution*, 10th ed., Macmillan, London, 1959, ch. 1.

²³⁵ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 1, p. 218.

²³⁶ *Id.* The same reasoning was applied in the CCL10 cases, where Control Council Law No. 10 was deemed to be a reflection of pre-existing international law (see especially, *United States v Alstoetter et al.* ("Justice Case") (1948) 3 TWC 1, p. 968; *United States v Ohlendorf et al.* ("Einsatzgruppen Case") (1948) 4 TWC 1, p. 498; *Trial of Hans Albin Rauter* (1949) XIV LRTWC 89, p. 120; *United States v List et al.* ("Hostages Case") (1948) VIII LRTWC 35, p. 53; *United States v. Alfried Krupp von Bohlen und Halbach* ("Krupp Case") (1948) 9 TWC 1327, p. 1331; *United States v Carl Krauch et al.* ("Farben Case") (1948) X LRTWC 1, pp. 58-59; *United States v Flick et al.* ("Flick Case") (1948) 6 TWC 1187). See, also, Bassiouni (1999), pp. 170-172, who notes that since the IMT, IMTFE and CCL10 cases, a number of States have attempted prosecutions of individuals for crimes against humanity arising out of atrocities of the Second World War: in each of these national prosecutions, the plea of *nullum crimen sine lege* was rejected in favour of the assumption that crimes against humanity, as criminalised under the Nuremberg Charter, were pre-existent in international law. Bassiouni states that:

In fact, all national prosecutions undertaken after 1946 took the same position, and none reopened the question, as if the accumulation of time and precedents relying on the IMT's judgments had cured all possible legal defects. This leads to the legally incongruous conclusion that reiteration of the same argument confirms its validity.

involve any substantive retroactivity, only procedural. This is in line with the submission of Sir Hartley Shawcross, the Chief Prosecutor for the United Kingdom, who had argued before the Tribunal that: “Nor, though this procedure and this Indictment of individuals may be novel, is there anything new in the principles which by this prosecution we seek to enforce.”²³⁷ Yet the reasoning of the Tribunal does not entirely bear faith with the assertion that there was no substantive retroactivity. The IMT stated, quite uncontroversially, that, “[w]ith respect to War Crimes...the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law.”²³⁸ Interestingly, however, the IMT appears to have neatly side-stepped this very same issue with respect to crimes against humanity by failing to similarly affirm that the crimes defined by Article 6, Section (c), of the Charter (*i.e.* crimes against humanity) were equally recognised as crimes under international law. The IMT did cite a number of international instruments that could be viewed as cumulatively indicating the criminality of waging aggressive war under customary law,²³⁹ though whether the accumulation of State practice offered up by the IMT was in fact sufficient to cross the threshold into customary law has been seriously doubted.²⁴⁰ Similar doubts could be put in relation to the conclusion of the IMT that the exclusion of the defence of obedience to superior orders in Article 8 of the IMT’s Charter was “in conformity with the law of all nations.”²⁴¹ Perhaps in recognition of the weakness of its assertions as to the conformity of the terms of the

(*id.*, p. 172).

²³⁷ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 3, p. 92; *see, also, id.*, p. 94.

²³⁸ *Id.*, vol. 1, p. 253.

²³⁹ *See, in particular, id.*, vol. 1, pp. 221-2.

²⁴⁰ *See, e.g.,* A. Cassese, “Crimes Against Humanity”, in A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, Oxford, 2002, Ch. 11.2.

²⁴¹ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 1, p. 224. According to the IMT:

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

(*id.*). That this overstates the customary law position in its aversion to the defence of obedience to superior orders is indicated by the previously cited authorities: *R v Smith* (1900) 17 SC 561, pp. 567-8, per Solomon J; *The Dover Castle*, (1921) 16 A.J.I.L. 704; *The Llandovery Castle*, (1921) 16 A.J.I.L. 708.

Charter with international law as it existed prior to the Second World War, the IMT pronounced a third position: that the principle *nullum crimen sine lege* is not, in any event, a principle of international law, but only a principle of “justice”.²⁴² The Tribunal declared that:

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.²⁴³

²⁴² *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 1, p. 219.

²⁴³ The conclusion that it would be “unjust” not to punish the Nazi defendants was only expressly reached by the IMT in the context of crimes against peace, in particular the waging of aggressive war. This conclusion appears to have been reached on two separate grounds. The first relates to the extent of the wrongdoing of the defendants and the second relates to the fact that the declaration of law in the Nuremberg Charter cannot be said to have genuinely taken the defendants by surprise. In relation to the latter point, the Tribunal stated, with particular reference to the Kellogg-Briand Pact (General Treaty for the Renunciation of War, 27 August 1928, 94 L.N.T.S. 57), which was binding on Germany, that:

Occupying the positions they did in the Government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.

(*Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 1, p. 219). This follows the remarks of the Chief Prosecutor for the United States, Mr Justice Jackson, who addressed the issue of notice in the following way:

I cannot, of course, deny that these men are surprised that this is the law; they really are surprised that there is any such thing as law. These defendants did not rely on any law at all. Their program ignored and defied all law...International law, natural law, German law, any law at all was to these men simply a propaganda device to be invoked when it helped and to be ignored when it would condemn what they wanted to do. That men may be protected in relying upon the law at the time they act is the reason we find laws of retrospective operations unjust. But these men cannot bring themselves within the reason of the rule which in some systems of jurisprudence prohibits *ex post facto* laws. They cannot show that they ever relied upon international law in any state or paid it the slightest regard.

(*id.*, vol. 2, p. 144.) The issue of justice appears to be presented here through analogy with the principles of equity: where individuals place reliance upon the state of the law at a particular point in time, the State is estopped from raising an *ex post facto* alteration to the law. The Nazi defendants were not able to make out their claim at equity, first, because they could not be said to have ever relied upon the state of the law at any point in time immediately prior to or during their reign of terror and aggression, and secondly, because they can hardly be said to have come to the Court with “clean hands” (see, e.g., P. Parkinson, “Estoppel”, in P. Parkinson (ed.), *The Principles of Equity*, LBC

The position of the IMT, therefore, was that international law did not place any limit upon the prescriptive or adjudicative jurisdiction of states with respect to the creation or application of laws having retroactive effect.²⁴⁴ This was a position that was supported by the International Military Tribunal for the Far East, which confirmed its “complete accord” with the view of the IMT that *nullum crimen sine lege* is not a limitation of sovereignty;²⁴⁵ and was reiterated in the judgments of a number of the cases tried under Control Council Law No. 10.²⁴⁶ Although the *Hostages Case* held (in *obiter dicta*) that Article 23(h) of the Hague Regulations of 1907 operated as a bar to retroactive action in criminal matters,²⁴⁷ and that in any event, a victorious nation had no lawful authority to enact *ex post facto* criminal laws,²⁴⁸ this was an uncommon position in the post-World War II proceedings.²⁴⁹

Information Services, Sydney, 1996, pp. 201-280; M. Spence, “Equitable Defences”, in P. Parkinson, *id.*, pp. 966-970).

²⁴⁴ See *Attorney-General of the Government of Israel v Adolf Eichmann* (1961) 36 ILR 5 (District Court of Jerusalem, affirmed by the Supreme Court of Israel, (1962) 36 ILR 277), par. 27, which states that by asserting that *nullum crimen sine lege* is not a limitation of sovereignty, the IMT indicated that, “the penal jurisdiction of a state with respect to crimes committed by ‘foreign offenders,’ insofar as it does not conflict on other grounds with the principles of international law, is not limited by the prohibition of retroactive effect.”

²⁴⁵ B.B. Ferencz, *Defining International Aggression: The Search for World Peace; A Documentary History and Analysis*, Oceana Publications, New York, 1975, vol. 1, p. 546.

²⁴⁶ See, in particular, *United States v Altstoetter et al.* (“Justice Case”) (1947) VI LRTWC 1, p. 41.

²⁴⁷ Article 23(h), Hague Regulations of 1907, states, *inter alia*, that it is especially forbidden: “To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.”

²⁴⁸ *United States v List et al.* (“Hostages Case”) (1948) VIII LRTWC 35, p. 54.

²⁴⁹ See UNWCC, “Defence Pleas”, (1949) XV LRTWC 155, p. 170. Nevertheless, the IMT did not necessarily envisage that the principle *nullum crimen sine lege* should be completely extrinsic to the legal process. Its pronouncement on the status of the principle was limited to a denial of its having any limiting effect on jurisdiction (“sovereignty”). Judge Pal (India) of the International Military Tribunal for the Far East stated, in his dissenting opinion, that “[t]he rule denying retroactivity to a law is not that a law cannot be made retroactive by its promulgator, but that it should not ordinarily be made so and that if such retroactive operation can be avoided courts should always do that.” (*Judgment of the International Military Tribunal for the Far East*, 1 November 1948, Judgment of Mr Pal, Member from India, reprinted in B.V.A. Röling and C.F. Fülér (eds), *The Tokyo Judgment: The International Military Tribunal For the Far East (I.M.F.T.E.)*, 29 April 1946-12 November 1948, University Press Amsterdam BV, Amsterdam, 1977, vol. 2, p. 538). The Member from India therefore envisaged that *nullum crimen sine lege* would operate at at least two levels: First, it would apply to the legislator as a matter of ethics, requiring the legislative authority to enquire into and satisfy itself as to the justice of prescribing acts as criminal *ex post facto*; secondly, it would apply to the adjudicator as a matter of interpretation, who, upon the assumption that the legislative authority would not enact laws that operate unjustly, should not interpret laws as having retroactive effect except where such interpretation is unavoidable.

2. AFTER NUREMBERG

The judgment of the IMT was affirmed by unanimous resolution of the United Nations General Assembly on 11 December 1946;²⁵⁰ but soon afterwards a steady flow of international instruments were created which indicated the impermissibility of criminal convictions on the basis of conduct which was not prescribed as criminal at the time of its commission. Article II(2) of the Universal Declaration of Human Rights (1948) states that:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.²⁵¹

Geneva Convention III of 12 August 1949 applies the same principle to prisoners of war as a matter of humanitarian law;²⁵² while Geneva Convention IV prohibits the enactment of retroactive penal provisions by an Occupying Power.²⁵³ The principle *nullum crimen sine lege* was also inserted in the International Covenant on Civil and Political Rights (1966),²⁵⁴ and Protocols I and II Additional to the Geneva

²⁵⁰ G.A. Res. 95(I), UN Doc. A/64/Add.1 (1946).

²⁵¹ Art. II(2), Universal Declaration of Human Rights, G.A. Res. 217 A (III), UN Doc. A/810 (1948).

²⁵² Art. 99, Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (hereinafter Geneva Convention III):

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International Law, in force at the time the said act was committed.

²⁵³ Art. 65, Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (hereinafter Geneva Convention IV).

²⁵⁴ Art. 15, International Covenant on Civil and Political Rights, 16 December 1966, 993 UNTS 171 (hereinafter ICCPR):

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the Offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Conventions of 1949 (1977),²⁵⁵ as well as in regional human rights treaties: the European Convention on Human Rights (1950),²⁵⁶ the American Convention on Human Rights (1969),²⁵⁷ and the African Charter on Human and Peoples' Rights (1981).²⁵⁸ The proliferation of international treaties and instruments embodying the

²⁵⁵ Art. 2(c), Protocol Additional to the Geneva Conventions of 12 August 1949, Relative to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (hereinafter Protocol I):

No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Art. 6(c), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (hereinafter Protocol II):

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

²⁵⁶ Art. 7, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222 (hereinafter European Convention on Human Rights):

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

²⁵⁷ Art. 9, American Convention on Human Rights, 22 November 1969, 1144 UNTS 123 (hereinafter American Convention on Human Rights):

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

²⁵⁸ Art. 7(2), African [Banjul] Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (hereinafter African Charter on Human and Peoples' Rights):

principle *nullum crimen sine lege* provided an international counterpart to the already extant principle of legality found in municipal law. The result is that *nullum crimen sine lege* is now uncontroversially accepted as a principle of customary international law.²⁵⁹ Thus, in his report to the Security Council on the creation of the ICTY, the United Nations Secretary-General stressed that the principle *nullum crimen sine lege* would require the Tribunal to limit itself to the application of rules of humanitarian law which were “beyond any doubt part of customary law”.²⁶⁰ Although the Statute of the ICTY does not expressly incorporate the principle of legality (and the same observation may be made in relation to the Statutes of the ICTR, the Special Court for Sierra Leone and the Iraqi Special Tribunal),²⁶¹ nevertheless the binding quality of the principle *nullum crimen sine lege* has been affirmed in the jurisprudence of the

No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

²⁵⁹ See, e.g., *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 402; *Prosecutor v Issa Hassan Sesay*, Case No. SCSL-03-05-PT, Trial Chamber, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, par. 5; *Prosecutor v Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3, Trial Chamber I, Judgment and Sentence, 6 December 1999, par. 86; *Prosecutor v Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, par. 141; *Prosecutor v Joao Franca da Silva Alias Jhoni Franca*, Case No. 04a/2001, District Court of Dili, Special Panel for the trial of Serious Crimes, Judgment, 5 December 2002, par. 59; *Prosecutor v Sabino Gouveia Leite*, Case No. 04a/2001, District Court of Dili, Special Panel for the trial of Serious Crimes, Judgment, 7 December 2002, par. 60; *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, par. 25; *Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-T, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002, par. 56.

²⁶⁰ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), par. 34.

²⁶¹ See ICTY Statute; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994, UN Doc. SC/5974 (1995) (hereinafter ICTR Statute); Statute of the Special Court for Sierra Leone, available at www.sc-sl.org; Statute of the Special Iraqi Tribunal, available at www.cpa-iraq.org. The Statute of the Special Iraqi Tribunal does, however, provide in Art. 24(e) that “[t]he penalty for any crimes under Articles 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents.” The principle *nullum crimen sine lege* is expressly provided for in Section 12 of UNTAET Regulation 2000/15, establishing the Special Panel for Serious Crimes within the Dili District Court, East Timor. See, also, Art. 33(2) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea (as amended up to 27 October 2004) which provides that the Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with Arts 14 and 15 of the ICCPR.

ICTY (and other tribunals)²⁶², both explicitly,²⁶³ as well as implicitly, for *e.g.*, through the tribunal's development of a principle of continuity of judicial decisions based loosely on the doctrine *stare decisis*.²⁶⁴

3. A GENERAL PRINCIPLE OF LAW?

While the status of *nullum crimen sine lege* as a principle of customary international law is now undisputed, there is some question as to whether that principle also has the status of a general principle of law (in the sense of Article 38(1)(c) of the Statute of the ICJ).²⁶⁵ The principle *nullum crime sine lege* is a source of substantive rights, and on that basis may exceed the minimal function assigned to general principles of law as a formal source of international law;²⁶⁶ but at the same time *nullum crimen sine lege* contains rules of legal interpretation, and is therefore precisely the sort of

²⁶² See below.

²⁶³ See, *e.g.*, *Prosecutor v Radislav Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, par. 580; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 402ff.

²⁶⁴ In *Prosecutor v Zlatko Aleskovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, the ICTY Appeals Chamber considered that the *ratio decidendi* of its decisions were binding on Trial Chambers (par. 113) and that the Appeals Chamber should follow its own previous decisions, but should be free to depart from them for cogent reasons in the interests of justice (par. 107). The rationale for this principle was expressly grounded, at least in part, in "the interests of certainty and predictability" (pars. 107, 113). The Appeals Chamber also considered that while decisions of the Trial Chambers have no binding force on each other, the Trial Chamber may nevertheless find them to be "persuasive" (par. 114); see also *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 167; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001 par. 8; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-PT, Trial Chamber, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to Infringement of the Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, 31 March 2004, par. 40; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-PT, Trial Chamber, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, pars 24-25; *Prosecutor v Issa Hassan Sesay*, Case No. SCSL-03-05-PT, Trial Chamber, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, pars 11-12; *Prosecutor v Sam Hinga Norman*, Case No. SCSL-03-08-PT, Trial Chamber, Decision on the Defence Motion on the Denial of Right to Appeal, 7 November 2003, par. 3; *Prosecutor v Morris Kallon*, Case No. SCSL-03-07-PT, Trial Chamber, Decision on the Defence Motion on the Denial of Right to Appeal, 7 November 2003, par. 3; See also *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, Separate Opinion of Judge Shahabuddeen, pars 15-28; *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, Separate Opinion of Judge David Hunt, pars 36-43.

²⁶⁵ Art. 38(1)(c), Statute of the ICJ.

²⁶⁶ See, *e.g.*, H. Waldock, "General Course on Public International Law" (1962-II) 106 *Hague Recueil* 1, p. 54ff.

principle found among general principles of law.²⁶⁷ Perhaps *nullum crimen sine lege* operates in some respect as a principle of equity *infra legem*, i.e. as a form of equity which constitutes a method of interpretation of the law in force.²⁶⁸ It has been suggested, however, that *nullum crimen sine lege* is not “a general principle of law universally accepted by all States.”²⁶⁹ Certainly the principle of legality operates in a different manner from state to state, and is thus susceptible to generality only at a certain level of abstraction. But the test of a general principle of law has never been put as requiring universal domestic consensus as to the specific rules of application of any relevant principle.²⁷⁰ Bin Cheng has stated that general principles of law do not consist in “specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law.”²⁷¹ The strongest argument levelled against the status of *nullum crimen sine lege* as a general principle of law appears to be the claim that while the basic prohibition on *ex post facto* laws may be found in civil law states,²⁷² it does not generally exist as a rule of law as such in common law systems. There it tends to operate as nothing more than an interpretative presumption.²⁷³ While it has potentially far-reaching implications at the level of judicial interpretation in such systems, it is ultimately incapable of preventing a conviction on the basis of *ex post facto* legislation where the legislative intent to create *ex post facto* law is manifest in the terms of the Statute. Such an argument may be thought to be fatal to the claim that the prohibition on *ex post facto* criminal laws has entered customary law, but the claim presumably proceeds on the assertion that common law states tend to be parties to the international instruments prohibiting *ex post facto* laws, and that their contribution towards state practice in recognising the inadmissibility of such laws is to be located in their signing and supporting the relevant international instruments rather than in their domestic practice.²⁷⁴ In fact, the

²⁶⁷ See, e.g., *Frontier Dispute Case (Burkina Faso v Mali)* [1985] ICJ Rep. 6, par. 28.

²⁶⁸ See *id.*

²⁶⁹ Lamb (2002), p. 740.

²⁷⁰ C.A. Ford, “Judicial Discretion in International Jurisprudence: Article 38(1)(c) and ‘General Principles of Law’”, (1994) 5 *Duke Journal of Comparative and International Law* 35, p. 73.

²⁷¹ Cheng (1987), p. 24.

²⁷² See Cassese (2003), p. 141.

²⁷³ Lamb (2002), p. 740.

²⁷⁴ On treaty practice as state practice for the purpose of customary international law, see discussion on prohibition on reprisals under international law below.

claim that common law and civil law states can be strongly differentiated in terms of the prescriptive jurisdiction of their respective legislatures to pass *ex post facto* criminal laws is misconceived and out of date. The overwhelming majority of states which employ common law as a formal source of law have expressly entrenched the prohibition on *ex post facto* criminal laws in their constitutions.

Art. I, §9(3) of the United States Constitution states that, “[n]o Bill of Attainder or ex post facto law shall be passed” by Congress.²⁷⁵ Art. I, §10(1) prohibits the States from passing the same.²⁷⁶ A similar provision exists in the Constitutions of American Samoa;²⁷⁷ the Federated States of Micronesia;²⁷⁸ and the Marshall Islands.²⁷⁹ The Constitution of Ireland states that the Oireachtas (the national parliament) “shall not declare acts to be infringements of the law which were not so at the date of their commission”.²⁸⁰ The Indian Constitution provides that “[n]o person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”²⁸¹ Similar provisions to the latter may be found in the Constitutions of: Antigua and Barbuda;²⁸² the Bahamas;²⁸³ Bangladesh;²⁸⁴ Barbados;²⁸⁵ Belize;²⁸⁶ the Cook Islands;²⁸⁷ Cyprus;²⁸⁸ Dominica;²⁸⁹ Fiji;²⁹⁰ Ghana;²⁹¹ Grenada;²⁹² Guyana;²⁹³ Jamaica;²⁹⁴ Kenya;²⁹⁵ Kiribati;²⁹⁶

²⁷⁵ Art. I, §9(3), Constitution of the United States of America, *reprinted in* G.H. Flanz (ed.), *Constitutions of the Countries of the World*, Oceana Publications Inc., Dobbs Ferry, NY, 1971-2004, binder XX.

²⁷⁶ Art. I(10)(1), Constitution of the United States of America, *id.*

²⁷⁷ Art. I(13), Constitution of American Samoa, *available at* www.asbar.org.

²⁷⁸ Art. 4(11), Constitution of the Federated States of Micronesia, *reprinted in* Flanz (1971-2004), binder XII.

²⁷⁹ Art. II(8), Constitution of the Marshall Islands, *reprinted in* Flanz (1971-2004), binder XII.

²⁸⁰ Art. 15(5)(1°), Bunreacht na hÉirann (Constitution of Ireland), *reprinted in* Flanz (1971-2004), binder IX.

²⁸¹ Art. 20(1), Constitution of India, *reprinted in* Flanz (1971-2004), binder VIII.

²⁸² Art. 15(4), Constitution of Antigua and Barbuda, *reprinted in* Flanz (1971-2004), binder I.

²⁸³ Art. 20(4), Constitution of the Bahamas, *reprinted in* Flanz (1971-2004), binder I.

²⁸⁴ Art. 35(1), Constitution of Bangladesh, *reprinted in* Flanz (1971-2004), binder II.

²⁸⁵ Art. 18(4), Constitution of Barbados, *reprinted in* Flanz (1971-2004), binder II.

²⁸⁶ Art. 6(4), Constitution of Belize, *reprinted in* Flanz (1971-2004), binder II.

²⁸⁷ Art. 65(g)-(h), Constitution of the Cook Islands, *available at* www.pacilii.org.

²⁸⁸ Art. 12(1), Constitution of Cyprus, *reprinted in* Flanz (1971-2004), binder V.

²⁸⁹ Art. 8(4), Constitution of Dominica, *reprinted in* Flanz (1971-2004), binder VI.

²⁹⁰ Art. 28(1)(j), Constitution of the Fiji Islands, *reprinted in* Flanz (1971-2004), binder VI.

²⁹¹ Art. 19(5)-(6), Constitution of Ghana, *reprinted in* Flanz (1971-2004), binder VII.

²⁹² Art. 8(4), Constitution of Grenada, *reprinted in* Flanz (1971-2004), binder VII.

Lesotho;²⁹⁷ Malawi;²⁹⁸ Malaysia;²⁹⁹ Malta;³⁰⁰ Mauritius;³⁰¹ Mozambique;³⁰² Namibia;³⁰³ Nigeria;³⁰⁴ Pakistan;³⁰⁵ Saint Kitts and Nevis;³⁰⁶ Saint Lucia;³⁰⁷ Saint Vincent and the Grenadines;³⁰⁸ Sierra Leone;³⁰⁹ Singapore;³¹⁰ the Solomon Islands;³¹¹ South Africa;³¹² Sri Lanka;³¹³ Tanzania;³¹⁴ Tuvalu;³¹⁵ Uganda;³¹⁶ and

²⁹³ Art. 144(4), Constitution of Guyana, *reprinted in* Flanz (1971-2004), binder VIII.

²⁹⁴ Art. 20(7), Constitution of Jamaica, *reprinted in* Flanz (1971-2004), binder IX.

²⁹⁵ Art. 77(1), Constitution of Kenya, *reprinted in* Flanz (1971-2004), binder X.

²⁹⁶ Art. 10(4), Constitution of Kiribati, *reprinted in* Flanz (1971-2004), binder X.

²⁹⁷ Art. 12(4), Constitution of Lesotho, *reprinted in* Flanz (1971-2004), binder X.

²⁹⁸ Art. 42(2)(f)(vi), Constitution of Malawi, *reprinted in* Flanz (1971-2004), binder XI.

²⁹⁹ Art. 7(1), Constitution of Malaysia, *reprinted in* Flanz (1971-2004), binder XI.

³⁰⁰ Art. 39(8), Constitution of Malta, *reprinted in* Flanz (1971-2004), binder XI.

³⁰¹ Art. 10(4), Constitution of Mauritius, *reprinted in* Flanz (1971-2004), binder XII.

³⁰² Art. 99, Constitution of Mozambique, *reprinted in* Flanz (1971-2004), binder XII.

³⁰³ Art. 12(3), Constitution of Namibia, *reprinted in* Flanz (1971-2004), binder XII.

³⁰⁴ Art. 36(8), Constitution of Nigeria, *reprinted in* Flanz (1971-2004), binder XIV.

³⁰⁵ Art. 12(1), Constitution of Pakistan, *reprinted in* Flanz (1971-2004), binder XIV.

³⁰⁶ Art. 10(4), Constitution of Saint Kitts and Nevis, *available at*

<http://www.georgetown.edu/pdba/Constitutions/Kitts/stkitts-nevis.html>.

³⁰⁷ Art. 8(4), Constitution of Saint Lucia, *reprinted in* Flanz (1971-2004), binder XV.

³⁰⁸ Art. 8(4), Constitution of Saint Vincent and the Grenadines, *reprinted in* Flanz (1971-2004), binder XV.

³⁰⁹ Art. 23(7)-(8), Constitution of Sierra Leone, *reprinted in* Flanz (1971-2004), binder XVI.

³¹⁰ Art. 11(1), Constitution of Singapore, *reprinted in* Flanz (1971-2004), binder XVI.

³¹¹ Art. 10(4), Constitution of the Solomon Islands, *reprinted in* Flanz (1971-2004), binder XVI.

³¹² Art. 35(3)(l) & (n), Constitution of South Africa, *reprinted in* Flanz (1971-2004), binder XVI. The South African Constitution states that the offence must have been an offence either under national or international law at the time of its commission (Art. 35(3)(l)).

³¹³ Art. 13(6), Constitution of Sri Lanka, *reprinted in* Flanz (1971-2004), binder XVII. Section 6 adds that:

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

³¹⁴ Art. 13(6)(c), Constitution of Tanzania, *reprinted in* Flanz (1971-2004), binder XVIII.

³¹⁵ Art. 22, Constitution of Tuvalu, *reprinted in* Flanz (1971-2004), binder XVIII:

(6) No-one shall be convicted of an offence on account of an act that was not at the time of the doing of the act, an offence or a legal element of an offence.

(7) No penalty shall be imposed for an offence that is more severe in amount or in kind than the maximum that might have been imposed for the offence at the time when it was committed.

The reference to "a legal element of an offence" in (6) above is puzzling as the implication arising from the text is that an act which involved only the partial completion of an offence at the time of its commission may be deemed a completed offence retroactively.

³¹⁶ Art. 28(7)-(8), Constitution of Uganda, *reprinted in* Flanz (1971-2004), binder XVIII.

Vanuatu.³¹⁷ Some States go further, requiring as a matter of constitutional imperative, that offences not merely be pre-existing in law at the time of their commission, but that they be defined as well. This is the case in the Constitutions of Nauru;³¹⁸ Western Samoa;³¹⁹ Papua New Guinea;³²⁰ and Zambia;³²¹ the latter two expressly requiring that that definition be located in written law. Reference should also be made to the Constitution of Tonga which expressly prohibits the enactment of retrospective laws, though in terms somewhat different to the preceding examples.³²²

Of course, in a small number of common law States there remains prescriptive jurisdiction to pass *ex post facto* criminal laws. These States (for *e.g.*, Canada, the United Kingdom, New Zealand, Australia) are particularly prominent common law States. Is the presence of this lingering prescriptive jurisdiction to pass *ex post facto* criminal laws fatal to the assertion that *nullum crimen sine lege* is a general principle of law? The answer is surely no. Even in these States, the “general

³¹⁷ Art. 5(2)(f)-(g), Constitution of Vanuatu, *reprinted in* Flanz (1971-2004), binder XX. The Constitution states that the offence must have existed, at the time of its commission, in either written or customary law (Art. 5(2)(f)).

³¹⁸ Art. 10(1)&(4), Constitution of Nauru, *reprinted in* Flanz (1971-2004), binder XII.

³¹⁹ Art. 10(1)-(2), Constitution of Western Samoa, *available at* www.pacilii.org.

³²⁰ Art. 37(2)&(7), Constitution of Papua New Guinea, *reprinted in* Flanz (1971-2004), binder XIV.

³²¹ Art. 18(4)&(8), Constitution of Zambia, *reprinted in* Flanz (1971-2004), binder XX.

³²² Art. 20, Constitution of Tonga, *reprinted in* Flanz (1971-2004), binder XVIII.:

It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws.

The reference to “privileges” indicates the unconstitutionality of certain forms of procedural retroactivity. The position in the Hong Kong Special Administrative Region is also of interest. The *Hong Kong Bill of Rights Ordinance 1991* incorporated into the law of Hong Kong, provisions of the ICCPR. §8 of the Ordinance sets out the Hong Kong Bill of Rights, Art. 12 of which provides for the prohibition on *ex post facto* criminal laws in terms substantively identical to Art. 15 of the ICCPR. Any legislation passed by Hong Kong’s Legislative Council which purports to prescribe *ex post facto* criminal laws, or which overrides the protections afforded in the Bill of Rights, would appear to be *ultra vires* the powers of the Council. The *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, which acts in all instances as a constraint upon the legislative powers of Hong Kong’s legislature (*see* Art. 11), provides in Article 39 that:

1. The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

2. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

proposition” (to apply Bin Cheng’s test) that underlies the law is one that disapproves of, and seeks to prevent, the application of *ex post facto* criminal laws. In Canada, for instance, §11 of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right “not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.”³²³ The Canadian Charter incorporates a supremacy provision rendering inconsistent laws a nullity to the extent of the inconsistency.³²⁴ While §33 of the Charter enables the Canadian Parliament or the legislature of a Province to expressly declare an Act to be operative notwithstanding inconsistency with certain Charter provisions (including the prohibition on *ex post facto* laws),³²⁵ in practice legislative recourse to §33 is extremely rare (with the exception of Quebec).³²⁶

In the United Kingdom neither the Scottish Parliament,³²⁷ nor the Northern Ireland Assembly,³²⁸ have legislative competence to prescribe *ex post facto* criminal laws. The European Convention on Human Rights (which incorporates the principle *nullum crimen sine lege*) was incorporated in part into the domestic law of

³²³ §11(g), Canadian Charter of Rights and Freedoms (enacted as Part I of the *Constitution Act 1982* (Can)) (hereinafter Canadian Charter).

³²⁴ §52, Canadian Charter.

³²⁵ §33, Canadian Charter:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection 1 shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection 1.

(5) Subsection 3 applies in respect of a re-enactment made under subsection 4.

³²⁶ F.L. Morton, “Can Judicial Supremacy be Stopped?”, [October 2003] *Policy Options* 25; F. R. Liss, “A Mandate to Balance: Judicial Protection of Individual Rights Under the Canadian Charter of Rights and Freedoms”, (1992) 41 *Emory Law Journal* 1281, p. 1286.

³²⁷ §29(2)(d), *Scotland Act 1998* (UK) provides that an Act of the Scottish Parliament is not law so far as it is incompatible with any “Convention rights”. “Convention rights” include the prohibition on *ex post facto* criminal laws under Art. 7 of the European Convention on Human Rights (See §126(1), *Scotland Act 1998* (UK); §1(1), *Human Rights Act 1998* (UK)).

³²⁸ §6(2)(c), *Northern Ireland Act 1998* (UK).

the whole of the United Kingdom through the *Human Rights Act 1998* (UK), but the scope within that Act for judicial review of legislation enacted by the Westminster Parliament on the grounds of incompatibility with the European Convention is limited. Nevertheless, courts are required to interpret and apply Westminster legislation as compatible with Convention rights wherever possible,³²⁹ and if such an interpretation is impossible, then the court may make a declaration indicating such incompatibility.³³⁰ A declaration of incompatibility does not affect the validity or continuing operation of the legislation in any respect,³³¹ but in its White Paper on the *Human Rights Bill* the government expressed the view that a declaration on incompatibility would “almost certainly” prompt an alteration to the offending legislation.³³² The Act includes an extraordinary procedure for amending legislation after a declaration of incompatibility.³³³ In addition, for legislation passed after the coming into force of the *Human Rights Act*, the Minister in charge of the bill is required to attest to the compatibility (in his view) of the bill with Convention rights, or alternatively acknowledge that such an attestation cannot be made, but that the government nevertheless wishes to proceed with the bill.³³⁴ Of course none of these safeguards protect an individual already charged on the basis of an *ex post facto* law. For such an individual the remedy may lie only in the European Court of Human Rights.

In New Zealand, §26(1) of the *Bill of Rights Act 1990* provides that, “[n]o one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.”³³⁵ While §6 of the Act requires courts to interpret other Acts as consistent with the protections set out in the *Bill of Rights Act* where possible,³³⁶ §4 precludes the possibility of Courts invalidating or not applying other Acts in the case of a direct inconsistency.³³⁷ New Zealand’s Bill of Rights, therefore,

³²⁹ §3(1), *Human Rights Act 1998* (UK). “Convention rights” are defined to include the right to protection against *ex post facto* criminal laws in Art. 7 (see §1, *Human Rights Act 1998* (UK)).

³³⁰ §4, *Human Rights Act 1998* (UK).

³³¹ §4(6), *Human Rights Act 1998* (UK).

³³² *Rights Brought Home: The Human Rights Bill*, Cmd 3782, 1997, par. 2.9.

³³³ §10, *Human Rights Act 1998* (UK).

³³⁴ §19, *Human Rights Act 1998* (UK).

³³⁵ §26(1), *Bill of Rights Act 1990* (NZ).

³³⁶ §6, *Bill of Rights Act 1990* (NZ).

³³⁷ §4, *Bill of Rights Act 1990* (NZ).

has no higher status than ordinary legislation.³³⁸ A small number of common law and hybrid-common law states offer no explicit protection against *ex post facto* criminal laws at all. These states include Australia,³³⁹ Cameroon,³⁴⁰ Trinidad and Tobago,³⁴¹ Israel,³⁴² and Niue.³⁴³ Nevertheless, the interpretative presumption against criminal laws operating retroactively within these (as within all) common law states still indicates a juridical principle that *ex post facto* criminal laws are unjust and improper and should be avoided. This principle could be said, therefore, to operate generally across legal systems.

4. AN INTERNATIONALLY RECOGNIZED HUMAN RIGHT?

The principle *nullum crimen sine lege* operates, not simply as a principle of general international law, but as an “internationally recognized human right.”³⁴⁴ It is one of the few provisions set out in the International Covenant on Civil and Political Rights that cannot be derogated from even in time of public emergency;³⁴⁵ and is expressly listed in other human rights treaties as non-derogable in time of war or other public emergency.³⁴⁶ While the UN’s Human Rights Committee has suggested that non-derogability of human rights does not necessarily signify that the right in question lies at the core of human rights,³⁴⁷ Schabas has stated that international human rights

³³⁸ See Concluding Observations of the Human Rights Committee: New Zealand 3/10/1995, UN Doc. A/50/40 (1995), par. 176. See, however, J. McLean, “Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act”, (2001) 4 *New Zealand Law Review* 421, who argues that New Zealand’s Bill of Rights nevertheless wields a powerful normative force.

³³⁹ See Constitution of Australia, reprinted in Flanz (1971-2004), binder I.

³⁴⁰ See Constitution of Cameroon, reprinted in Flanz (1971-2004), binder III.

³⁴¹ See Constitution of Trinidad and Tobago, reprinted in Flanz (1971-2004), binder reprinted in Flanz (1971-2004), binder XVIII, which enshrines, in Part I, a number of rights and freedoms, but makes no reference to the prohibition on *ex post facto* criminal laws.

³⁴² See *Basic Law: Human Dignity and Liberty 1992* (Israel), which incorporates a number of fundamental rights into Israeli law at a constitutional level, but makes no explicit reference to the prohibition on *ex post facto* criminal laws.

³⁴³ See Constitution of Niue, available at www.paclii.org.

³⁴⁴ See chapter 1 above.

³⁴⁵ Art. 4(2), ICCPR.

³⁴⁶ Art. 15(2), European Convention on Human Rights; Art. 27(2), American Convention on Human Rights. Although the African Charter on Human and Peoples’ Rights does not contain a general non-derogation clause, the permissibility of derogation in the case of public need is expressly provided for in certain Articles; no such provision is made however in respect of Article 7(2), incorporating the principle *nullum crimen sine lege*.

³⁴⁷ ‘General Comment No. 24(52)’, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), §12, cited in W.A. Schabas, “Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals”, (2000) 11 *European Journal of International Law* 521, p. 522 (hereinafter Schabas, (2000a)).

law considers “the prohibition of retroactive crimes and punishments to be one of its most fundamental principles.”³⁴⁸ The relevant test, for the purpose of Article 21(3) of the ICC Statute, is simply whether the human right is “internationally recognized”. It was suggested above that this test would be satisfied by the status of the relevant human rights norm as general international law. The international law principle *nullum crimen sine lege* is a principle of customary international law, and appears to be a general principle of law. Further, it is incorporated into various multilateral human rights and humanitarian law treaties as indicated above, and into the fundamental rights provisions of a significant number of national constitutions. Recourse may therefore be had to Article 21(3) of the ICC Statute if, and to the extent, that the principle *nullum crimen sine lege* in Article 22 understates the principle as it applies in general international law. The application and interpretation of law by the ICC must be in accordance with the wider standard.

5. CONGRUENCE BETWEEN THE ICC STATUTE & CUSTOMARY LAW

The customary international law standard of *nullum crimen sine lege* does not strictly require pre-existing criminal laws in written form; both written and unwritten sources of criminal law may suffice. The International Covenant on Civil and Political Rights, for *e.g.*, adds the proviso that the prohibition on *ex post facto* criminal law shall not “prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.”³⁴⁹ The ILC’s 1994 Draft Statute for an International Criminal Court had originally proposed that the court would have subject-matter jurisdiction over certain enumerated treaty-based crimes as well as crimes under general international law.³⁵⁰ The ICC Statute, however, confers jurisdiction over crimes only where enumerated and defined in advance in written

³⁴⁸ W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001, p. 57.

³⁴⁹ Art. 15(2), ICCPR.

³⁵⁰ See, *e.g.*, J. Crawford, “The ILC’s Draft Statute for an International Criminal Tribunal”, (1994) 88 *American Journal of International Law* 140, pp. 143-7. See, also, *CR v UK* (1995) 21 EHRR 363, par. 33, where the European Court of Human Rights indicates that the term “law” within Article 7 of the European Convention on Human Rights (incorporating the principle *nullum crimen sine lege*), comprises written as well as unwritten law.

form.³⁵¹ The ICC Statute appears, therefore, to evince a respect for the principle of *nullum crimen sine lege* which is in some respects more extensive than that required by customary international law. The ICTY, for instance, which purports in its case law to abide by the customary international law standard of *nullum crimen sine lege*,³⁵² had no trouble in recognising an “inherent jurisdiction” to try and punish individuals for the crime of contempt, despite no mention of such a crime in the ICTY Statute.³⁵³ The ICC Statute, on the other hand, specifically enumerates (within Article 70) the offences against the administration of justice over which the ICC has jurisdiction.³⁵⁴

While the classical civil law requirement that offences be enumerated and defined in written law³⁵⁵ appears to have been adopted by the ICC Statute despite the fact that it does not form a part of *nullum crimen sine lege* under customary international law, in other respects there is a close congruence between the principle *nullum crimen sine lege* as it exists under customary law and the principle as it exists within Article 22 of the ICC Statute. Article 22(1) of the ICC

³⁵¹ See Arts 5-8, ICC Statute.

³⁵² See below.

³⁵³ *Prosecutor v Duško Tadić*, Case No. IT-94-1-A-R77, Appeals Chamber, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, pars 13 & 24, affirmed in *Prosecutor v Duško Tadić*, Case No. IT-94-1-A-AR77, Appeals Chamber, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001. The International Court of Justice recognised the existence of “inherent powers” in its judgment in the *Northern Cameroons Case* [1963] ICJ Rep. 15, p. 29. These powers were further elaborated by the ICJ in the *Nuclear Tests Cases* as follows: “the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the ‘inherent limitations on the exercise of the judicial function’ of the Court and to ‘maintain its judicial character’” (*Australia v France* [1974] ICJ Rep. 253, par. 23; *New Zealand v France* [1974] ICJ Rep. 457, par. 23.) The recognition of an inherent jurisdiction is not in any sense remarkable, but then, at no stage did the ICJ suggest that these inherent powers extended to the power of criminalisation.

³⁵⁴ Art. 70, ICC Statute. See, also, Art. 5(2) of the ICC Statute which excludes the crime of aggression from the ICC’s jurisdiction until such time as the crime is explicitly defined in an amendment to the ICC Statute. Compare this insistence on written law with the existence of the residual jurisdiction under Article 3 of the ICTY Statute over violations of the “laws or customs of war”, a source of jurisdiction which extends to *all* serious violations of humanitarian law (including customary violations), with the exception of those violations already enumerated within the ICTY Statute, *i.e.*, grave breaches of the Geneva Conventions of 1949 (*Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, pars 87, 91; *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, Case No. IT-96-23-T, Judgment of the Trial Chamber, 22 February 2001, par. 401; but see *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Separate Opinion of Judge Li, par. 13).

³⁵⁵ This requirement is known in civil law systems as *nullum crimen sine lege scripta* (see, *e.g.*, Cassese (2003), p. 141).

Statute, which states the general principle that “[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court”,³⁵⁶ is drafted in terms that are almost identical to the principle *nullum crimen sine lege* as drafted in successive human rights treaties.³⁵⁷ Article 22(2) of the ICC Statute, which contains a number of corollaries of the principle *nullum crimen sine lege* (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”), appears to replicate the requirements of *nullum crimen sine lege* under customary international law, at least as they apply to the definitions of crimes where located in statutory form. The ICTY Trial Chamber in *Prosecutor v Delalić*, for instance, has confirmed as a corollary of the principle of legality under customary law, the rule that “penal statutes must be strictly construed”.³⁵⁸ The requirement of strict construction, and its logical necessity – the prohibition on the extension of crimes by analogy – have been confirmed in numerous decisions of international criminal tribunals,³⁵⁹ as well as the European Court of Human Rights.³⁶⁰ The requirement that ambiguity in the definition of a crime be resolved in favour of the

³⁵⁶ The effect of Article 22(1) of the ICC Statute is discussed below.

³⁵⁷ On this point *see below*.

³⁵⁸ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 408.

³⁵⁹ *See, e.g., Prosecutor v Radislav Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, par. 580; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, pars 17-21; *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004, pars 19-20; *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, pars 17-18; *Prosecutor v Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment and Opinion, 5 December 2003, par. 93; *Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, par. 195; *Prosecutor v Leonardus Kasa*, Case No. 11/CG/2000, Dili District Court, Special Panel for Serious Crimes, Judgment, 9 May 2001, at part ‘E’; *Prosecutor v Domingos Amati and Fransisco Matos*, Case No. 12/2003, Dili District Court, Special Panel for Serious Crimes, Decision on the Defence Motion to Dismiss Count 1 of the Indictment for Failure to Establish a Prima Facie Case, 11 July 2003, pars 31-32; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-PT, Trial Chamber, Brima – Decision on Applicant’s Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, pars 89-91.

³⁶⁰ *See, e.g., CR v UK* (1995) 21 EHRR 363, par. 33.

accused (a rule of construction known as *contra proferentem*)³⁶¹ has also been upheld in decisions of the international criminal tribunals.³⁶² In one respect, however, it appears that the elaboration of the principle *nullum crimen sine lege* in Article 22 of the ICC Statute fails to mention a significant corollary of the principle *nullum crimen sine lege* recognised under customary international law, *i.e.*, the requirement of specificity. This requirement, known to civil law systems by the maxim *nullum crimen sine lege stricta*,³⁶³ requires that an offence not merely be defined in law, but that it be defined clearly. The ICTY Trial Chamber in *Prosecutor v Delalić*, for instance, identified as a corollary of the principle *nullum crimen sine lege*, the “requirement of specificity and the prohibition of ambiguity in criminal legislation”;³⁶⁴ the European Court of Human Rights identified as a component of the principle *nullum crimen sine lege*, the rule that “an offence must be clearly defined in law”.³⁶⁵ This requirement has been upheld in a number of decisions of international criminal tribunals.³⁶⁶ The requirement of specificity could be argued to follow in any event from the rule of strict construction and from the rule *contra proferentem*: Where a crime is defined ambiguously the accused can only be convicted if his conduct clearly and unambiguously violated the relevant provision. But the requirement of specificity is not coextensive with the rules of strict construction and

³⁶¹ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 413.

³⁶² *See, e.g. Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, pars 402 & 413; *Prosecutor v Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgment and Sentence, 21 May 1999, par. 103; *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, pars 27-28; *Prosecutor v Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment and Opinion, 5 December 2003, par. 93.

³⁶³ Cassese (2003), pp. 141-2.

³⁶⁴ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 402; *see also, id.*, par. 409.

³⁶⁵ *CR v UK* (1995) 21 EHRR 363, par. 33.

³⁶⁶ *See, e.g., Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, pars 193, 201-202; *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, par. 40. *See, also, Prosecutor v Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, par. 141; *Prosecutor v Enver Hadžihanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, par. 44; *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, par. 9; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, par. 178.

contra proferentem, and it deserves separate mention. The effect of specificity as a pre-requisite for criminalisation is that the court is stripped of subject-matter jurisdiction in respect of an ambiguously defined crime even where the conduct in question unambiguously contravenes the provision. Thus specificity is in some respects a more stringent rule than strict construction and *contra proferentem*. The requirement of specificity is similar in effect to the void-for-vagueness doctrine under U.S. constitutional law whereby vaguely drafted penal provisions may be declared unconstitutional.³⁶⁷ As an element of the principle *nullum crimen sine lege* under customary international law, the requirement of specificity governs the application and interpretation of the ICC Statute by virtue of Article 21(3) of the Statute which states that the application and interpretation of law by the ICC must be consistent with internationally recognised human rights.³⁶⁸

There are, however, a number of potential means through which the ICC could treat an absence of specificity in relation to a crime within the ICC Statute. Treating the crime as falling outside of the jurisdiction *ratione materiae* of the ICC by virtue of the requirement of specificity (which impliedly forms a part of the ICC Statute as a result of Article 21(3)) is only one such means. Each of the corollaries of the principle *nullum crimen sine lege* is inherently intertwined,³⁶⁹ thus any particular violation of the principle could theoretically, depending on the circumstances, be treated as a violation of more than one corollary. In relation to an absence of specificity, therefore, the ICC could (instead of applying a non-specified corollary by recourse to Article 21(3)) apply the rule *contra proferentem* under Article 22(2) of the ICC Statute so as to interpret any ambiguity in the favour of the accused. Alternatively, the ICC could treat the absence of specificity as entailing a violation of the prohibition on non-retroactivity (which is incorporated in Article 22(1) of the ICC Statute). The latter approach has been adopted in the practice of the ICTY. In the case of *Prosecutor v Vasiljević*, Trial Chamber II acquitted the accused of the charge of “violence to life and person” on the grounds that the crime was

³⁶⁷ See, e.g., Ashworth (1999), p. 76. The requirement of specificity does not, however, create any voidability as such; rather the court is deprived jurisdiction *ratione materiae* in respect of any provision which is not drafted with sufficient clarity.

³⁶⁸ See above.

³⁶⁹ See, generally, however, J.C. Jeffries, Jr., “Legality, Vagueness and the Construction of Penal Statutes”, (1985) 71 *Virginia Law Review* 189

insufficiently defined within customary international law. The Trial Chamber held that although the crime ostensibly fell within the subject-matter jurisdiction of the ICTY (as a “serious” violation of Common Article 3 of the Geneva Conventions of 1949),³⁷⁰ it could not convict an accused person of the crime unless “the criminal conduct in question was sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the criminal heading chosen by the Prosecution”.³⁷¹ The requirement of sufficient clarity in the definition of a criminal offence was stated by the Chamber to be a component of the principle *nullum crimen sine lege*,³⁷² and thus a precondition to the Tribunal’s jurisdiction.³⁷³ Ultimately, the Trial Chamber was unable to find any conclusive evidence of State practice which would point towards the definition of the crime of “violence to life and person”,³⁷⁴ and acquitted the accused on that charge.³⁷⁵ The requirement of sufficient clarity in the definition of an offence appears to have been treated by Trial Chamber II as an aspect of the requirement of non-retroactivity. According to the Trial Chamber, the absence of any clear indication in the practice of States as to the definition of “violence to life and person” meant that the Trial Chamber was not able to satisfy itself that such an offence existed under customary international law.³⁷⁶ The Trial Chamber indicated that even where a crime is listed as a punishable offence in statutory form, that does not dispense with the requirement to ensure that the offence is defined with sufficient clarity.³⁷⁷ It could be objected that the position would be entirely different in relation to a crime falling within the ICC Statute. The ICC Statute, after all, pre-dates any potential conduct which may be prosecuted under it,³⁷⁸ thus (it could be argued) precluding any issue of non-retroactivity. But in fact it was the very absence of a definition of the offence (rather than the absence of its enumeration in any authoritative form) which was the source of the defect in *Vasiljević*. Trial Chamber II indicated two ways in which a court may

³⁷⁰ *Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, par. 193.

³⁷¹ *Id.*

³⁷² *Id.*, par. 201.

³⁷³ *Id.*, par. 202.

³⁷⁴ *Id.*, par. 194.

³⁷⁵ *Id.*, par. 204.

³⁷⁶ *Id.*, par. 203.

³⁷⁷ *Id.*, par. 202.

³⁷⁸ Art. 11, ICC Statute.

violate the principle *nullum crimen sine lege* through the retroactive creation of criminal offences: One was by criminalising an act which had not until the present time been regarded as criminal (this, we may think of as retroactivity in the classical sense), and the other was by “giving a definition to a crime which had none so far”.³⁷⁹ Thus, wherever criminal conduct is enumerated and identified as criminal in the ICC Statute, that conduct could nevertheless fall outside of the ICC’s subject-matter jurisdiction on the basis of the principle of non-retroactivity under Article 22(1) of the ICC Statute if the definition of that conduct is not sufficiently precise to identify the conduct in question and distinguish the criminal from the permissible.³⁸⁰

iii. APPLICABILITY OF *NULLUM CRIMEN SINE LEGE* TO DEFENCES

While the principle *nullum crimen sine lege* unquestionably applies to the definition of crimes located in the “special part” of the criminal law, there is some question as to the extent to which the principle applies to other rules responsible for affixing criminal liability. Article 22(2) of the ICC Statute provides only that “[t]he definition of a crime” shall be strictly construed, not extended by analogy, and interpreted in favour of the person being investigated, prosecuted or convicted in the case of ambiguity.³⁸¹ It is therefore unclear to what extent, if any, these rules of interpretation apply to rules located in the “general part” of the criminal law, including a number of defences. Certainly, some core of the principle *nullum crimen sine lege* applies, under the ICC Statute, to liability rules generally, including “general part” defences. Article 22(1) states that “[a] person shall not be criminally responsible under this Statute unless the *conduct* in question constitutes, at the time it

³⁷⁹ *Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, par. 196 (emphasis added).

³⁸⁰ *See id.*, par. 193. Of course this does not prevent a court from interpreting and clarifying the elements of a particular crime (*id.*, par. 196, citing *Prosecutor v Zlatko Aleskovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, pars 126-7 & *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, par. 173). Nor does it preclude the progressive development of the law by the court (*Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, par. 196).

³⁸¹ Art. 22(2), ICC Statute (emphasis added).

takes place, a crime within the jurisdiction of the Court.”³⁸² The term “conduct” would imply the criminal act (or omission)³⁸³ in its totality, including the absence of any defence. Fletcher has stated that “[t]he definition [of any crime] must be read, together with the exceptions represented by claims of justification and excuse, in order to arrive at the conduct that is actually subject to punishment.”³⁸⁴ That portion of the *nullum crimen sine lege* principle contained within Article 22(1) could therefore be said to apply to all defences, whether contained in the “special part” or the “general part” and whether justification or excuse. But what portion of the *nullum crimen sine lege* principle is contained within Article 22(1)?

Article 22(1) of the ICC Statute is a sparse statement of the legality principle. It could be asserted that it embodies only the basic prohibition on the retroactive application of criminal laws (*i.e.* the branch of the principle delimiting prescriptive and adjudicative jurisdiction),³⁸⁵ with the other corollaries of *nullum crimen sine lege* (*i.e.* the rules of interpretation) being relegated to Article 22(2). There are, however, two problems with this view: The first concerns the difficulty of distending non-retroactivity from the other corollaries of *nullum crimen sine lege* at the fringes. There is a point at which the interpretation of pre-existing law becomes so extensive or constructive that it becomes indistinguishable from retroactivity; The second – and more substantial – problem relates to the wording employed in the various international human rights and humanitarian law treaties and instruments incorporating the *nullum crimen sine lege* principle. In each example, the principle is incorporated in its entirety through the use of sparse language, similar to Article 22(1) of the ICC Statute. The European Convention on Human Rights, for instance,

³⁸² Article 22(1), ICC Statute (emphasis added).

³⁸³ B. Broomhall, “Article 22: Nullum Crimen Sine Lege”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 455, margin 29.

³⁸⁴ G. Fletcher, *Rethinking Criminal Law*, Little, Brown and Company, Boston, 1978, p. 575.

³⁸⁵ The enunciation of the principle of non-retroactivity in Article 22(1) may appear superfluous in light of the limitation of the jurisdiction *ratione temporis* of the ICC in Article 11 which states that the ICC has jurisdiction only with respect to crimes committed after the entry into force of the ICC Statute. But where a State makes a declaration under Article 12(3) of the ICC Statute, accepting the exercise of jurisdiction by the ICC in relation to crimes committed on the territory of the State, or on board a vessel or aircraft registered in that State, or by nationals of the State, after the entry into force of the ICC Statute but before its entry into force for that State, then Article 22(1) prevents the possibility of criminal responsibility in relation to acts or omissions which were not criminal under customary international law (*see* Schabas (2001), p. 58). However, as elaborated below, Article 22(1) does not simply incorporate the principle of non-retroactivity, but the principle *nullum crimen sine lege* generally, including each of its corollaries (of which the principle of non-retroactivity is but one).

which employs the very same language used in the International Covenant on Civil and Political Rights,³⁸⁶ and highly similar language to that used in the Universal Declaration of Human Rights,³⁸⁷ Protocols I and II Additional to the Geneva Conventions,³⁸⁸ the American Convention on Human Rights³⁸⁹ and the African Charter on Human and People's Rights,³⁹⁰ states simply, in Article 7(1), that, "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."³⁹¹ Yet from these sparse words, which ostensibly incorporate only the basic principle of non-retroactivity, the European Court of Human Rights has confirmed, flow the entire principle *nullum crimen sine lege* including each of its corollaries. As the Court stated in its *Kokkinakis v Greece* judgment of 25 May 1993:

Article 7(1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullem crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance, by analogy; it follows from this that an offence must be clearly defined in law.³⁹²

The implication is that the language of Article 22(1) of the ICC Statute – being identical, or at least highly similar, in all material respects to that employed in the various human rights treaties – incorporates the principle *nullum crimen sine lege* in its entirety including its various corollaries.³⁹³ General liability rules, including

³⁸⁶ Art. 15(1), ICCPR.

³⁸⁷ Art. II(2), Universal Declaration of Human Rights, G.A. Res. 217 A (III), UN Doc. A/810 (1948).

³⁸⁸ Art. 2(c), Protocol I; Art. 6(c), Protocol II.

³⁸⁹ Art. 9, American Convention on Human Rights.

³⁹⁰ Art. 7(2), African Charter on Human and Peoples' Rights.

³⁹¹ Art. 7(1), European Convention on Human Rights.

³⁹² *Kokkinakis v Greece* (1994) 17 EHRR 397, par. 52; see also *CR v UK* (1995) 21 EHRR 363, par. 33.

³⁹³ Indeed, in the ILC's original Draft Statute for an International Criminal Court, draft Article 39, entitled *Principle of legality (nullum crimen sine lege)*, only addressed in express terms, the general principle of non-retroactivity, although the title of the draft Article clearly indicates that by those terms it was the entire principle *nullum crimen sine lege* that was intended to be incorporated. Draft Article 39 stated:

An accused shall not be held guilty:

- (a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law;

defences found in the “general part” of the ICC Statute (even those non-enumerated grounds excluding criminal responsibility in Article 31(3)) would be subject, at least theoretically, to the principle *nullum crimen sine lege* and its corollaries. But if this is so, how does one account for Article 22(2) which specifically sets out the rule of strict construction, the prohibition on analogy and the requirement that ambiguity be resolved in favour of the defendant, and yet applies these rules only to “[t]he definition of a crime”?³⁹⁴

It may be that Article 22(2) is not intended to limit the operation of *nullum crimen sine lege* under the ICC Statute in any sense, but only to clarify certain of its features in a non-exhaustive manner. The drafters of the ICC Statute may have decided, for instance, in light of the practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda, which have tended to take an expansive view of the circumstances giving rise to criminal responsibility,³⁹⁵ that the ICC Statute should set out explicitly, the fact that *nullum crimen sine lege* requires strict construction, a non-analogical approach to interpretation and ambiguity to be resolved in favour of the accused. That these requirements are said to exist in relation to the “definition of a crime” does not, on this view, limit these requirements to that context, but rather clarifies the existence of these requirements in addition to the other requirements which flow from the incorporation of the principle *nullum crimen sine lege* in Article 22(1) of the ICC Statute. Section 12 of UNTAET Regulation 2000/15 limits the jurisdiction of the Special Panel for Serious Crimes according to the principle *nullum crimen sine lege* in terms that are substantively identical to Article 22 of the ICC Statute. Regulation 2000/15 provides:

12.1 A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.

(b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused; at the time the act or omission occurred.

(Draft Statute for an International Criminal Court, Report of the International Law Commission on its Forty-Sixth Session, Report of the International Law Commission on the Work of its Forty-Sixth session, 2 May-22 July 1994, U.N. G.A.O.R., 49th Session, Supplement No. 10, U.N. Doc. A/49/10 (1994))

³⁹⁴ Art. 22(2), ICC Statute.

³⁹⁵ See below.

12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.³⁹⁶

The Special Panel for Serious Crimes within the Dili District Court has taken the view that §12.1 of Regulation 2000/15 (incorporating, in general terms, the principle *nullum crimen sine lege*) “is underlined” by §12.2.³⁹⁷ This would suggest that §12.2 of Regulation 2000/15 (and by necessary implication, Art. 22(2) of the ICC Statute) merely emphasises certain features or corollaries of *nullum crimen sine lege* in a non-exhaustive manner. Contrarily, however, the view could be taken that Article 22(2) operates to limit the effect of Article 22(1). The specific reference to the three interpretative rules in the context of “[t]he definition of a crime” may imply that they do not apply outside of that context. But any attempt to apply the principle *nullum crimen sine lege* under Article 22 of the ICC Statute more narrowly than its customary international law counterpart is thwarted by Article 21(3) which requires that the application and interpretation of law by the ICC be consistent with internationally recognised human rights.³⁹⁸ If customary international law recognises that the principle *nullum crimen sine lege*, including its corollaries, applies fully to defences found in the “general part” of the criminal law, then the ambiguity over the effect of Article 22(2) – *i.e.* whether it limits the operation of *nullum crimen sine lege* under Article 22, or whether it simply clarifies certain features in a non-exhaustive manner – should be resolved in favour of latter.

What then, does customary international law say as to the applicability of *nullum crimen sine lege* to defences? Some defences, of course, are simply “failure of proof” arguments,³⁹⁹ and there is no question that the principle of legality applies to them (in a negative sense). Military necessity, where expressly provided for, is a defence that falls within the “special part” of international criminal law statutes. Thus, it is a grave breach of the Geneva Conventions of 12 August 1949 and a war

³⁹⁶ United Nations Transitional Administration in East Timor, Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15 (2000).

³⁹⁷ *Prosecutor v Domingos Amati and Fransisco Matos*, Case No. 12/2003, Dili District Court, Special Panel for Serious Crimes, Decision on the Defence Motion to Dismiss Count 1 of the Indictment for Failure to Establish a Prima Facie Case, 11 July 2003.

³⁹⁸ Art. 21(3), ICC Statute.

³⁹⁹ Ashworth (1999), p. 209.

crime under Article 8(2)(a)(iv) of the ICC Statute to commit “[e]xtensive destruction and appropriation of property, *not justified by military necessity* and carried out unlawfully and wantonly”.⁴⁰⁰ The principle that the definition of a crime not be extended by analogy, for *e.g.*, implies here that the *absence* of military necessity not be extended – rather than the defence itself, which is, after all, only incorporated into the definition negatively. Other defences, however, fall within the “general part” of the ICC Statute. These include defences expressly provided for and defined within the Statute,⁴⁰¹ as well as non-enumerated defences derived from the “applicable law” of the Statute, including customary international law.⁴⁰² The wording of the various international human rights and humanitarian law treaties and instruments which incorporate the principle *nullum crimen sine lege* is couched in such terms as to indicate the applicability of the principle even to these “general part” defences. Each applies the requirement of non-retroactivity to “any act or omission” which did not constitute a criminal offence at the time of its commission. The principle is not limited, by terms, to the definitional element of the offence.⁴⁰³ Given that acts or omissions do not constitute criminal offences in isolation, but only when coupled with the requisite *mens rea*, it would appear that the international law standard of *nullum crimen sine lege* applies generally to any aspect of act or omission which bears on criminality, including any attenuating mental state,⁴⁰⁴ regardless of whether that aspect has been incorporated into the “general” or “special” part of the criminal law, and regardless (in the case of defences) of whether it constitutes justification or

⁴⁰⁰ Art. 8(2)(a)(iv), ICC Statute (emphasis added).

⁴⁰¹ See, *e.g.*, Art. 31(1), ICC Statute.

⁴⁰² Art. 31(3), ICC Statute.

⁴⁰³ Article II(2), Universal Declaration of Human Rights, G.A. Res 217A (III), UN Doc. A/811 (1948); Art. 15(1), ICCPR; Art. 2(c), Protocol I; Art 6(c), Protocol II; Art. 7(1), European Convention on Human Rights; Art. 9, American Convention on Human Rights; Art. 7(2), African Charter on Human and Peoples’ Rights. Art. 99, Geneva Convention III, refers simply to any “act” (omitting the word “omission”). Art 65 of Geneva Convention IV is stated in somewhat different terms:

The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. *The effect of these penal provisions shall not be retroactive.*

(Emphasis added). By limiting the “effect” of penal provisions to non-retroactive effects only, the Article is couched in terms that apply generally and not only to the definitional element of any offence.

⁴⁰⁴ Where act or omission *x* did not formerly constitute a criminal offence when committed with state-of-mind *y*, retroactively deeming or interpreting mental state *y* as no longer excluding criminal responsibility means that an individual has been held guilty of a criminal offence on account of an act or omission which did not constitute a criminal offence at the time of its commission.

excuse. According to the ICTY Trial Chamber in its Decision on Joint Challenge to Jurisdiction in the case of *Prosecutor v Hadžihasanović* (the emphasis appearing in the original):

This Trial Chamber understands the principle *nullum crimen sine lege*, a constitutive element of the principle of legality, in relation to the factual criminality of a particular *conduct*. In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance. This interpretation of the principle is supported by the subsequent declaratory formulation of the principle of *nullum crimen sine lege* in Article 22 of the ICC Statute:

“A person shall not be criminally responsible under this Statute unless *the conduct* in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”

This interpretation is further supported by the relevant practice between States in the field of extradition. In order to determine whether the requirement of double criminality is fulfilled, the test to be applied is not so much whether a certain conduct is qualified in the respective national jurisdiction in the same way, but whether the conduct in itself is criminalised under those jurisdictions. The Trial Chamber is fully aware of the different contexts in which these two principles are applied. However, the Trial Chamber observes the similarity of the underlying problem and legal guarantee. In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance.⁴⁰⁵

Thus any suggestion that the principle of legality does not apply to “general part” elements of criminal responsibility (as opposed to the definition of the crime itself) is, at least in the context of international criminal law, misconceived.⁴⁰⁶ International

⁴⁰⁵ *Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-T, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002, par. 62 (emphasis in original).

⁴⁰⁶ Certainly, such suggestions exist. Fletcher, for *e.g.*, notes that citizens “need to know what is prohibited in the special part of the code in order to avoid the risk of liability,” whereas citizens “need not ponder the mysteries of action, causation, and the subtle differences between purposeful, knowing, and reckless conduct.” He states:

The primary purpose of legislation in the general part of a criminal code is distinguished from the purpose of the special part in that it may not be to guide citizens, but rather to generate consistency in judging. The audience may be primarily judges rather than citizens. Definitions of excusing conditions, such as duress, insanity, and mistakes of law, are needed not so much to advise citizens about how to avoid liability for harmful conduct, but rather to channel the decisions of the judges

criminal law has never devised a rigorous dogmatic, or theoretical, structure for the elaboration of crimes.⁴⁰⁷ The ICC Statute itself has been criticised on the basis that it is not a “dogmatically refined” criminal code.⁴⁰⁸ The weakness in any assertion that only the “special part” of the ICC Statute, and not the “general part”, should be governed by the principle of legality is that the ICC Statute is comprised of a somewhat haphazard collection of rules, definitions and principles, dispersed throughout the Statute.⁴⁰⁹ The haphazard dispersal throughout the Statute of conditions resulting in exoneration would make a mockery of the notion that those conditions are subject to the principle of legality only when found in the “special part” but not when found in the “general part” of the ICC Statute. Were such fundamental consequences to attach to the precise method of elaboration of crimes (and their division into doctrinal elements) the drafters of the ICC Statute would have taken far greater care to ensure a “dogmatically refined” Statute. That they did not – probably out of the necessity of forging a Statute made up of elements of diverse legal systems – should put aside any suggestion that legality applies only to certain elements of criminal responsibility under international criminal law and not to others. Indeed, one only need look at the jurisprudence of the international criminal tribunals to see that the principle *nullum crimen sine lege* is held to apply, not only to the definitional element of offences, but to the wider *corpus* of criminal law. In *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, the ICTY Appeals Chamber stated that the jurisdiction *ratione personae* of the ICTY was limited by the principle *nullum crimen sine lege* in the same manner as the jurisdiction *ratione materiae*;⁴¹⁰ in *Prosecutor v Leonardus Kasa*, the Special Panel

into predictable patterns. These are the rules that Meir Dan-Cohen describes as decision rules for judges rather than conduct rules addressed to citizens. However, it would be difficult to say this is the exclusive function served by the norms of the general part. For example, norms about the justifiable use of deadly force, also in the general part, serve to advise citizens about when and under what circumstances they can shoot to kill.

(Fletcher (1998), pp. 752-3).

⁴⁰⁷ See above.

⁴⁰⁸ K. Ambos, “General Principles of Criminal Law in the Rome Statute”, (1999) 10 *Criminal Law Forum* 1, p. 1.

⁴⁰⁹ See above.

⁴¹⁰ *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, par. 10.

for Serious Crimes held as inadmissible an analogical approach to interpretation which would have taken an expansive view of the Court's jurisdiction *ratione loci*;⁴¹¹ in both *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* and *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, the Trial Chamber of the Special Court for Sierra Leone endorsed strict construction as the proper method of interpretation of the Court's Rules of Procedure and Evidence.⁴¹² For a final observation – specifically in relation to defences – it should be noted that the complete removal of the defence of “obedience to superior orders” in relation to the trials arising out of the second world war is often viewed as having been a serious violation of the principle of legality.⁴¹³ That this *ex post facto* application of law (assuming that that was what it was) was not in relation to the definitional element of an offence, but rather to a defence (and an excuse, rather than a justification, at that),⁴¹⁴ is not viewed in any sense as having diminished the violation.

iv. LIMITS TO *NULLUM CRIMEN SINE LEGE* IN PRACTICE

1. INTRODUCTION

Treated as an aspect of “justice” the principle of legality makes no *ex ante* prescription as to the interpretation of law: The correct interpretation (narrowly or broadly, exculpatory or inculpatory) falls to be determined by balancing the competing interests of justice; on the one hand, individual justice to the accused through the provision of fair notice, and on the other hand, social justice through the punishment of wrongs. As a legal principle, however, the principle of legality does not enter into the philosophical or practical dimensions of justice. Individual justice

⁴¹¹ Case No. 11/CG/2000, Dili District Court, Special Panel for Serious Crimes, Judgment, 9 May 2001, part ‘E’.

⁴¹² *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, par. 18; *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004, par. 20.

⁴¹³ See, e.g., Bassiouni (1999), p. 159. See, also, *id.*, p. 163.

⁴¹⁴ Obedience to superior orders as a defence under international law is not a justifying condition, but at best only an excusing one on the basis that there is no “right”, under international law, to obey orders of commanders and other superiors that are violative of international law. For the distinction between justifications and excuses, see, e.g. van Sliedregt (2003), pp. 229-231.

(as a value) and positivism (as a method) are given automatic priority over other competing interests.⁴¹⁵ The principle of legality, in its pure form, insists on complete certainty.⁴¹⁶ That at least, is the theory. The practice of courts, however, at both the domestic and international level, does not always bear faith with the rules of strict construction and the resolution of ambiguity in favour of the accused.⁴¹⁷ This deviation from theory may be, at least at some level, necessary. It has been observed that it is impossible, and probably undesirable, to construct a legal system consisting entirely of fixed, precise, mechanical rules.⁴¹⁸ Ashworth notes that, “[u]nless the criminal law occasionally resorts to open-ended terms such as ‘reasonable’ and ‘dishonest’, it would have to rely on immensely detailed and lengthy definitions which might be extremely complicated and which might still fail to cover the ground.”⁴¹⁹ The European Court of Human Rights has stated that “[h]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.”⁴²⁰ There are a number of examples in the jurisprudence of international criminal tribunals involving the adoption of expansive interpretations of offences enumerated within the relevant statute.⁴²¹ Consider for instance the ICTY’s interpretation of the

⁴¹⁵ See *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, pars 12 (referring to *nullum crimen sine lege* as an “absolute” principle) & 15; *Prosecutor v Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment and Opinion, 5 December 2003, par. 98 (referring to the “unqualified imperative of respect for the *nullum crimen sine lege* principle”). See, also, Cassese (2003), p. 141 (noting that “most democratic civil law countries tend to uphold the doctrine of strict legality as an overarching principle.”)

⁴¹⁶ Ashworth (1999), p. 78.

⁴¹⁷ See, e.g., *Kneller v DPP* [1973] AC 435 which, according to Ashworth, appears to create a new offence of outraging public decency while ostensibly upholding the principle of non-retroactivity (Ashworth (1999), p. 72, n. 34). See, also, *CR v United Kingdom* (1995) 21 EHRR 363, where the European Court of Human Rights concluded that the House of Lords had not violated the principle *nullum crimen sine lege* in upholding the conviction of a husband of marital rape, despite the existence of a long-standing presumption of consent in marital sexual relations which had not been repealed by legislation and appeared to be upheld in a number of earlier cases.

⁴¹⁸ Jeffries (1985), p. 213.

⁴¹⁹ Ashworth (1999), p. 78.

⁴²⁰ *CR v UK* (1995) 21 EHRR 363, par. 34.

⁴²¹ See, e.g., *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, which concluded that the recruitment of child soldiers was a crime under customary international law by November 1996, the beginning of the time frame referred to in the indictments. The Decision was heavily criticised by Justice Robertson in his Dissenting Opinion on the basis that prior to the

meaning of “[v]iolations of the laws or customs of war” which is enumerated within Article 3 of the ICTY Statute as a class of offence falling within the subject-matter jurisdiction of the Tribunal.⁴²² Article 3 of the ICTY Statute does not offer a definition of “[v]iolations of the laws or customs of war”, but instead provides that:

- Such violations shall include, but not be limited to:
- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
 - (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
 - (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
 - (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
 - (e) plunder of public or private property.⁴²³

Each of the violations listed above derives from the Hague Regulations of 1907 which is concerned with limitations on the means and methods of warfare and is often referred to as “Hague law” (as opposed to “Geneva law”, a reference to the Geneva Conventions of 1949 and related customary law, which is principally concerned with the protection of those taking no active part in hostilities).⁴²⁴ While the distinction between “Hague law” and “Geneva law” is a blurred one, there is nevertheless a clear conceptual difference between the employment of unlawful weapons or the unnecessary destruction of civilian property on the one hand (prohibited under “Hague law”) and acts such as murder and torture of civilians on the other (prohibited, for *e.g.*, under common Article 3 of the Geneva Conventions of 1949).⁴²⁵ Applying the canon of statutory interpretation *ejusdem generis*,⁴²⁶ whereby

promulgation of the ICC Statute there was insufficient basis for the conclusion that the recruitment of child soldiers gave rise to individual criminal responsibility under customary law (*see id.*, Dissenting Opinion of Justice Robertson). *See, also, Prosecutor v Radislav Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004, which may be viewed as having confirmed a widening of the legal definition of genocide in accepting that the killing of men only (and the sparing of women and children) may still satisfy an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

⁴²² Art. 3, ICTY Statute.

⁴²³ *Id.*

⁴²⁴ *See, e.g.*, Jones & Powles (2003), p. 251, par. 4.2.431.

⁴²⁵ Article 3, common to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (hereinafter Geneva Convention I), Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (hereinafter Geneva Convention II), Geneva Convention III and Geneva Convention IV (hereinafter Common Article 3).

general words are not to be construed in their widest sense but are to be construed as applying only to things of the same general kind or class as those specifically mentioned,⁴²⁷ violations of the laws or customs of war under Article 3 of the ICTY Statute would appear to be limited to violations of “Hague law”.⁴²⁸ Nevertheless, the ICTY Appeals Chamber in *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) adopted what could probably be described as the widest possible interpretation of Article 3 of the ICTY Statute:

[I]t can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 [of the ICTY Statute], more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as “grave breaches” by those Conventions; (iii) violations of common Article 3 [of the Geneva Conventions of 1949] and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, *i.e.*, agreements which have not turned into customary international law.⁴²⁹

That these conclusions did not follow inexorably from the wording of Article 3 of the ICTY Statute is evident in the Separate Opinion of Judge Li who viewed the majority’s conclusion that Article 3 covered all serious violations of international humanitarian law not otherwise covered by the ICTY Statute as an “unwarranted assumption of legislative power which has never been given to this Tribunal by any authority.”⁴³⁰ It can be observed, therefore, that in practice the theoretical quest for certainty is mediated by practical concern with the need to allow for the gradual development or clarification of rules. Thus each of the corollaries of *nullum crimen*

See J.E. Ackerman & E. O’Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, Kluwer Law International, The Hague, 2000, p. 26.

⁴²⁶ The canon of statutory interpretation, *ejusdem generis*, could be said to entail analogical reasoning and therefore be inconsistent with the principle *nullum crime sine lege*. *Ejusdem generis* may, however, be consistent with *nullum crimen sine* where the relevant provision specifically calls for the application of analogy (*discussed below*).

⁴²⁷ Black’s Law Dictionary, p. 517.

⁴²⁸ See Ackerman & O’Sullivan (2000), p. 26.

⁴²⁹ *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 89; *see, also, Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, Case No. IT-96-23-T, Judgment of the Trial Chamber, 22 February 2001, par. 401; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 278.

⁴³⁰ *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Separate Opinion of Judge Li, par. 13.

sine lege have been interpreted in the jurisprudence of international criminal tribunals as limited in nature.

2. STRICT CONSTRUCTION

In accordance with the principle *nullum crimen sine lege*, the ICTY Trial Chamber in its Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo (in the context of *Prosecutor v Delalić*) confirmed that it was obliged to interpret statutory provisions according to the rule of strict construction.⁴³¹ According to the Trial Chamber:

the meaning and intention of a statutory provision should be discerned from the plain and unambiguous expression used therein rather than from any notions which may be entertained as just and expedient.

Hence where the language of a provision is clear and plain, admitting only of one meaning there is no need for construction. The clear, unambiguous meaning so understood should be applied. When the meaning of a provision is plain, it is scarcely the province of the reader to scan its wisdom or policy. The duty is to expound the law as it stands according to the real sense of the words.⁴³²

There is, in the Trial Chamber's Decision, a clear repudiation of the "purposive" or "teleological" approach to the interpretation of international penal provisions,⁴³³ at least where the meaning of the provision is clear. According to the Trial Chamber:

The corollary to the literal rule of construction is that nothing should be added to or taken away from a statute, unless there are adequate grounds to justify the inference that the legislator intended something which it omitted to express. In *Thompson v Goold* [1910] AC 409 at p. 420, Lord Mersey, speaking of English Law, stated that "[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity, it is a wrong thing to do."

The Trial Chamber accepts and adopts this view...⁴³⁴

⁴³¹ See *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, pars 17-21.

⁴³² *Id.*, pars 17-18.

⁴³³ On the distinction between "textual" and "teleological" approaches to statutory interpretation, see, e.g., S.L. Bunn-Livingstone, *Juriscultural Pluralism vis-à-vis Treaty Law: State Practice and Attitudes*, Martinus Nijhoff Publishers, The Hague, 2002, pp. 85-88. On the meaning of "purposive" approach, see *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, p. 236 per Lord Simon; see also A. Bredimas, *Methods of Interpretation and Community Law*, North-Holland Publishing Company, Amsterdam, 1978, pp. 157-161.

⁴³⁴ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, pars 20-21.

Insofar as the above passage implies that it may be acceptable, in the presence of a “clear necessity”, to read into a statutory provision something which does not appear in its literal terms, it is evident from the Chamber’s reasoning that “clear necessity” does not include the interests of justice or any other policy concern. As the Trial Chamber indicated above, the meaning of words should not be deduced “from any notions which may be entertained as just and expedient”.⁴³⁵ Instead, the rule is that it is impermissible to read into statutory provisions, “words which are not there, and which cannot by *necessary implication* be read into [the provision] to give it sense and meaning.”⁴³⁶ The only extraneous words or inferences that may be added to the statutory text, therefore, are those that are mandated by “necessary implication”. This would suggest some limited power to avoid logical *non-sequiturs* or absurdities in the construction of statutory terms, but not a judicial *fiat* to construe terms as commensurate with the underlying purpose of the provision or with social policy.

An analysis of the constellation of methodological approaches to statutory interpretation within the common law tradition is instructive as it suggests that the approach to statutory interpretation employed by the ICTY Trial Chamber in the decision cited above is commensurate with what common law lawyers traditionally referred to as the “golden rule” of statutory interpretation. To this end, it entails a rejection of the two alternative rules that stood at opposite extremes of the spectrum of interpretative methods traditionally referred to by common law judges: The “literal rule” of interpretation and the “mischief rule”.⁴³⁷ Although the Trial Chamber in the passage cited immediately above referred to the “literal rule” of

⁴³⁵ *Id.*, par. 17.

⁴³⁶ *Id.*, par. 21 (emphasis added).

⁴³⁷ Judges in the common law tradition have tended to distinguish these three rules or methods of statutory interpretation (*i.e.*, the “golden”, “literal” and “mischief” rules) as the alternative rules or methods employed by courts (*see, e.g.*, R.J. Aldisert, “The Brennan Legacy: The Art of Judging”, (1999) 32 *Loyola of Los Angeles Law Review* 673, p. 679). Nevertheless, Bennion states, in relation to the contemporary process of statutory interpretation as applied in common law systems:

Our courts have moved on from the old simplistic view. No longer is a problem of statutory interpretation settled by applying some talisman called “the literal rule”, or “the golden rule”, or the “mischief rule”. Nowadays we have purposive construction, coupled with respect for the text and a recognition by judges that interpreting a modern Act is a matter sophisticated and complex. Rules of thumb are out. The only golden rule, as Shaw said, is that there are no golden rules.

(F. Bennion, *Statutory Interpretation*, Butterworths, London, 1984, p. xxvii).

construction,⁴³⁸ apparently in reference to the method of construction being expounded by the Chamber itself, the Trial Chamber's approach is in fact not reconcilable with the "literal rule" of construction as that term is known in common law systems. Although it is possible to presume, for reasons of facial similarity, that "strict construction" entails an obligation to employ the "literal rule" of statutory construction, the presumption would be incorrect. The term "strict construction" has no definite or precise meaning, and it has been observed that "strict construction" is not the opposite of "liberal construction".⁴³⁹ The "literal rule" was enunciated in *Vacher & Sons Ltd v London Society of Compositors* (1913) where Lord Atkinson stated that unambiguous statutory terms must be given effect to, even where the result produces an absurdity:

If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordship's House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous.⁴⁴⁰

It is clear that the principle of strict construction as it has been interpreted in the decisions of the international criminal tribunals does not extend to granting primacy to the text in circumstances where that would lead to an absurdity.⁴⁴¹ At the same

⁴³⁸ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, par. 20.

⁴³⁹ Black's Law Dictionary, p. 1422.

⁴⁴⁰ *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107, pp. 121-2. See also *Dixon v Harrison* (1669) Vaugh 36, 124 ER 958; *Wallis v Smith* (1804) 1 Smith KB 346; *Warburton v Loveland* (1832) 2 Dow&Cl 480, 5 ER 499; *Lowther v Bentink* (1874) LR 19 Eq 166, p. 169 per Jessel MR; *Caledonian Railway Co v North British Railway Co* (1881) 6 App Cas 114, p. 121 per Lord Selborne LC.

⁴⁴¹ See *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, pars 20-21; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 410; *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004, par. 19; see also *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, par. 16.

time, it appears that the decisions of the international criminal tribunals do not explicitly support the “mischief rule” whereby a liberal construction of statutory terms is adopted in order to ensure that the purpose or object of the statutory provision is given effect. The “mischief” rule (now more commonly referred to as the “purposive” or “functional” approach to statutory construction)⁴⁴² was articulated in *Heydon’s Case* (1584) as follows:

That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restricting or enlarging of the common law) four things are to be discerned and considered: (1) what was the common law before the passing of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; (4) the true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro private commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.⁴⁴³

This approach to statutory interpretation is clearly at odds with the approach to statutory interpretation as explicitly articulated in decisions of the international criminal tribunals. In its Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, the ICTY Trial Chamber stated (as cited above) that “[w]hen the meaning of a provision is plain, it is scarcely the province of the reader to scan its wisdom or policy”.⁴⁴⁴ The Trial Chamber thus refrained from adopting an interpretation that would ensure that the result was “just” or “expedient”.⁴⁴⁵ The Trial Chamber of the Special Court for Sierra Leone has equally insisted that the meaning of statutory terms should be discerned from the plain and unambiguous expression employed rather than from notions of justice or expedience.⁴⁴⁶ As a corrective to

⁴⁴² See *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, p. 236 per Lord Simon.

⁴⁴³ (1584) 3 Co. Rep. 7a. See, also, *Parker v Sanders* (1617) Cro Jac 418, 79 ER 357; *Stallwood v Tredger* (1815) 2 Phillim 287, 161 ER 1147; *Lyde v Barnard* (1836) 1 M&W 101, 150 ER 363; *River Wear Comrs v Adamson* (1877) 2 App Cas 743, p. 764; *Re Mayfair Property Co, Bartlett v Mayfair Property Co* [1898] 2 Ch 28, p. 35.

⁴⁴⁴ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, par. 18.

⁴⁴⁵ *Id.*, par. 17.

⁴⁴⁶ *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004, par. 19; see also *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Trial Chamber,

perceived ills arising both from the “literal” and “mischief” rules, common law judges enunciated the “golden rule” of statutory interpretation which offers fealty neither to the literalistic terms of the statutory provision (where those terms compel a meaning which is absurd or inherently self-contradictory), nor to the “object” and “purpose” of the provision (where that object and purpose is separable from, or not manifest in, the actual words employed). As Lord Wensleydale stated in his exposition on the “golden” rule in *Grey v Pearson* (1857):

in construing...statutes, and indeed all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, *but no farther*.⁴⁴⁷

The approach to statutory interpretation, as explicitly expounded in decisions of the international criminal tribunals, appears to be commensurate with this “golden rule” approach. This approach is, in effect, a means of mediating both the primacy of the text and the intention of the legislature (including the object or purpose of the legislative enactment). The mediating principle is the assumption that the legislature intended what the text clearly states. The principle is in effect a denial of the assumption that unjust, inconvenient and ostensibly narrow constructions of legislative terms do not accord with the true intent of the drafters.⁴⁴⁸ In fact, where, as in the case of the ICC Statute, the terms are the product of involved negotiations between numerous interested State parties it cannot simply be assumed that the final wording was chosen with the common intention that it should be given its most expansive or humanitarian interpretation. In *Prosecutor v Alex Tamba Brima*, the Trial Chamber of the Special Court for Sierra Leone adopted the *dictum* of Lord Herschel in *The Bank of England v Vagliano Brothers* [1891] AC 107 at 144 where

Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, par. 16.

⁴⁴⁷ (1857) 6 HLC 61, p. 106 (emphasis added). See also *Simpson v Unwin* (1832) 3 B&Ad 134, 110 ER 50; *Becke v Smith* (1836) 2 M&W 191, 150 ER 724; *Brettell v Dawes* (1852) 7 Exch 307, 155 ER 963; *Cave v Horsell* [1912] 3 KB 533; *Bodega Co v Martin* [1915] 2 Ch 385; *Re Jenkins, Jenkins v Davies* (1931) 100 LJ Ch 265; *M v Law Society (Alberta)* [1941] 1 DLR 213; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948; *McCormick v Horsepower Ltd* [1981] 2 All ER 746; *R v West Yorkshire Coroner, Ex p Smith* [1982] 3 All ER 1098.

⁴⁴⁸ See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, p. 305.

His Lordship stated that “I think the proper cause is in the first instance, to examine the language of the Statute and to ask what its natural meaning is.”⁴⁴⁹ The Trial Chamber proceeded to state that this *dictum*:

has stood the test of time because it limits the prevalent temptation to import into a clearly enacted Statute or Regulation, extraneous meanings and interpretations which, in the long run, not only enable the authority to assume legislative functions which is *ultra vires*, but also produces a result that is directly contradictory or even contrary to the necessary intent of the legislative or regulatory instrument.⁴⁵⁰

In its Judgment in *Prosecutor v Delalić*, the ICTY Trial Chamber stated that “[t]he legislature will not allow [its] intention to be gathered from doubtful inferences from the words used. It will also not leave its intention to be inferred from unexpressed words. The intention should be manifest.”⁴⁵¹ Then, in what appears to be a direct rebuke to the “mischief” rule, the Trial Chamber stated that:

The accepted view is that if the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them. The interpreter of a provision can only determine whether the case is within the intention of a criminal statute by construction of the express language of the provision.⁴⁵²

The assumption that the intention of the legislative drafters cannot be put at anything higher than that which is unambiguously present in the text itself does of course begin to collapse once the clear and unambiguous meaning of the text produces a result which is absurd or self-contradictory. Thus the “golden rule” permits a tightly constrained deviance from the clear meaning of the text in such circumstances, but both the circumstances justifying deviance and the extent of the

⁴⁴⁹ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-PT, Trial Chamber, Brima – Decision on Applicant’s Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, par. 90.

⁴⁵⁰ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-PT, Trial Chamber, Brima – Decision on Applicant’s Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, par. 91; *see, also, Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 409 (“The legislature will not allow [its] intention to be gathered from doubtful inferences from the words used. It will also not leave its intention to be inferred from unexpressed words. The intention should be manifest.”)

⁴⁵¹ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 409.

⁴⁵² *Id.*, par. 410.

deviance itself are limited. Logical *non-sequiturs* may be avoided, but this should not be taken by the judicial decision-maker as an opportunity to simply re-write the statutory terms to accord with principles of justice or social policy.

The role of the “golden rule” as a means of mediating what are otherwise apparently inconsistent considerations is highlighted in the following decision of the Trial Chamber of the Special Court for Sierra Leone, where the Trial Chamber observes:

by way of first principles, that no rule, however formulated, should be applied in a way that contradicts its purpose. A kindred notion here is that a statute or rule must not be interpreted so as to produce an absurdity. In effect, it is rudimentary law that a statute or rule must be interpreted in light of its purpose. Another basic canon of statutory interpretation is that a statute is to be interpreted in accordance with legislative intent.⁴⁵³

The Trial Chamber then proceeds immediately to endorse what it refers to as the “literal” approach to interpretation in which (citing the ICTY Trial Chamber), “the meaning and intention of a statutory provision shall be discerned from the plain and unambiguous expression used therein rather than from any notions which may be entertained as just or expedient.”⁴⁵⁴ Legislative intent and the purpose of the enactment are treated as considerations consistent with a strict rendering of the text.⁴⁵⁵

⁴⁵³ *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004, par. 19; *see, also, Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, par. 16.

⁴⁵⁴ *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004, pars 19-20 (citing *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, par. 17); *see also Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, pars 17-18.

⁴⁵⁵ *See, however*, the Judgment of the ICTY Trial Chamber in the *Čelebići* case:

The rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall within the reasonable meaning of its terms and within the spirit and scope of the enactment.

(*Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 410). It appears on the face of it that the above passage is a “watered down” version of strict construction; one that ultimately permits a more liberal

As indicated above, “strict construction”, as the term has come to be interpreted in the jurisprudence of the international criminal tribunals, does not prohibit all “constructive” interpretations of statutory terms; construction is permissible in order to avoid logical *non-sequiturs*, absurdities or self-contradiction. Presumably the legislative intent or object and purpose of the enactment may be examined in conducting these limited acts of construction. Consider, for instance, the “constructive” interpretation adopted by the ICTY Trial Chamber in its Rule 61 decision in *Prosecutor v Rajić*. That decision concerned, *inter alia*, the status of the residents of Stupni Do, a village in Bosnia-Herzegovina under the control of Bosnian Croats. The Trial Chamber found that although the residents of Stupni Do were not directly or physically “in the hands of” Croatia (a requirement for their characterisation as protected persons under Geneva Convention IV of 1949),⁴⁵⁶ nevertheless they could be treated as being “constructively” in the hands of Croatia.⁴⁵⁷ The Trial Chamber was satisfied that the Bosnian Croats controlled the territory surrounding the village,⁴⁵⁸ and that the attack against the village was carried out by the Croatian Defence Council, the forces of which were under the control of Croatia to such an extent that they could be regarded as “agents” of the Croatian State.⁴⁵⁹ While the residents of Stupni Do were not directly or physically in the hands of Croatia, they nevertheless fell within the protective provisions of Geneva Convention IV which protects those who “at a given moment, *and in any manner whatsoever*, find themselves, in case of a conflict or occupation, in the hands of a

rendering of statutory terms. Of course, the above passage needs to be treated with some considerable caution. The Trial Chamber offered no authority for its proposition (either from among the decisions of national courts or from the jurisprudence of the international criminal tribunals). Further, the very notion of “strict construction”, while not the subject of precise definition (on this point, *see above*) nevertheless suggests at least some element of “strictness”. That element is incorporated into the decisions of the international criminal tribunals (in their consideration of the requirement of strict construction) cited in the preceding paragraphs of the text above. In the final analysis, it is hard to escape the conclusion that the above passage does not establish a standard of statutory interpretation, but rather begs the very question of what that standard is. Strict construction, we are told, requires us to adopt a meaning which does not exceed the “reasonable meaning” of the provision’s terms. The meaning that is “reasonable” must surely depend on the relevant rules and methods of interpretation. While mention is made of the “spirit and scope” of the enactment, this is not offered as the sum total of the correct measure of interpretation, but rather a measure which exists *in addition* to that of the “reasonable meaning”.

⁴⁵⁶ Art. 4, Geneva Convention IV.

⁴⁵⁷ *Prosecutor v Rajić*, Case No. IT-95-12-R61, Trial Chamber, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, par. 37.

⁴⁵⁸ *Id.*, par. 37.

⁴⁵⁹ *Id.*, par. 35.

Party to the conflict or Occupying Power of which they are not nationals.”⁴⁶⁰ While the Trial Chamber’s interpretation appears constructive, it would not appear to fall foul of the requirements of strict construction. The relevant provision is “clear and plain”⁴⁶¹ in its inclusive approach to the meaning of being “in the hands of” a Party (*i.e.* by virtue of the phrase “in any manner whatsoever”).

The requirement of strict construction of penal provisions is a requirement that exists in relation to the interpretation of terms located in the form of treaties or international instruments. It is relevant to ask whether the requirement exists in any form in relation to norms located in customary international law. On the face of it, it does not. The elements of customary law are state practice and *opinio juris*,⁴⁶² rather than textual provisions which can be construed “strictly” or otherwise. On the other hand, it may be that where a customary norm is heavily associated with a particular treaty provision (as is the case, for *e.g.*, in relation to the UN Convention on the Prevention and Punishment of the Crime of Genocide),⁴⁶³ then the interpretation of the relevant norm should be by way of strict construction of the relevant text.⁴⁶⁴

Finally, it is to be recalled that the requirement of strict construction exists in relation to statutory terms that are clear and unambiguous. As the ICTY Trial Chamber stated in its Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo (cited above), “where the language of a provision is clear

⁴⁶⁰ Art 4, Geneva Convention IV (emphasis added).

⁴⁶¹ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, par. 17.

⁴⁶² Art. 38(1)(b), ICJ Statute.

⁴⁶³ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), [1951] ICJ Rep. 16, p. 23; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226, par. 31; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), par. 45.

⁴⁶⁴ It will very often be the case, however, that in the determination of customary norms, the relevant norm will not be located or reflected in one authoritative treaty. As the Appeals Chamber of the Special Court for Sierra Leone stated in *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, par. 38:

A norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty?

and plain, admitting only of one meaning there is no need for construction”.⁴⁶⁵ What is the relevant interpretative course, however, where the statutory terms are ambiguous? In such circumstances, the rule of strict construction offers no guidance. Instead one must look to the other corollaries of the principle *nullum crimen sine lege*: the obligation to interpret ambiguity in favour of the accused, the prohibition on analogy and the requirement of specificity.

3. INTERPRETATION IN FAVOUR OF THE ACCUSED

In the case of ambiguity in penal provisions the relevant interpretative principle is that the interpretation which most favours the accused is the one that should be adopted.⁴⁶⁶ Just as with the principle of strict construction as expounded in the jurisprudence of the international criminal tribunals, it would appear that the principle of interpreting ambiguity in favour of the accused (also known as the principle *contra proferentem*,⁴⁶⁷ *in dubio pro reo*,⁴⁶⁸ or *favor rei*)⁴⁶⁹ is not to be applied to the point that the end result is absurd or entails self-contradiction or some other logical *non-sequitur*. In *Prosecutor v Krstić*, the ICTY Trial Chamber upheld the principle that “where there is a *plausible* difference of interpretation or application, the position which most favours the accused should be adopted”.⁴⁷⁰ For the purpose of application of the principle, it is only in relation to competing “plausible” interpretations, that any ambiguity may be said to arise.

⁴⁶⁵ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, par. 18.

⁴⁶⁶ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 402; *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, pars 27-28; *Prosecutor v Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment and Opinion, 5 December 2003, par. 93; *Prosecutor v Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgment and Sentence, 21 May 1999, par. 103.

⁴⁶⁷ See *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 413.

⁴⁶⁸ See *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, pars 27-28.

⁴⁶⁹ See Cassese (2003), pp. 156-7.

⁴⁷⁰ *Prosecutor v Radislav Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, par. 502 (emphasis added).

In the case of *Krstić*, the principle of interpretation in favour of the accused was employed in the context of determining the elements of “extermination” as a crime against humanity under Article 5(b) of the ICTY Statute. The Trial Chamber noted that the term “extermination” strongly suggested the commission of a “massive” crime, but could also be taken to refer to the eradication of an entire population made up of only a relatively small number of people.⁴⁷¹ In applying the principle of resolving ambiguity in favour of the accused, the Trial Chamber concluded that the definition of extermination should be read as meaning “the destruction of a *numerically significant* part of the population concerned”.⁴⁷² The principle of resolving ambiguity in favour of the accused was also employed by ICTR Trial Chamber I in *Prosecutor v Akayesu* in relation to the meaning of “killing” in the context of the definition of Genocide in Article 2(2)(a) of the ICTR Statute. The Trial Chamber noted that the term “killing” could encompass both intentional and unintentional homicides, whereas the French version of the Statute employed the term “*meurtre*” (the same term employed, incidentally, in the Penal Code of Rwanda in relation to intentional homicide).⁴⁷³ The Trial Chamber stated that:

Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which “*meurtre*” (killing) is homicide committed with the intent to cause death.⁴⁷⁴

The principle of resolving ambiguities in favour of the accused was also visited by the ICTY Trial Chamber in its Judgment in *Prosecutor v Delalić*. The Judgment in that case, however, adds an element of confusion as to the proper application of the principle. The Trial Chamber stated that:

⁴⁷¹ *Id.*, par. 501.

⁴⁷² *Id.*, par. 502 (emphasis added). While the Trial Chamber’s definition of extermination was addressed on appeal, the application by the Trial Chamber of the principle of resolving ambiguity in favour of the accused was not touched upon (see *Prosecutor v Radislav Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004).

⁴⁷³ *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998, par. 500.

⁴⁷⁴ *Id.*, par. 501. This aspect of the Trial Chamber’s Judgment was not raised on appeal (see *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeals Chamber, Judgment, 1 June 2001).

The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem*.⁴⁷⁵

The element of confusion is produced by the suggestion that it is only reasonable doubt as to the meaning of a statutory provision “*which the canons of construction fail to resolve*”, which must be interpreted in favour of the accused. The Trial Chamber does not enlighten the reader as to which canons of construction it had in mind. Given that the discussion relates to the interpretation of penal provisions, and given that such interpretation must be consistent with the principle *nullum crimen sine lege*, it is axiomatic that the Trial Chamber’s reference to the canons of construction is a reference only to those canons of construction consistent with the principle *nullum crimen sine lege*. Those canons include strict construction, the prohibition on analogy and (at the risk of circularity in this context) the requirement to interpret ambiguity in favour of the accused. It is probably fair to conclude, then, that the phrase “*which the canons of construction fail to resolve*” implies simply that it is not any literalistic ambiguity on the face of the Statute that must be interpreted in favour of the accused, but rather those ambiguities that remain after the judicial decision-maker has attempted a strict construction of the statute, giving the words their ordinary and natural meaning and avoiding any conclusions which are absurd or illogical. If, after such an endeavour, there are two or more possible interpretations – each consistent with the natural and ordinary meaning of the words and each fairly open to the court (being neither absurd or illogical), then the court should apply that interpretation which poses the least imposition towards the accused.⁴⁷⁶

The difficulty here, however, is that both the rule of strict construction and the prohibition on analogy have narrow applications. The requirement of strict construction applies only where the terms of any provision are plain and

⁴⁷⁵ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 413. See also *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, pars 27-28.

⁴⁷⁶ For similar conclusions in the domestic law context, see *Kirkness v John Hudson & Co Ltd* [1955] AC 696, p. 712 per Viscount Simonds; *DPP v Ottewell* [1970] AC 642, p. 649 per Lord Reid.

unambiguous; the requirement has limited, if any, application in the context of norms located solely in customary law.⁴⁷⁷ The narrow application of the prohibition on analogy is discussed below. It may therefore be that in the context of ambiguous provisions, provided that the prohibition on analogy is observed, those provisions may be construed in accordance with interpretative criteria that apply generally in international law, which is to say, in accordance with those rules of interpretation arising under the Vienna Convention on the Law of Treaties, including reference to the object and purpose of the provision in question.⁴⁷⁸ Thus in the context of ambiguous penal provisions, it could be said that the “object and purpose” approach⁴⁷⁹ is not inconsistent with *nullum crimen sine lege* so long as the approach does not involve reliance on analogy (as discussed below). Nevertheless, if the ICTY Trial Chamber is correct in *Delalić* and the requirement of interpreting ambiguity in favour of the accused is a residual rule only, applying where the canons of construction have left a “reasonable doubt” as to the meaning of the provision, then the rule *contra proferentem* must still have some considerable application as canons of construction (such as looking to the “object and purpose” of the enactment) must regularly involve “reasonable doubt” as to whether the proper interpretation is *x* as opposed to *y*. Unless the object and purpose, for *e.g.*, is unambiguously clear and involves, beyond any “reasonable doubt”, interpretation *x*, then the question whether *x* or *y* is the correct interpretation must be resolved *contra proferentem*, *i.e.* in favour of the accused.

The principle of interpreting ambiguity in favour of the accused appears to apply, under customary international law, not only to the interpretation of penal provisions in statutory form, but also to the determination of norms relating to the ascription of individual criminal responsibility located in customary international law. This would appear, after all, to be what was intended in the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Regulation 808 (1993), concerning the creation of the ICTY, which states:

⁴⁷⁷ See above.

⁴⁷⁸ See Arts 31-33, Vienna Convention.

⁴⁷⁹ This is a reference to the determination of the meaning of treaty terms in light, *inter alia*, of the “object and purpose” of the treaty as provided for under the general rule of interpretation set out in Art. 31(1) of the Vienna Convention.

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are *beyond any doubt* part of customary law.⁴⁸⁰

The international criminal tribunals have also considered or applied the principle of interpretation in favour of the accused in the context of determining the customary international law status of certain norms. For instance, Justice Robertson, in his Dissenting Opinion in the Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) in *Prosecutor v Sam Hinga Norman*, stated, in the context of the question of whether the recruitment of child soldiers gave rise to individual criminal responsibility under customary international law, that “in cases of real doubt as to the existence or definition of a criminal offence, the benefit of that doubt must be given to the defendant”.⁴⁸¹ In its Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, the ICTY Trial Chamber decided that “[i]nsofar as concerns the question whether joint criminal enterprise is recognised in customary international law, the Appeals Chamber has no doubt that the application of the principle *in dubio pro reo* could help to resolve.”⁴⁸² While the Trial Chamber found that the conditions necessitating application of the principle *in dubio pro reo* were not enlivened, it nevertheless considered that the principle was potentially applicable in the determination of a customary norm impinging on criminal responsibility. Of course, there is more scope for doubt in the determination of rules of customary international law than there is in the interpretation of statutory provisions, and the level of acceptable doubt must therefore be greater in the context of the determination of customary norms. Those norms, however, must still be determined consistently with the prohibition on analogy, and applied consistently with the requirement of specificity.

⁴⁸⁰ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Regulation 808 (1993), UN Doc. S/25704 (1993), par. 34 (emphasis added).

⁴⁸¹ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, par. 6.

⁴⁸² *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, par. 28. *See, however*, Jones and Powles who note that while it is understandable that joint criminal enterprise should have been incorporated into the ICTY’s practice as a matter of jurisprudence, basing convictions on a form of liability which is not set out in the ICTY Statute may nevertheless be criticised on legality grounds (Jones & Powles (2003), pp. 418-9, par. 6.2.44).

4. PROHIBITION ON ANALOGY

The prohibition on analogy is a prohibition that applies equally in the context of statutory interpretation and the determination of norms of customary international law.⁴⁸³ It is a corollary of the principle of non-retroactivity in that the prohibition of act *x* does not entail a prohibition of acts *analogous* to *x*; in the absence of a prohibition encompassing the act in question, the act cannot be criminalised simply because of its similarity or proximity to unlawful conduct. In *Prosecutor v Vasiljević*, ICTY Trial Chamber II stated, in relation to the criminality of “violence to life and person” as prohibited under Common Article 3 of the Geneva Conventions of 1949, that:

The residual character of a criminal prohibition such as Article 3 of the [ICTY] Statute does not by itself provide for the criminalisation by analogy to any act which is even vaguely or potentially criminal, and the statement by the Appeals Chamber in *Tadić* [that “customary international law imposes criminal liability for all serious violations of common Article 3”] does not repair the absence of any definition of the crime at the time of the acts charged in the particular case.⁴⁸⁴

Thus, it was insufficient, for the purpose of establishing criminal liability under customary international law, to show that the putative offence in question involved *analogous* conduct to that which was clearly criminal under customary international law; it was essential to show that precise conduct was recognised as a matter of customary international law, as amounting to “violence to life and person” and that criminal liability attached to such conduct.

While analogy is prohibited as an interpretative criterion in the construction of statutory norms, and as a basis for determining the content of customary norms, it is not, however, the case, that international criminal law must

⁴⁸³ See Cassese (2003), p. 154; *Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, par. 195; *Prosecutor v Leonardus Kasa*, Case No. 11/CG/2000, Dili District Court, Special Panel for Serious Crimes, Judgment, 9 May 2001, part ‘E’. See, however, Bassiouni (1999), p. 144 (stating that the “minimum standard of legality” applicable under international criminal law “permits the resort to the rule *ejusdem generis* with respect to analogous conduct”); *Prosecutor v Joao Franca da Silva Alias Jhoni Franca*, Case No. 04a/2001, District Court of Dili, Special Panel for the trial of Serious Crimes, Judgment, 5 December 2002, par. 75 (stating that “[u]se of analogy in applying customary definitions is necessary because traditionally, international criminal law has lacked the specificity of national criminal law in defining crimes.”)

⁴⁸⁴ *Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, par. 195.

remain a static body of law, never changing or developing. As the ICTY Appeals Chamber stated in *Prosecutor v Aleksovski*, the principle *nullum crimen sine lege*:

does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.⁴⁸⁵

The upper limits on the permissible development of international criminal law (through the interpretation of applicable treaties or international instruments, and through the determination of relevant customary norms) are addressed in the next section on the principle of specificity. It suffices for present purposes to observe that the sort of development of legal principle envisaged in *Aleksovski* would, in all likelihood, rarely contravene the ban on analogy, strictly speaking. Analogical reasoning is of the form represented by the following syllogism:

1. Act *x* is prohibited;
2. Act *y* is similar to act *x*;
3. Therefore act *y* is prohibited.

Where, through the judicial development of international criminal law, act *y* comes to be deemed as giving rise to individual criminal responsibility in circumstances where it did not formerly attract judicial opprobrium, the basis for this development would rarely lie, at the level of juridical reasoning, in the mere fact that act *y* is similar to act *x*. Instead, the juridical basis of the development would almost certainly be articulated by reference to some juridical principle, for *e.g.*, a “general principle of law” articulated for the first time in the jurisprudence of international tribunals, or a newly emerged rule of customary international law. Cassese notes that “international law only prohibits the so-called *analogia legis* (that is, the extension of a rule so as to cover a matter that is formally unregulated by law). It does not bar the regulation of a matter not covered by a specific provision or rule, by *resorting to general principles* of international criminal law, or to general principles of criminal justice, or to

⁴⁸⁵ *Prosecutor v Zlatko Aleskovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, par. 127.

principles common to the major legal systems of the world.”⁴⁸⁶ Thus there is nothing *inherently* wrong in the inclusion in statutory form of prohibitions couched in general terms, or in criminalisation on the basis of ostensibly open-ended norms located in general international law, for *e.g.*, the prohibition on persecution as a crime against humanity,⁴⁸⁷ or the prohibition on means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.⁴⁸⁸ Nevertheless, in determining whether concrete facts fall within the norm in question, the judicial decision-maker is limited by the requirements of specificity.⁴⁸⁹

There does appear, however, to be one exception to the prohibition in international criminal law on analogical reasoning (in the syllogistic sense indicated above). That exception is where a norm set out in treaty form (or through some other international instrument) explicitly invites or requests analogy.⁴⁹⁰ Examples may be found in the ICC Statute: Article 8(2)(b)(xviii) prohibits “[e]mploying asphyxiating, poisonous or other gases, *and all analogous liquids, materials or devices*”;⁴⁹¹ Article 7(1)(k) lists as a crime against humanity “[o]ther inhumane acts *of a similar character [i.e. to the other prohibitions in Article 7(1)] intentionally causing great suffering, or serious injury to body or mental or physical health*”;⁴⁹² Article 7(1)(g) prohibits “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, *or any other form of sexual violence of comparable gravity*”.⁴⁹³ According to Cassese, where the text itself calls for analogical reasoning, the relevant norm should be interpreted according to the *ejusdem generis* canon of statutory construction.⁴⁹⁴ That was the conclusion of the District Court of Tel Aviv in the case of *Elsa Ternek* which interpreted the meaning of “other inhumane acts”

⁴⁸⁶ Cassese (2003), p. 155.

⁴⁸⁷ See, *e.g.*, *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, pars 567-636; *Prosecutor v Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, pars 203-210.

⁴⁸⁸ See, *e.g.* *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226, pars 78-9; *Shimoda v. The Japanese State* (1964) 8 Japanese Annual of International Law 212, pp. 241-2.

⁴⁸⁹ See *Prosecutor v Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, par. 194.

⁴⁹⁰ Cassese (2003), p. 155.

⁴⁹¹ Art. 8(2)(b)(xviii), ICC Statute (emphasis added).

⁴⁹² Art. 7(1)(k), ICC Statute (emphasis added).

⁴⁹³ Art. 7(1)(g), ICC Statute (emphasis added).

⁴⁹⁴ Cassese (2003), p. 155.

within the definition of crimes against humanity in Article 1 of the Nazis and Nazi Collaborators (Punishment) Law 5710-1950 to be a reference to acts “which resemble in their type and severity” the expressly enumerated acts, namely murder, extermination, enslavement, starvation and deportation.⁴⁹⁵ The international criminal tribunals have suggested, however, a less rigorous approach to the interpretation of “other inhumane acts” within the definition of crimes against humanity within their respective statutes. In *Prosecutor v Kayishema and Ruzindana* the ICTR Trial Chamber suggested only that the other inhumane acts must be “of similar gravity and seriousness” to the other enumerated crimes in Article 3(i) of the ICTR Statute (omitting the requirement in *Elsa Ternek* of similar typology).⁴⁹⁶ In *Prosecutor v Kupreškić* the ICTY Trial Chamber stated that in interpreting the phrase “other inhumane acts” within the meaning of Article 5(i) of the ICTY Statute, “resort to the *ejusdem generis* rule of interpretation does not prove to be of great assistance.”⁴⁹⁷ The Trial Chamber stated that rather than covering acts similar to those specifically provided for in the rest of Article 5 of the ICTY Statute:

Less broad parameters for the interpretation of “other inhumane acts” can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. Thus, for example, serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1). Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IV Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights), as well as the enforced

⁴⁹⁵ *Elsa Ternek*, District Court of Tel Aviv, Judgment of 14 December 1951, as cited in Cassese (2003), p. 146, n. 19.

⁴⁹⁶ *Prosecutor v Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgment and Sentence, 21 May 1999, par. 154.

⁴⁹⁷ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 564.

disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5. Once the legal parameters for determining the content of the category of “inhumane acts” are identified, resort to the *ejusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted.⁴⁹⁸

Treating *ejusdem generis* as a means of relating acts by virtue of their “gravity”, or the moral turpitude displayed in their perpetration, rather than as a means of relating acts by virtue of similar inherent characteristics or typology seriously weakens the predictive value of *ejusdem generis* as a criterion of interpretation. While the prohibition on analogy does not, strictly speaking, prohibit methods of interpretation such as that indicated in the passage of the ICTY Trial Chamber above, nevertheless such interpretative methods may, depending on the concrete application, still be violative of the principle *nullum crimen sine lege* by virtue of the strictures inherent in the requirement of specificity.⁴⁹⁹

5. REQUIREMENT OF SPECIFICITY

As indicated above, *nullum crimen sine lege* has not been interpreted in the jurisprudence of the international criminal tribunals as preventing a court from developing elements of international criminal law through interpretation and clarification.⁵⁰⁰ Some elements of international criminal law, whether elaborated in treaty form or located in customary international law, are open-ended, rather than elaborate and specific in their definition. The imprecise nature of some norms of criminal law is sometimes advocated as necessary in order to ensure that the norms adequately cover the ground of the regulated subject-matter.⁵⁰¹ For example, in *Prosecutor v Radoslav Brdjanin*, the *Amicus Curiae* Prosecutor sought leave, *inter alia*, to amend the allegation of “intimidating” a witness to “intimidating or

⁴⁹⁸ *Id.*, par. 566.

⁴⁹⁹ It is therefore of note that the ICC Statute, in Article 7(1)(k), resurrects the requirement of similar typology in the context of “other inhumane acts” within the definition of crimes against humanity, stating that such acts must be of “a similar character” to the other enumerated crimes in Art. 7(1) of the ICC Statute.

⁵⁰⁰ *Prosecutor v Zlatko Aleskovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, par. 127.

⁵⁰¹ *See, e.g.*, Ashworth (1999), p. 78.

otherwise interfering with” a witness (emphasis added). The Respondent objected to the amendment, *inter alia*, on the grounds that the term “otherwise interfering with the Witness” is exceedingly vague and amounts to a violation of the principle *nullum crimen sine lege*. The Trial Chamber held, however, “that it would be undesirable for this category to be exhaustively enumerated and consequently create opportunities for evasion of the letter of the prohibition”.⁵⁰² While the requirements of strict construction, the interpretation of ambiguity in favour of the accused and the ban on analogy are interpretative criteria mandated by the principle *nullum crimen sine lege*, the principle of specificity is an overarching test that limits the adjudicative jurisdiction of the court or tribunal in such a manner that it can only apply the relevant law, once determined or interpreted, if it satisfies the requirement of specificity. As Judge Nieto-Navia stated in his Separate and Partially Dissenting Opinion in *Prosecutor v Galić*:

Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, a Trial Chamber must finally confirm that this offence was defined with sufficient clarity under international customary law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.⁵⁰³

The above statement is made, of course, in relation to the determination of whether a putative norm of customary international law satisfies the requirement of specificity. Presumably there is an expectation that treaty-based norms will be defined with greater clarity than norms located in customary international law. Nevertheless, the requirement of specificity offers only limited concession to the fact that customary norms are not authoritatively elaborated in written form. The offence must be defined with sufficient clarity under customary international law for its “general nature, its criminal character and its approximate gravity”. Norms of criminal law, particularly those of the level of gravity dealt with by international criminal tribunals, must presumably be elaborated with clarity. Thus, in his Dissenting Opinion in the

⁵⁰² *Prosecutor v Radoslav Brdjanin*, Case No. IT-99-36-R77, Trial Chamber II, Decision on Motion by *Amicus Curiae* Prosecutor to Amend Allegations of Contempt of the Tribunal, 6 February 2004. The Trial Chamber concluded that in any event there had been no violation of *nullum crimen sine lege* (*id.*)

⁵⁰³ *Prosecutor v Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment and Opinion, 5 December 2003, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, par. 110.

Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) in the case of *Prosecutor v Norman*, Justice Robertson stated, in relation to the determination of customary based norms, that:

the elements of the offence must be *tolerably clear* and must include the mental element of a guilty intention. Its existence, as an international law crime, must be capable of reasonable ascertainment, which means (as an alternative formulation) that prosecution for the conduct must have been foreseeable as a realistic possibility.⁵⁰⁴

In terms of how such a test could realistically be satisfied in the context of customary based norms, some insight is offered by the ICTY Appeals Chamber in its Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, in *Prosecutor v Milutinović*, which finds the twin tests of foreseeability and accessibility of the customary norms satisfied on the basis that there was “a long and consistent stream of judicial decisions, international instruments and domestic legislation which would have permitted any individual to regulate his conduct accordingly and would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility.”⁵⁰⁵ The conjunctive test of foreseeability and accessibility tends to be the most common way in which the requirement of specificity is expressed. Both the ICTY Trial Chamber, in its Decision on Joint Challenge to Jurisdiction in *Prosecutor v Hadžihasanović*, and the Appeals Chamber of the Special Court for Sierra Leone in its Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) in *Prosecutor v Norman*, have expressed the requirement of specificity as requiring, in relation to any particular norm, that it must have been “foreseeable and accessible to a possible

⁵⁰⁴ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, par. 20 (emphasis added). See also *Prosecutor v Duško Tadić*, Case No. IT-94-1, Trial Chamber, Decision on the Defence Motion on the Jurisdiction of the Tribunal, 10 August 1995, par. 128, which predicated criminality upon “the clear and unequivocal recognition of the rules of warfare in international law and state practice indicating an intention to criminalize the prohibition”; see, also, *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, par. 37.

⁵⁰⁵ *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, par. 41.

perpetrator that his concrete conduct was punishable.”⁵⁰⁶ How this translates, in terms of applying the conjunctive test, is explained in the Judgment of ICTY Trial Chamber II in *Prosecutor v Vasiljević*:

the Trial Chamber must further satisfy itself that the criminal conduct in question was sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the criminal heading chosen by the Prosecution, in this case “violence to life and person”. From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.⁵⁰⁷

Thus, what the tests of foreseeability and accessibility mean in practice is that an individual must be in a position to distinguish the criminal from the non-criminal. It must have been clear, not simply that his concrete conduct was considered questionable or suspect by the international community but that it would render him criminally responsible.

According to the European Court of Human Rights, the requirement of specificity is satisfied where “the individual can know *from the wording of the relevant provision and if need be, with the assistance of the courts’ interpretation of it*, what acts and omissions will make him criminally liable.”⁵⁰⁸ Thus the result must have been foreseeable in the sense that it clearly falls within the wording of a provision in a formalistic sense, or alternatively, that the jurisprudence of the courts clearly indicates what the result will be. The conclusion appears to be that it is the predictable trajectory of juridical reasoning, and not the predictable trajectory of public opinion, that determines whether a particular development in the law was sufficiently predictable for the purpose of satisfying the principle *nullum crimen sine*

⁵⁰⁶ *Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-T, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002, par. 62; *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, par. 25.

⁵⁰⁷ *Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, par 193.

⁵⁰⁸ *CR v United Kingdom* (1995) 21 EHRR 363, par. 33 (emphasis added).

lege. Predictability or foreseeability is not to be answered by whether the expectation of the international community was that a particular act *should* be outlawed, but rather whether the law in its totality (*i.e.* taking into account all applicable norms, both conventional and customary) has reached a point where that act must clearly be viewed as prohibited. According to Ascensio et al.:

for the *nullum crimen* principle to be observed scrupulously, it is not absolutely necessary that the international norm providing for and/or organising the repression of the crime should define the *figura criminis* and the applicable penalty down to the last detail. It suffices to observe, for this purpose, that the author of the act in question was subject, at the *tempus delicti*, to clear, accessible legal norms – internal and/or international – establishing such a definition *ante factum*.⁵⁰⁹

During the Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) in *Prosecutor v Norman*, the prosecution submitted that “[t]he principle of *nullum crimen sine lege* should not be rigidly applied to an act universally regarded as abhorrent. The question is whether it was foreseeable and accessible to a possible perpetrator that the conduct was punishable.”⁵¹⁰ The prosecution further submitted that “[t]he possible perpetrator did not need to know the specific description of the offence. The dictates of the public conscience are important in determining what constitutes a criminal act, and this will evolve over time.”⁵¹¹ Naturally, the Appeals Chamber did not rely on, or endorse, these submissions. Instead the Chamber endorsed the view of the ICTY Appeals Chamber in *Tadić* predicating criminality upon “the clear and unequivocal recognition of the rules of warfare in international law and state practice indicating an intention to criminalize the prohibition.”⁵¹² Justice Robertson, in his Dissenting Opinion, stated that:

[t]he enlistment of children of fourteen years and below to kill and risk being killed in conflicts not of their making was abhorrent to all reasonable persons in 1996 and is abhorrent to them today. But

⁵⁰⁹ “Présentation de la IIème partie” in H. Ascensio, E. Decaux & A. Pellet, *Droit international penal*, 2000, at p. 246 (translated in Pellet (2000), p. 1058, n. 39).

⁵¹⁰ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, par. 2 (as paraphrased by the Appeals Chamber).

⁵¹¹ *Id.*, par. 4 (as paraphrased by the Appeals Chamber).

⁵¹² *Id.*, par. 37.

abhorrence alone does not make the conduct a crime in international law.⁵¹³

He stated further that the fact the defendant's conduct would shock or even appall decent people is not enough to make it unlawful in the absence of a prohibition."⁵¹⁴

There is, however, some residual relevance of the immorality of particular conduct to the question of whether the requirement of specificity is satisfied. The ICTY Appeals Chamber in its Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, stated that:

due to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime. In the *Tadić* Judgment, for instance, the Appeals Chamber noted "the moral gravity" of secondary participants in a joint criminal enterprise to commit serious violations of humanitarian law to justify the criminalisation of their actions. Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.⁵¹⁵

Thus while immorality (even of the gravest form) cannot, of itself, satisfy the requirements of foreseeability and accessibility, as the relevant test relates to the predictability of the *lex lata* and not the *lex ferenda*, nevertheless, where the particular conduct can be shown clearly to be prohibited as a matter of treaty or customary law it would be more difficult for the accused to assert that that result was not foreseeable or accessible.

v. INCONSISTENCY BETWEEN NULLUM CRIMEN AND THE VIENNA CONVENTION ON THE LAW OF TREATIES?

The operation of Article 22 of the ICC Statute (and Article 21(3) to the extent that it incorporates aspects of *nullum crimen sine lege* not already incorporated by Article

⁵¹³ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, par. 9.

⁵¹⁴ *Id.*, par. 13.

⁵¹⁵ *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, par. 42.

22)⁵¹⁶ sets up a potential inconsistency with the operation of the Vienna Convention on the Law of Treaties. The Vienna Convention governs the ICC Statute (both expressly on the grounds that the latter is an international agreement concluded between States,⁵¹⁷ and impliedly on the grounds that it is the constituent instrument of an international organisation)⁵¹⁸ and incorporates its own rules of treaty interpretation.⁵¹⁹ These rules of treaty interpretation are potentially inconsistent with the rules of interpretation contained within the principle *nullum crimen sine lege* as incorporated in Article 22 (and possibly 21(3)) of the ICC Statute. Article 22, for *e.g.*, requires, in relation to the definition of crimes, that they be strictly construed and not extended by analogy, and that any ambiguity be interpreted *contra proferentem*.⁵²⁰ The general rule of interpretation set out in the Vienna Convention on the Law of Treaties, on the other hand, states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁵²¹ The existence of two differing regimes of treaty interpretation, each ostensibly applicable to the interpretation of the same treaty terms, creates the risk of an inconsistent result. For instance, the strict construction of inculpatory terms, as required by the principle *nullum crimen sine lege*, could be viewed in particular instances as inconsistent with the obligation of “good faith” interpretation of those terms as required under the Vienna Convention (*e.g.*, on the basis that a good faith interpretation requires that legal obligations not be evaded through a narrow application of clauses).⁵²² Alternatively, the strict construction of terms could produce a result which is inconsistent with the “object and purpose” of the ICC Statute, which, it could be

⁵¹⁶ See above.

⁵¹⁷ Arts 1, 2, 4, Vienna Convention.

⁵¹⁸ Art. 5, Vienna Convention. See A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2000, p. 113.

⁵¹⁹ Arts 31-33, Vienna Convention.

⁵²⁰ Art. 22(2), ICC Statute.

⁵²¹ Art. 31(1), Vienna Convention. Article 31 of the Vienna Convention has been accepted by the ICJ as reflecting customary international law (*Territorial Dispute Case (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep. 6, par. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, [1995] ICJ Rep. 6, p. 18)

⁵²² See Report of the International Law Commission on the second part of its seventeenth session (Monaco, 3 - 28 January 1966) and on its eighteenth session, 4 May to 19 July 1966, [1966-II] *Yearbook of the International Law Commission* 1, p. 211. Good faith is mandated under the Vienna Convention in relation to both the interpretation (Art. 31(1)) and performance (Art. 26) of the treaty.

argued, is to restrict the scope for atrocity and impunity, rather than extend the scope for exculpation.

While the Vienna Convention rules of interpretation potentially differ from *nullum crimen sine lege* under the ICC Statute, nevertheless the two sources should, in all instances, be capable of simultaneous application. The Vienna Convention's approach to the interpretation of treaties is primarily textual. The International Law Commission explained, in relation to its draft of the Convention, that the general rule of interpretation "is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text".⁵²³ The ICJ has confirmed that interpretation in line with the Vienna Convention "must be based above all upon the text of the treaty."⁵²⁴ Thus where the text clearly provides that the terms of the treaty be interpreted according to the principle *nullum crimen sine lege*, then interpretation in line with that principle is in fact consistent with the Vienna Convention in so far as the Vienna Convention gives primacy to the text. There is some question, however, as to the limits to which the Vienna Convention will give effect to the clear meaning of the text when it conflicts with the other considerations cited in the general rule of interpretation (good faith, context and object and purpose). In his Separate Opinion in the *South West Africa Case*, Judge de Castro stated that "a clause which is reasonably clear cannot be interpreted literally if by so doing one reaches a result which is contrary to the purpose of the treaty."⁵²⁵ The Vienna Convention, however, leaves it unclear as to how the various elements listed in the general rule of interpretation in Article 31 are to be related to each other and the text, and given effect to in the case of inconsistency between them.⁵²⁶ The view has been expressed that the "object and

⁵²³ Report of the International Law Commission on the second part of its seventeenth session (Monaco, 3 - 28 January 1966) and on its eighteenth session, 4 May to 19 July 1966, [1966-II] *Yearbook of the International Law Commission* 1, p. 220.

⁵²⁴ *Territorial Dispute Case (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep. 6, par. 41. *See, also, Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] ICJ Rep. 4, p. 8 ("the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.")

⁵²⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep. 16, Separate Opinion of Judge de Castro, p. 183.

⁵²⁶ McDougal *et al.* (1994), p. 1xiii; *see, also, Golder v United Kingdom* (1975) 1 EHRR 524, par. 14.

purpose” of the treaty is to be referred to in determining the ordinary meaning of the terms, and not as an independent basis for interpretation.⁵²⁷ It would appear on this view that object and purpose could not be given effect to, when to do so would directly contradict the wording of the treaty itself.⁵²⁸ However, even if the Vienna Convention does permit recourse to good faith, context and object and purpose when the text is clear, those extra-textual elements are entirely consistent, in the case of the interpretation of the ICC Statute, with the principle *nullum crimen sine lege*. It is clear, for instance, that the “object and purpose” of the ICC Statute is not the unqualified prosecution of individuals responsible for serious violations of humanitarian law, but rather the prosecution of such individuals *only to the extent that it is compatible with the principle nullum crimen sine lege and other internationally recognised human rights*.⁵²⁹ In addition, the Vienna Convention states that, together with “context”, account shall be taken, *inter alia*, of “any relevant rules of international law applicable in the relations between the parties.”⁵³⁰ These rules must surely include the principle *nullum crimen sine lege* which limits, as a matter of general international law, the prescriptive and adjudicative jurisdiction of States with respect to the prosecution of crimes.⁵³¹ Where the ordinary meaning of the terms of the treaty, the context of those terms, and the object and purpose of the treaty are each consistent with the principle *nullum crimen sine lege*, then the only “good faith” interpretation of those terms is one which is equally consistent with that principle.

⁵²⁷ D.J Harris, *Cases and Materials on International Law*, 5th ed., Sweet & Maxwell, London, 1998, p. 814.

⁵²⁸ See *Interpretation of Peace Treaties Case (Second Phase) (Advisory Opinion)* [1950] ICJ Rep. 221, pp. 226-230.

⁵²⁹ Arts 22, 21(3), ICC Statute.

⁵³⁰ Art. 31(3)(c), Vienna Convention.

⁵³¹ The Vienna Convention itself deals directly with the issue of non-retroactivity of treaties in Article 28:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

This Article, however, does not replicate the *nullum crimen sine lege* principle; it is a provision of much narrower scope. It only replicates those provisions in the ICC Statute precluding the ICC from exercising jurisdiction in respect of conduct committed prior to the entry into force of the Statute. Where the ICC asserts jurisdiction over an individual in respect of conduct committed after the entry into force of the ICC Statute, but in circumstances where the relevant applicable law is unclear or has not yet been determined, then that may amount to a violation of Article 22 of the ICC Statute, but it does not raise an issue relevant to Article 28 of the Vienna Convention.

There would therefore appear to be no inconsistency as such between the application of the general rule of interpretation under Article 31 of the Vienna Convention and the principle *nullum crimen sine lege* under the ICC Statute.

What would be the consequence, however, if an inconsistency between the Vienna Convention and *nullum crimen sine lege* were nevertheless held to exist? There is no express provision in the Vienna Convention indicating that where a subsequent treaty sets out its own rules of interpretation which are inconsistent with the Vienna Convention rules that the rules in the subsequent treaty are to be accorded primacy. Article 5 of the Vienna Convention does, however, state that “[t]he present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization *without prejudice to any relevant rules of the organization*.”⁵³² The ICC Statute is the constituent instrument of an international organisation (the ICC). If the rules of interpretation contained within the principle *nullum crimen sine lege* under the ICC Statute could be considered “relevant rules of the organization”, then the rules of interpretation set out in the Vienna Convention would be without prejudice to the principle *nullum crimen sine lege* as provided for in the ICC Statute. Alternatively, Article 30 of the Vienna Convention concerns the resolution of inconsistencies produced by the application of successive treaties relating to the same subject-matter.⁵³³ It provides for the application of the rule *lex posterior derogat priori* in relation to parties to both treaties; the earlier treaty thus applies only to the extent that its provisions are compatible with those of the later treaty.⁵³⁴ For this test to apply in the potential inconsistency between *nullum crimen sine lege* under the ICC Statute and the rules of interpretation in the Vienna Convention, it would need to be shown that the two treaties are “treaties relating to the same subject-matter”.⁵³⁵ The Vienna Convention relates to the law of treaties whereas the ICC Statute relates to penal consequences for violations of international humanitarian law, however the test of whether they relate to the same subject-matter

⁵³² Art. 5, Vienna Convention (emphasis added).

⁵³³ Art. 30, Vienna Convention.

⁵³⁴ Art. 30(3)-(4)(a), Vienna Convention. In the relations between a State party to both treaties, and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations (Art. 30(4)(b), Vienna Convention).

⁵³⁵ Art. 30(1), Vienna Convention.

for the purpose of Article 30 of the Vienna Convention is probably best answered by the application of the following test: “If an attempted simultaneous application of two rules leads to incompatible results it can safely be assumed that the test of sameness is satisfied.”⁵³⁶ The application of Article 30 of the Vienna Convention leads to the conclusion that the principle *nullum crimen sine lege* under the ICC Statute must be accorded primacy over the Vienna Convention rules of interpretation to the extent of any inconsistency.⁵³⁷ Nevertheless, it may be that the proper determination of this issue is not to be made by the application of the *lex posterior* rule under Article 30 of the Vienna Convention, but rather the application of the rule *lex specialis derogat lex generali*. In the 1969 Vienna Conference, which led to the Vienna Convention, the view was put that the words “relating to the same subject-matter” in Article 30 of the Vienna Convention should be construed strictly and not applied to successive treaties where the inconsistency related to general versus special regimes.⁵³⁸ It may be then that the inconsistency is to be answered by stating that the rules of interpretation in the ICC Statute, relating specifically to the interpretation of penal provisions, are *lex specialis* and set up special rules of interpretation to which the *lex generalis* in the Vienna Convention must yield.⁵³⁹ In either case, *nullum crimen sine lege* under the ICC Statute takes precedence over the Vienna Convention methods of interpretation.

⁵³⁶ E.W. Vierdag, “The Time of the ‘Conclusion’ of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions”, (1988) 59 *British Yearbook of International Law* 75, p. 100.

⁵³⁷ Although some difficulty could arise in the case of a State that accedes to the Vienna Convention after it ratifies or accedes to the ICC Statute. In such a case it would be unclear which is the “earlier”, and which is the “later”, treaty. *See id.*, p. 102.

⁵³⁸ *See id.*, p. 100. *See, also*, I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd rev. ed., Manchester University Press, Manchester, 1984.

⁵³⁹ *See, e.g.*, *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Award on Jurisdiction and Admissibility, 4 August 2000, par. 52 (*available at* www.worldbank.org/icsid/bluefintuna/award080400.pdf)

3

judicial discretion

Article 31(3) of the ICC Statute confers a power on the ICC to consider defences not expressly enumerated within the ICC Statute. That power, however, is ostensibly expressed in discretionary form. Article 31(3) states that:

At trial, the Court *may* consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from the applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.⁵⁴⁰

Rule 80 of the Rules of Procedure and Evidence requires that the defence give sufficient notice to both the Trial Chamber and the Prosecutor if it intends to raise a ground for excluding criminal responsibility under Article 31(3), so as to enable the Prosecutor to prepare adequately for trial.⁵⁴¹ The Rule also provides that the Trial Chamber shall hear both the Prosecutor and the defence before deciding whether the defence can raise a ground for excluding criminal responsibility under Article 31(3),⁵⁴² and that if the defence is permitted to raise such a ground, the Trial Chamber may grant the Prosecutor an adjournment to address that ground.⁵⁴³ The Rules of Procedure and Evidence are silent as to what considerations the Trial Chamber should take into account in determining whether the defence will be permitted to raise a ground for excluding criminal responsibility under Article 31(3).

The presumption that Article 31(3) confers a discretionary power upon the ICC derives from the use of the word “may”. The term “may”, where used to

⁵⁴⁰ Art. 31(3) (emphasis added).

⁵⁴¹ Rule 80(1), International Criminal Court, Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000) (hereinafter ICC Rules of Procedure and Evidence).

⁵⁴² Rule 80(2), *id.*

⁵⁴³ Rule 80(3), *id.*

indicate a grant of judicial power, usually indicates that the power granted is discretionary in nature, particularly where the term “may” is specifically used in opposition to the term “shall”.⁵⁴⁴ On this basis, it appears that the ICC is compelled to consider the applicability of all relevant defences which are expressly enumerated in the ICC Statute, whereas no such compulsion exists in relation to non-enumerated defences. Article 31(2) of the ICC Statute states that “[t]he Court *shall* determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.”⁵⁴⁵ This is immediately followed by Article 31(3) which provides that “the Court *may* consider a ground for excluding criminal responsibility other than those referred to in paragraph 1...”⁵⁴⁶ Nevertheless, the actual terms employed in a statutory provision (e.g. “may” or “shall”) are not necessarily conclusive as to whether a grant of power is discretionary or not; a long-standing rule of statutory interpretation is that there may be something in the surrounding circumstances to show that permissive terms such as “may” were in fact intended, or

⁵⁴⁴ See, e.g., *Montgomery v Wanda Modes Ltd* [2002] 1 BCLC 289, par. 5; *R v City of Westminster Housing Benefit Review Board, ex parte Mehanne* [2001] 2 All ER 690, par. 23 (per Lord Hope of Craighead); *R v Northumbrian Water Ltd, ex parte Newcastle and North Tyneside Health Authority* [1999] JPL 704; *Masson v Netherlands (A/327)* (1996) 22 EHRR 491; *R v Wandsworth District Board of Works* (1858) 6 WR 576. A number of Interpretation Acts enshrine this distinction between “may”, as discretionary, and “shall”, as mandatory. See, e.g., the *Interpretation Act 1987* (NSW), which provides, in §9, that:

- (1) In any Act or instrument, the word “may” if used to confer a power, indicates that the power may be exercised or not at discretion.
- (2) In any Act or instrument, the word “shall”, if used to impose a duty, indicates that the duty must be performed.

Notwithstanding provisions such as the above, courts, at least in common law jurisdictions, will often find that the intention of the legislature was to confer a mandatory grant of power by the use of the word “may”, or a discretionary grant by the use of the word “shall”, and interpret the Act accordingly (A.I. MacAdam & T.M. Smith, *Statutes: Rules and Examples*, 2nd ed., Butterworths, Sydney, 1989, p. 255).

⁵⁴⁵ Art. 31(2), ICC Statute. Emphasis added.

⁵⁴⁶ Art. 31(3), ICC Statute (emphasis added). There is perhaps an issue of defective drafting here. It could be argued that the non-enumerated grounds for excluding criminal responsibility, provided for in Article 31(3), are also (*i.e.*, in addition to the enumerated grounds), “grounds for excluding criminal responsibility provided for in this Statute”. The Court “shall” therefore determine their applicability to the case at hand (Art. 31(2)). If Article 31(2) was intended to refer only to those grounds expressly enumerated in the Statute, then Article 31(2) should have explicitly recognised this fact. By referring, generically, to grounds for excluding criminal responsibility “provided for” in the ICC Statute, that, on its ordinary meaning, could include those non-enumerated grounds “provided for” in the terms of Article 31(3). It could therefore be argued that the power to determine non-enumerated defences is non-discretionary.

must be construed, to operate by way of command.⁵⁴⁷ There are a number of cases arising in common law jurisdictions concerning the distinction between the effect of “may” and “shall” when used to confer executive or judicial powers. The principal question involved is whether “may [do act x]” denotes a discretionary grant of power (sometimes referred to as a “directory” provision), or whether it denotes, instead, a mandatory grant of power. If “may” denotes a mandatory grant of power then “may [do act x]” is equivalent in effect to the words “*must* [do act x]”. When a literal approach is applied to this question of statutory interpretation, the result is indeterminate as to whether “may” is a discretionary or mandatory term. In the case of *Re Falconbridge Nickel Mines Ltd and Minister of Revenue for Ontario*, Thorson J.A. of the Ontario Court of Appeal stated that in some contexts the word “may” is neither necessarily permissive nor necessarily imperative, but rather merely empowering, *i.e.*, its function is to empower some person or authority to do something which, otherwise, that person or authority would be without any power to do.⁵⁴⁸ There is, therefore, nothing inherent in the literal meaning of “may” which is dispositive to the question of whether the term confers a power which *must* be exercised when the relevant conditions are met or whether the power is to be exercised only as a matter of discretion.⁵⁴⁹ The term “may” removes the impediment to the exercise of powers, but the conditions under which those powers are to be exercised can only be determined from an interpretation of the statute as a whole.⁵⁵⁰ When the question is approached from the ordinary meaning of words, however, there is at least a presumption that “may” denotes a grant of discretion, but that presumption is rebuttable depending upon the circumstances of the case. The question of whether provisions in a statute are mandatory or discretionary can only be determined by considering the factors that relate to the particular enactment rather than by any general rule.⁵⁵¹ Common law rules of statutory interpretation have

⁵⁴⁷ *Halsbury's Laws of England*, 4th ed. Reissue, Vol. 44(1), Butterworths, London, 1995, par. 1337 (hereinafter *Halsbury's Laws of England*).

⁵⁴⁸ *Re Falconbridge Nickel Mines Ltd and Minister of Revenue for Ontario* (1981) 121 D.L.R. (3d) 403, p. 408.

⁵⁴⁹ *See, e.g.*, the entry for “may” in the Macquarie Dictionary, which is defined *inter alia* as expressing only “ability or power” (A. Delbridge, J.R.L. Bernard, D. Blair, P. Peters & S. Butler (eds), *The Macquarie Dictionary*, 2nd ed., The Macquarie Library, Sydney, 1991, p. 1101).

⁵⁵⁰ *Clarkson Co. Ltd. v White* (1979) 32 C.B.R. (N.S.) 25, pp. 29-30, per Hart J.A.

⁵⁵¹ *See, e.g.*, *Howard v Bodington* (1877) 2 PD 203, p. 211, per Lord Penzance; *R v. Boylan* [1979] 3 W.W.R. 435, p. 442, per Culliton CJ.

tended to lend significance to the context and the general scope and object of the enactment in this determination,⁵⁵² which are considerations similar to those applicable under the general rule of interpretation in the Vienna Convention on the Law of Treaties.⁵⁵³ Where, for instance, the object of a statute is the provision of justice or the public good, courts have interpreted grants of power directed to that end to be mandatory. Thus, in *Rex et Regina v Barlow* it was held that “where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*: thus, the [statute] 23 H. 6 says the sheriff may take bail; this is construed shall, for he is compellable to do so.”⁵⁵⁴ In *Julius v Lord Bishop of Oxford*, Lord Cairns L.C. stated that “[w]here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised.”⁵⁵⁵

One specific class of statutes enacted for the sake of justice or the public good that has been the subject of judicial consideration is statutes conferring powers upon courts or judicial officers to dispense with the rights of parties before them. Where a statute provides that a court “may” perform a judicial act for the benefit of a party to the proceedings, that grant of power is held (according to common law principles of statutory interpretation) to be mandatory.⁵⁵⁶ There is a long line of consistent authority to this effect, as the following cases indicate:

In *Alderman Backwell’s case* (1687) a question arose as to whether the power of the Lord Chancellor to grant a commission of bankrupt was discretionary or *de jure*. Lord Keeper North held that “the commission is *de jure*, and the statute, which saith that the Chancellor *may* grant, &c., is as if it had been ‘shall grant,’ or ‘ought to grant,’ but he cannot grant *ex officio*, but on request of persons

⁵⁵² See, e.g., *Re Nicholson, Ex p Nyberg* (1882) 8 VLR (L) 292.

⁵⁵³ Art. 31(1), Vienna Convention.

⁵⁵⁴ 2 Salk. 609; 91 ER 516 (year of judgment not published) (emphasis in original); see, also, *Jones v Harrison* (1851) 2 LM&P 257; *Ex p Gilbert* (1873) 14 NBR (1 Pug) 231; *Julius v. Lord Bishop of Oxford* (1880) 5 App Cas 214; *Border RDC v Roberts* [1950] 1 KB 716.

⁵⁵⁵ (1880) 5 App Cas 214, p. 225; see, also, *Re Baker, Nichols v Baker* (1890) 44 Ch D 262; *R v Turner* [1897] 1 QB 445; *R v Mitchell, Ex p Livesey* [1913] 1 KB 561.

⁵⁵⁶ *MacDougall v Paterson* (1851) 11 CB 755; 138 ER 672; *Bell v Crane* (1873) LR 8 QB 481; *Forbes v Lee Conservancy Board* (1879) 4 Ex D 116; *Fenson v City of New Westminster* (1897) 5 BCR 624; *Sheffield Corporation v Luxford, Same v Morrell* [1929] 2 KB 180; *John Sainsbury & Co (a firm) v Roberts* [1975] 2 All ER 801; *Bristol City Council v Rawlins* (1977) 34 P&CR 12.

interested.”⁵⁵⁷ This decision was affirmed in a number of cases, including *MacDougall v. Patterson* (1851), which confirmed that “when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application.”⁵⁵⁸ In the latter case it was held in relation to a statute providing that in certain cases a court or judge at chambers “may” allow a plaintiff to recover his costs, that “the word ‘may’ is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises.”⁵⁵⁹

In *Fenson v City of New Westminster* (1897), the appellant had appealed against an order of a Justice imposing a fine, and, in accordance with §880(c) of the *Criminal Code 1892*, had deposited with the Justice, money sufficient to cover the fine, the costs of the order, and the costs of the appeal. The appeal was dismissed and the respondent applied for payment to be made to it in accordance with §880(e) of the *Criminal Code 1892*, which provided that “whenever, after any such deposit has been made as aforesaid [*i.e.*, in accordance with §880(c)], the conviction or order is affirmed, the Court *may* order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant.”⁵⁶⁰ The appellant submitted that the power to order the payment of the fine to the respondent, as well as the costs of the original order and appeal, was only discretionary, as evinced by the use of the word “may”. The Court held, however, that the power was mandatory. Bole L.J.S.C. stated that:

the rule, I think, is that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arrives, and its exercise is duly applied for by a party interested and having the right to make the application: *MacDougall v Paterson*, 11 C.B. 755; *Julius v Bishop of Oxford*, 5 A.C. 214. In the present case I entertain no doubt as to the sense in which the word “may” is used. I must therefore grant the application and direct the fine, costs and costs of appeal to be paid forthwith to the respondent, out of the

⁵⁵⁷ (1687) 2 Chan. Cas 190, p. 191 (emphasis added).

⁵⁵⁸ 11 C.B. 755, p. 773; 138 E.R. 672, p. 679.

⁵⁵⁹ *Id.*

⁵⁶⁰ Emphasis added.

deposit in Court, and that the balance, if any, be paid to the party entitled thereto.⁵⁶¹

In *Sheffield Corporation v Luxford; Same v Morrell* (1929), the Sheffield Corporation had sought orders for possession of two premises against defendants who were tenants of the Corporation but refused to vacate the premises after notice to quit was given. The orders were sought under §138 of the *County Courts Act 1888*, which stated that where a tenant neglects to deliver up possession after the expiry of a notice to quit, then following compliance with certain conditions, “the judge *may* order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name.”⁵⁶² The county court judge acted on the view that §138 of the *County Court Act* granted him an absolute discretion (by virtue of the word “may”). He refused to issue an order against the defendant Morrell, and, against Luxford, he made an order for possession but postponed its operation for 12 months. On appeal in both cases by the Sheffield Corporation, the Court held that the county court judge had in fact been under a duty to grant the order, notwithstanding the permissive language of the statute. Talbot J stated that:

“May” is a permissive or enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it. One of those cases is where he is applied to to use the power which the Act gives him in order to enforce the legal right of the applicant. I think this is such a case.

On the information before us, the legal right of the plaintiffs, the landlords, was complete as soon as the notice to quit had expired, and the tenant’s right to remain in occupation of this house had absolutely ceased... That being so, I think that, as soon as the application is made to the judge for an order for possession, the latter being clothed by the Act of Parliament with the power to make such an order, it becomes his duty to make it.⁵⁶³

In *Clarkson Co. Ltd. v. White* (1979), the term “may” in the *Bankruptcy Act* was held to be mandatory. The *Bankruptcy Act* stated that where the court finds, in relation to the sale of property in a reviewable transaction, that the consideration given or received by the bankrupt was greater or less than the fair market value of the

⁵⁶¹ *Fenson v City of New Westminster* (1897) 5 BCR 624, p. 625.

⁵⁶² Emphasis added.

⁵⁶³ [1929] 2 KB 180, pp. 183-4.

property, the court “may” give judgment to the trustee against the other party to the transaction for the difference. Hart J.A. stated that:

although the remedy is in the permissive form, the court has a duty to grant some judgment against any or all of the persons named in the section so that an asset improperly removed from the company may be restored for the benefit of creditors. The section of the Act involved does not leave the judge with an unfettered discretion to grant or withhold the remedy on the grounds of fairness to the people concerned but indicates that the trustee has a right to judgment upon satisfying the requirements established by the legislation.⁵⁶⁴

If the above rules of interpretation are applied to determining the effect of the meaning of “may” in the context of Article 31(3) of the ICC Statute, the conclusion must be that although the power to dispose of the rights of the accused is set in permissive form, there is an attenuating duty to consider and admit any defence which is not expressly located (or excluded) in the ICC Statute, as long as (a) the defence is applicable under international law; and (b) Rule 80 of the Rules of Procedure and Evidence are complied with. If a defence exists under customary international law (or under any other source of law located in Article 21 of the ICC Statute, provided that that source is recognised as creating legal rights or duties under international law), then as long as that defence has not been extinguished (including as a result of the ICC Statute), a defendant has a right under international law to an acquittal on that ground. Assuming that the defence can be made out, the defendant’s right to an acquittal is complete and the ICC is under a duty to admit the defence.⁵⁶⁵ The ICC lacks the competence or power to rule such a defence inadmissible on public policy grounds.⁵⁶⁶

The question, then, is whether the above rules of interpretation can be applied to Article 31(3) of the ICC Statute. Let us examine, in the first instance, what the conclusion would be following the rules of interpretation set out in the Vienna Convention on the Law of Treaties. As indicated above, the common law rule of statutory interpretation, whereby the power of courts to perform a judicial act for the benefit of a party to the proceedings is held to be mandatory, follows from the

⁵⁶⁴ *Clarkson Co. Ltd. v White* (1979) 32 C.B.R. (N.S.) 25, per Hart J.A., p. 34.

⁵⁶⁵ *See, e.g.*, [1929] 2 KB 180, pp. 183-4.

⁵⁶⁶ *See, e.g.*, *Clarkson Co. Ltd. v White* (1979) 32 C.B.R. (N.S.) 25, per Hart J.A., p. 34.

context and the general scope and object of the enactment.⁵⁶⁷ These considerations are looked to for the purpose of giving effect to the intention of the legislature.⁵⁶⁸ Thus, where it is clear that the legislature intended the power granted to be discretionary only, that intention must be given effect.⁵⁶⁹ “Intention” often occupies a very different position in the interpretation of treaties under international law. The question of intention is very often a fiction; especially where, as in the case of multilateral treaty negotiation, it is almost impossible to pinpoint a common intention which each of the parties held simultaneously in relation to any one provision. Perhaps this is why the Vienna Convention on the Law of Treaties does not refer expressly to “intention” as a marker in the interpretation of treaties,⁵⁷⁰ choosing instead to give effect to intention indirectly by lending significance to objective, exterior indicia of intent.⁵⁷¹ Thus the general rule of interpretation in the Vienna Convention looks to the ordinary meaning of words in their context and in light of the treaty’s object and purpose.⁵⁷² The ordinary meaning of the word “may” certainly appears to be discretionary in nature, but as indicated above, there is no ineluctable necessity in “may” being a discretionary term (only an empowering one), and its ordinary meaning can also be susceptible to ambiguity, depending upon the circumstance. It is possible that the word “may” implies some level of discretion or contingency without rendering discretionary the admissibility of defences which are

⁵⁶⁷ See, e.g., *Re Nicholson, Ex p Nyberg* (1882) 8 VLR (L) 292.

⁵⁶⁸ *Delhi & London Bank v. Orchard* (1877) LR 4 Ind App 127 (Privy Council).

⁵⁶⁹ See, e.g., *Bell v Crane* (1873) LR 8 QB 481.

⁵⁷⁰ While the intention of the parties has in the past, been asserted by some scholars as a principal test in the interpretation of treaties (G. Fitzmaurice, “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points”, (1951) 28 *British Yearbook of International Law* 1), it appears to have been relegated to a subsidiary means of treaty interpretation under the Vienna Convention where it may be indirectly relevant to the primary considerations (ordinary meaning, context, object and purpose), or possibly applicable if these primary considerations produce results which are ambiguous or obscure or lead to results which are manifestly absurd or unreasonable (See Art. 32, Vienna Convention). Direct provision is however made for the intention of the parties in Article 31(4) of the Vienna Convention which provides that a special meaning shall be given to a term in the treaty “if it is established that the parties so intended.”

⁵⁷¹ This has been the approach of the ICJ, for e.g., which has taken clarity in the wording of a treaty as a clear conveyance of the intention of the parties. See *Territorial Dispute Case (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep. 6, par. 51. See also, M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Finnish Lawyer’s Publishing Company, Helsinki, 1989 (pp. 291-294, 298-299) cited in M. Dixon & R. McCorquodale (eds), *Cases and Materials on International Law*, 4th ed., Oxford University Press, Oxford, 2003, p. 86, who draws a distinction between the goal of treaty interpretation and the means for attaining it.

⁵⁷² Art. 31(1), Vienna Convention. See, also, Aust (2000), p. 188.

raised in accordance with the Rules of Procedure and Evidence and which can be shown to exist under international law.

It is possible for instance, that the word “may” relates to the contingency of a defence being raised in accordance with Rule 80 of the Rules of Procedure and Evidence, rather than to some sweeping form of discretion inherent in the Court to admit defences or not on public policy grounds. The point may well be that while the ICC is under a duty, *ex officio*, to consider and determine the applicability of all potentially relevant defences which are expressly provided for in the ICC Statute,⁵⁷³ no such duty exists in relation to non-enumerated defences. Non-enumerated defences need only be considered by the ICC where specifically raised in advance in accordance with the Rules of Procedure and Evidence.⁵⁷⁴ The possibility that “may” signifies a duty which becomes pregnant only upon a particular contingency is recognised in a number of the cases referred to above. For instance, in *Alderman Backwell’s case* Lord Keeper North held that “the statute, which saith that the Chancellor *may* grant, &c., is as if it had been ‘shall grant,’ or ‘ought to grant,’ *but he cannot grant ex officio, but on request of persons interested.*”⁵⁷⁵ In *MacDougall v Patterson* the court held that the authority to perform a particular judicial act in a certain case becomes mandatory when “the case arises, *and its exercise is duly applied for by a party interested, and having the right to make the application.*”⁵⁷⁶

Alternatively, it is possible that the term “may” relates to the limited form of discretion that necessarily accompanies the determination of which law is to be applied as “applicable law” in accordance with Article 21 of the ICC Statute. What needs to be avoided in relation to the power of the ICC to consider a non-enumerated ground for excluding criminal responsibility “where such a ground is derived from the applicable law as set forth in article 21”,⁵⁷⁷ is the situation where

⁵⁷³ Art. 31(2), ICC Statute.

⁵⁷⁴ Art. 31(3), ICC Statute; Rule 80, ICC Rules of Procedure and Evidence.

⁵⁷⁵ (1687) 2 Chan. Cas 190, p. 191 (italics added).

⁵⁷⁶ (1851) 11 C.B. 755, p. 773; 138 E.R. 672, p. 679 (italics added). One implication of the admissibility of non-enumerated defences being dependent upon being raised in advance in accordance with the Rules of Procedure and Evidence is that if counsel overlooked a potentially applicable non-enumerated defence at or before trial, the defendant may have lost the chance of acquittal on that ground. As the ICC is not under a duty to consider non-enumerated defences *ex officio*, but only where raised in advance in accordance with procedure, the failure of counsel to raise such a defence in time may not be able to be visited on appeal (except, perhaps, in relation to an argument of incompetent counsel). Certainly there is no issue of error at the Trial Division level.

⁵⁷⁷ Art. 31(3), ICC Statute.

the ICC is compelled to apply any defence which happens to be located within any of the sources set out in Article 21. One such source includes, for instance, “the national laws of States that would normally exercise jurisdiction over the crime”.⁵⁷⁸ It would certainly be going too far to assert that the ICC was required to accept an obscure defence which happened to be recognised in the criminal code of one of the States that was able to assert a head of jurisdiction in respect of the crime. Not every source listed in Article 21 is automatically applicable by the ICC in every instance. Article 21 is, instead, a reservoir of potential sources of law that may be applied by the ICC depending upon the circumstances. This is implicit in the three-tiered hierarchy of Article 21, where the second-tier sources shall only be applied “[i]n the second place, where appropriate”,⁵⁷⁹ and the third-tier sources only applied “[f]ailing that”,⁵⁸⁰ (the latter sources include general principles of law, including, “as appropriate”,⁵⁸¹ law derived from the national laws of States that would normally exercise jurisdiction over the crime). There is by no means an unfettered discretion inherent in the ICC to pick and choose which sources of law will be applied at will. The ICC is required to arrive at a comprehensive determination of the relevant law, which may require supplementing the rules found in the ICC Statute, the Elements of Crimes and the Rules of Procedure and Evidence with additional sources,⁵⁸² but the task of determination is not necessarily straightforward, and some element of judgement may be required. Nevertheless, the ICC does not possess the power to ignore or exclude a relevant source of law that completes the legal picture. If Article 21 is to be described as conferring “discretionary” powers on the ICC, it is only discretionary in the sense that any powers of legal determination are discretionary. It is clear that Article 31(3) of the ICC Statute could not state that the ICC “shall” consider and admit a defence where derived from the applicable law set forth in Article 21. The applicable law in Article 21 is not automatically applicable in its entirety. The word “may” in Article 31(3) of the ICC Statute could therefore relate to that highly limited form of discretion implicit in the consideration of which applicable law in Article 21 is applicable in any one instant.

⁵⁷⁸ Art. 21(1)(c), ICC Statute.

⁵⁷⁹ Art. 21(1)(b), ICC Statute.

⁵⁸⁰ Art. 21(1)(c), ICC Statute.

⁵⁸¹ *Id.*

⁵⁸² *See above.*

It is by no means clear, therefore, that the ordinary meaning of “may” in Article 31(3) of the ICC Statute indicates a grant of discretion to admit or exclude non-enumerated defences at will or on public policy grounds. The ordinary meaning of “may” in this context may well be consistent with a mandatory grant of power to consider and admit non-enumerated defences subject only to a number of contingencies (compliance with the Rules of Procedure and Evidence, and the relevant source of applicable law under Article 21 of the ICC Statute completing the legal picture – for *e.g.*, being a recognised rule of international law not excluded by the ICC Statute). It is necessary to consider the ordinary meaning of the term “may” in its *context* and in light of the *object and purpose* of the ICC Statute.⁵⁸³ It is significant that these considerations are similar to the considerations which lead the common law courts to conclude that “may” indicated a mandatory grant of judicial powers in the cases cited earlier.⁵⁸⁴ The context of the term “may” in Article 31(3) of the ICC Statute is in the grant of judicial powers for the purpose of determining the criminal responsibility of a defendant. It would appear inconceivable that such powers could be dispensed at will, or exercised on the basis of public policy concerns as opposed to the law in force. Criminal responsibility, when considered from the perspective of the judiciary, is a question of law, not policy. As for the object and purpose of the ICC Statute, that could be stated to be the prosecution of serious violations of humanitarian law, but that would understate (or misstate) the true object and purpose, which is the achievement of that goal *in so far as it is compatible with nullum crimen sine lege and with internationally recognised human rights*, the latter two expressly being given primacy over the achievement of a conviction.⁵⁸⁵ The object and purpose of the ICC Statute is the dispensation of justice *according to law*. It therefore follows from a Vienna Convention approach to the interpretation of “may” in Article 31(3) of the ICC Statute, that the ICC is under a duty to consider and admit any non-enumerated defence which (a) is applicable under international law and has not been excluded by the ICC Statute; and (b) has been raised by the defence in accordance with the Rules of Procedure and Evidence. This is not to

⁵⁸³ See Art. 31(1), Vienna Convention.

⁵⁸⁴ See, *e.g.*, *Re Nicholson, Ex p Nyberg* (1882) 8 VLR (L) 292; *Re Falconbridge Nickel Mines Ltd and Minister of Revenue for Ontario* (1981) 121 D.L.R. (3d) 403, p. 408.

⁵⁸⁵ Art. 22, ICC Statute; Art. 21(3), ICC Statute.

suggest that there is no element of discretion in the admission of non-enumerated defences. A defence that exists in one of the sources of law set out in Article 21 of the ICC Statute, but which is not applicable under international law as such (for *e.g.* a defence existing in the domestic law of the State where the alleged crime occurred), *could* be applied by the ICC upon its discretion. Certainly the ICC possesses the power to consider and admit the defence in question.⁵⁸⁶ But it is only where the non-enumerated defence exists under international law and remains in force (thus entitling the defendant to an acquittal under international law) that the ICC falls under a duty to consider and admit the defence.

It is, of course, not always the case that discretionary powers are mandatory ones. Judicial discretion clearly exists in relation to sentencing.⁵⁸⁷ Of course, sentencing powers are discretionary in nature because there is no single “correct” determination of sentence, only an acceptable range.⁵⁸⁸ The admissibility of a particular defence, on the other hand, can be determined only one way or another, and for this reason it is appropriate to assert that admissibility should follow the law rather than discretion. Even so, the powers of sentencing are highly circumscribed and are directed according to concrete considerations. Direction may be found in a number of sources, including, in relation to the ICC, the ICC Statute (which sets out the possible range of punishments,⁵⁸⁹ and relevant considerations including gravity of the crime and the individual circumstances of the convicted person),⁵⁹⁰ as well as the Rules of Procedure and Evidence which sets out a non-exhaustive list of criteria to consider in the determination of sentence or the imposition of fines, including a non-exhaustive list of mitigating circumstances.⁵⁹¹ In contrast, neither the ICC Statute nor the Rules of Procedure and Evidence suggest a single criteria to be taken into account in determining whether a non-enumerated defence, which derives from the applicable law in Article 21 and is raised in accordance with the Rules of Procedure and Evidence, should be admitted. This is further indication of the context in which the grant of power under Article 31(3) of the ICC Statute has been made, and makes

⁵⁸⁶ Art. 31(3), ICC Statute.

⁵⁸⁷ *See, e.g., Prosecutor v Anto Furundžija*, Case No. IT-95-17/1-A, Appeals Chamber, Judgment, 21 July 2000, par. 250.

⁵⁸⁸ *See, e.g., Art. 77, ICC Statute.*

⁵⁸⁹ Art. 77, ICC Statute.

⁵⁹⁰ Art. 78(1), ICC Statute.

⁵⁹¹ Rules 145-6, ICC Rules of Procedure and Evidence.

it highly unlikely that that grant can be considered discretionary, except, perhaps, as already indicated, in relation to defences that derive from the sources set out in Article 21 but are not applicable under international law as such. It would be a perverse result to interpret a grant of power to determine criminal responsibility as discretionary; but the result would be even more perverse if that discretion was uncircumscribed, and operated, in effect, as a blank cheque. Such powers would sit uneasily with the remainder of the ICC Statute which is principle-based and gives primacy to the principle *nullum crimen sine lege*.⁵⁹² Discretionary powers to determine criminal responsibility (including the power to refrain from applying grounds of exculpation extant in international law) would be repugnant to the values underpinning the ICC Statute; they would be arbitrary in nature and inconsistent with the judicial function. The interpretation of “may” in Article 31(3) of the ICC Statute as discretionary would, in short, be “manifestly unreasonable and absurd”, which is a result that the Vienna Convention on the Law of Treaties seeks to eschew.⁵⁹³

Additional to the considerations above, the interpretation of “may” in Article 31(3) of the ICC Statute as discretionary is precluded in relation to those defences already existing in international law as a result of the principle *nullum crimen sine lege* under Article 22 of the ICC Statute. Where a defence is pre-existing in international law, and has not been superseded (e.g. by falling into desuetude) or expressly excluded under the ICC Statute, then the failure to admit that defence would violate Article 22(1) of the ICC Statute which states that a person shall not be criminally responsible under the Statute “unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”⁵⁹⁴ The principle *nullum crimen sine lege* could operate, firstly, as a principle of interpretation, so as to interpret “may” in Article 31(3) of the ICC Statute as equal, in effect, to “shall” wherever the defence raised is recognised in international law. In this sense, *nullum crimen sine lege* could bolster or affirm the Vienna Convention interpretation of “may” in the case of doubt as to its proper interpretation. Alternatively, if the ICC formed the view that “may” in Article 31(3) of the ICC Statute was, according to ordinary rules of treaty interpretation, a discretionary term,

⁵⁹² See, e.g., Art. 22, ICC Statute.

⁵⁹³ Art. 32, Vienna Convention.

⁵⁹⁴ Art. 22(1), ICC Statute.

then *nullum crimen sine lege* would operate as a rule of application so as to preclude the operation of the word “may” in relation to any case where the defendant raised a non-enumerated defence pre-existing in international law, and treat it instead, as if it read “shall”. It is to be recalled that the principle *nullum crimen sine lege* not only incorporates rules of interpretation, but rules of application as well. Article 22(1) of the ICC Statute states that a person “shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”⁵⁹⁵ If the ICC is unable to interpret the ICC Statute in such a way as to ensure that a person avoids criminal responsibility for an act that was not a crime within the jurisdiction of the Court at the time it took place, then in order to comply with Article 22(1) the ICC would have to decline to apply the relevant provisions of the ICC Statute which required criminalisation of the conduct in question. The same result is produced by Article 21(3) of the ICC Statute which states that the “application” (and interpretation) of law by the ICC “must be consistent with internationally recognized human rights”.⁵⁹⁶ If a particular defence recognised and currently extant in international law was not excluded within the ICC Statute, either expressly or by necessary implication, then where that defence is made out the conduct in question cannot be viewed as criminal under customary law; nor can the ICC Statute be viewed as having ousted the right to rely upon the defence as a matter of treaty law: The defence has not been excluded under the terms of the ICC Statute and the ICC Statute in fact makes provision for the admissibility of non-enumerated defences. The latter point precludes any argument that parties to the ICC Statute have, by consent, ousted the possibility of any exculpatory conditions being raised other than those expressly provided for in the ICC Statute.

⁵⁹⁵ Art. 22(1), ICC Statute.

⁵⁹⁶ See above.

Part II

The Defence of Reprisals

4

reprisals under customary international law

i. INTRODUCTION

Reprisals are coercive measures of self-help, which would otherwise be contrary to international law, but are justified on the basis that they are taken by one State in order to stop another State from violating international law.⁵⁹⁷ Reprisals – in the sense of forcible measures⁵⁹⁸ – are divided according to whether they are applied in times of peace and governed by the *jus ad bellum* (“peace-time reprisals”) or whether they are applied in times of armed conflict and governed by the *jus in bello*

⁵⁹⁷ See, e.g., S. Oeter, “Methods and Means of Combat” in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, §476.

⁵⁹⁸ Traditionally, the term “reprisals” was of wide import, referring alternatively to non-forcible measures (such as economic sanctions) as well as forcible measures, both in times of war and peace. Modern nomenclature has seen a narrowing of the proper use of the term reprisals, such that now most sources treat the term as referring solely to forcible measures, whether applied in times of peace or war (although some authors continue to use the term reprisals in relation to non-forcible measures – see, e.g., L.-A. Sicilianos, “The Relationship Between Reprisals and Denunciation or Suspension of a Treaty” (1993) 4 *European Journal of International Law* 341). Particularly since the *Air Service Agreement* award, non-forcible measures have been referred to as “countermeasures” rather than “reprisals” (see *Air Service Agreement between the United States of America and France*, (1978) 15 RIAA 417, pp. 445-6). This is affirmed by the terminology of the ILC in its Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifth-third Session, 23 April-1 June and 2 July-10 August, 2001, UN GAOR, 56th Sess., Supp. No. 10, p. 43, UN Doc. A/56/10 (2001), Art. 22 (hereinafter Articles on State Responsibility); see, also Report of the International Law Commission on the Work of its Fifth-third Session, 23 April-1 June and 2 July-10 August, 2001, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), p. 181. The term “countermeasures”, however, is still often employed to refer collectively to all forms of coercive self-help whether forcible or non-forcible (see, e.g., R. Provost, “Reciprocity in Human Rights and Humanitarian Law”, (1994) 65 *British Yearbook of International Law* 383, p. 413; M. Bothe, K.J. Partsch & W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, p. 636; J. Crawford, J. Peel & S. Olleson, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading”, (2001) 12 *European Journal of International Law* 963 available at www.ejil.org/journal/Vol12/No5/art2.pdf, n. 74).

("belligerent reprisals").⁵⁹⁹ Peace-time reprisals are generally recognised as illegal on the basis that they are contrary to Article 2(4) of the UN Charter, and remain unjustified by Article 51.⁶⁰⁰ Nevertheless, it has been noted that there is a discrepancy between formal principle and actual practice in relation to peace-time reprisals,⁶⁰¹ and their legality still remains a topic of debate.⁶⁰² The ICJ in *Legality of the Threat or Use of Nuclear Weapons* refrained from examining the legality of "armed [*i.e.* peace-time] reprisals", noting only that they were "considered to be unlawful".⁶⁰³ In relation to defences to war crimes, only belligerent reprisals are relevant. Belligerent reprisals justify, within certain strict constraints, the application of measures which would otherwise be contrary to the *jus in bello*, on the basis that they are taken in response to a prior violation of the *jus in bello* by one's adversary,⁶⁰⁴ in order to coerce the adversary into compliance with the law.⁶⁰⁵ As the *jus in bello* has never effected the outlawry of the use of force (but only limited it in certain respects), there is no room to argue that the movement towards the illegality

⁵⁹⁹ See F. Kalshoven, *Belligerent Reprisals*, Sijthoff, Leiden, 1971, p. 1.

⁶⁰⁰ I. Brownlie, *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1963, p. 281.

⁶⁰¹ D. Bowett, "Reprisals Involving Recourse to Armed Force", (1972) 66 *American Journal of International Law* 1, p. 22.

⁶⁰² See Kalshoven (1971), pp. 6-7, noting that it would be saying too much to assert that the coming into force of the UN Charter has removed any uncertainty concerning the legality of peace-time reprisals. See, also, B. Levenfeld, "Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law", (1982) 21 *Columbia Journal of Transnational Law* 1; G.B. Roberts, "Self-Help in Combating State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals", (1987) 19 *Case Western Reserve Journal of International Law* 243; W.V. O'Brien, "Reprisals, Deterrence and Self-Defense in Counterterror Operations" (1990) 30 *Virginia Journal of International Law* 421.

⁶⁰³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, par. 46.

⁶⁰⁴ See, however, below, where the possibility of employing belligerent reprisals in relation to a violation of international law outside of the *jus in bello* is discussed.

⁶⁰⁵ Reprisals were defined by the United States Military Tribunal in *United States v. Ohlendorf* as follows:

Reprisals in war are the commission of acts which, although illegal in themselves, may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future.

((1950) 4 TWC 1, p. 493). Similar definitions may be found throughout the available literature. See, e.g., A.R. Albrecht, "War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949", (1953) 47 *American Journal of International Law* 590, p. 590; M.C.C. Bristol III, "The Laws of War and Belligerent Reprisals Against Enemy Civilian Populations", (1979) 21 *Air Force Law Review* 397, p. 397; C. Greenwood, "The Twilight of the Law of Belligerent Reprisals", (1989) 20 *Netherlands Yearbook of International Law* 35, p. 37; Oeter (1995), §476.

of peace-time reprisals produced a mirror effect on the legality of belligerent reprisals. The term “reprisals” when used in this work shall refer solely to belligerent reprisals, unless the context indicates otherwise.

It is necessary to distinguish reprisals from three related notions with which they are often confused; namely retorsions, reciprocity and *tu quoque*.⁶⁰⁶

1. RETORSIONS

Reprisals are distinct from the related notion of “retorsions” which are legal, but unfriendly, responses to an adversary’s legal or illegal actions.⁶⁰⁷ Retorsions may therefore consist in an escalation of attacks against lawful military objectives in response to unfriendly (possibly illegal) conduct on the part of one’s adversary. Retorsions and reprisals, therefore, are both forms of coercion, employed to alter the conduct of an adversary.⁶⁰⁸ Reprisals, however, are restricted by law, both in terms of the pre-conditions which must be satisfied before a right to recourse arises, and in terms of the pre-conditions which must be satisfied in the method of their employment. Pictet in his commentary on the Geneva Conventions sought to answer the question of whether the prohibitions on reprisals in the Conventions may be interpreted as applying equally to retorsions.⁶⁰⁹ He formed the view that it “appears more prudent to conclude” that they do not.⁶¹⁰ There is of course no logical or

⁶⁰⁶ Reprisals are often confused with a fourth institution, namely self-defence. As the ICRC’s Commentary to Protocol I explains, the main difference between them is that in the case of self-defence, force is used directly to counter an imminent danger, whereas reprisals are designed to force an adversary to change its conduct (Y. Sandoz, C. Swinarski and B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva, 1987, par. 3431). Although the two may coincide at points, the precise relationship between the two is really only relevant in the context of peace-time reprisals, where reprisals may, in circumstances of overlap, be justified under the doctrine of self-defence (see Y. Dinstein, *War, Aggression and Self-Defence*, 3rd ed., Cambridge University Press, Cambridge, 2001, pp. 172-3). In the context of belligerent reprisals, however, national self-defence is no justification for violating the *jus in bello*. Only self-defence, in the sense of the defence of persons or property may do so (see Art. 31(1)(c), ICC Statute).

⁶⁰⁷ See Sandoz *et al.* (1987), par. 3429; Greenwood (1989a), pp. 37-38. The term “retorsion” has sometimes been confused (or at least used interchangeably) with “reprisal”. See, e.g., *In re Lepeschkin* (1923-4) 2 AD 323, p. 325.

⁶⁰⁸ Schachter has suggested that retorsions are often more effective than reprisals (O. Schachter, “International Law in Theory and Practice”, (1982-V) 178 *Recueil des Cours* 13, p.169).

⁶⁰⁹ See, e.g., J. Pictet (ed.), *Commentary on the First Geneva Convention of 12 August 1949*, ICRC, Geneva, 1952, p. 347.

⁶¹⁰ *Id.*

interpretative basis for holding provisions on reprisals as applicable to retorsions, which are, after all, *prima facie* lawful.

2. RECIPROCITY

Reciprocity and reprisals constitute distinct legal mechanisms for dealing with breaches of international law obligations.⁶¹¹ Although the term *reciprocity* has a number of alternative meanings in international law,⁶¹² *reciprocity stricto sensu* refers to that rule of the law of treaties which permits one State to suspend or terminate its treaty obligations upon the material breach of another State.⁶¹³ Reprisals, on the other hand, do not involve the suspension or termination of treaty obligations. Reprisals are subject to strict limitations (such as proportionality and proper purpose, discussed below), whereas such limitations would not apply if the treaty obligation had come to a final or temporary end.⁶¹⁴ The same point is made in relation to non-forcible countermeasures where the Commentary to the ILC's Articles on State Responsibility states that:

the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied.⁶¹⁵

Thus in relation to the oft-cited case of the 1925 Gas Protocol, a number of States have attached reservations which structure the reserving States' obligations under the Protocol on a strictly reciprocal basis. Where one party engages in gas warfare against another – assuming a relevant reservation lawfully governs the relations between the two – then the injured party may employ gas warfare against the other without limitation, except in relation to binding rules or principles deriving from

⁶¹¹ Provost (1994), p. 415.

⁶¹² *See, generally*, Provost (1994); *see also* Bristol (1979), p. 407. This is discussed further below.

⁶¹³ Provost (1994), p. 383, n. 1.

⁶¹⁴ F. Kalshoven, "Belligerent Reprisals Revisited", (1990) 21 *Netherlands Yearbook of International Law* 43, p. 71.

⁶¹⁵ Report of the International Law Commission on the Work of its Fifty-third Session, 23 April-1 June and 2 July-10 August, 2001, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), p. 181

sources outside the 1925 Gas Protocol.⁶¹⁶ In the context of reprisals, however, any employment of gas warfare (assuming such a reprisal were permissible) would be subject to a number of strict requirements, as set out below. In the past, some authors have viewed the legality of reprisals as an application of the doctrine of reciprocity,⁶¹⁷ but this can no longer be viewed as correct.⁶¹⁸ Reprisals may be described as an example of “reciprocity”, but only in the widest, non-technical, sense of the word.⁶¹⁹

3. TU QUOQUE

The doctrine of reciprocity, discussed above, is an aspect of the law of treaties, and, potentially, an aspect of the law of obligations generally under international law (*i.e.* including those obligations arising under customary international law).⁶²⁰ Any argument that reciprocity governs the conduct of belligerents during a state of armed conflict would be premised on the assumption that obligations arising under the law of armed conflict are bi-lateral in nature (owed only from State to State) and that no other entity or individual derives any right to protection from those obligations in their own right. The defence of *tu quoque* is the plea at criminal law that follows from the doctrine of reciprocity. It seeks to set up as a defence, the fact that the enemy has engaged in similar violations of the law of armed conflict.⁶²¹ *Tu quoque* purportedly operates to deny the continuing operation of the law in question,⁶²² although there is some uncertainty as to whether the purported juridical effect of a successful plea of *tu quoque* is in the nature of a defence (precluding illegality or criminality),⁶²³ or whether it operates as a procedural bar to prosecution (effectively

⁶¹⁶ See Oeter (1995), §435; Kalshoven (1990), pp. 73-4; F.J. Hampson, “Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949”, (1988) 37 *International and Comparative Law Quarterly* 818, p. 829.

⁶¹⁷ See, e.g., Le Fur, *Des Représailles en Temps de Guerre*, 1919, p. 25, discussed in R. Bierzanek, “Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law”, in A. Cassese, *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Napoli, 1979, p. 235, n. 16.

⁶¹⁸ See Provost (1994), p. 383 (discussed below).

⁶¹⁹ See *Id.*

⁶²⁰ See, generally, Provost (1994).

⁶²¹ See *id.*, pp. 446-453.

⁶²² See R.W. Tucker, *The Law of War and Neutrality at Sea*, US Government Printer, Washington D.C., 1955 (US Naval War College International Law Studies, Vol. 50), p. 67.

⁶²³ See, e.g., R. Woetzel, *The Nuremberg Trials in International Law*, Praeger, New York, 1962, pp. 120-121.

acting as an estoppel, preventing the victim State from invoking another's violation of international law on the basis of the victim State's own violations).⁶²⁴ Whichever is the correct characterisation, the defence of *tu quoque* is inadmissible under customary international law. The defence of *tu quoque* was consistently rejected in the war crimes trials following the Second World War.⁶²⁵ In its Judgment in *Prosecutor v Kupreškić* the ICTY Trial Chamber confirmed that "the *tu quoque* defence has no place in contemporary international humanitarian law."⁶²⁶ In its earlier Decision on Defence Motion to Summon Witness in the same case, the Trial Chamber had stated that:

The *tu quoque* principle does not apply to international humanitarian law. This body of law does not lay down synallagmatic obligations, *i.e.*, obligations based on reciprocity, but obligations *erga omnes* (or, in the case of treaty obligations, obligations *erga omnes contractantes*) which are designed to safeguard fundamental human values and therefore must be complied with regardless of the conduct of the other party or parties.⁶²⁷

4. JUSTIFICATION

Reprisals operate as a form of justification,⁶²⁸ precluding wrongfulness both at the level of State and individual responsibility. This point was made by the United States Military Tribunal in the *Einsatzgruppen* case, when it stated that:

Reprisals in war are the commission of acts which, although illegal in themselves, may under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future.⁶²⁹

⁶²⁴ See, e.g., Hampson (1988), p. 820; Bristol (1979), p. 407.

⁶²⁵ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 516.

⁶²⁶ *Id.*, par. 511.

⁶²⁷ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Decision on Defence Motion to Summon Witness, 3 February 1999, cited with approval in *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999.

⁶²⁸ Kalshoven (1971), p. 253; Cassese (2003), pp. 219-220; see, however, M.C. Bassiouni (1992), p. 448 ("It cannot...be claimed that reprisals are justified in and of themselves, but they may constitute an excusable condition which exonerates the performing party from responsibility.")

⁶²⁹ *United States v Ohlendorf*, (1950) 4 TWC 1, p. 493.

One of the consequences of the explicit recognition of reprisals as a form of justification rather than as a form of excuse is the illegality of counter-reprisals. It is an inherent condition of justifications that no measure of counter-self-help may be employed against them.⁶³⁰ Thus the Tribunal in the *Einsatzgruppen* case found that under international law, "there can be no reprisal against reprisal. The assassin who is being repulsed by his intended victim may not slay him and then, in turn, plead self-defense."⁶³¹

5. REQUIREMENT OF EXPLICIT PROHIBITION OR DESUETUDE

The legality of reprisals may be ousted through the *explicit* prohibition on reprisals in treaty form,⁶³² or alternatively through the right to reprisals falling into desuetude.⁶³³ Given, however, that reprisals have long been accepted as an *exception* to the law in force (*i.e.* an exception to treaty prohibitions as well as an exception to norms of customary international law), there may be some doubt as to whether the right to reprisals could be prohibited through treaty provisions that did not directly and explicitly purport to override the operation of the doctrine of reprisals. There would certainly be a question, if it was purported that the right to certain reprisals had been *impliedly* ousted by treaty terms, as to whether those terms were sufficiently clear to indicate that the right to reprisals had in deed been ousted.

6. REPRISALS IN NON-INTERNATIONAL ARMED CONFLICTS

It is often asserted that the right to engage in reprisals is limited to States in their relations *inter se*.⁶³⁴ It could be argued that the corollary of this is that treaty-based and customary norms applicable in non-international armed conflict are not open to exception by way of reprisals. Traditionally, however, non-international conflicts fell outside of the ambit of international law,⁶³⁵ and retaliatory actions were common in

⁶³⁰ Ashworth (1999), p. 138.

⁶³¹ *United States v Ohlendorf*, (1950) 4 TWC 1 pp. 493-494.

⁶³² See Green (2000), p. 123.

⁶³³ In relation to desuetude, *see below*.

⁶³⁴ See, *e.g.*, Sandoz *et al.* (1987), p. 1372, n. 18; *see, also*, Albrecht (1953), p. 599; *Trial of Hans Rauter*, (1949) XIV LRTWC 89, pp. 132-3.

⁶³⁵ Green (2000), p. 317.

such conflicts and remain so.⁶³⁶ Thus, whether or not “reprisals” are lawful in the context of non-international conflicts, measures substantively identical to reprisals have long been lawful in that context. The question, then, is whether reprisals (or analogous measures) have now been prohibited by international law in the context of non-international armed conflict.

Most treaty provisions dealing specifically with non-international conflicts make no reference to the issue of reprisals. Common Article 3 of the Geneva Conventions of 1949,⁶³⁷ and Protocol II of 1977,⁶³⁸ are both silent on the issue of reprisals. There are, however, two exceptions: Article 19(1) of the Hague Cultural Property Convention of 1954⁶³⁹ states that in the event of non-international armed conflict each party to the conflict shall apply, as a minimum, those provisions of the Convention which relate to “respect for cultural property”.⁶⁴⁰ Article 4 of the Convention is entitled “respect for cultural property” and includes, within its fourth paragraph, the requirement that parties shall refrain from reprisals directed against cultural property.⁶⁴¹ Additionally, there is the amended Mines Protocol of 1996 which applies to non-international,⁶⁴² as well as international,⁶⁴³ conflicts, and prohibits the use of mines, booby-traps and other devices by way of reprisals against civilians and civilian objects.⁶⁴⁴ The original Mines Protocol of 1980 with its more restricted reprisal prohibition (prohibiting only the use of mines, booby-traps and other devices by way of reprisals against civilians, but not civilian objects)⁶⁴⁵ now also applies in the case of non-international conflicts, at least for those Parties that

⁶³⁶ See Kalshoven (1990), p. 77.

⁶³⁷ Common Article 3, Geneva Conventions I-IV.

⁶³⁸ Protocol II.

⁶³⁹ Art. 19, Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1964, 249 UNTS 240 (hereinafter Cultural Property Convention).

⁶⁴⁰ Art. 19(1), Cultural Property Convention.

⁶⁴¹ Art. 4(4), Cultural Property Convention.

⁶⁴² Art. 1(2), Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 3 May 1996, UN Doc CCW/CONF.I/14 (1996) (hereinafter Amended Mines Protocol).

⁶⁴³ Art. 1, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, UN Doc A/CONF.95/15 (1980) (hereinafter Conventional Weapons Convention); Art. 1(2), Amended Mines Protocol.

⁶⁴⁴ Art. 3(7), Amended Mines Protocol.

⁶⁴⁵ Art. 3(2), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *annexed to* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, UN Doc. A/CONF.95/15 (1980) (hereinafter Mines Protocol).

have adopted the 2001 Amendment to Article 1 to the 1980 UN Convention on Certain Conventional Weapons.⁶⁴⁶

ii. GENERAL LIMITATIONS ON RECOURSE TO REPRISALS UNDER CUSTOMARY LAW

1. INTRODUCTION

There are a number of pre-conditions which reprisals must satisfy in order to be legal. Customary international law has established at least four such preconditions. These are: (1) The reprisal must be a response to a prior violation of international law; (2) it must be undertaken for the specific purpose of coercing the enemy into compliance with the law; (3) it must only be undertaken as a last resort; and (4) it must be a proportionate response.⁶⁴⁷ Greenwood states that each of these requirements exists in relation to all types of reprisals,⁶⁴⁸ and each may in fact be found as a requirement in relation to peace-time reprisals,⁶⁴⁹ and non-forcible countermeasures,⁶⁵⁰ as well as belligerent reprisals.⁶⁵¹ Some sources also suggest a number of other requirements, including that the reprisal measure must be consistent with the principles of humanity, although not all sources agree that additional requirements exists.⁶⁵² The potentiality of additional limitations applying in relation to recourse to reprisals is addressed later, below.

⁶⁴⁶ See Amendment to Article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 21 December 2001, UN Doc. CCW/CONF.II/2 (2001).

⁶⁴⁷ See, e.g., C. Greenwood, "Reprisals and Reciprocity in the New Law of Armed Conflict", in M.A. Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989, pp. 228-9.

⁶⁴⁸ *Id.*, p. 229.

⁶⁴⁹ See *Responsabilité de L'Allemagne a Raison des Dommages Causés dans les Colonies Portugaises du Sud L'Afrique (Portugal v Germany)* (1928) 8 Trib. Arb. Mixtes 409 (hereinafter the *Naulilaa Incident*), extracted in L.C. Green, *International Law Through the Cases*, 2nd ed., Stevens & Sons Ltd., London, 1959; Bowett (1972), pp. 2-3.

⁶⁵⁰ See, generally, Report of the International Law Commission on the Work of its Fifty-third Session, 23 April-1 June and 2 July-10 August, 2001, UN GAOR, 56th Sess., Supp. No. 10, p. 43ff, UN Doc. A/56/10 (2001).

⁶⁵¹ Each of these requirements emerges in the submission by Jackson to the IMT concerning the limitations on reprisals as a defence to war crimes (see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 1, pp. 217-8).

⁶⁵² Greenwood (1989b), p. 229.

2. PRIOR VIOLATION

The *sine qua non* of any right to reprisals consists in a violation of international law by the party against which the reprisal is taken.⁶⁵³ There are two issues which arise here: The first concerns the question of whether *any* violation of international law justifies a reprisal, or whether it is only violations of the law of armed conflict – *i.e.* the *jus in bello*.⁶⁵⁴ In *The Netherlands v Rauter* the Special Court of Cassation accepted that Germany's initial aggression against the Netherlands entitled the Netherlands to employ reprisals against Germany.⁶⁵⁵ But it appears that the reasoning in that case has since been overtaken by the entrenchment, within international law, of the principle that the *jus in bello* applies equally to each belligerent, regardless of the justness or legality of its cause. This principle was affirmed by the United States Military Tribunal in *United States v List*,⁶⁵⁶ and is widely accepted as a cardinal principle of the law of armed conflict.⁶⁵⁷ The United States Department of the Air Force *Commander's Handbook on the Law of Armed Conflict* makes the point that arising out of this principle is the subsidiary principle that “[t]he side that is acting in self-defence against illegal aggression does not, because of that fact, gain any right to violate the laws of armed conflict.”⁶⁵⁸ Violations of the *jus ad bellum* do not trigger a right to belligerent reprisals.⁶⁵⁹

⁶⁵³ In the *Naulilaa Incident*, the Special Arbitral Tribunal stated that: “The first condition, in fact the *sine qua non*, of a resort to reprisals is the existence of a previous act contrary to international law” (extracted in Green (1959)). Because there was no prior illegal act on the part of Portugal, Germany's purported reprisal was unlawful.

⁶⁵⁴ See Albrecht (1953), pp. 593-5; Kalshoven (1971), p. 157; Greenwood (1989a), pp. 40-42.

⁶⁵⁵ *Netherlands v Rauter* (1949) 14 LRTWC 89, pp. 134-5.

⁶⁵⁶ (1948) 15 AD 632, p. 637.

⁶⁵⁷ See, e.g., Green (2000), p. 347. See however Art. 54(5), Protocol I which departs from this principle in permitting a party defending itself against aggression to derogate from the terms of Article 54(2) – protecting objects indispensable to the survival of the civilian population – in certain circumstances.

⁶⁵⁸ US Dept. of the Air Force, *Commander's Handbook on the Law of Armed Conflict*, Pamphlet AFP 110-34, Dept. of the Air Force, Washington D.C., 1980, par. 1-4(b) (1-3).

⁶⁵⁹ An interesting question may arise, however, as a result of the fact that a belligerent's legal duties *vis-à-vis* other belligerents is not exhausted by the *jus in bello* alone. It may therefore be possible to envisage a scenario in which a belligerent asserts a right to engage reprisals against an adversary in answer to violations which are neither *jus ad bellum* violations nor *jus in bello* violations. Certain duties, such as those pertaining to human rights, may remain in force throughout the duration of the conflict (Green (2000), p. 75). On the one hand it could be argued that any right of belligerent reprisals in response to violations of international law which are neither *jus in bello* nor *jus ad bellum* violations would be dependent upon customary law recognising such a right. But on the other hand, it

The second issue, which arises in relation to the requirement of a prior violation of international law, concerns the standard of responsibility that a belligerent must possess in relation to that violation before it may be made the target of reprisals. In the context of *non-forcible* countermeasures, it appears that a State may only be made the target of reprisals if it is responsible for an internationally wrongful act in accordance with the principles of the law of State responsibility.⁶⁶⁰ The question is, whether the same requirement exists in relation to belligerent reprisals. Greenwood states that “the prior violation to which the reprisals are a response must be imputable to the State against which the reprisals are directed, or perhaps to an ally of that State.”⁶⁶¹ Other authors also suggest the test of imputability.⁶⁶² In *The Netherlands v Rauter*, the Court found that the only acts which triggered the right to reprisals were those carried out by the State or its organs; acts carried out by members of the civilian population did not trigger any right to reprisals.⁶⁶³ A similar conclusion was reached by the Italian Military Tribunal in the *Adreatine Cave* case.⁶⁶⁴ Each of these sources appears to adopt the position that before a State may be made the target of reprisals, it must be responsible for a violation of international law in accordance with the principles of the law of State responsibility. On the other hand, both the British and US military manuals in force during World War II recognised that illegal acts of individuals (as distinct from States) could trigger the right to reprisals;⁶⁶⁵ the current US Field Manual has since deleted the reference to individuals,⁶⁶⁶ although it is retained by the British

could be pointed out that reprisals have traditionally been recognised as a lawful response to *any* violation of international law – it is only as a result of the UN Charter that forcible reprisals outside of the context of armed conflict have come to be viewed as illegal (*see above*). Thus it could be argued that where States are currently engaged in armed conflict it would be permissible to engage in reprisal measures for violations of rules of international law other than *jus in bello* violations (but not in relation to *jus ad bellum* violations).

⁶⁶⁰ Art. 49(1), Articles on State Responsibility; *Case Concerning Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep. 7, par. 83.

⁶⁶¹ Greenwood (1989a), p. 43.

⁶⁶² *See, e.g.*, M. Greenspan, *The Modern Law of Land Warfare*, University of California Press, Berkeley, 1959, pp. 410-11; Hampson (1988), pp. 822-3.

⁶⁶³ *The Netherlands v Rauter* (1949) 14 LRTWC 89, p. 132.

⁶⁶⁴ *In re Kappler* (1948) 15 AD 471, pp. 473-5.

⁶⁶⁵ US War Dept., Field Manual No. 27-10, *The Law of Land Warfare*, US Govt. Printing Office, Washington D.C., 1940, par. 358(d); British War Office, *Manual of Military Law*, HMSO, London, 1929, par. 453.

⁶⁶⁶ *See* US Dept. of the Army, Field Manual No. 27-10, *The Law of Land Warfare*, Dept. of the Army, Washington D.C., 1956 (incorporating changes required on 15 July 1976) (hereinafter US Field Manual No. 27-10), par. 497.

manual.⁶⁶⁷ A number of authors also reject the requirement of imputability.⁶⁶⁸ Albrecht states that such a requirement “seems to run counter to the general theory of reprisals.”⁶⁶⁹ Provost states that “[a] rigid requirement of imputability appears to be inconsistent with the context in which belligerent reprisals take place and unsupported by State practice.”⁶⁷⁰ Reprisals, by their very nature, are responses to unlawful acts, and on this basis they must be preceded by a violation of international law imputable to some responsible agent. But in the context of the law applicable in armed conflict, violations of that body of law may be committed by individuals as much as States.⁶⁷¹ Greenwood in recognising that the right to reprisals may be triggered when a violation is imputable to an *ally* of the target State departs from the notion that the target State must be responsible for a violation of international law in the sense of the law of State responsibility. According to Greenwood:

Allies of a State which is responsible for a violation of the laws of armed conflict may also be subjected to reprisals where they are themselves implicated in the violation and probably even where they have no direct involvement if the violation takes the form of a policy of conducting hostilities in a particular way.⁶⁷²

The obvious conflict in the authorities, and the presence of State practice to the contrary,⁶⁷³ must place in considerable doubt the assertion that before a State may be made the target of a reprisal measure it must bear State responsibility for the violation justifying the measure. On the other hand, given that reprisals must serve a rational and genuinely deterrent function (discussed below), there must be a sufficient connection between the perpetrator of the original violation and the target of the reprisal measure. Given that the test of imputability within the law of State responsibility (now more commonly referred to as the test of “attribution”)⁶⁷⁴ has

⁶⁶⁷ UK War Office, *Manual of Military Law: Part III The Law of War on Land*, HMSO, London, 1958 (hereinafter UK Manual of Military Law), par. 643.

⁶⁶⁸ See, e.g., E. Stowell, “Military Reprisals and the Sanctions on the Laws of War”, (1942) 36 *American Journal of International Law* 643, pp. 649-50:

⁶⁶⁹ Albrecht (1953), p. 595.

⁶⁷⁰ Provost (1994), p. 418.

⁶⁷¹ See, generally, van Sliedregt (2003).

⁶⁷² Greenwood (1989a), p. 43.

⁶⁷³ See Provost (1994), p. 418.

⁶⁷⁴ See D. Bodansky and J.R. Cook, “The ILC’s State Responsibility Articles: Introduction and Overview”, (2002) 96 *American Journal of International Law* 773, p. 778.

considerably widened in recent years,⁶⁷⁵ it could well be argued that where the actions of non-State actors or State allies cannot be attributed to the target State, there is an insufficient connection to justify a reprisal measure.

3. PROPER PURPOSE

In popular usage, the term “reprisal” is often used interchangeably with “retaliation” or “revenge”.⁶⁷⁶ Reprisals, *stricto sensu*, however, are not punitive measures and may only be undertaken in order to serve the purely deterrent function of coercing a delinquent adversary into compliance with the law.⁶⁷⁷ The continued reference in some of the literature to the punitive or retributive nature of reprisals,⁶⁷⁸ is probably best explained on the basis of a conflation of legal and popular usage. Sir David Hughes Morgan, who was a member of the British delegation to the Geneva Diplomatic Conference of 1974-77, which produced the Protocols Additional to the Geneva Conventions of 1949, has stated that the conference may not have appreciated the clear distinction between reprisals and retaliation.⁶⁷⁹ Although reprisals were often viewed in the past as lawfully serving a partly punitive function, that function has now come to be accepted as improper, to the point of invalidating the legality of the reprisal measure.⁶⁸⁰ The requirement that reprisals only be undertaken in order to achieve a specific purpose limits the range of permissible reprisal activity in two main ways: Firstly, it requires that the initial decision to undertake reprisals be made for a proper purpose; and second, it limits the execution

⁶⁷⁵ See *Prosecutor v Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment 15 July 1999, *esp. par. 137*; ILC Articles on State Responsibility, Arts 4-11. *Contrast Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, par. 115. There is a suggestion that State practice has moved towards an even wider test of attribution since the events of September 11, 2001 (see S.R. Ratner, “*Jus ad Bellum* and *Jus in Bello* After September 11”, (2002) 96 *American Journal of International Law* 905).

⁶⁷⁶ See Almond (1980), p. 198.

⁶⁷⁷ UK Manual of Military Law, pp. 184-5; US Field Manual No. 27-10, p. 177. See, also, Walzer, stating that reprisals may be described as “deterrence without retribution” (M. Walzer, *Just and Unjust Wars*, Basic Books, New York, 1977, p. 209.)

⁶⁷⁸ See, e.g., Bowett (1972), p. 3; Kwakwa (1990), p. 51.

⁶⁷⁹ Netherlands Red Cross Society, *The New Humanitarian Law in War and Conflict: Report of an international symposium held on 25 and 26 September 1978 under the auspices of the Netherlands Red Cross Society, at the Peace Palace in The Hague*, Netherlands Red Cross Society, The Hague, 1978, p. 11. See, however, Kalshoven, who argues that in terms of reprisals against innocents such as members of an occupied population, there is no real difference between “punitive” and “deterrent” measures (Kalshoven (1971), p. 43).

⁶⁸⁰ See Bassiouni, (1992), p. 447.

of the reprisal measures by ensuring that throughout their course, the nature and purpose of the reprisals remain compatible with coercing a delinquent adversary into compliance with the law. The *Institut de droit international* has stated that it is a condition of the continuing legality of reprisals that the State must not deflect reprisals away from their original objective.⁶⁸¹ If the only legitimate objective is deterrent rather than punitive, a reprisal measure which comes to be turned to a punitive objective loses its legality.⁶⁸²

4. SUBSIDIARITY

Reprisals may only be undertaken as a last resort.⁶⁸³ This requirement is sometimes referred to as a requirement of “subsidiarity” as reprisals are rendered subsidiary to all other available remedial options, which must first be exhausted.⁶⁸⁴ The principle of subsidiarity appears to require, *inter alia*, that a protest be made to the delinquent belligerent. In the *Naulilaa Incident* the Arbitral Tribunal stated that “[r]eprisals are only legitimate when they have been preceded by an unsuccessful demand for redress.”⁶⁸⁵ Some sources go further and suggest that subsidiarity requires an express warning of the prospect of reprisals so as to give a delinquent adversary a reasonable opportunity to bring its actions in line with the law.⁶⁸⁶ Other sources appear to treat protests and warnings as alternative options.⁶⁸⁷ It should be noted that in the *Case*

⁶⁸¹ (1934) 9 AIDI 692, Article 6(5), translated in Kalshoven (1971), p. 8.

⁶⁸² Dinstein states however, that “a tinge of retribution can probably be traced in every instance of response to force” (Dinstein (2001), p. 199). *See, also*, Greenwood:

...where a State engaged in an armed conflict has a valid reason for resorting to reprisals, it will almost always be impossible at the time to determine how far it is also influenced by other considerations. The presence of an ulterior motive will not, therefore, rob reprisals of their legality, so long as they are also taken in order to put an end to a course of illegal conduct or to deter the repetition of illegal acts.

(Greenwood (1989a), p. 46). An alternative test may be to require that the *primary* or *overriding* motive be related to the proper purpose of reprisals.

⁶⁸³ *United States v List*, (1950) 11 TWC 757, pp. 1249-1250 (requiring that “every available method” be employed before resort to the execution of hostages may be had as a reprisal measure in occupied territory); Oeter (1995), §478; Provost (1994), p. 414; Bristol (1979), pp. 412-3.

⁶⁸⁴ *See, e.g.*, Kalshoven (1971), pp. 340-341.

⁶⁸⁵ Green (2000), p. 630.

⁶⁸⁶ *See, e.g.*, Oeter (1995), §478; Provost states that such a requirement “probably” exists (Provost (1994), p. 414).

⁶⁸⁷ *See, e.g.*, Albrecht (1953), p. 597.

Concerning Oil Platforms (Islamic Republic of Iran v United States of America), which was concerned with principles relating to self-defence under international law, the ICJ treated the failure of the US to protest Iran's military presence and activity on the Reshadat oil platforms as an indication that there was no "necessity" in the US's attack on those platforms.⁶⁸⁸ Protests or warnings may therefore be relevant not only in fulfilling the requirements of subsidiarity, but also in satisfying any fact finder that there is a sufficient evidentiary basis for the conclusion that the test of necessity is satisfied. Nevertheless, if granting additional time to a belligerent, through means of prior protest or warning, would seriously endanger the security of civilians or troops, then the requirement may be waived,⁶⁸⁹ and this is equally the case if a protest or warning would be futile in the circumstances.⁶⁹⁰ The law relating to reprisals is not the only branch of public international law to offer remedies on a purely subsidiary basis. A rule of subsidiarity exists, for e.g., in the context of diplomatic protection claims where one State claims against another State on behalf of an injured national. In that context, the standing of the claimant State to seek relief in an international court or tribunal is dependent on the national of that State having exhausted all available local remedies in the respondent State.⁶⁹¹ There are, however, limits to this rule of subsidiarity. Judge Lauterpacht in his Separate Opinion in the *Norwegian Loans Case* stated (in the context of diplomatic protection) that:

the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the considerations prevailing in it..⁶⁹²

⁶⁸⁸ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep. 1, par. 76.

⁶⁸⁹ Kalshoven (1971), p. 340; McDougal & Feliciano (1961), p. 688. The United States did not purport to exhaust alternative remedies prior to bombing raids against North Vietnam in reprisal for surprise attacks against its airbases near Pleiku in South Vietnam in 1965 due to the danger that such delay would present to its troops (Bristol (1979), p. 413).

⁶⁹⁰ Kalshoven (1971), p. 340.

⁶⁹¹ See Dixon & McCorquodale (2003), pp. 429-432. The various human rights tribunals established by international and regional human rights instruments have also upheld a requirement to exhaust local remedies (*id.*, p. 432).

⁶⁹² *Norwegian Loans Case (France v Norway)* [1957] ICJ Rep. 9, Separate Opinion of Judge Lauterpacht, p. 39. See, also, *Finnish Shipowners Arbitration (Finland v Great Britain)* (1934) 3 RIAA 1479; *El Oro Mining and Railway Co. Arbitration (Great Britain v Mexico)* (1931) 5 RIAA 191, p. 198; *Robert E. Brown Arbitration (United States v Great Britain)* (1923) 6 RIAA 120, p. 129.

It is only reasonably available and effective alternatives which must be exhausted before reprisals are resorted to.⁶⁹³

A number of sources list, as an additional limitation on the right to reprisals, the requirement that reprisals may only be ordered by those at the highest levels of the military echelon.⁶⁹⁴ Art. 86 of the Oxford Manual, for instance, states, *inter alia*, that reprisals “can only be resorted to with the authorization of the Commander in Chief.”⁶⁹⁵ Interestingly, the Arbitral Tribunal in the *Naulilaa Incident* did not list senior authorisation as a requirement. The distinction may lie in the fact that the Oxford Manual was concerned specifically with belligerent reprisals whereas the *Naulilaa Incident* concerned peace-time reprisals. Perhaps there is greater scope for abuse in the context of armed conflict where a State (or other belligerent) imbues far reaching lethal power to those at relatively low levels in the chain of command. Alternatively, the Arbitral Tribunal’s omission may indicate that the requirement of senior authorisation was a practical limitation, rather than a generally accepted legal one. Greenwood states that while it is highly desirable that the decision to order reprisals be taken only by a senior officer or political body, such a requirement “would seem to be more a matter of internal military discipline than of international law.”⁶⁹⁶ As Kalshoven stated in relation to a somewhat different aspect of the law of reprisals:

it is not believed that international law has yet considered the details of the procedure which a military commander ought to follow in order to arrive at a balanced decision in respect to a contemplated execution of

⁶⁹³ McDougal & Feliciano (1961), p. 688; Provost (1994), p. 414 says that only “rapid and effective measures [which] are available” must be exhausted. *See, also*, Levenfeld (1982) who argues, in the context of peace-time reprisals, that the consistent failure of the Security Council to deal meaningfully with *fedayeen* attacks against Israel due to the political make-up of that body (at least during the cold war) released Israel from the requirement to seek pacific redress through the Security Council before resorting to reprisals (pp. 38-39).

⁶⁹⁴ *See, e.g.*, US Field Manual No. 27-10, p. 177; Oeter (1995), §477; Bothe *et al.* (1982), p. 312. There is dispute among the sources, however, as to exactly which ranks are entitled to order reprisals (*see* Albrecht (1953), pp. 599-600).

⁶⁹⁵ Art. 86, The Laws of War on Land, adopted by the Institute of International Law at Oxford, 9 September 1880 (hereinafter Oxford Manual), available at www.icrc.org.

⁶⁹⁶ Greenwood (1989b), p. 233. *See* UK Manual of Military Law, par. 645. *See also* Oeter (1995), §477, who states that “No individual soldier is authorized to order reprisals of his own accord.” The reference here appears to be to domestic rather than international law as the Handbook goes on to explain that the taking of reprisals “is the sole responsibility of the highest political authority, in the case of Germany: the Federal Government.” (*id.*)

hostages or reprisal prisoners. What remains, of course, is the rule...that 'the lives of persons may not be arbitrarily taken.'⁶⁹⁷

Nevertheless, the requirement was insisted upon by the Dutch Special Court of Cassation in *In re Kooymans* where the fact that a reprisal measure was authorised only by a non-commissioned officer was one of the bases of its illegality.⁶⁹⁸ It may be that the absence of senior authorisation suggests that insufficient attention was paid to attempting alternative remedies (thus violating the requirement of subsidiarity). The lack of senior authorisation may therefore be a factual consideration to be taken into account in determining compliance with subsidiarity rather than a separate legal requirement as such. It is a requirement, however, at least as a purely formal condition of treaty law, under the United Kingdom's reservation to Protocol I, which reserves the right to take reprisals otherwise prohibited by Articles 51-55 of Protocol I, but only under certain restrictive conditions, including the requirement that "formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government."⁶⁹⁹

5. PROPORTIONALITY

Proportionality is clearly established as an essential precondition of the legality of any reprisal.⁷⁰⁰ This was first confirmed by the Special Arbitral Tribunal in the

⁶⁹⁷ Kalshoven (1971), pp. 228-9. Kalshoven was addressing the determination of the United States Military Tribunal in *United States v List* that the execution of hostages in reprisal could only occur after a fair trial before a judicial body (see (1948) 11 TWC 757, p. 1250). Kalshoven stated that this purported rule was an invention of the Tribunal and suggested that it has no foundation in international law (Kalshoven (1971), pp. 228-9). See also Albrecht (1953), p. 598.

⁶⁹⁸ (1946) AD 398; see, also, *In re Kappler* (1948) 15 AD 471, p. 473, where the Military Tribunal of Rome stated that belligerent reprisals "may be ordered not only by those authorities of the State which represent it in international law, but also by the Supreme Commander or by the Commander of a big unit."

⁶⁹⁹ Reservation of the United Kingdom upon ratification of Protocol I, reprinted in A. Roberts & R. Guelff, *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000, p. 511.

⁷⁰⁰ This was not, however, always the case. In the *Naulilaa Incident*, the Special Arbitral Tribunal noted that on the question of whether proportionality is a prerequisite to the legality of reprisals, "authors, unanimous until a few years ago, begin to be divided in their opinions. The majority regard a certain proportion between the offence and the reprisals as a necessary condition for the legitimacy of the latter. Other authors, among the most modern, no longer require this condition." (extracted in Green (1959), p. 629). See, also, the 1951 decision in the *Trial of General Von Falkenhause*n where the Military Tribunal in Brussels did not include proportionality as one of the preconditions for a legal reprisal (discussed in Kalshoven (1971), pp. 255-260.)

Naulilaa Incident, where the disproportionality between Portugal's alleged initial wrong and Germany's consequent reprisal was a "decisive" alternative basis for the Tribunal's rejection of Germany's claim as to the legality of its actions.⁷⁰¹ According to the Tribunal:

In its Reply, Germany admitted the need for proportion between the reprisals and the offence. Even if it is admitted that international law only requires relative approximation of the reprisals to the offence, reprisals out of all proportion to the act that inspired them ought certainly to be considered excessive and illegal.⁷⁰²

Although the decision concerned peacetime reprisals, the requirement of proportionality is equally applicable to belligerent reprisals. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ refrained from addressing the legality of belligerent reprisals, but observed that "in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality."⁷⁰³

While there is no dispute over the existence of a proportionality rule, it is still largely unclear as to how proportionality is to be assessed in any particular instance of reprisals. The spectrum of possibilities breaks down in a number of ways: Firstly, there are those who argue that reprisals are to be measured against that which is necessary to bring an end to the enemy's continuing or future illegal conduct (which we may broadly refer to as a "future-oriented" test of proportionality);⁷⁰⁴ and second, there are those who argue that reprisals are to be measured against the enemy's past illegal conduct (which we may broadly refer to as a "past-oriented" test). Within these two groupings, there are further possibilities; for instance, one

⁷⁰¹ The Tribunal rejected Germany's case on the ground that there was no prior illegal action on the part of Portugal to justify a resort to reprisals; but it held that had Portugal's conduct constituted prior illegal action, then Germany's case would still have failed on two separate grounds, "each of which is decisive", namely that Germany had made no demand for redress, and that Germany's actions were disproportionate. See *Naulilaa Incident*, extracted in Green (1959), pp. 629-630.

⁷⁰² Extracted in Green (1959), p. 630.

⁷⁰³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, p. 246.

⁷⁰⁴ See, e.g., McDougal & Feliciano (1961), p. 682, who state that:

the kind and amount of permissible reprisal violence is that which is reasonably designed so as to affect the enemy's expectations about the cost and gains of reiteration or continuation of his initial unlawful act as to induce the termination of and future abstention from such act.

past-oriented test may measure reprisals against the physical harm illegally perpetrated by the enemy, while another may measure it against the seriousness of the international norm violated. In addition, it is possible to postulate a hybrid test of proportionality that takes into account all, or a number of, possible aspects of the enemy's conduct both past and potential.

The problem with adopting a past-oriented test, where reprisals are measured against the level of wrong already perpetrated, is that that past wrong bears no logical relationship to the future-oriented or preventative purpose of reprisals.⁷⁰⁵ The only lawful purpose for which a reprisal may be undertaken is to prevent further unlawful conduct, and not to punish or retaliate for that which has already passed.⁷⁰⁶ Provost has observed that "if reprisals were wholly backward-looking, resting solely on the initial violation by the enemy belligerent, they would in fact constitute punitive actions".⁷⁰⁷ Nevertheless, employing the initial violation as the yard-stick against which reprisals are to be measured has the advantage of reducing proportionality to a practical, concrete test (or at least something in that direction). The test of proportionality is always more easily stated than applied in practice,⁷⁰⁸ and cannot be reduced to a simple mathematical equation,⁷⁰⁹ but the initial violation at least provides a focal point against which the magnitude of reprisals may be measured. If reprisals were to be measured against some hypothetical evaluation of the adversary's future conduct, the test of proportionality would be almost impossible to apply in practice. It has been argued that the only feasible means of limiting reprisals, therefore, is to limit them by reference to the initial violation.⁷¹⁰

⁷⁰⁵ Levenfeld (1982), p. 39.

⁷⁰⁶ See US Field Manual No. 27-10, p. 177; UK Manual of Military Law, pp. 184-5.

⁷⁰⁷ Provost (1994), p. 417.

⁷⁰⁸ Rogers (1996), p. 17.

⁷⁰⁹ Provost (1994), p. 417.

⁷¹⁰ Hampson (1988), p. 824. Nevertheless, future-oriented measures of proportionality are applied in other contexts in customary international law, including in relation to self-defence (as an exception to the prohibition on the use of force under Article 2(4) of the U.N. Charter). See, e.g., *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, where the ICJ refused to construe Article 51 of the UN Charter or customary international law as precluding "the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake." (pars 96-97). Where a State resorts to nuclear weapons in self-defence, its defensive actions may be proportional to the *threat* posed by an aggressor State, but they are likely to exceed beyond computation the magnitude of any attack already carried out. See, also, the case of the *Caroline*, where US Secretary of State Daniel Webster stated that an act of self-defence must not be "unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it." Expressed in this way, proportionality in the context of self-

Further, limiting proportionality by reference to a hypothetical evaluation of the enemy's future conduct creates the very real danger that belligerents may seriously escalate hostilities and engage in a spiral of reprisals and counter-reprisals.⁷¹¹ As suggested below, if reprisals are to be at all effective, it is only likely that they will be so if they are employed sparingly and in a restrained manner. The preponderance of modern authors therefore tends to assert the existence of a past-oriented test of proportionality which limits reprisals by the extent of the actual breach committed by the delinquent enemy.⁷¹²

Ambiguity remains, however, as to what measure (or measures) of past conduct stand as the yardstick against which reprisals are to be measured. In particular, the authorities are unclear as to whether a reprisal should be measured against the physical harm illegally perpetrated by the enemy, or whether it should be measured instead by reference to the gravity of the norm violated.⁷¹³ If the answer is

defence may be said to measure the magnitude of any permissible response against the achievement of a future outcome; it requires that force be limited to that which is necessary to achieving the proper purpose of self-defence (US Secretary of State Daniel Webster's letter of 24 April 1841 to the British Minister at Washington Mr. Fox (hereinafter the *Caroline* case), reprinted in R.Y. Jennings, "The *Caroline* and *McLeod* Cases" (1938) 32 *American Journal of International Law* 82, p. 89). See, however, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (*Merits*) [1986] ICJ Rep. 14, p. 176, where the ICJ suggested that acts of self-defence must be proportional to the initial armed attack. Future-oriented measures of proportionality have also been applied in the context of the *jus in bello*, where proportionality stands as an overriding limitation on the legality of any particular attack. The principle of proportionality is codified in Protocol I which prohibits attacks which may be expected to cause "excessive", "incidental loss" (Arts 51(5)(b) & 57(2)(b)). "Excessive" in this context is measured "in relation to the concrete and direct military advantage anticipated" from the attack (*id.*) The principle of proportionality in the context of the *jus in bello* therefore requires commanders and others to weigh up the expected impact of any attack upon civilians and civilian objects against the anticipated military advantage of the attack (*see* Art. 57(2)(b), Protocol I). The principle of proportionality in the context of the *jus ad bellum* and *jus in bello* is examined further in J. G. Gardam, "Proportionality and Force in International Law", (1993) 87 *American Journal of International Law* 391; C.A. Allen, "Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity", (1992) 86 *American Society of International Law Proceedings* 39; W.J. Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare", (1982) 98 *Military Law Review* 91.

⁷¹¹ Levenfeld (1982), p. 40.

⁷¹² See, e.g., Provost (1994), p. 417; Hampson (1988), pp. 823-824; Greenwood (1989a), p. 44.

⁷¹³ Art. 86, Oxford Manual provides that belligerent reprisals must never exceed the "measure of the infraction of the laws of war"; the British manual of military law in use in the Second World War provided that reprisals must not exceed "the degree of violation committed by the enemy" (British War Office, *Manual of Military Law*, HMSO, London, 1929, par. 459); the American manual in force during the Second World War also measured reprisals against "the degree of violations committed by the enemy" (US War Dept., Field Manual No. 27-10, *The Law of Land Warfare*, US Govt. Printing Office, Washington D.C., 1940, par. 358(c)); in the *Hostages Case*, the Tribunal said that belligerent reprisals were not to exceed "the severity of the unlawful act" ((1948) 11 TWC 757, p. 1252). The test was expressed more clearly, however, in the 1934 resolution of the *Institut de Droit International* concerning peacetime reprisals, which provides, in Article 6(2) that reprisals must be proportionate to

the latter, then a significant reprisal may be warranted even where the enemy has caused little concrete harm. The war crimes trials arising out of the Second World War are of limited assistance in determining the limits of proportionality. Those reprisals which came to the attention of the military tribunals were invariably so utterly excessive on any count that in rejecting their legality the military tribunals have clarified little:⁷¹⁴ In the *Hostages Case*, for instance, the Military Tribunal condemned as “clearly excessive”, a reprisal order calling for the execution of between 50 and 100 “communists” in exchange for the death of every German soldier.⁷¹⁵ In the *Trial of Kappler*, the Military Tribunal condemned as disproportionate, a reprisal adopting the lesser ratio of ten executions for every one German soldier killed in a bomb attack carried out by the Italian resistance.⁷¹⁶ A number of studies have examined deliberations of the U.N. Security Council in relation to acts of peacetime reprisals, particularly in the context of the Arab-Israeli conflict.⁷¹⁷ It has been observed that the Security Council appears in practice to be satisfied with (or turn a blind eye to) peace-time reprisal measures which do not exceed the physical harm wrought by the initial unlawful act.⁷¹⁸ In the context of belligerent reprisals, however, most authors state that the test of proportionality is

the gravity of the illegal act *and* the injury suffered (“Proportionner la contrainte employée à la gravité de l’acte dénoncé comme illicite et à l’importance du dommage subi.”) ((1934) AIDI 692, translated in Kalshoven (1971), p. 8).

⁷¹⁴ There were, however, exceptions. See, e.g., *In re Best* (1950) 17 ILR 434, p. 436, where the Eastern Provincial Court of Copenhagen held that:

the essential part of those of the German measures which were exclusively against property were not quantitatively excessive in relation to the preceding acts of the Danish Resistance Movement. With regards to the killings and those of the demolitions which involved and were known to involve loss of life and personal injury, the Court observes that the number of persons killed and injured does not exceed, according to the evidence before the Court, the number of persons killed or injured by the preceding Danish actions, with – possibly – isolated exceptions.

Although the Court was prepared to accept as a matter of factual inquiry that the German measures were largely proportionate, they were ultimately held not to be lawful reprisals on the basis that they lacked a proper purpose (due to the failure to notify the opponent that the measures were reprisals). On appeal, the Danish Supreme Court suggested that these same measures in fact lacked proportionality, but the finding was *obiter* (*id.*, pp. 437-8).

⁷¹⁵ *Trial of List et al.* (1948) VIII LRTWC 35, p. 65. According to Albrecht, the wording of the judgment “seems to be open to the view that certain circumstances might justify reprisals exceeding the damage inflicted by the original offense.” (Albrecht (1953), p. 605).

⁷¹⁶ *In re Kappler* (1948) 15 AD 471.

⁷¹⁷ See, e.g., R.A. Falk, “The Beirut Raid and the International Law of Retaliation”, (1969) 63 *American Journal of International Law* 415; Y. Blum, “The Beirut Raid and the International Double Standard”, (1970) 64 *American Journal of International Law* 73; Bowett (1972); Levenfeld (1982).

⁷¹⁸ See in particular, the Annex in Bowett (1972), pp. 33-36.

satisfied in the absence of obvious disproportionality, rather than the presence of strict proportionality.⁷¹⁹ Nevertheless, the ILC, in its Articles on State Responsibility, has adopted a much narrower test of proportionality in the context of non-forcible countermeasures. Article 51 of the Articles (headed “Proportionality”) provides that:

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.⁷²⁰

The requirement of proportionality is framed in positive terms: *i.e.*, rather than adopt the negative formulation that the measure must “not be disproportionate”, there is a positive requirement of commensurability. The ILC’s Commentary to the Article explains the choice of phraseology as follows:

The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.⁷²¹

The positive formulation may therefore be more a matter of “progressive development” than pure “codification” of customary law.⁷²² The first reading text of the ILC’s draft Articles on State Responsibility contained the negative formulation that countermeasures “shall not be out of proportion” to the wrongful act, but this appears to have been altered in order to bring the formulation in line with the ICJ’s treatment of countermeasures in the *Gabčíkovo-Nagymaros* case.⁷²³ That case was concerned with the actions of Hungary and Czechoslovakia in relation to a treaty between them providing for the joint construction and operation of hydro-electric and related works. Hungary abandoned the joint project in violation of the terms of the treaty and Czechoslovakia responded by damming the Danube River, altering its

⁷¹⁹ Kalshoven (1971), pp. 341-2. *See, also*, the *Naulilaa Incident*, extracted in Green (1959), p. 630 (“reprisals out of all proportion to the act that inspired them ought certainly to be considered excessive and illegal”).

⁷²⁰ Art. 51, Articles on State Responsibility.

⁷²¹ Report of the International Law Commission on the Work of its Fifty-third Session, 23 April-1 June and 2 July-10 August, 2001, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), p. 344.

⁷²² *See* Art. 13(1), Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose, *inter alia*, of “encouraging the progressive development of international law and its codification.”

⁷²³ *See* J. Crawford, Third Report on State Responsibility, 15 March 2000, UN Doc. A/CN.4/507 (2000), par. 346.

water and navigational course in a manner prejudicial to Hungary. The ICJ considered whether Czechoslovakia's actions could have been characterised as a legitimate countermeasure. The Court stated that in its view, "an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question."⁷²⁴ In relation to the facts of the case, the ICJ found that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate."⁷²⁵ Thus the ICJ framed the test of proportionality in a positive manner.

The fact that the ILC adopted this narrow test of commensurability within its Articles would appear flawed – at least from the perspective of codification – on two grounds. First, the ICJ in the *Gabčíkovo-Nagymaros* case dealt with proportionality in such a cursory manner as to leave its full purport and effect unclear. Secondly, it appears to depart from previous authority. In discussing the conditions which must be met by any lawful countermeasure, the ICJ relied upon the judgments in two cases: The ICJ's Judgment on the Merits in the case concerning *Military and Paramilitary Activities in and Against Nicaragua* and the Arbitral Award in the case concerning the *Air Services Agreement of 27 March 1946*.⁷²⁶ In the *Nicaragua* case, the ICJ expressed the requirement of proportionality in the context of any countermeasure, but it did not elaborate upon the calculus involved in determining proportionality, or disproportionality.⁷²⁷ The *Air Services Agreement* case,⁷²⁸ however, did. In that case the dispute centred around an alleged breach by France of the terms of its bilateral air services agreement with the United States. The alleged breach consisted in France's refusal to permit a "change of gauge" – specifically, a transshipment of passengers and cargo between a Boeing 747 and a Boeing 727 at London – in relation to Pan American's West Coast of the United States-Paris, *via* London, route. The U.S. response was to issue two orders under Part

⁷²⁴ *Case Concerning Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep. 7, par. 85.

⁷²⁵ *Id.*, par. 87.

⁷²⁶ *Id.*, par. 83.

⁷²⁷ *See, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, par. 249.

⁷²⁸ *Air Service Agreement between the United States of America and France (United States v France)* (1978) 15 RIAA 417.

213 of the Civil Aeronautics Board's Economic Regulations⁷²⁹: The first, ordering Air France, and a second airline, UTA, to file flight schedules within specified time limits, and the second, ordering the cancellation of Air France's Paris-Los Angeles, *via* Montreal, route. The second order never actually came into effect as the day before it was scheduled to do so the United States and France agreed to submit the dispute to arbitration. The *Compromis* of arbitration between the two States stated that the Tribunal shall determine, *inter alia*, whether the United States had the right to undertake such action as it undertook under Part 213 of the Economic Regulations,⁷³⁰ *i.e.* whether they had the right to make the orders they did. The fact that the second order was not actually implemented was therefore not particularly material.⁷³¹ Although France asserted that the United States, through its retaliatory actions, would have induced far greater losses by France than were originally suffered by the United States,⁷³² the Tribunal found that the measures ordered by the United States were not "clearly disproportionate" to those taken originally by France, and were thus legal.⁷³³ According to the Tribunal, the test of proportionality required "a very approximate appreciation".⁷³⁴ The Tribunal was of the view that:

it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the countermeasures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.⁷³⁵

It appears therefore, that the Tribunal formed the view that the importance of the principle initially breached by France justified the greater losses that may have been suffered by France. The Tribunal implied that there was a paucity of evidence before

⁷²⁹ Hereinafter Economic Regulations.

⁷³⁰ *Id.*, par. 9.

⁷³¹ *See id.*, par. 41.

⁷³² *Id.*, par. 17. The United States, however, argued that Air France's Paris-Los Angeles route was roughly equivalent, in fact, to Pan American's West Coast-Paris service (par. 18).

⁷³³ *Id.*, par. 83.

⁷³⁴ *Id.*

⁷³⁵ *Id.*

it in relation to concrete losses,⁷³⁶ – but this only strengthens the conclusion that the Tribunal was prepared to accept asymmetrical losses given the importance of the principle breached. Proportionality – or lack thereof – is universally acknowledged as a *sine qua non* of the right to reprisals, and the onus on establishing its existence, at least in relation to cases involving delictual, as opposed to criminal, responsibility, must lie with the respondent State; after all a *prima facie* case of international responsibility presumably stands against such State. For the Tribunal to accept the legality of the US countermeasure, even in the absence of concrete evidence as to the actual respective projected losses, the Tribunal must have been prepared to accept that even if France’s contention was correct and its losses would have far exceeded those of the United States, the countermeasure was still not disproportionate. This is not to suggest, however, that the *Air Services Agreement* stands for the proposition that countermeasures may exact losses out of any proportion whatsoever with those initially suffered. As the Tribunal proceeded to state: “They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute.”⁷³⁷ It has been suggested that:

the real insight of the *Air Services Agreement* award was that there had to be a permissible level of escalation in response to illegal acts, or else the malefactor would simply not regard the threats made by the injured state as credible. The key, as the tribunal indicated, was that the response not be disproportionate, and that any escalation proceed in relatively carefully measured increments.⁷³⁸

Although the ICJ in the *Gabčíkovo-Nagymaros* case cited the *Air Services Agreement* award as supporting its conclusions on countermeasures, it would appear that the ICJ in fact departed significantly from the law embodied in the latter case. It is probably fair to conclude, therefore, that the restrictive approach to proportionality taken by the ILC’s Articles (in line with the *Gabčíkovo-Nagymaros* case) is innovative rather than reflective of currently existing law. In fact a number of States took the position that the ILC’s preconditions on countermeasures has no basis

⁷³⁶ See *id.*

⁷³⁷ *Id.*, par. 91.

⁷³⁸ D.J. Bederman, “Counterintuiting Countermeasures”, (2002) 96 *American Journal of International Law* 817, p. 820.

in law.⁷³⁹ The ILC's Commentary to the Articles also implies that some level of innovation has been adopted for practical purposes:

*Considering the need to ensure the adoption of Countermeasures does not lead to inequitable results, proportionality must be assessed taking account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach.*⁷⁴⁰

Whilst the narrow, positive approach to proportionality has some basis in Professor Ago's early work on State responsibility, to the extent that it informed the current approach it has probably been taken out of context. Professor Ago (as he then was) considered that escalation may be necessary in the context of self-defence, but viewed reprisals in an entirely different light:

The requirement of *proportionality* of the action taken in self-defence...concerns the relationship between that action and its purpose, namely...that of halting and repelling the attack...It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered...

Above all, one must guard against any tendency in this connection to consider, even unwittingly, that self-defence is actually a form of sanction, such as reprisals. There must of course be some proportion between the wrongful infringement by one State of the right of another State and the infringement by the latter of a right of the former through reprisals. In the case of conduct adopted for punitive purposes, of specifically retributive action taken against the perpetrator of a particular wrong, it is self-evident that the punitive action and the wrong should be commensurate with each other. But in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin.⁷⁴¹

⁷³⁹ See, e.g., the comments and observations of Denmark (on behalf of Finland, Iceland, Norway, Sweden and Denmark) in Comments and Observations received from Governments, 19 March 2001, UN Doc. A/CN.4/515 (2001), p. 80; comments and observations of the United States in *id.*, pp. 81-83.

⁷⁴⁰ Report of the International Law Commission on the Work of its Fifty-third Session, 23 April-1 June and 2 July-10 August, 2001, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), p. 344 (emphasis added).

⁷⁴¹ Addendum to the Eighth Report on State Responsibility, [1980-II] *Yearbook of the International Law Commission* 1, Part I, p. 69.

The reason for the distinction in approach – *i.e.* the functional approach to self-defence where the response must not be disproportionate to its *purpose*, and the non-functional approach to reprisals where the response must be commensurate to the initial wrong – lies in Ago’s theoretical characterisation of reprisals. He viewed reprisals (in contradistinction to self-defence) as a form of “specifically retributive action”, “taken for punitive purposes”. In reality, Ago’s approach to reprisals may be described as functional, but only because he saw the function of a reprisal measure as the delivery of retribution itself. By limiting the measure of the reprisal to the measure of the initial wrong, Ago permitted reprisals to perform their retributive function. But it is a limited (or proportional) form of retribution.

It should be clear that what Ago was describing was not reprisals, *stricto sensu*, but an outmoded conception of reprisals that is no longer part of the corpus of international law. Reprisals are adopted strictly for the purpose of coercing an adversary into compliance with the law. To insist that reprisals, or countermeasures, be limited in the manner Ago specifies, is to impose a restrictive element that bears no logical connection to the functional purpose they serve. By requiring the presence of proportionality in *both* “quantitative” and “qualitative” terms – *i.e.* in terms of the injury suffered as well as the importance of the interest protected by the rule infringed and the seriousness of the breach⁷⁴² – the ILC’s rules on countermeasures not only exceed or contradict pre-existing judicial authority,⁷⁴³ but they can claim no intellectual continuity with the work of Ago who was operating from an entirely different set of assumptions (assumptions which were in fact expressly overturned, *inter alia*, by Article 49(1) of the ILC’s Articles on State Responsibility which provides that countermeasures shall only be taken “in order to induce that State to comply with its obligations”).⁷⁴⁴ In addition the positive requirement of proportionality is inconsistent with the long line of authority which has consistently

⁷⁴² Report of the International Law Commission on the Work of its Fifty-third Session, 23 April-1 June and 2 July-10 August, 2001, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), p. 344.

⁷⁴³ As discussed above, the *Air Service Agreement case* did not require proportionality in *both* quantitative and qualitative senses, but rather took an overall impression whereby the two values could be considered cumulatively rather than separately. In addition, the test of proportionality was framed in negative rather than positive terms.

⁷⁴⁴ Art. 49(1), Articles on State Responsibility.

indicated that the test of proportionality is satisfied in the absence of clear disproportionality.⁷⁴⁵

⁷⁴⁵ Kalshoven (1971), pp. 341-2. *See, also*, the *Naulilaa Incident*, extracted in Green (1959), p. 630.

5

prohibitions on reprisals under treaty law

i. INTRODUCTION

The first legal restrictions on the recourse to reprisals arose under customary law and applied as general limitations applicable across the range of reprisals. These restrictions appear to have arisen simultaneously with the emergence of the doctrine of reprisals itself. Thus, while Article 27 of the Lieber Code of 1863 recognises the permissibility of reprisals (“[t]he law of war can no more wholly dispense with retaliation than could the law of nations, of which it is a branch”);⁷⁴⁶ Article 28 restricts their use as follows:

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously, and unavoidably – that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.⁷⁴⁷

Similarly, the Oxford Manual of 1884 recognises both the permissibility of reprisals,⁷⁴⁸ and restrictions upon their use.⁷⁴⁹ According to the Oxford Manual, recourse to reprisals may only be had if four conditions are met: (1) the injury

⁷⁴⁶ Art. 27, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, 24 April 1863 (hereinafter the Lieber Code), *reprinted in* D. Schindler & J. Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1988, p. 3.

⁷⁴⁷ Art. 28, Lieber Code.

⁷⁴⁸ Art. 84, Oxford Manual.

⁷⁴⁹ Arts 85-86, Oxford Manual.

complained of has not been redressed; (2) the reprisals are proportionate to the infraction of the law of war; (3) the reprisals are carried out with the authorisation of the commander-in-chief; and (4) the reprisals conform to the laws of humanity and morality.⁷⁵⁰ These restrictions were, of course, the foundation for the more developed restrictions which apply generally in relation to reprisals as a matter of customary law at the current time (as discussed above).

In addition to these restrictions, a number of conventional rules have been introduced which expressly prohibit the recourse to reprisals in particular contexts. The first such express prohibition appeared in the 1929 Geneva Prisoners of War Convention and was followed by further express prohibitions in the 1949 Geneva Conventions, the 1954 Hague Cultural Property Convention, and Additional Protocol I of 1977, as well as the Mines Protocol of 1980 and the Amended Mines Protocol of 1996. The Hague Conventions and Regulations of 1899 and 1907 are, however, silent on the matter of reprisals. It appears that in 1899 and 1907 the time was not yet ripe for a comprehensive prohibition on reprisals in relation to any one class of target, and no attempt was made to codify the general limitations which applied in relation to the recourse to reprisals out of a concern that such codification would constitute a legitimisation of their use.⁷⁵¹ It has, however, been suggested that Article 50 of the Hague Regulations of 1899 and 1907 *implicitly* prohibits reprisals against civilians in occupied territory.⁷⁵² Article 50 provides that:

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.⁷⁵³

According to Kwakwa, this provision appears to be “a clear, albeit feeble, attempt to grapple with the problem of belligerent reprisals.”⁷⁵⁴ However customary law had already come to recognise reprisals as an *exception* to the rule prohibiting collective punishment (the Oxford Manual states quite clearly that “[r]eprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the

⁷⁵⁰ See *id.* (discussed in Kwakwa (1990), pp. 53-4).

⁷⁵¹ Kalshoven (1971), pp. 66-67. The Brussels Declaration of 1874 appears to have been silent on the matter of reprisals for the same reason (See Kalshoven (1971), pp. 47-51).

⁷⁵² See Kwakwa (1990), p. 54, n. 23.

⁷⁵³ Article 50, Hague Regulations of 1907.

⁷⁵⁴ Kwakwa (1990), p. 54, n. 23.

guilty”)⁷⁵⁵ In addition, it seems to have been fairly well understood during the course of the 1899 and 1907 Hague Peace Conferences that Article 50 was enacted without prejudice to the question of reprisals.⁷⁵⁶ That is certainly the position that was endorsed by the Military Manuals in force during World War II.⁷⁵⁷ The most accepted position appears to be that no provision within the 1899 or 1907 Hague Conventions and Regulations relates to the matter of reprisals.⁷⁵⁸

ii. 1929 GENEVA PRISONERS OF WAR CONVENTION

On 27 July 1929, a Diplomatic Conference in Geneva resulted in the signing of two Conventions: The Geneva Convention Relative to the Treatment of Prisoners of War (the “1929 Prisoners of War Convention”)⁷⁵⁹ and the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armies in the Field (the

⁷⁵⁵ Article 84, Oxford Manual; *see also* H. Grotius, *De Jure Belli ac Pacis Libri Tres*, 1646 (trans. by F. W. Kelsey, in J. Scott (ed.), *The Classics of International Law*, vol. II, book III, Carnegie Endowment for International Peace, Washington D.C., 1925), bk. III, ch. XI, pt. VIII, §§ 733-4: “It is the bedding mercy, if not of justice, that, *except for reasons that are weighty and will affect the safety of many*, no action should be attempted whereby innocent persons may be threatened with destruction” (emphasis added).

⁷⁵⁶ *See* Albrecht (1953), p. 591, n. 6; *see also*, Report of Captain Crozier to the Commission of the United States of America to the International Conference at the Hague, Regarding the Work of the Second Sub-Committee of the Second Committee of the Conference, 31 July 1899 (*available at www.yale.edu/lawweb/avalon/lawofwar/hague99/hag99-09.htm*), where Captain Crozier notes that “because of their delicacy”, certain subjects, including “retaliation and reprisals” were omitted from the terms of the Hague Regulations of 1899.

⁷⁵⁷ US War Dept., Field Manual No. 27-10, *The Law of Land Warfare*, US Govt. Printing Office, Washington D.C., 1940, par. 344; British War Office, *Manual of Military Law*, HMSO, London, 1929, p. 85, n. 2.

⁷⁵⁸ *See* Kalshoven (1971), pp. 55-56; Sandoz *et al.* (1987), par. 3432. It has also been suggested that Article 27 of the Hague Regulations of 1907 implicitly prohibits reprisals against cultural property (Kalshoven (1971), 66-67; A. Mitchell, “Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law”, (2001) 170 *Military Law Review* 155, p. 161), but in fact nothing in Article 27 even tangentially grapples with the issue of reprisals. Art. 27, Hague Regulations of 1907 states as follows:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

⁷⁵⁹ Convention Relating to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343.

“1929 Wounded and Sick Convention”).⁷⁶⁰ Article 2(3) of the 1929 Prisoners of War Convention provides that: “Measures of reprisals against them [*i.e.* prisoners of war] are forbidden.”⁷⁶¹ As is mentioned above, this was the first prohibition on reprisals in a multilateral treaty.⁷⁶² The 1929 Wounded and Sick Convention, however, makes no reference to reprisals. It is possible that the explanation for this lies in the fact that the 1929 Geneva Conventions were an attempt to ameliorate the horrors experienced in the first world war, which included, in particular, reprisals against prisoners of war.⁷⁶³ On the other hand it has been suggested that the 1929 Wounded and Sick Convention implicitly incorporates a prohibition on reprisals against those protected by the Convention: Des Gouttes has stated that the two Geneva Conventions should be read together as the 1929 Wounded and Sick Convention is limited in its application to armies on the battlefield, with wounded and sick combatants evacuated to the rear already falling under the protection of the 1929 Prisoners of War Convention.⁷⁶⁴ Pictet has argued that the absence of a reprisal prohibition in the 1929 Wounded and Sick Convention is merely an oversight as prisoners of war and wounded and sick are ultimately in analogous positions.⁷⁶⁵ An alternative argument, put by some authors on the eve of World War Two, was that reprisals against the sick and wounded would be prohibited as contrary to the principles of humanity.⁷⁶⁶ The effect of the principles of humanity on the admissibility of reprisals is discussed later. In relation to the argument that the 1929 Wounded and Sick Convention implicitly included a prohibition on reprisals, that was not an interpretation that was transmitted into the various military manuals.⁷⁶⁷ The prohibition on reprisals against

⁷⁶⁰ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, 118 LNTS 303. The 1929 Wounded and Sick Convention was a revision of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies on the Field, 6 July 1906, [1907] UKTS 15 (hereinafter 1906 Wounded and Sick Convention); the 1929 Prisoners of War Convention was a new Convention in terms of the subject-matter dealt with.

⁷⁶¹ Article 2(3), 1929 Prisoners of War Convention.

⁷⁶² Kalshoven (1971), pp. 106-7.

⁷⁶³ See G. Roberts, “The New Rules for Waging War: The Case Against Ratification of Additional Protocol I”, (1985) 26 *Virginia Journal of International Law* 109, p. 141; J. Pictet (ed.), *Commentary on the Second Geneva Convention of 12 August 1949*, ICRC, Geneva, 1960, available at www.icrc.org, p. 253; Sandoz *et al.* (1987), par. 3434.

⁷⁶⁴ P. des Gouttes, “La Convention de Genève du 27 juillet 1929”, (1930) *Commentaire*, pp. 22-24, cited in Kalshoven (1990), p. 46, n. 8.

⁷⁶⁵ Pictet (1952), p. 344.

⁷⁶⁶ Kalshoven (1971), p. 108.

⁷⁶⁷ See, e.g., US War Dept., Field Manual No. 27-10, *The Law of Land Warfare*, US Govt. Printing Office, Washington D.C., 1940, par. 358.

prisoners of war was viewed, in 1929, as an innovation in international law.⁷⁶⁸ The prospect of a blanket prohibition of reprisals against any one target was, at the time, controversial: The International Law Association, for instance, took the position that a limited right of reprisal against prisoners of war should be retained.⁷⁶⁹ Although the analogy between prisoners of war and the wounded and sick on the battlefield is a fair one to make at a *de facto* level, it may be going too far to suggest that an innovative and controversial protection that was granted to one automatically applies, *de jure*, to the other; especially if one considers that the distinction between prisoners of war and the wounded and sick on the field is a legal distinction which continues to apply to this day.⁷⁷⁰ In addition, the 1929 Prisoners of War Convention makes specific provision for a system of “protecting Powers” to assist in the protection of prisoners of war.⁷⁷¹ Such a system was viewed as helping eliminate the causes, or need, for reprisals,⁷⁷² and it has been observed that during the Second World War the obligations of States towards prisoners of war were generally observed due in large measure to the vigilance of both protecting Powers and the ICRC.⁷⁷³ The 1929 Wounded and Sick Convention, on the other hand, makes no provision for protecting Powers. It may be that the absence of any prohibition on reprisals in the context of that Convention is simply consistent with the fact that the Convention adopts a more *laissez-faire* approach to the suppression of breaches, leaving it primarily to the parties to ensure compliance.⁷⁷⁴

iii. 1949 GENEVA CONVENTIONS

Each of the four Geneva Conventions of 1949 expressly prohibits reprisals against the persons and objects protected by that Convention. The exception here is Geneva

⁷⁶⁸ Kwakwa (1990), p. 55.

⁷⁶⁹ Kalshoven (1971), p. 107; Kwakwa (199), p. 55; Kalshoven (1990) p. 46.

⁷⁷⁰ See Geneva Conventions I & III.

⁷⁷¹ Arts 86-88, 1929 Prisoners of War Convention.

⁷⁷² See Pictet (1952), p. 343.

⁷⁷³ *Id.*, p. 343.

⁷⁷⁴ Kalshoven (1971), p. 82. See, also, J. Pictet (ed.), *Commentary on the Fourth Geneva Convention of 12 August 1949*, ICRC, Geneva, 1958, p. 228, which states, in the context of Geneva Convention IV, that “[i]t was possible for the Convention to prohibit reprisals only because it substituted for them other means of ensuring respect of the law, based on the principles of supervision by the Protecting Powers and the obligation to punish individuals in cases of grave breaches.”

Convention III which prohibits reprisals against prisoners of war,⁷⁷⁵ but does not expressly prohibit reprisals against effects and articles of personal use belonging to prisoners of war, even though these are protected objects under the Convention.⁷⁷⁶

Thus reprisals are prohibited against:

1. Soldiers and other protected personnel in the field who are wounded or sick;⁷⁷⁷ and medical and religious personnel,⁷⁷⁸ and medical buildings or equipment,⁷⁷⁹ protected by Geneva Convention I;⁷⁸⁰

⁷⁷⁵ Art. 13(3), Geneva Convention III.

⁷⁷⁶ Art. 18, Geneva Convention III.

⁷⁷⁷ Geneva Convention I provides protection to the wounded or sick belonging to the following categories:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside of their territory, even if their territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.
- (5) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law.
- (6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously 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.

(Art. 13, Geneva Convention I)

⁷⁷⁸ See Chapter IV (Arts 24-32), Geneva Convention I.

⁷⁷⁹ See Chapters III (Arts 19-23), V (Arts 33-34) & VI (Arts 35-37), Geneva Convention I.

⁷⁸⁰ Art. 46, Geneva Convention I: "Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited."

2. Naval and other protected personnel at sea who are wounded, sick or shipwrecked;⁷⁸¹ and medical and religious personnel,⁷⁸² and medical vessels and equipment,⁷⁸³ protected by Geneva Convention II;⁷⁸⁴
3. Prisoners of war;⁷⁸⁵ and
4. Civilians in occupied territory, or otherwise in the hands of a party to the conflict of which they are not a national (*e.g.*, enemy aliens), and their property.⁷⁸⁶

The Geneva Conventions of 1949 effected a significant change in the law of reprisals. They expanded the class of persons and objects protected against reprisals, to include more than simply prisoners of war. And in the context of prisoners of war, Geneva Convention III of 1949 provides protection (including against reprisals) to a wider class of persons than the Prisoners of War Convention of 1929. Article 4 of Geneva Convention III defines “prisoners of war”, and confers equivalent protections, upon a wider class of persons than the 1929 Convention.⁷⁸⁷ The Geneva Conventions of 1949 also put to rest the weak, but nevertheless present, claims concerning *implicit* prohibitions in favour of civilians in occupied territory (under Article 50 of the Hague Regulations of 1907) and the wounded and sick (arising generally under the 1929 Wounded and Sick Convention by virtue of an analogy with prisoners of war). The Geneva Conventions of 1949 prohibited reprisals in favour of both classes of persons (and, in the context of civilians, their property as well). The only persons not protected under the terms of the Geneva Conventions of 1949 (and thus theoretically subject to reprisal) are enemy combatants (*i.e.* those not outside the conflict as sick, wounded, shipwrecked or

⁷⁸¹ Art. 13, Geneva Convention II provides protection to the wounded, sick and shipwrecked at sea who belong to the same categories as those set out in Article 13, Geneva Convention I (*see above*).

⁷⁸² *See* Chapter IV (Arts 36-37), Geneva Convention II.

⁷⁸³ *See* Chapters III (Arts 22-35) & V (Arts 38-40), Geneva Convention II.

⁷⁸⁴ Art. 47, Geneva Convention II: “Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.”

⁷⁸⁵ Art. 13(3), Geneva Convention III: “Measures of reprisal against prisoners of war are prohibited.”

⁷⁸⁶ Art. 33(3), Geneva Convention IV: “Reprisals against protected persons and their property are prohibited.” Protected persons under Geneva Convention IV are designated in Article 4(1), as “those who, at a given moment, and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

⁷⁸⁷ *See* Art. 4, Geneva Convention III; Arts 1 & 81, 1929 Prisoners of War Convention.

prisoners of war, or otherwise protected as medical, religious or other personnel) and civilians who have not fallen into enemy hands (*i.e.*, enemy civilians located in enemy territory, neutral territory or the High Seas). Thus Greenwood notes that in the context of the first Gulf War:

Reprisal attacks on urban centres of population, such as were undertaken in the 'war of the cities'...were thus outside the scope of any treaty prohibition on reprisals, although it was arguable that they were prohibited by customary international law.⁷⁸⁸

iv. 1954 HAGUE CULTURAL PROPERTY CONVENTION

The necessity of protecting cultural property was highlighted by the devastation wrought upon the cultural heritage of Europe during the Second World War.⁷⁸⁹ The Geneva Conventions of 1949, however, made only limited inroads towards their protection. The Geneva Conventions accord protection to objects or property in two distinct contexts:⁷⁹⁰ (1) Where the property is of a *type* accorded protection under the Conventions regardless of the status of the territory where it's located; only a narrow range of property is protected here, primarily on the basis of its dedication to the medical assistance of war victims, for example, hospitals and hospital ships;⁷⁹¹ and

⁷⁸⁸ Greenwood, 1989(a), p. 51.

⁷⁸⁹ H. Abtahi, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia", (2001) 14 *Harvard Human Rights Journal* 1, p. 7. During the Second World War the Germans employed a type of reprisal known as *Bädker Raids* which involved air attacks against cultural, historical, artistic and religious importance (Albrecht (1953), p. 601, n. 50). *See, however*, Detter:

The attack on the monastery of Monte Cassino, by an erroneous lack of judgment or on the basis of false information, by the Americans, assuming this was a German stronghold, caused...the loss of some of the most important medieval manuscript collections in the world. The attack on Dresden by the United Kingdom, in retaliation for the bombing of Coventry, caused the total destruction of one of the most important cities in Europe, together with the Meissen porcelain works. But otherwise the cultural heritage of Europe was spared; neither Rome nor Paris was bombed.

(I. Detter, *The Law of War*, 2nd ed., Cambridge University Press, Cambridge, 2000, p. 177, n. 76.) *See, also*, Kalshoven, who argues that "reprisals against cultural property in practice have never represented a particularly serious issue." (Kalshoven (1990), p. 53).

⁷⁹⁰ *See Prosecutor v Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, par. 341.

⁷⁹¹ *See, e.g.*, Chapters III (Arts 19-23), V (Arts 33-34) & VI (Arts 35-37), Geneva Convention I; Chapters III (Arts 22-35) & V (Arts 38-40), Geneva Convention II; Arts 18, 21 & 22, Geneva Convention IV. Of course, such objects lose their immunity when used for hostile purposes (*see, e.g.*,

(2) where property is accorded protection on the basis of its location in occupied territory, or on the basis that it belongs to enemy aliens; the class of protected property here is much wider extending, in the case of property in occupied territory, to “real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations”.⁷⁹² Cultural property is thus only protected under the Geneva Conventions to the extent that it is located in occupied territory. It may also receive some protection in the case of enemy aliens under Article 27 of Geneva Convention IV which provides, *inter alia*, that:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.⁷⁹³

The destruction of religious or cultural institutions by a particular State belonging (whether in a legal sense or not) to enemy aliens living within that State may constitute a violation of the “respect” owed by that State as specified above.

The 1954 Hague Convention for the Protection of Cultural Property extends these protections by obliging States to respect and protect cultural property regardless of whether it is located in one’s own territory or the territory of another High Contracting Party,⁷⁹⁴ or in occupied territory.⁷⁹⁵ Significantly, the Convention requires Parties to “refrain from any act directed by way of reprisals against cultural property.”⁷⁹⁶ Although limited protections exist in relation to a wide class of cultural

Art. 21, Geneva Convention I; Art. 34, Geneva Convention II; Art. 19, Geneva Convention IV). This appears to have been the case, for instance, when United States Marines seized a hospital near the Iraqi city of Nasiriya during *Operation Iraqi Freedom* in March, 2003, on the basis that it was being used as a staging area for attacks against US positions. It appears that the hospital was housing a large quantity of AK47 assault rifles and ammunition and that it was used as a firing position by Iraqi forces (“Nasiriya Hospital Shows Signs of Military Use”, *ABC News Online*, 26 March 2003, available at <http://www.abc.net.au/news/newsitems/s816684.htm>).

⁷⁹² Art. 53, Geneva Convention IV. *See, also*, Art. 33, Geneva Convention IV, which provides in relation to protected persons, both in occupied territory and the territory of a party to the conflict, that “[p]illage is prohibited” (Art. 33(2)) and that “[r]eprisals against protected persons and their property are prohibited” (Art. 33(3)).

⁷⁹³ Art. 27, Geneva Convention IV.

⁷⁹⁴ *See* Art. 4, Cultural Property Convention

⁷⁹⁵ *See* Art. 5, Cultural Property Convention.

⁷⁹⁶ Art. 4(4), Cultural Property Convention. “Cultural property” is defined by Article 1 of the Convention as the following objects, irrespective of origin or ownership:

property under the Hague Conventions and Regulations of 1907, those protections do not extend to immunity from reprisals.⁷⁹⁷

V. 1977 ADDITIONAL PROTOCOL I

The prohibitions on reprisals in Protocol I are far more extensive than those contained in the earlier treaties, and considerably reduce the ambit of permissible reprisals, at least as a matter of conventional law. Protocol I contains seven separate provisions concerning reprisals, each prohibiting reprisals against a different class of persons or objects. The first of these, Article 20, is contained within Part II of the Protocol, concerned with the wounded, sick and shipwrecked. It proved to be an entirely non-controversial provision among the delegates to the Geneva Diplomatic

-
- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
 - (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
 - (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'.

⁷⁹⁷ The Hague Regulations of 1907 provide protection to "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected" in the case of sieges and bombardments (Art. 27(1)); and "[t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences" (Art. 56(1)) and "historic monuments, works of art and science" (Art. 56(2)) in the case of occupied territory. The Hague Convention IX of 1907 provides protection to "sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected" in the case of bombardment by naval forces (Art. 5(1), Convention IX Concerning Bombardment by Naval Forces in Time of War, 18 October 1907, [1910] UKTS 13 (hereinafter Hague Convention IX of 1907)). While the cultural objects protected by the 1907 Hague Conventions and Regulations are more extensive than those protected under the Cultural Property Convention, the level of protection offered is more limited. In occupied territory, seizure, destruction or wilful damage to protected objects is forbidden (Art. 56, Hague Regulations of 1907), but in relation to sieges and bombardments from land and sea, forces are required only to take all necessary steps to spare such objects "as far as possible" (Art. 27(1), Hague Regulations of 1907; Art. 5(1), Hague Convention IX of 1907). The claim that property protected under the Hague Regulations of 1907 was implicitly immunised from reprisals by operation of Article 50 of the Hague Regulations was discussed above.

Conference.⁷⁹⁸ The remaining six are each contained within Part IV of Protocol I, concerned with the civilian population. The primary innovation in relation to these prohibitions consists in the extension of protection over civilians and their property to all civilians on land regardless of the territorial status of that land.

1. WOUNDED, SICK AND SHIPWRECKED

Article 20 of Protocol I provides that: “Reprisals against the persons and objects protected by this Part [*i.e.* Part II] are prohibited.”⁷⁹⁹ Part II of Protocol I, headed “Wounded, Sick and Shipwrecked”, extends the basic protections provided for in Geneva Conventions I and II. Given that both those Conventions prohibit reprisals against protected persons and objects,⁸⁰⁰ it followed that those additional persons and objects protected in Part II of Protocol I should also be immune from reprisal attacks. Whereas the Conventions adopted an enumerated approach to protected persons and objects, Part II of Protocol I adopted a more general (and expansive) definition of protected persons and objects.⁸⁰¹ Thus, for instance, Geneva Conventions I and II provide protection to the wounded, sick and shipwrecked only when they fall within one of a number of specified categories (*e.g.* members of the armed forces of a Party to the conflict),⁸⁰² whereas Protocol I provides quite simply that “wounded” and “sick” means:

persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.⁸⁰³

2. CIVILIAN POPULATION

⁷⁹⁸ Kalshoven (1990), p. 52.

⁷⁹⁹ Art. 20, Protocol I.

⁸⁰⁰ Art. 46, Geneva Convention I: “Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.”; Art. 47, Geneva Convention II: “Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.”

⁸⁰¹ Sandoz *et al.* (1987), par. 809.

⁸⁰² Art. 13(1), Geneva Conventions I & II. *See, generally*, Art. 13, Geneva Conventions I & II.

⁸⁰³ Art. 8(a), Protocol I.

Article 51(6) of Protocol I provides that: "Attacks against the civilian population or civilians by way of reprisals are prohibited."⁸⁰⁴ In prohibiting reprisal attacks, the reference here is to *direct* attacks; reprisal attacks which harm civilians *indirectly* through collateral damage are not prohibited, at least under the terms of Article 51(6). Certain provisions within Protocol I provide immunity to certain persons and objects from direct attack,⁸⁰⁵ and other provisions provide generalised protections to those same persons and objects from the indirect effects of attacks.⁸⁰⁶ Article 51(6) falls into the former category, providing immunity to civilians, collectively and individually, from reprisal attacks made directly against them. This is implied in particular, by the reference to the prohibition of reprisal attacks "against" civilians in the wording of Article 51(6). This same point may be made with respect to all six reprisal prohibitions in Part IV of Protocol I, each of which prohibits reprisals "against" certain persons or objects,⁸⁰⁷ or prohibits certain objects from being made the "object" of a reprisal attack.⁸⁰⁸

⁸⁰⁴ Art. 51(6), Protocol I. During the course of the Geneva Diplomatic Conference of 1974-1977, the prohibition on reprisals against the civilian population and civilians as it appears in Article 51(6) of Protocol I was adopted by consensus in Committee III of the Conference, which was assigned the task of dealing with methods and means of warfare and with the protection of the civilian population (Bothe *et al.* (1982), pp. 312-3). Most concerns of States in relation to prohibitions on reprisals were reserved for the reprisal prohibitions other than those relating to civilian persons – *i.e.* those appearing in Articles 52-56 (*see* Bothe *et al.* (1982), pp. 313-4). Nevertheless, some concerns have been raised in relation to the prohibition in Article 51(6). *See, e.g.*, Kwakwa (1990), p. 60:

it is doubtful that a prohibition on reprisals against civilians will have the intended effect. Theoretically, it seems difficult to argue that state A is precluded from responding in kind to state B's massive and continuing attacks against state A's civilian population. In actual armed conflict there is bound to come a time when state A can no longer tolerate state B's illegal acts on its civilian population without taking retaliatory or extraordinary measures to effect a change in the policy of state B.

⁸⁰⁵ In relation to Article 51 of Protocol I, *see* the first sentence of paragraph 2, which provides that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack". The term "as such" implies that the paragraph provides no protections against indirect harm to civilians resulting from attacks directed against legitimate targets (Bothe *et al.* (1982), p. 300). Various States made declarations to this effect upon ratification of Protocol I. Australia declared upon ratification that "the first sentence of paragraph 2 Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective" (*reprinted in* Roberts & Guelff (2000), p. 500.) A number of other States made substantially identical statements (*see* statements by Canada (*reprinted in id.*, pp. 502-3); Italy (*id.*, p. 507); Netherlands (*id.*, p. 508); New Zealand (*id.*, p. 508); and the United Kingdom (*id.*, p. 511))

⁸⁰⁶ In relation to Article 51 of Protocol I, *see* pars 1, 4, 5, 7 & 8. *See, also*, Arts 55-60, Protocol I.

⁸⁰⁷ Arts 51(6) & 55(2), Protocol I.

⁸⁰⁸ Arts 52(1), 53(c), 54(4) & 56(4), Protocol I.

Although the Hague Regulations of 1907 and Geneva Conventions of 1949 do not provide protection to civilians other than those in occupied territory or otherwise in the hands of a party to the conflict of which they are not a national, Protocol I is significant in that it does not distinguish between civilians by virtue of the status of the territory in which they are located or the nationality of the civilian.⁸⁰⁹ Thus, under Protocol I, reprisals may not be carried out against enemy civilians located in their own (*i.e.* enemy) territory. In fact, Protocol I even extends protection to a State's own citizens.⁸¹⁰ Protocol I does not, however, provide full protection to civilians (or civilian objects) at sea, in the air, or in outer space. Article 49(3) of Protocol I provides that:

The provisions of this Section [including all six reprisal prohibitions in Part IV] apply to any land, air or sea warfare which may affect the civilian populations, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.⁸¹¹

The issue of reprisals against civilians or civilian objects in space is perhaps, at this time, somewhat academic, but it may be that they are precluded by operation of the Outer Space Treaty of 1967 and the Moon Treaty of 1979 which limit the permissible uses of space to peaceful purposes.⁸¹² These treaties are generally regarded as having achieved the status of customary law.⁸¹³ In terms of the law of naval and aerial warfare, the relevant international instruments are silent on the matter of reprisals.⁸¹⁴ There appears to be a tendency among jurists to treat the

⁸⁰⁹ R. W. Gehring, "Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I", (1980) 90 *Military Law Review* 49, p. 65.

⁸¹⁰ There is some debate, however, as to whether a State must accord its own citizens the protections set out in Article 75 of Protocol I, concerning fundamental guarantees (Gehring (1980), p. 65, n. 29). Article 75 does not refer to "civilians" as the object of protection, but rather, "persons who are in the power of a Party to the conflict" (Art 75(1), Protocol I).

⁸¹¹ Art. 49(3), Protocol I.

⁸¹² Arts I-IV, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205; Art. 3, Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 18 December 1979, UN Doc. A/RES/34/68 (1979), Annex.

⁸¹³ N. Jasentuliyana, *International Space Law and the United Nations*, Kluwer Law International, The Hague, 1999, p. 190; *see, also*, B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", (1965) 5 *Indian Journal of International Law* 23.

⁸¹⁴ On the law of aerial warfare, *see, in particular*, Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 October 1907, [1910] UKTS 15; Arts 25, 26, 27, 29 & 53, Hague Regulations of 1907; Draft Rules on Aerial Warfare, 19 February 1923, (1923) 17 AJIL

expanded protections accorded to civilians and civilian objects on land under Protocol I as equally applicable to the air and sea. This is evident, for instance, in the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea. The Manual adopts a definition of “military objectives” identical to that in Protocol I,⁸¹⁵ and limits attacks strictly to such objectives.⁸¹⁶ Although the Manual provides no definition of “civilians” or “combatants” as such, it does set out a list of certain protected persons,⁸¹⁷ and stipulates that Parties to the conflict shall at all times distinguish between civilians and other protected persons on the one hand, and combatants on the other.⁸¹⁸ In addition, the Manual sets out certain basic rules governing means and methods of warfare, including the prohibition on the use of indiscriminate means and methods of warfare,⁸¹⁹ and the requirement of proportionality,⁸²⁰ and other precautions which must be taken in attack, identical or highly similar to a number of those in Protocol I.⁸²¹ These rules are applicable to any attack upon enemy warships⁸²² and enemy⁸²³ and neutral⁸²⁴ merchant vessels, as well

Supplement 245; San Remo Manual of International Law Applicable to Armed Conflicts at Sea, 12 June 1994, *reprinted in* Roberts & Guelff (2000) (hereinafter San Remo Manual), p. 573. On the law of naval warfare, *see in particular* Declaration Respecting Maritime Law, 16 April 1856, *reprinted in* Roberts & Guelff (2000), p.48; Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 29 July 1899, [1901] UKTS 10; Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 18 October 1907, [1910] UKTS 10; Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships, 18 October 1907, [1910] UKTS 11; Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, [1910] UKTS 12; Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 18 October 1907, [1910] UKTS 13; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 18 October 1907, 36 Stat. 2371; Convention (XI) Relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, 18 October 1907, [1910] UKTS 14; Convention (XII) Relative to the Creation of an International Prize Court, 18 October 1907, 205 Consol. T.S. 381; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, 205 Consol. T.S. 395; Declaration Concerning the Laws of Naval Warfare, 26 February 1909, 208 Consol. T.S. 338; Treaty for the Limitation and Reduction of Naval Armaments, (Part IV, Art. 22, relating to submarine warfare), 22 April 1930, 112 L.N.T.S. 65; Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, 6 November 1936, 173 L.N.T.S. 353; Geneva Convention II; San Remo Manual.

⁸¹⁵ San Remo Manual, par. 40; Art. 52(2), Protocol I.

⁸¹⁶ San Remo Manual, par. 41.

⁸¹⁷ San Remo Manual, pars 161-8.

⁸¹⁸ San Remo Manual, par. 39.

⁸¹⁹ San Remo Manual, par. 42(b).

⁸²⁰ San Remo Manual, pars 4 & 46(d).

⁸²¹ San Remo Manual, par. 46; Art. 57(2) Protocol I. *See also* San Remo Manual, pars 72-77, which set out certain precautions aimed at minimising harm to civil aircraft, unique to the San Remo Manual.

⁸²² San Remo Manual, par. 66.

⁸²³ San Remo Manual, par. 61.

⁸²⁴ San Remo Manual, par. 68.

as to military aircraft⁸²⁵ and enemy⁸²⁶ and neutral⁸²⁷ civil aircraft. Thus the San Remo Manual is applicable to aerial warfare, at least in so far as attacks from the sea are concerned. These developments may indicate that wider aspects of the modern *jus in bello*, as it applies on land, are equally applicable in air and at sea. It may be that on this basis the reprisal prohibitions in Protocol I, so far as they are incorporated into customary law, are applicable to those additional areas of operation. Some caution would be required, however, as the San Remo Manual is not a treaty as such, but rather a restatement of the law by legal and naval experts acting in their personal capacity,⁸²⁸ and contains a number of provisions which may be considered progressive developments in the law.⁸²⁹

3. CIVILIAN OBJECTS

Article 52(1) of Protocol I provides that: "Civilian objects shall not be the object of attack or reprisals."⁸³⁰ Civilian objects are defined, negatively, as "all objects which are not military objectives".⁸³¹ Military objectives are, in turn, defined as:

⁸²⁵ San Remo Manual, par. 66.

⁸²⁶ San Remo Manual, par. 64.

⁸²⁷ San Remo Manual, par. 71.

⁸²⁸ See Introductory Note, San Remo Manual.

⁸²⁹ *Id. See, also*, Roberts & Guelff (2000), p. 573. On the other hand, it might be argued that the San Remo Manual merely involves a clarification or elaboration on Article 57(4) of Protocol I which provides for protections of civilians and civilian objects at sea or in the air as follows:

In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

⁸³⁰ Art. 52(1), Protocol I. The prohibition of reprisals against civilian objects was the most controversial reprisal prohibition in Protocol I. Committee III adopted Article 52(1) by a vote of 58 to 3 with 9 abstentions (CDDH/III/SR.24, par. 16, *reprinted in* Federal Political Department (Switzerland), *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*, Federal Political Department, Bern, 1978 (hereinafter Official Records), vol. XIV, p. 217). The benefit of a prohibition on reprisals against civilian objects is that it strengthens protections against civilians generally; were civilian objects to be targeted in reprisals, the collateral damage to civilians themselves would be extensive. On the other hand, the prohibition has been criticised as unrealistic. It has been suggested that granting states a limited right to conduct reprisals against civilian objects – instead of prohibiting reprisals in their entirety – may be a case of choosing the lesser of two evils: If States insist on carrying out reprisals, it is better that they carry them out against civilian objects than civilian populations. If both forms of reprisals are prohibited, States may in practice end up carrying out reprisals against civilians as much as, or more than, civilian objects (*see* Kwakwa (1990), p. 63; Kalshoven (1990), pp. 47-8; Mitchell (2001), pp. 165-6).

those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁸³²

Thus, civilian objects are not defined in terms of objects falling within the ownership or possession of civilians, but rather in terms of their lack of military significance. This may indicate a shift from the position in the Geneva Conventions, where Geneva Convention IV provides that “reprisals against protected persons and their property are prohibited”.⁸³³ It might be pointed out that protected property in the latter context appears to be defined in terms of ownership rather than military advantage. Under Protocol I, an object belonging to the armed forces could theoretically constitute a “civilian object” if its destruction offered no definite military advantage.⁸³⁴ At the same time, a house or other object belonging to civilians could theoretically constitute a “military objective”, and thus not qualify for protection.⁸³⁵ It should be noted that the protections accorded by Protocol I are

⁸³¹ Art. 52(1), Protocol I.

⁸³² Art. 52(2), Protocol I.

⁸³³ Art. 33(3), Geneva Convention IV.

⁸³⁴ This may be unlikely given that “military advantage” is to be judged in terms of the advantage anticipated from the attack as a whole, and not in terms of the advantage accruing from isolated or particular aspects of the attack (Bothe *et al.* (1982), pp. 324-5; *see, also*, interpretative statements upon ratification of Protocol I by Belgium (*reprinted in* Roberts & Guelff (2000), p. 501), Canada (*id.*, p. 503), Italy (*id.*, p. 507), the Netherlands (*id.*, p. 508) and New Zealand (*id.*, p. 508). In addition, military advantage may refer to a number of possible advantages, including security to troops (Bothe *et al.* (1982), p. 324; interpretative statement of New Zealand (*reprinted in* Roberts & Guelff (2000), p. 508), or benefits derived from the mere harassment of enemy forces even where objects destroyed are of no particular significance to either side (*see* Bothe *et al.* (1982), pp. 307-8, particularly in relation to harassing and interdiction fires).

⁸³⁵ In the case of doubt, however, as to whether an object which is normally dedicated to civilian purposes, is being used to make an effective contribution to military action, Article 52(3) of Protocol I creates the presumption that it is a civilian object and immune from direct attack or reprisals (Art. 52(3), Protocol I). Bothe *et al.* (1982) state that this presumption may be overturned whenever a commander or other responsible decision-maker concludes that the object is in fact being used to make an effective contribution to military action on the basis of information reasonably available to him at the time (p. 326). This is consistent with a number of interpretative statements made by States upon signature or ratification of Protocol I. Italy, for *e.g.*, stated that “[i]n relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time” (*reprinted in* Roberts & Guelff (2000), p. 507). Similar statements were made by Australia (*id.*, p. 500), Belgium (*id.*, p. 501), the Netherlands (*id.*, p. 508), New Zealand (*id.*, p. 508), Spain (*id.*, p. 509) and the UK (*id.*, p. 510). *See, however*, Sandoz *et al.* (1987), par. 2034, where it is implied that the test requires “certainty” on the part of commanders.

additional to those accorded by the Geneva Conventions.⁸³⁶ Thus, if Geneva Convention IV confers protection over property on the basis of ownership, then these protections may be additional to those in Protocol I – at least in relation to property belonging to that narrow class of civilians protected by the Convention. On the other hand, these protections are limited in a number of ways: Property in occupied territory (including property belonging to civilians) may be destroyed where such destruction is rendered “absolutely necessary by military operations.”⁸³⁷ Civilians in the hands of a party to the conflict of which they are not a national may lose their protections under Geneva Convention IV, including the protection of their property, where they engage in, or are definitely suspected of engaging in, hostile activity.⁸³⁸ Whilst the protections accorded to civilian objects are in general wider under Protocol I than under Geneva Convention IV, in particular as a result of Protocol I’s application to all civilians on land regardless of the territorial status of that land, there may theoretically be certain circumstances where civilian objects not qualifying for protection under Protocol I nevertheless qualify for protection under Geneva Convention IV. On the other hand, the principle of distinction as it applied to property was left in a state of disorder and uncertainty prior to its clarification in Protocol I,⁸³⁹ and it may be that on that basis, Article 52 of Protocol I is to be treated as the most precise statement of the principle.

4. CULTURAL OBJECTS AND PLACES OF WORSHIP

According to Article 53 of Protocol I it is prohibited to make “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples...the object of reprisals.”⁸⁴⁰ Article 53 appears to provide protection to substantially the same objects protected under the Hague Cultural Property Convention of 1954 which protects “property of great importance to the cultural heritage of every people”.⁸⁴¹ According to the ICRC, there was no question during the Diplomatic Conference of 1974-77 of creating a new category of cultural

⁸³⁶ See Art. 1(3), Protocol I.

⁸³⁷ Art. 53, Geneva Convention IV.

⁸³⁸ Art. 5(1), Geneva Convention IV.

⁸³⁹ See Rogers (1996), chapter 2.

⁸⁴⁰ Art. 53, Protocol I.

⁸⁴¹ Sandoz *et al.* (1987), par. 2064; Bothe *et al.* (1982), p. 333.

objects.⁸⁴² Differences in terminology (for instance, the inclusion of “spiritual” heritage in Article 53 of Protocol I) may be explained as being more a matter of clarification than deviation from the Cultural Property Convention.⁸⁴³ The reprisal prohibition in Article 53 of Protocol I, therefore, appears to replicate the reprisal prohibition in the Cultural Property Convention.

There is a degree of overlap between Article 53 and Article 52 of Protocol I. To the extent that the objects listed in Article 53 are “civilian objects” they are already immune from reprisals under Article 52. An ancient cathedral, as an object normally dedicated to civilian purposes, is presumed to be a “civilian object” as a result of the presumption mandated by Article 52(3).⁸⁴⁴ Where, however, it is clear that that cathedral is being used to make an effective contribution to military action, and action against it would offer a definite military advantage, then its immunity under Article 52 is lost.⁸⁴⁵ It may, however, still retain its protection under Article 53. Article 53 differs from Article 52 in that it makes no express provision for loss of immunity. At the same time, the protections accorded to objects under Article 53 are accorded “[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments”.⁸⁴⁶ To the extent that the Cultural Property Convention and other relevant instruments, such as the Hague Conventions and Regulations of 1907, make provision for loss of immunity or protection for cultural property, those provisions may continue to apply. Under the Cultural Property Convention, certain protections, including immunity of cultural property from acts of hostility directed against such property, may be waived in cases of imperative or unavoidable military necessity.⁸⁴⁷ Under the Hague Conventions and

⁸⁴² Sandoz *et al.* (1987), par. 2064, n. 23.

⁸⁴³ *See id.*, par. 2064.

⁸⁴⁴ Art. 52(3), Protocol I.

⁸⁴⁵ *See* Arts 52(1)-(2), Protocol I.

⁸⁴⁶ Art. 53, Protocol I.

⁸⁴⁷ The Cultural Property Convention creates a two-pronged system of protection for cultural property. Chapter I of the Convention sets out ordinary protections for “cultural property” as defined in Article 1 of the Convention (Arts 1-7); in addition, a set of special protections are set out in Chapter II for refuges intended to shelter moveable cultural property, centres containing monuments, and immovable cultural property of very great importance, provided they fulfil certain qualifications (Arts 8-11). In terms of cultural property generally, parties are under an obligation, *inter alia*, to refrain from (1) any use of the property and its immediate surroundings, or of the appliances in use for its protection, for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and (2) any act of hostility directed against such property (Art. 4(1), Cultural Property Convention). These

Regulations of 1907, the protections accorded to cultural property during sieges and bombardments, including from naval forces, may be waived where such property is being used, at the time, for military purposes.⁸⁴⁸ It is unclear whether Parties to Protocol I must also be Parties to (or otherwise bound by) the earlier Conventions in order to avail themselves of the waiver provisions in those Conventions, or whether those waiver provisions are impliedly incorporated into the terms of Article 53 for all Parties. The ICRC suggests the former interpretation: "...in case of a contradiction between [Article 53 of Protocol I] and a rule of the 1954 Convention the latter is applicable, though of course only in so far as the Parties concerned are bound by that Convention. If one of the Parties is not bound by the Convention, Article 53 applies."⁸⁴⁹ On the other hand, the delegates to the Diplomatic Conference indicated, during their discussions concerning Article 53, that there was no need to revise the existing rules on the subject of cultural property.⁸⁵⁰ This may suggest that Article 53 was intended as a restatement of existing rules, and that existing exceptions to the immunity of cultural objects were impliedly incorporated into Article 53. This was the understanding of a number of delegates to the Conference. Upon ratification of Protocol I, the United Kingdom and Ireland both declared that if objects protected by Article 53 were unlawfully used for military purposes, they would thereby lose protection from attacks directed against them.⁸⁵¹ These declarations were made despite the fact the United Kingdom and Ireland had each signed, but not ratified, the Cultural Property Convention. It would be insufficient to explain these declarations on the basis that both States were merely availing themselves of the waiver provisions in the Hague Conventions and Regulations of 1907 which they were entitled to rely upon on the basis that they had entered customary law. Article 53 of

obligations may be waived "in cases where military necessity imperatively requires such a waiver" (Art. 4(2)). In terms of specially protected property, parties are under an obligation, *inter alia*, to refrain from (1) any act of hostility directed against such property; and (2) any use of such property or its surroundings for military purposes (Art. 9). These obligations may be waived in "exceptional cases of unavoidable military necessity" (Art. 11(2)). Rogers submits that there is no difference between "imperative" and "unavoidable" military necessity (Rogers (1996), p. 93; *see, also, id.*, p. 99).

⁸⁴⁸ Art. 27(1), Hague Regulations of 1907; Article 5(1), Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 18 October 1907, [1910] UKTS 13.

⁸⁴⁹ Sandoz *et al.* (1987), par. 2046. *See, also*, Bothe *et al.* (1982), p. 330, n. 2. On this basis, Rogers stated, prior to the UK's ratification of Protocol I, that: "The United Kingdom would be well advised either to ratify the Cultural Convention before ratifying Protocol I or to make an appropriate reservation on ratifying Protocol I" (Rogers (1996), p. 103).

⁸⁵⁰ Sandoz *et al.* (1982), par. 2046.

⁸⁵¹ Roberts & Guelff (2000), pp. 506, 511.

Protocol I applies to cultural objects in a number of circumstances not covered under the 1907 Conventions and Regulations – for instance, in relation to enemy territory not under occupation – yet the declarations purportedly applied to all objects protected by Article 53. It may be possible to explain the declarations as reservations that depart from the letter and spirit of Article 53. On the other hand, a number of delegates indicated, during the course of the Conference, that their understanding of the purport and effect of Article 53 was that should the objects protected under the Article be used in support of the military effort, these objects would lose their protection.⁸⁵²

Where a Party to Protocol I relies upon provisions relating to loss of protection of cultural objects or places of worship under the Cultural Property Convention, or other relevant Conventions, not only must the conditions for loss of protection be met under those Conventions, the object must also fall within the definition of a “military objective” under Article 52 of Protocol I.⁸⁵³ Otherwise, the object will remain protected as a “civilian object” under Article 52 – and such protection is not made subject to the provisions of other conventions. Of course, any cultural object which loses its immunity under the Cultural Property Convention or the Hague Conventions and Regulations of 1907 is almost certain to fall within the definition of a “military objective” under Article 52 in any event.

Any cultural object or place of worship ordinarily entitled to protection under Article 53 which loses its immunity may be made the object of direct attack – provided of course that such attack satisfies other applicable requirements, including those related to precautions in attack.⁸⁵⁴ It follows therefore that any such attack against it, using lawful means and methods of warfare, cannot amount to a “reprisal” as the attack would not be *prima facie* unlawful. But what of the situation where a cultural object or place of worship which has lost its immunity under Article 53 is attacked using unlawful weapons as a reprisal? Such reprisal would appear to be prohibited under the terms of Article 53 which precludes such objects from being made the object of reprisals; it appears that the loss of immunity does not render the

⁸⁵² See CDDH/SR.42, par. 16 (*reprinted in* Official Records, vol. VI, p. 205); CDDH/SR.42, annex (*reprinted in* Official Records, vol. VI, pp. 219-42); Bothe *et al.* (1982), p. 333.

⁸⁵³ See Sandoz *et al.* (1982), par. 2079.

⁸⁵⁴ See, e.g., Art. 57, Protocol I.

object liable to reprisals. This is because the exceptions to Article 53 – namely, the provisions of the Cultural Property Convention and other relevant international instruments – may provide for loss of immunity from direct attack, but do not provide for the loss of protection against reprisals, meaning that the prescription of Article 53(c), prohibiting reprisals against cultural objects and places of worship, is not open to waiver. Article 4(2) of the Cultural Property Convention allows a waiver – in the case of imperative military necessity – of the obligations set out in Article 4(1); the prohibition on reprisals, however, is contained in Article 4(4), and therefore falls outside of those obligations open to waiver. The Hague Conventions and Regulations of 1907, on the other hand, do not set out any prohibition on reprisals. This may leave open the theoretical question of whether a State bound by the Hague Conventions and Regulations of 1907, but not the Cultural Property Convention, may carry out a reprisal against cultural property which has lost its immunity under the 1907 Conventions and Regulations. On the one hand it might be said that a reprisal attack against an object which has lost its immunity under the 1907 Conventions and Regulations would not be impermissible under those Conventions and Regulations; thus if Article 53(c) of Protocol I is without prejudice to the 1907 provisions then Protocol I cannot prohibit reprisals in such a context. On the other hand, it might be said that the 1907 provisions leave the issue of reprisals untouched – thus, a prohibition on reprisals in Article 53(c) of Protocol I can hardly be said to “prejudice” the 1907 provisions given that there is no direct conflict as such. As the silence of the 1907 provisions in relation to reprisals appears to have been based in part on concern that by expressly dealing with the matter the 1907 Conventions and Regulations would be seen to legitimise their use and arrest the development of customary law against such use,⁸⁵⁵ the latter interpretation appears to be the better one: The prohibition on reprisals in Article 53(c) of Protocol I does not “prejudice” the provisions of the 1907 Conventions and Regulations, notwithstanding that reprisals against cultural objects which have lost their immunity under the 1907 provisions would be perfectly lawful under the terms of those provisions.

5. OBJECTS INDISPENSABLE TO THE CIVILIAN POPULATION

⁸⁵⁵ *See above.*

Article 54(4) of Protocol I provides that objects indispensable to the survival of the civilian population “shall not be made the object of reprisals.”⁸⁵⁶ Such objects are not exhaustively defined by Protocol I (nor by any other international instrument) although an illustrative list is provided in Article 54(2) whereby such objects include “foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.⁸⁵⁷ The protection of objects indispensable to the civilian population is significant in that it confers protection on items that are of use and importance to the civilian population, but may not qualify for protection as “civilian objects” as defined by Protocol I.⁸⁵⁸ Civilian objects are defined negatively, in terms of their lack of military significance, whereas objects indispensable to the survival of the civilian population are illustrated positively, in terms of their significance to civilians. In relation to the general protection afforded objects indispensable to survival under Article 54(2), it is prohibited to attack, destroy, remove or render useless such objects “for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party”.⁸⁵⁹ Exceptions apply, within certain limits, where the objects are used by an adverse party solely for the sustenance of their armed forces,⁸⁶⁰ or in direct support of military action,⁸⁶¹ as well as in the case of defence of unoccupied territory by defending forces.⁸⁶² Thus, direct attacks upon such objects do not violate the general protection afforded such objects *per se*; rather, the infraction is dependent upon the presence of a “specific purpose” to deny the sustenance value of such objects to civilians, or to enemy forces in the case where civilians also rely upon those objects. If an object indispensable to survival falls within the definition of a “military objective” under Article 52, it may be attacked, at least consistently with Article 54(2), provided there is no relevant specific purpose.⁸⁶³ The prohibition on reprisals, however, does not depend upon the establishment of any specific purpose. Nevertheless, where an object indispensable

⁸⁵⁶ Art. 54(4), Protocol I.

⁸⁵⁷ Art. 54(2), Protocol I.

⁸⁵⁸ Art. 52(1), Protocol I.

⁸⁵⁹ Art. 54(2), Protocol I.

⁸⁶⁰ Art. 54(3)(a), Protocol I.

⁸⁶¹ Art. 54(3)(b), Protocol I.

⁸⁶² Art. 54(5), Protocol I.

⁸⁶³ Bothe *et al.* (1982), p. 339.

to survival may be attacked consistently with Article 52 and Article 54(2), any attack against it, using lawful means and methods of warfare, for the purpose of coercing an enemy into compliance with the law could only be described as a “retorsion” and not a “reprisal”. On the other hand, reprisals consisting in the use of unlawful weapons or methods of warfare against objects indispensable to survival are prohibited under Article 54(4) of Protocol I, even where there is no “specific purpose” as elaborated in Article 54(2).

6. NATURAL ENVIRONMENT

Article 55(2) of Protocol I provides that: “Attacks against the natural environment by way of reprisals are prohibited.”⁸⁶⁴ It should be noted that attacks against the “natural environment” are not prohibited as such by Protocol I. Therefore Article 55(2) only prohibits reprisals consisting in otherwise *unlawful* attacks against the natural environment. Protection is accorded to the natural environment in Article 55(1) of Protocol I as follows:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.⁸⁶⁵

Nothing in the wording of Article 55(1) requires the realisation of any particular harm to the natural environment as such; rather, what is prohibited is the use of methods or means of warfare specifically “intended” to cause widespread, long-term and severe damage to the environment, or alternatively, the use of methods or means which “may be expected” to cause such damage.⁸⁶⁶ The latter standard appears to require an objective expectation that such damage would flow from the use of the methods or means in question.⁸⁶⁷ The level of damage which must be intended or expected is quite extreme, being described in Article 55(1) in conjunctive terms as consisting in widespread, long-term *and* severe damage. During the course of the

⁸⁶⁴ Art. 55(2), Protocol I.

⁸⁶⁵ Art. 55(1), Protocol I.

⁸⁶⁶ Bothe *et al.* (1982), p. 345.

⁸⁶⁷ Bothe *et al.* (1982), p. 345.

Geneva Diplomatic Conference which promulgated Protocol I, the Report of Committee III did not address the meaning of “widespread” or “severe”,⁸⁶⁸ but it did address itself to the meaning of “long-term”, noting that while it was impossible to say with certainty what period of time may be involved, it was considered by some to be measured in decades, and that references to twenty or thirty years were made by some delegates as being a minimum.⁸⁶⁹

The reprisal prohibition in Article 55(2) prohibits reprisal attacks “against” the natural environment. This implies that while reprisal attacks “intended” to cause widespread, long-term and severe damage to the natural environment are prohibited, reprisal attacks which are only “expected” to cause such damage are not, at least under the terms of Article 55(2). The term “against” implies a prohibition on direct attacks rather than those which may be expected to produce certain collateral effects. At the same time, by prohibiting “[a]ttacks against the natural environment by way of reprisals”, Article 55(2) appears to prohibit reprisals consisting in *any* unlawful attack against the natural environment and not just those provided for under Article 55(1). Protection of the natural environment is also provided for under Article 35(3) of Protocol I which provides that: “It is prohibited to employ means and methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”⁸⁷⁰ The prohibition is almost identical to that in Article 55(1), with the exception that Article 55(1) adds the qualification “and thereby to prejudice the health or survival of the population.” It is not clear whether this amounts to an additional substantive requirement as such, or whether it merely clarifies the purpose of Article 55(1). Article 55(1) relates to the protection of the civilian population whereas Article 35(3) relates to the prohibition of unnecessary injury.⁸⁷¹ One clear substantive difference between Article 55(1) and Article 35(3) is that Article 55(1) is limited in its scope of operation to hostilities which may affect the civilian population, individual civilians, civilian objects or

⁸⁶⁸ Bothe *et al.* (1982), p. 346.

⁸⁶⁹ CDDH/215/Rev.1, par. 27 (*reprinted in* Official Records, vol. XV, p.259).

⁸⁷⁰ Art. 35(3), Protocol I.

⁸⁷¹ CDDH/III/GT/35, p. 3, par. 11, *reprinted in* H.S. Levie (ed.), *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, Oceana Publications Inc., Dobbs Ferry, NY, 1980, vol. 3, p. 268. Art. 55(1), Protocol I refers merely to the “population” rather than the “civilian population”. The omission appears to be deliberate, serving to emphasize the fact that as the relevant damage to the natural environment is long-term it is likely to affect the whole population without distinction (*see* Sandoz *et al.* (1987), par. 2134).

other objectives on land;⁸⁷² whereas Article 35(3) is of wider scope, relating to all means or methods of warfare including those in the air or at sea.⁸⁷³ Thus environmental damage on the high seas, for example, may fall within the prohibition in Article 35(3), but not Article 55(1). Any attack upon the natural environment contrary to Article 35(3) of Protocol I by way of reprisal would appear to be prohibited by Article 55(2), regardless of whether the attack is prohibited under the terms of Article 55(1). Protection of the natural environment is also provided for in the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) of 1980, Article 2(4) of which makes it “prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except where such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.” This prohibits certain attacks against the natural environment as such. It is therefore possible that Article 55(2) of Protocol I renders violations of Article 2(4) of the Protocol on Incendiary Weapons by way of reprisals, impermissible. In addition, protection of the natural environment is directly provided for in the United Nations Convention on the Prohibition of Military and any other Hostile Use of Environmental Modification Techniques of 1976 (also known as the ENMOD Convention). Article 1(1) of the ENMOD Convention provides that each State Party to the Convention:

undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.⁸⁷⁴

Whereas Article 55(1) of Protocol I provides certain protection to the natural environment against attacks by *any* methods or means, the ENMOD Convention prohibits only certain methods or means, specifically those involving the deliberate manipulation of the natural processes of the Earth, its contents, or surrounds.⁸⁷⁵ On the other hand, the ENMOD Convention prohibits the use of such methods or means against any other State Party – which is to say, against its armed forces, civilian

⁸⁷² Art. 49(3), Protocol I; Rogers (1996), p. 113.

⁸⁷³ Rogers (1996), p. 113; Sandoz *et al.* (1982), par. 1449.

⁸⁷⁴ Art. 1(1), Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 10 December 1976, 1108 UNTS 151.

⁸⁷⁵ See Sandoz *et al.* (1987), par. 1451.

population, towns, industries, agriculture, transportation and communication networks, natural resources and wealth or other objectives,⁸⁷⁶ whereas Article 55(1) of Protocol I only prohibits certain attacks intended or expected to damage the natural environment. In this sense, it could be argued that the ENMOD Convention is not concerned with attacks “against” the natural environment as such, as the environment is merely manipulated as a method or means of attack rather than as a target as such. There may be some doubt, therefore, as to whether the prohibition on reprisals in Article 55(2) of Protocol I prohibits violations of the ENMOD Convention by way of reprisals.

7. WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

Article 56(4) of Protocol I provides that it is prohibited “to make any of the works, installations or military objectives mentioned in [Article 56(1)] the object of reprisals.”⁸⁷⁷ Article 56(1) protects certain works and installations containing dangerous forces as well as certain other military objectives from attack. These objects appear to be limited⁸⁷⁸ to (1) dams, dykes and nuclear electrical generating stations where an attack upon them “may cause the release of dangerous forces and consequent severe losses among the civilian population”; and (2) other military objectives located at or in the vicinity of these works or installations where an attack upon them “may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population”.⁸⁷⁹

Article 56(2) provides for loss of immunity from attack, of objects protected under Article 56(1), under certain highly restrictive circumstances. Thus, in relation to dams and dykes, loss of protection against attack occurs where a dam or

⁸⁷⁶ *Id.*

⁸⁷⁷ Art. 56(4), Protocol I.

⁸⁷⁸ Art. 56(1), Protocol I states that works or installations containing dangerous forces are “*namely* dams, dykes and nuclear electrical generating stations...” (emphasis added). This implies an exhaustive, rather than an illustrative, list. In particular, it may be contrasted with Art. 54(2), Protocol I which prohibits attacks upon objects indispensable to the civilian population which are said to be objects “such as” foodstuffs *etc.*

⁸⁷⁹ Art. 56(1), Protocol I. By referring to attacks which “may” cause the release of dangerous forces and consequent severe losses among the civilian population, Article 56(1) imposes a high standard of care – it is not merely attacks which are “likely” or may be “expected” to produce this result which are prohibited (Bothe *et al.* (1982), p. 353).

dyke is (1) “used for other than its normal function”,⁸⁸⁰ *i.e.* for a purpose other than containing an actual or potential body of water;⁸⁸¹ (2) used “in regular, significant and direct support of military operations”;⁸⁸² and (3) where an attack “is the only feasible way to terminate such support”.⁸⁸³ In relation to nuclear electrical generating stations, loss of protection against an attack occurs where a station (1) “provides electric power in regular, significant and direct support of military operations”;⁸⁸⁴ and (2) where an attack “is the only feasible way to terminate such support”.⁸⁸⁵ It has been observed that in practice, electricity is conducted to both civilian and military destinations,⁸⁸⁶ and that it is difficult to check the source of supply in an integrated grid.⁸⁸⁷ It has also been observed that it is relatively easy to stop electricity reaching its destination by attacking electricity lines, as opposed to nuclear electrical generating stations.⁸⁸⁸ In relation to other military objectives, protected under Article 56(1) by virtue of their location at or in the vicinity of dams, dykes or nuclear electric generating stations, loss of protection against attack occurs where such objects are (1) “used in regular, significant and direct support of military operations”;⁸⁸⁹ and (2) where such attack “is the only feasible way to terminate such support”.⁸⁹⁰

Where an object ordinarily protected under Article 56(1) loses its immunity as provided for above, it is still protected against reprisals. This is because the provision concerning loss of immunity merely states that the protections provided by Article 56(1) shall cease in the circumstances mentioned, whereas the protections against reprisals are located in Article 56(4) and thus not open to waiver.⁸⁹¹ If an object has lost its immunity under Article 56(1) then any attack against it using lawful methods and means of warfare is not prohibited and cannot amount to a

⁸⁸⁰ Art. 56(2)(a), Protocol I.

⁸⁸¹ Sandoz *et al.* (1987), par. 2161; CDDH/215/Rev.1, par. 88, *reprinted in* Official Records, vol. XV, p. 259.

⁸⁸² Art. 56(2)(a), Protocol I. Bothe *et al.* (1982) view this as creating a higher standard than is used in Article 52, *i.e.*, “effective contribution to military action” (p. 355; *see, also*, Sandoz *et al.* (1987), par. 2162).

⁸⁸³ Art. 56(2)(a), Protocol I.

⁸⁸⁴ Art. 56(2)(b), Protocol I.

⁸⁸⁵ Art. 56(2)(b), Protocol I.

⁸⁸⁶ Sandoz *et al.* (1987), par. 2165.

⁸⁸⁷ Bothe *et al.* (1982), p. 355.

⁸⁸⁸ Sandoz *et al.* (1987), par. 2166.

⁸⁸⁹ Art. 56(2)(c), Protocol I.

⁸⁹⁰ Art. 56(2)(c), Protocol I.

⁸⁹¹ Art. 56(2), Protocol I.

reprisal, but any reprisal attack against it using unlawful methods or means is prohibited under the terms of Article 56(4).

What is uncertain is whether Article 56(4) renders the objects listed in Article 56(1) immune from reprisals in all circumstances, or only in the circumstances set out in Article 56(1) – namely, where an attack upon it “may cause the release of dangerous forces [from the works or installations] and consequent severe losses among the civilian population.”⁸⁹² Article 56(4) states that the objects “mentioned in paragraph 1” are protected against reprisals, but paragraph 1 protects certain objects *in certain circumstances*. If the objects listed are immune from reprisals in *all* circumstances, then *any* illegal attack against them by way of reprisals (for *e.g.* through the use of an unlawful weapon) becomes impermissible, even if the particular attack is not otherwise contrary to Article 56(1). The common sense answer is probably that Article 56(4) only prohibits reprisals against objects listed in Article 56(1) under the circumstances provided in that paragraph, namely where an attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Article 56 appears to have been geared towards protection against serious loss of human life.⁸⁹³ Article 56 is located within Part IV of Protocol I concerned with the Civilian Population. Article 56(4) therefore appears to be intended as a means of directly protecting the civilian population. It may also be pointed out that Article 56 protects “works and installations containing dangerous forces”, whereas a nuclear electrical generating station which has not yet come on line, for *e.g.*, does not yet contain “dangerous forces”. Thus it is probably fair to conclude that Article 56(4) prohibits reprisals against the objects mentioned in Article 56(1) only in the circumstances there mentioned.

8. CONCLUSION

If the reprisal prohibitions in Protocol I have not entered customary international law, then a significant catalogue of persons and objects could lawfully be made the target of reprisals by those States to which the reprisal prohibitions in Protocol I are non-opposable. Thus, for instance, reprisal attacks could lawfully be carried out against

⁸⁹² Art. 56(1), Protocol I.

⁸⁹³ See Rogers (1996), p. 117.

civilians in enemy territory. Given that the civilian objects protected under Geneva Convention IV are those belonging to protected civilians,⁸⁹⁴ the property of civilians in enemy territory (including their houses) could be attacked in reprisal together with individual civilians or the civilian population if the reprisal prohibitions in Protocol I are not binding as a matter of general international law. The same could be said of cultural objects and places of worship and objects indispensable to the survival of the civilian population (where not protected as civilian objects under Geneva Convention IV) and the natural environment and works and installations containing dangerous forces.

Even if we assume, however, that the reprisal prohibitions in Protocol I have entered general international law, there may still be a number of legitimate reprisal measures lawfully open to belligerents. While the catalogue of reprisal prohibitions in Protocol I and the Geneva Conventions covers most persons and objects other than effective combatants and their arms and equipment,⁸⁹⁵ it would be going too far to conclude, as the ICRC's Commentary to Protocol I does, that "the Conventions and Protocol incontestably prohibit reprisals against any person who is not a combatant in the sense of Article 43 (Armed Forces), and any object which is not a military objective."⁸⁹⁶ In fact, there appear to be reprisal measures other than those against combatants and military objectives which do not fall within any conventional prohibition. These *lacunae* arise, in part, as a result of the failure of Protocol I to incorporate a general prohibition on reprisals against all objects and persons protected by Protocol I and the Geneva Conventions. The ICRC's Commentary to Protocol I notes that some States expressed the fear that in prohibiting reprisals in a piecemeal fashion, as occurs in Articles 20 & 51-56, some persons and objects may be overlooked.⁸⁹⁷ A number of delegates to the Geneva Diplomatic Conference of 1974-77 had supported the adoption of a general provision on reprisals,⁸⁹⁸ and two competing (and mutually exclusive) proposals were

⁸⁹⁴ See above.

⁸⁹⁵ Bristol (1979), p. 427.

⁸⁹⁶ Sandoz *et al.* (1987), par. 3456.

⁸⁹⁷ *Id.*, par. 3456.

⁸⁹⁸ *Id.* par 3423. See, also, *id.*, pars 3440-3448. Greenwood notes that: "Although the ICRC had at one point contemplated including a general provision dealing with reprisals in Draft Protocol I, the opposition which this proposal aroused at the Conference of Government Experts led it to abandon this idea." ((1989)(b), p. 235).

submitted during the course of the Conference to this end.⁸⁹⁹ The first of these was a proposal by Poland to insert an amendment into the Protocol in the following terms: "Measures of reprisals against persons and objects protected by the Conventions and by the present Protocol are prohibited."⁹⁰⁰ The alternative proposal was that by France whose proposed amendment expressly recognised a right to take reprisals involving breaches of Protocol I (but not the Geneva Conventions) where certain preconditions were met.⁹⁰¹ Those preconditions were arguably more stringent than the requirements of customary law. Strangely, however, the proposal only recognised a right to take reprisals in answer to violations of Protocol I; thus leaving the right of reprisals in answer to violations of the Geneva Conventions or other rules applicable in armed conflict unclear. An odd result given that the purpose of the proposal must surely have been to bring some measure of clarity to the right to reprisals. The French proposal received the clear backing of Australia, Belgium, Canada, the

⁸⁹⁹ Sandoz *et al.* (1987), par. 3434.

⁹⁰⁰ CDDH/III/103, *reprinted in* Official Records, vol. III, p. 313.

⁹⁰¹ The French Proposal provided that:

1. In the event that a party to a conflict commits serious, manifest and deliberate breaches of its obligations under this Protocol, and a party victimized by these breaches considers it imperative to take action to compel the party violating its obligations to cease doing so, the victimised party shall be entitled, subject to the provisions of this Article, to resort to certain measures which are designed to repress the breaches and induce compliance with the Protocol, but which would otherwise be prohibited by the Protocol.

2. The measures described in paragraph 1 of the Article may be taken only when the following conditions are met:
(a) The measure may be taken only when other efforts to induce the adverse party to comply with the law have failed or are not feasible, and the victimized party clearly has no other means of ending the breach;
(b) The decision to have recourse to such measures must be taken at the highest level of the government of the victimized party; and
(c) The party committing the breach must be given specific, formal and prior warning that such measures will be taken if the breach is continued or renewed.

3. If it proves imperative to take these measures, their extent and their means of application shall in no case exceed the extent of the breach which they are designed to end. The measures may not involve any actions prohibited by the Geneva Conventions of 1949. The measures must cease, in all events, when they have achieved their objective, namely, cessation of the breach which prompted the measure.

(CDDH/I/221/Rev.1, *reprinted in* Official Records, vol. III, p. 324).

Federal Republic of Germany, Switzerland, the UK and the US.⁹⁰² The opposition it engendered, however, was far wider.⁹⁰³ In stressing the need for a general prohibition on reprisals (as opposed to a collection of piecemeal prohibitions), the representative of Poland stated, in a meeting of Working Group B, where the issue of the competing proposals was dealt with from 19 to 21 April, 1977, that the Protocol left open certain *lacunae*.⁹⁰⁴ Ultimately, however, it became clear that neither the Polish nor the French proposal could muster sufficient votes and both were simultaneously withdrawn.⁹⁰⁵ It is of course fair to say that the reason for this lay at least partly in the fact that both proposals were put at a relatively late stage in the drafting process when the matter of reprisals had already largely been decided and this opened up significant difficulties from a procedural point of view.⁹⁰⁶ On the other hand it may be argued that the Conference *rejected* the position that Protocol I prohibits reprisals in a blanket manner against all persons and objects protected by the Protocol, although at a formal level it could be argued that Poland voluntarily withdrew its submission and the matter was never put to a vote. As Nahlik has stated:

As the matter now stands, only specific categories of persons and objects are protected from reprisals. Even if those categories comprise *most* of the persons and objects mentioned in the Protocol, *some* have been excluded... The possibility of an *a contrario* reasoning (*inclusio unius est exclusio alterius*), allowing persons or objects not covered specifically by any of the prohibitory clauses to be lawfully exposed to reprisals, cannot be excluded. Should such interpretation occur, the lack of a general prohibitory provision would prove, too late, how misguided the Conference had been.⁹⁰⁷

⁹⁰² See CDDH/I/SR.46, pars 45-55, *reprinted in* Official Records, vol. IX, p. 55; CDDH/I/48, pars 25-28 & 54, *reprinted in* Official Records, vol. III, p. 40. Switzerland, however, did suggest enlarging the category of immune persons and objects (CDDH/I/SR.46, pars 50-52, *reprinted in* Official Records, vol. IX, p. 55).

⁹⁰³ See, e.g., CDDH/I/SR.46, pars 28-44, *reprinted in id.*; CDDH/I/SR.47, pars 20-32, 39-60, *reprinted in* Official Records, vol. IX, p. 67; CDDH/I/SR.48, pars 1, 9-13, 18-23, 29-39, 57, *reprinted in* Official Records, vol. IX, p. 83. While much of the opposition to the French proposal was unequivocal, some of it was directed at specific aspects of the proposal, rather than the proposal in its entirety.

⁹⁰⁴ S.E. Nahlik, "Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva, 1974-1977", (1978) 42 *Law and Contemporary Problems* 36, p. 56. In particular he noted that there was no express prohibition on reprisals against: remains of the deceased, enemies *hors de combat*, occupants of aircraft, members of the armed forces and military units assigned to civil defense organizations, women and children vulnerable to rape, forced prostitution, or indecent assault, and undefended localities and demilitarized zones.

⁹⁰⁵ S.E. Nahlik, "From Reprisals to Individual Penal Responsibility", in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Challenges Ahead*, Nijhoff Publishers, Dordrecht, 1991, pp. 171-2.

⁹⁰⁶ See *id.*, p. 169; see, also, Nahlik (1978), pp. 51-66.

⁹⁰⁷ Nahlik (1978), pp. 64-5.

The list of persons or objects receiving no express protection against reprisals includes:

- *Persons or Objects at Sea, in the Air or in Outer Space.* Although the reprisal prohibitions in Part IV of Protocol I only apply (at least as a matter of express provision) to conflicts affecting civilians on land,⁹⁰⁸ the Protocol is, in other sections, of wider effect. The Fundamental Guarantees, set out in Article 75, which are now recognised as being of customary status,⁹⁰⁹ apply to persons (but not objects) in the power of a Party to the conflict affected, *inter alia*, by “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...”⁹¹⁰ – nothing here limits the Fundamental Guarantees of Protocol I to persons on land. Thus, had the Polish proposal been adopted, any person in the power of a Party to the conflict who did not benefit from more favourable treatment under the Conventions or Protocol I, whether on land, at sea, in the air or outer space, would have been expressly immune from reprisals as a person protected (under Article 75) by Protocol I. As it now stands, however, there is no express prohibition on departing from the Fundamental Guarantees set out in Article 75 as a measure of reprisal.

- *Other Persons Entitled only to Fundamental Guarantees under Article 75 upon Capture.* Other persons who fall under the protection of Article 75, but who receive no express guarantee against reprisals (because, for instance, they do not qualify for protection as civilians under Geneva Convention IV or under Articles 50-51 of Protocol I; or because they do not qualify for Prisoner of War status under Geneva Convention III or under Articles 43-47 of Protocol I) may theoretically be subjected to reprisals. Thus, spies and mercenaries do not benefit from any express protection against reprisals (being denied prisoner of war status by Articles 46 and 47 of Protocol I respectively). According to Provost, “a State could lawfully respond to an

⁹⁰⁸ Art. 49(3), Protocol I.

⁹⁰⁹ *Sandoz et al.* (1987), par. 3084; M.J. Matheson, “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions” (1987) 2 *American University Journal of International Law and Policy* 419.

⁹¹⁰ Art. 2 common to Geneva Conventions I-IV. Art. 75, Protocol I, applies to individuals affected by a situation referred to in Art. 1, Protocol I, which, in paragraph 3, specifically includes the situations referred to in Art. 2 common to Geneva Conventions I-IV.

enemy belligerent's killing of that State's prisoners of war by executing captured mercenaries without conforming to the due process guarantees found in Article 75(4)."⁹¹¹ Significantly, spies, mercenaries and "unlawful combatants" generally⁹¹² would each be immune from reprisals had the Polish proposal been adopted, as each would be protected persons on the basis of the protections afforded them under Article 75 of Protocol I.

- *Persons or Objects in Non-International Conflicts.* Similarly, the Polish proposal would have rendered any person in the context of a non-international conflict taking no active part in the hostilities as expressly immune from reprisals, on the basis that such persons are protected under the terms of the Geneva Conventions (in Common Article 3). Nothing within Common Article 3, itself, states that the protections there afforded are inviolable in the case of reprisals.

- *Certain miscellaneous objects* receive no protection against reprisals, including the personal effects of POWs⁹¹³ and remains of the deceased.⁹¹⁴ In addition, no protection is afforded undefended localities and demilitarised zones.⁹¹⁵

vi. 1980 UN CONVENTION ON CERTAIN CONVENTIONAL WEAPONS

It was originally expected that Additional Protocol I of 1977 would contain prohibitions or restrictions on the use of specific conventional weapons, but agreement could not be reached during the course of the Geneva Diplomatic Conference of 1974-77 to that end.⁹¹⁶ On 9 June 1977, the Conference adopted resolution 22(IV) which contained the recommendation that prohibitions or

⁹¹¹ Provost (1994), p. 422.

⁹¹² On the status of unlawful combatancy, see R. Baxter, "So-Called 'Unprivileged Belligerency', Spies, Guerrillas, and Saboteurs", (1951) 28 *British Yearbook of International Law* 323; J. Callen, "Unlawful Combatants and the Geneva Conventions", (2004) 44 *Virginia Journal of International Law* 1025; M. Mofidi and A.E. Eckert, "'Unlawful Combatants' or 'Prisoners of War': The Law of Politics and Labels", (2003) 36 *Cornell International Law Journal* 59; M.H. Hoffman, "Terrorists are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law", (2002) 34 *Case Western Reserve Journal of International Law* 227.

⁹¹³ *Discussed above.*

⁹¹⁴ *Id.*

⁹¹⁵ Mentioned in the statement of the representative of Poland (cited in Nahlik (1978), p. 56).

⁹¹⁶ Roberts & Guelff (2000), p. 515.

restrictions on the use of specific conventional weapons be the subject of a separate treaty regime.⁹¹⁷ That regime was provided for in the Conventional Weapons Convention. Prohibitions or restrictions on specific conventional weapons are provided for in Protocols annexed to the Conventional Weapons Convention. Upon its adoption in 1980 the Conventional Weapons Convention contained three annexed Protocols. Article 8 of the Conventional Weapons Convention sets up a mechanism for the establishment of intermittent Review Conferences in which the Conventional Weapons Convention or its annexed Protocols may be amended,⁹¹⁸ or new Protocols created establishing prohibitions or restrictions on categories of conventional weapons not already covered by the pre-existing Protocols.⁹¹⁹ Protocol II of 1980, sometimes known as the “Mines Protocol”, prohibits the use on land of mines, booby-traps and other devices “by way of reprisals against the civilian population as such or against individual civilians.”⁹²⁰ The scope of this prohibition is limited by Article 1 of the Conventional Weapons Convention which states that:

This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.⁹²¹

The Mines Protocol of 1980 replicates the effect of Article 51(6) of Protocol I in prohibiting specific reprisals against civilians. It suffers from the same limitations of Protocol I in that it is restricted in its application to international conflicts⁹²² on land.⁹²³ During the Spring 1996 session of the first Review Conference of the States Parties to the Conventional Weapons Convention, the Parties adopted Amended Protocol II (also known as the “Amended Mines Protocol”) of 1996 which extended the terms of the Mines Protocol, including the prohibition on reprisals. Article 1(2) of the Amended Mines Protocol states that the Protocol shall apply:

⁹¹⁷ *Id.*

⁹¹⁸ Arts 8(1) & 8(3), UNCCW.

⁹¹⁹ Art. 8(2), *id.*

⁹²⁰ Art. 3(2), Mines Protocol.

⁹²¹ Article 1, UNCCW.

⁹²² Article 1, *id.*

⁹²³ Article 1, Mines Protocol.

in addition to situations referred to in Article 1 of [the Conventional Weapons Convention], to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949.⁹²⁴

Thus the Amended Mines Protocol exceeds, by agreement, the scope of application ordinarily applicable to Protocols annexed to the Conventional Weapons Convention. Article 3(7) of the Amended Mines Protocol prohibits the use on land of mines, booby-traps and other devices “by way of reprisals against the civilian population as such or against individual civilians or civilian objects.” The Amended Mines Protocol of 1996 therefore extends the reprisal prohibition contained in the Mines Protocol of 1980 by extending that prohibition to non-international conflicts (at least as defined in article 3 common to the Geneva Conventions of 1949) and to civilian objects.

On 21 December 2001, a number of Parties to the Conventional Weapons Convention adopted an amendment to Article 1 of the Convention which states, *inter alia*, that:

This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article [identical to original Article 1, Conventional Weapons Convention, cited above], to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949.

In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.⁹²⁵

The effect of this amendment is to expand the scope of the Mines Protocol of 1980 (and its reprisal prohibition) to non-international conflicts, at least for Parties to the amendment. The number of Parties to the amendment however (totalling 39 after Turkey’s accession to the amendment on 2 March 2005),⁹²⁶ is only a fraction of the total number of Parties to the Conventional Weapons Convention (totalling 97 following Sierra Leone’s ratification on 30 September 2004).⁹²⁷ The vast majority of

⁹²⁴ Article 1(2), Amended Mines Protocol.

⁹²⁵ Art. 1(2)-(3), Amendment to Article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 21 December 2001, UN Doc. CCW/CONF.II/2 (2001).

⁹²⁶ List of States parties available at www.icrc.org.

⁹²⁷ List of States parties available at www.icrc.org.

the 39 Parties are bound in any event by the Mines Protocol II of 1996 which already prohibited the use on land of mines, booby-traps and other devices by way of reprisals against civilians in non-international conflicts. In the case of Mexico, however, that State is bound both by the Mines Protocol of 1980 and the amendment of 2001 but not the Mines Protocol of 1996. Thus, for Mexico at least, the amendment of 2001 has the effect of extending Mexico's treaty obligations under the Mines Protocol of 1980 (including its prohibition on reprisals) to the case of non-international conflicts.

Unusually, the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction does not include any provision relating to reprisals, despite the fact that the Parties to that Convention sought to adopt a more comprehensive set of prohibitions than those found in the Mines Protocol of 1980 and the Amended Mines Protocol of 1996.⁹²⁸

⁹²⁸ See Roberts & Guelff (2000), pp. 645-47.

6

customary law status of treaty prohibitions

i. INTRODUCTION

The Geneva Conventions of 1949 are widely regarded as wholly, or at least, largely, embodying customary international law.⁹²⁹ Nevertheless, a number of authors still stress the need to distend custom from those provisions binding only on a conventional basis. Meron states that: “the determination to which category – customary or conventional – a particular provision [of the Geneva Conventions of 1949] belongs must be made *in concreto*.”⁹³⁰ Even the limited decision in the *Nicaragua Case* – that Articles 1 and 3 common to the Geneva Conventions reflected customary law – was not reached without dissent.⁹³¹ At the time of their promulgation, the Geneva Conventions were partly reflective of pre-existing custom and partly innovative.⁹³² While the prohibition on reprisals against prisoners of war had its antecedents in the Geneva Prisoners of War Convention of 1929, the other reprisal prohibitions were innovative. Nevertheless, the prohibitions on reprisals in the Geneva Conventions of 1949 are now widely viewed as having entered customary law.⁹³³ Geneva Convention III replaced the Geneva Prisoners of War

⁹²⁹ *Prosecutor v Milorad Krnojelac*, Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, par. 220; Roberts & Guelff (2000), p. 196.

⁹³⁰ T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989, p. 37.

⁹³¹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, Dissenting Opinion of Judge Jennings, p. 537; *see, also, id.*, Separate Opinion of Judge Ago, p. 184.

⁹³² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, p. 113.

⁹³³ Kalshoven (1990), p. 53; Meron (1989), pp. 46-47.

Convention of 1929 as between parties to both agreements,⁹³⁴ but as the former simply expanded upon the latter the 1929 Convention must also be viewed as having entered customary law.

In relation to the 1954 Hague Cultural Property Convention, the customary law status of the reprisal prohibition therein is somewhat more difficult to assess. Cassese has stated that:

In view of the very broad participation in this Convention, and the fact that contracting parties include States from practically all main areas of the world, the contention could be made that the prohibition [on reprisals therein] has passed into customary law. If this view is correct, it could be argued that Article 53(c) [of Protocol I], on reprisals, is itself part of customary law, to the extent that it restates the prohibition of reprisals against cultural objects covered by both the 1954 Hague Convention and by Article 53 itself.⁹³⁵

Nevertheless, Cassese had already stated that “one can doubt whether the ban on reprisals [in Article 53(c), Protocol I] has become a part of general consent.”⁹³⁶ In addition, it appears fair to conclude that at least prior to the adoption of Protocol I, the reprisal prohibition in the 1954 Hague Cultural Property Convention had not entered customary law given that the analogous prohibition in Article 53 of Protocol I was widely viewed as an innovation in international law.⁹³⁷ Whether the reprisal prohibition in the 1954 Hague Cultural Property Convention has, in recent years, entered customary law, is probably best ascertained by assessing whether the parallel reprisal prohibition in the far-more-subscribed Protocol I has now entered customary law. The customary law status of the reprisal prohibitions in Protocol I is a matter of great controversy, and great consequence given the extent to which Protocol I attempts to close many *lacunae* in the area of legitimate reprisals: –

ii. CODIFICATION OR CRYSTALLISATION

The prohibitions upon reprisals in Protocol I, in so far as they add to the pre-existing prohibitions found in the 1949 Geneva Conventions, are accepted as having been

⁹³⁴ Roberts & Guelff (2000), p. 243.

⁹³⁵ A. Cassese, “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law”, (1984) 3 *UCLA Pacific Basin Law Journal* 55, p. 90.

⁹³⁶ *Id.*

⁹³⁷ *See below.*

innovations in international law.⁹³⁸ As such, there is little room to argue that the Protocol I prohibitions were in any sense declaratory of pre-existing customary law.⁹³⁹ Nor can the prohibitions be viewed as having crystallised as customary law

⁹³⁸ C. Greenwood, "Customary Law Status of the 1977 Additional Protocols" in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991, pp. 110-111; *see, also*, Cassese (1984), pp. 88-94; Kwakwa (1990), p. 72. Many of the delegates to the Diplomatic Conference appeared to have viewed the breadth of the prohibitions on reprisals in Protocol I as an open matter to be negotiated. In relation to the civilian population, *see, e.g.*, the comments of Mr. Nahlik (Poland), which indicate that although Poland supported the categorical prohibition on reprisals against the civilian population or civilians, they nevertheless viewed it as innovative, stating that the prohibition on reprisals together with other rules "would fill some of the gaps in existing rules of a more specific character" (CDDH/SR.41, par. 130, *reprinted in* Official Records, vol. VI, p. 141); *see, also*, comments by Mr. Girard (France) opposing the blanket prohibition of reprisals against the civilian population or civilians (CDDH/III/SR.8, par. 56, *reprinted in* Official Records, vol. XIV, p. 59). In relation to civilian objects, *see, e.g.*, the explanatory statement made by the delegation of Australia in regard to draft Article 47: "The Australian delegation supports proposals for rules to prohibit attacks against civilian objects but it opposes the adoption of a provision which prohibits reprisals against civilian objects in all circumstances." (CDDH/SR.41, Annex, *reprinted in* Official Records, vol. VI, p. 175); *see, also*, comments by Mr. Samuels (Canada) that his delegation could accept a prohibition on reprisals against civilians or the civilian population, but not on reprisals against civilian objects. (CDDH/III/SR.7, par. 38, *reprinted in* Official Records, vol. XIV, p. 51). In relation to cultural objects and places of worship *see, e.g.*, comments by Mr. Mahony (Australia) who stated that his delegation objected to the proposed new Article 47 *bis* (Protection of Cultural Objects and of Places of Worship) because of the reference in the proposed article to reprisals (CDDH/III/SR.59, par. 42, *reprinted in* Official Records, vol. XV, p. 209). In relation to objects indispensable to the survival of the civilian population, *see, e.g.*, comments by Mr. Eaton (United Kingdom) discussing an amendment to draft Article 48 (Objects indispensable to the survival of the civilian population) sponsored by Belgium and the United Kingdom (CDDH/III/67, *reprinted in* Official Records, vol. III, p. 218), which, *inter alia* and unlike the draft Article, proposed no ban on reprisals: "The amendment proposed no ban on reprisals, the intention being to leave intact the existing bans on reprisals against civilian objects in occupied territory which were contained in the Hague Regulations annexed to the Hague Convention No. IV on 1907 concerning the Laws of War on Land, and the fourth Geneva Convention of 1949, and to retain the right of reprisal against such objects in enemy territory subject to the existing restraints in customary law, which were considerable." (CDDH/III/SR.16, par. 57, *reprinted in* Official Records, vol. XIV, p. 127); *see, also*, comments by Mrs. Bindschelder-Robert (ICRC): "The reprisals to which reference was made in the second sentence of the draft article constituted an extension of the rule under Article 33, third paragraph, of the fourth Geneva Convention of 1949, applicable in occupied and national territory, according to which 'Reprisals against protected persons and their property are prohibited.' The prohibition provided for in Article 66 would in fact cover all indispensable objects, no matter in whose possession those objects were." (CDDH/III/SR.37, par. 40, *reprinted in* Official Records, vol. XIV, p. 387). In relation to the natural environment, *see, e.g.*, comments by Mr. Rosas (Finland) indicating that the protection of the natural environment was an essential but innovative idea (CDDH/III/SR.17, par. 5, *reprinted in* Official Records, vol. XV, p. 141). In relation to works and installations containing dangerous forces, *see, e.g.*, comments by Mr. Veuthey (ICRC), who in introducing draft Article 49 (Works and installations containing dangerous forces), argued that works and installations "required special measures of protection", implying that the draft article was filling a *lacuna* (CDDH/III/SR.14, par. 16, *reprinted in* Official Records, vol. XIV, p. 109).

⁹³⁹ It has been suggested that reprisals against *all* civilians (and not just those protected by Geneva Convention IV) were prohibited under customary international law prior to the convening of the Geneva Diplomatic Conference which promulgated Protocol I (Kwakwa (1990), p. 81, n. 131; Greenwood (1989a), p. 63; *see, also*, Sandoz *et al.* (1987), par. 3444). This view finds support in UN General Assembly Resolution 2675 (XXV) of 1970, entitled "Basic Principles for the Protection of Civilian Populations in Armed Conflicts", which states, *inter alia*, that: "Civilian populations, or

through the process of the 1974-1977 Geneva Diplomatic Conference which promulgated Protocol I, or in the adoption of the Protocol itself.⁹⁴⁰ No consensus emerged within that conference as to the binding character of the reprisal prohibitions contained within, what became, Articles 51-56 of Protocol I *qua* norms of general international law.⁹⁴¹

iii. SUBSEQUENT GENERATION

1. THE NORTH SEA CONTINENTAL SHELF CASES

The question then is whether the reprisal prohibitions in Protocol I have since come to be accepted as generating new customary law. In order to answer this, one must look, at least in the first instance, to the decision of the ICJ in the *North Sea*

individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity" (UN Doc. A/8028 (1970)). But there is very little to support the proposition that reprisals against civilians generally (regardless of the territorial status of the land in which they were located) were prohibited under general international law prior to the promulgation of Protocol I. There is little in the practice of States or the content of juristic opinion to suggest a movement away from the permissive attitude of the Second World War (discussed above) by the 1970s. Kalshoven, for instance, stated, prior to the promulgation of Protocol I, that "it is clear that there is no express treaty prohibition of reprisals against the enemy civil population, nor can it be maintained that a customary rule to that effect has emerged from the practice of belligerents" (Kalshoven (1971), p. 357). There is also very little in the writings of publicists to support the position. Greenwood has stated that: "The better view... is that no firm rule prohibiting reprisals against the civilian population was already part of customary international law when the Diplomatic Conference convened" (Greenwood (1989a), p. 63).

⁹⁴⁰ In the course of the oral hearing in the *North Sea Continental Shelf Cases*, Denmark and the Netherlands argued that Article 6 of the Geneva Convention on the Continental Shelf did not embody a pre-existing rule of customary law, but rather "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference" and this emerging customary law "crystallized in the adoption of the Continental Shelf Convention by the Conference." (*North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep. 3, par. 61). Although the Court rejected this contention of Denmark and the Netherlands with respect to Article 6, it was nevertheless clear that the Court viewed as entirely possible the process of crystallization of emerging rules in the adoption of multilateral conventions (*see id.*, pars 62-69). The Third Conference on the Law of the Sea is often cited as highlighting the potential of diplomatic conferences to crystallize novel or emergent norms as customary law. The Conference crystallized at least two law of the sea principles as customary law; the first being the 12 nautical mile limit to the territorial sea and the second being the concept of the Exclusive Economic Zone. *See, e.g.*, Cassese (1984), pp. 65-66.

⁹⁴¹ *See Sandoz et al.* (1987), pars 3450-3451, noting that it proved impossible to reconcile the different points of view of the delegates in relation to reprisals during the Diplomatic Conference. *See, also*, Cassese, who notes that the declarations made by States during the Conference and the lengthy discussions on the general rule on reprisals made it clear that no general agreement emerged at any point during the course of the Conference (Cassese (1984), p. 88. *See, also, id.*, pp. 89-94).

Continental Shelf Cases.⁹⁴² There the Court laid down certain preconditions which must be met before a non-codifying or crystallizing provision in a treaty may be said to have entered customary law: The first of these was that the provision should, “at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”;⁹⁴³ the second pre-condition was that “State practice, including that of States whose interests are specially affected, should [be] both extensive and virtually uniform in the sense of the provision invoked”;⁹⁴⁴ and third was the requirement that that State practice must be shown to be based upon *opinio juris*.⁹⁴⁵ Underlying each of these requirements was the *caveat* that the concurrence of all three was “not lightly to be regarded as having been attained.”⁹⁴⁶

a. Norm-Creating Character

The norm-creating character of the Protocol I prohibitions on reprisals is enhanced by the fact that each prohibition in Articles 51-56 is clear and unambiguous in its meaning (subject to minor exceptions at the periphery, addressed above) and non-derogable (*i.e.* by reference to military necessity).⁹⁴⁷ On the other hand, those prohibitions appear to be subject, potentially, to reservation. In the *North Sea Continental Shelf Cases* the ICJ treated the potential to make reservations to treaty provisions as diminishing the capacity of those provisions to generate customary law.⁹⁴⁸ This was on the basis that where treaty provisions are intended to reflect or

⁹⁴² *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep. 3.

⁹⁴³ *Id.*, par. 72.

⁹⁴⁴ *Id.*, par. 74.

⁹⁴⁵ *See id.*

⁹⁴⁶ *Id.*, par. 71.

⁹⁴⁷ Sandoz *et al.* (1987), par. 1984.

⁹⁴⁸ In addition to the faculty of reservation-making, the faculty of denunciation may also be considered in examining the norm-creating character of a treaty. The Geneva Conventions of 1949 each provide a faculty for denunciation of the Convention, subject to the consideration that the denunciation “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations...” (Art. 63, Geneva Convention I; Art. 62, Geneva Convention II; Art. 142, Geneva Convention III; Art. 158, Geneva Convention IV). While Protocol I makes no such reference to customary law in its denunciation clause (Art. 99), that may be in large measure because the very same consideration expressly applies to Protocol I in treaty form as a result of the operation of Article 43 of the Vienna Convention on the Law of Treaties. The absence of any reference to customary law in Article 99 of Protocol I should in no way be viewed as weakening the claim of Protocol I, or various of its provisions, to customary status (*see* Meron (1989), pp. 6-7.)

embody existing, or emerging,⁹⁴⁹ customary norms, it is to be expected that those provisions “will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded.”⁹⁵⁰ In that case the ICJ was concerned, in part, with whether Article 6 of the Geneva Convention on the Continental Shelf (embodying the equidistance principle) had come to generate customary law subsequent to the entry into force of the Convention. The Court considered it relevant that Article 12 of the Convention permitted reservations to all the articles of the Convention “other than to Articles 1 to 3 inclusive”.⁹⁵¹ This made it exceedingly difficult for the ICJ to conclude that Article 6 had come to generate customary international law:

...the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention – of which there is at present no official indication – it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.⁹⁵²

The situation with respect to the Protocol I prohibitions on reprisals is somewhat different in that Protocol I does not expressly provide any faculty for the making of reservations; although it does not expressly exclude reservations either. Baxter has suggested that it is only where a treaty makes an express distinction between provisions to which reservations are permitted and provisions to which they are excluded that any inference should be drawn as to the customary status of those

⁹⁴⁹ The principle was applied to emerging norms in [1969] ICJ Rep. 3, par. 72.

⁹⁵⁰ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Federal Republic of Germany v Netherlands)* [1969] ICJ Rep. 3, pp. 38-39.

⁹⁵¹ *Id.*

⁹⁵² *Id.*, p. 72. See, however, the dissenting opinion of Judge Morelli who argued that the power to make reservations under the terms of a treaty affects only the obligation flowing from the treaty *qua* treaty law and therefore does not affect the status of any parallel customary rule. On this basis, it appears that Judge Morelli did not view the power of reservation-making under the treaty as of any evidential significance in relation to the question of whether the treaty or its individual provisions codify or crystallize customary law. See [1969] ICJ Rep. 3, Dissenting Opinion of Judge Morelli, p. 198); see, also, *id.*, Dissenting Opinion of Judge Lachs, pp. 223-225; London Statement of Principles, Section 22, Commentary, pp. 44-45.

provisions.⁹⁵³ This would certainly provide a sound basis for distinguishing the *North Sea Continental Shelf Cases* from the present inquiry.⁹⁵⁴ It has also been suggested that it is only where reservations have in fact been made (and deposited) in relation to particular provisions that any negative inference should be drawn in terms of the customary status of those provisions.⁹⁵⁵ Meron has stated that in assessing the adverse effect of reservations upon the status of provisions under customary law, “the number and depth of the reservations actually made must be considered.”⁹⁵⁶

At the present moment it appears that four States have entered reservations to the reprisal prohibitions in Articles 51-56 of Protocol I (Italy, Germany, the United Kingdom and France) although only two of these (the United Kingdom and France) have entered what amounts unequivocally to a reservation. Italy ratified Protocol I on 27 February 1986 and issued a number of statements of interpretation, including one which appears to relate to reprisals: “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation.”⁹⁵⁷ Germany issued a virtually identical statement upon its ratification to Protocol I on 14 February 1991.⁹⁵⁸ Although the statement has been described as a

⁹⁵³ R. Baxter, “Treaties and Custom”, (1970-I) 129 *Recueil des Cours* 25, pp. 49-50.

⁹⁵⁴ It may be that the ICJ had the very same distinction in mind when it stated in relation to treaty provisions of customary status that those provisions “will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded” ([1969] ICJ Rep. 3, pp. 38-9), implying (as was the case with the Geneva Convention on the Continental Shelf) that some provisions will be subject to a right of reservation and others will not.

⁹⁵⁵ See Baxter (1970), p. 51; Meron (1989), p. 16.

⁹⁵⁶ Meron (1989), p. 16. Thus Cassese stated that the approval, by consensus, of four of the five reprisal provisions of Protocol I (Article 51 being adopted by a vote of 77 to 1 (France) with 16 abstentions) combined with “the lack of substantial reservations” to those provisions could demonstrate that all States, with the exception of France and Australia, agreed to ban reprisals and that such agreement was so strong as to demonstrate the intention to create a general rule (Cassese (1984), p. 103). Cassese notes, however, that a more cautious, and possibly, more accurate, view may be that many States were in fact opposed to the extension of reprisal prohibitions in Protocol I, but refrained from voicing their dissent on the understanding that they could enter reservations upon ratification (*id.*). Given the significant number of ratifications now received, and the very limited number of reservations in relation to the reprisal prohibitions, this view may have reflected the understanding of a number of States during the process of the Diplomatic Conference, but it does not appear to have been an understanding that continued to be held by States over the course of time. Australia for instance, was a vocal critic of the reprisal prohibitions in Protocol I during the period of the Diplomatic Conference, but ultimately it ratified Protocol I without making any reservation in relation to the reprisal provisions.

⁹⁵⁷ Roberts & Guelff (2000), p. 507.

⁹⁵⁸ *Id.*, p. 505.

“reservation”,⁹⁵⁹ it is unclear whether, in affirming their right to use “all means admissible under international law”, Italy and Germany intended to include, within that, their pre-Protocol rights including the right to take reprisals prohibited in Articles 51-56.

Upon ratification of Protocol I on 28 January 1998, the United Kingdom entered a clear reservation to the reprisal prohibitions in Articles 51 to 55 in the following terms:

The obligations of Articles 51 to 55 are accepted on the basis that any adverse party against which the UK might be engaged will itself scrupulously observe those observations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or 52 against the civilian population or civilians or against civilian objects, or, in violations of Articles 53, 54 and 55, on objects or items protected by those Articles, the UK will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the UK will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The UK will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.⁹⁶⁰

The fact that the above reservation deals only with Articles 51-55, and not Article 56, may be explained by the fact that the United Kingdom entered a separate reservation concerning Article 56 (as well as Article 85(3)(c), which defined certain attacks against works and installations containing dangerous forces as a “grave breach” of Protocol I). That reservation stated that:

The UK cannot undertake to grant absolute protection to installations which may contribute to the opposing Party’s war effort, or to the defenders of such installations, but will take all due precautions in military operations at or near the installations referred to in paragraph 1 of Article 56 in light of the known facts, including any special markings which the installation may carry to avoid severe collateral losses among the civilian population; direct attacks against such installations will be launched only on an authorisation at a high level of command.⁹⁶¹

⁹⁵⁹ See Meron (1989), pp. 66-67.

⁹⁶⁰ Roberts & Guelff (2000), p. 511.

⁹⁶¹ *Id.*, p. 511.

In reserving the right to make direct attacks against the works and installations protected by Article 56 (and Article 85(3)(c)), the United Kingdom has, *ipso facto*, reserved a right of reprisal against such works and installations.

France, upon its accession to Protocol II, on 24 February 1984, issued a statement in which it stated that it was not acceding to Protocol I due to the “lack of consensus among the signatory states of Protocol I as to the exact meaning of the obligations they have undertaken so far as deterrence is concerned.”⁹⁶² This appears to be a somewhat cryptic protest against the inclusion of the reprisal prohibitions, although each of those prohibition, subject to minor exceptions at the periphery, is quite clear and unambiguous. It may be, however, that some uncertainty exists as to which (if any) reprisal measures remain legal as a result of the Protocol I prohibitions, and the statement is intended to highlight that uncertainty.⁹⁶³ In any event, France acceded to Protocol I on 11 April 2001, but issued a reservation to the prohibitions on reprisals therein.⁹⁶⁴

The question of whether Protocol I includes the potential of reservation making is probably not exhausted by an examination of whether (1) reprisals are expressly excluded under the terms of the Protocol; and (2) reservations have in fact been entered. On both these tests Protocol I may be said to include the potential that reservations be entered to the reprisal prohibitions in Articles 51-56, if not Article 20 (neither the United Kingdom nor France entered a reservation to Article 20 although the ambiguous statement of Italy and Germany may be thought to cover it). Attention should also be placed on the permissibility of the reservations entered under the law of treaties. Article 19 of the Vienna Convention on the Law of Treaties requires that reservations be compatible with the object and purpose of the treaty.⁹⁶⁵ Although the

⁹⁶² *Id.*, p. 504.

⁹⁶³ Aldrich has stated: “France ratified [*sic*] Protocol II, but not Protocol I, in large part, I believe, because of the objections to protocol I’s prohibitions of reprisals” (G.H. Aldrich, “Why the United States of America Should Ratify Additional Protocol I” in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991, p. 129).

⁹⁶⁴ See reservations of France upon accession to Protocol I (11 April 2001), available in French at www.icrc.org. See, in particular, par. 11 (“*Le Gouvernement de la République Française déclare qu’il appliquera les dispositions du paragraphe 8 de l’article 51 dans la mesure où l’interprétation de celles-ci ne fait pas obstacle à l’emploi, conformément au droit international, des moyens qu’il estimerait indispensables pour protéger sa population civile de violations graves, manifestes et délibérées des Conventions de Genève et du protocole par l’ennemi.*”)

⁹⁶⁵ Art. 19, Vienna Convention. For judicial consideration of the compatibility of reservations with the object and purpose of treaties, see *Reservations to the Convention on the Prevention and Punishment*

Vienna Convention does not strictly govern the terms of Protocol I (as Protocol I came into force prior to the Vienna Convention),⁹⁶⁶ nevertheless those Articles of the Vienna Convention dealing with reservations (Articles 19-23) are based in part on the ICJ's earlier jurisprudence concerning reservations under the law of treaties,⁹⁶⁷ and are often viewed as reflective of customary law.⁹⁶⁸ During the course of the Geneva Diplomatic Conference, the representative for the German Democratic Republic stated (specifically in relation to the prohibition of reprisals against the civilian population or civilians) that his delegation would regard any reservation as incompatible with the humanitarian object and purpose of the Protocol.⁹⁶⁹ Compatibility is difficult to assess in this context given that the object and purpose of reprisal measures, strictly speaking, is to effect compliance with the law of armed conflict, and therefore its object and purpose could be argued to run parallel to that of Protocol I as a whole.⁹⁷⁰ George Aldrich, who was the Chairman of the United States delegation to the Conference, has confirmed that the United States seriously considered ratifying Protocol I, but reserving certain rights of reprisal.⁹⁷¹ Aldrich has stated that: "The only provisions of the Protocol that I believe may warrant a reservation are the various prohibitions of reprisal found in Articles 51-56."⁹⁷² Ultimately, however, the United States did not reserve the right of reprisals, choosing

of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep. 16. Aust notes that it can be extremely difficult to assess whether a reservation passes the test of compatibility with the object and purpose of a treaty. He states further that there is no clear consensus as to how the test is to be applied (Aust (2000), pp. 110-111; *see, also*, J. Klabbers, "Some Problems Regarding the Object and Purpose of Treaties" (1997) 8 *Finnish Yearbook of International Law* 138). Article 19 of the Vienna Convention provides that a State "may" formulate a reservation to a treaty "unless [*inter alia*] the reservation is incompatible with the object and purpose of the treaty". Incompatible reservations are therefore not permitted by the Vienna Convention. International law has not, however, reached consensus on the question of what happens if a State does in fact formulate an incompatible reservation. While some decisions of the European Court of Human Rights appear to support the view that in such a case the State is bound by the treaty, but without the benefit of the reservation (*see Belilos v Switzerland* (1988) 10 EHRR 466; *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99), Aust suggests that these decisions reflect the particular circumstances of their cases and the special character of the European Convention on Human Rights (Aust (2000), pp. 118-119).

⁹⁶⁶ The Vienna Convention entered into force on 27 January 1980. The non-retroactivity provision within Art. 4 of the Convention provides that the Convention applies only to treaties concluded after the Vienna Convention has entered into force.

⁹⁶⁷ *See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep. 16.

⁹⁶⁸ *See, e.g.*, Hampson (1988), p. 832.

⁹⁶⁹ Comments by Mr Ullrich (German Democratic Republic) in Plenary Meeting, 26 May 1977, (CDDH/SR.41, par. 137, *available at* Official Records, vol. VI, p. 141).

⁹⁷⁰ *See* W. Hays Parks, "Air War and the Law of War", (1990) 32 *Air Force Law Review* 1, p. 94.

⁹⁷¹ Aldrich (1991), p. 129.

⁹⁷² *Id.*, p. 142.

instead not to ratify the Protocol at all. This could be cited as evidence of the non-admissibility of reservations to the reprisal prohibitions, but the motivation of the United States appears to have been more complex than a desire to retain the right of reprisals alone. The decision in 1987 by the United States President, Ronald Reagan, not to seek the Senate's advice and consent to the ratification of the Protocol appears to have been based primarily on the concern that by assimilating wars of national liberation to international armed conflict,⁹⁷³ the Protocol would unduly privilege terrorists.⁹⁷⁴

Even if the potential for reservation-making were deemed to diminish the norm-creating character of the reprisal prohibitions, the passage from the *North Sea Continental Shelf Cases*, cited above, indicates that that potential should not be treated as dispositive in relation to the question of whether treaty prohibitions have subsequently come to be viewed as embodying customary law. The norm-creating character of the treaty was important in the context of the *North Sea Continental Shelf Cases* where the Court was examining whether Article 6 of the Geneva Convention on the Continental Shelf had entered customary law "partly because of its own impact, partly on the basis of subsequent State practice".⁹⁷⁵ There is no reason in principle why a treaty provision which lacked normative character upon its adoption could not nevertheless come to embody customary law at a later stage. The process of the formation of customary law would proceed less because of the provision's "own impact" and more on the basis of subsequent State practice.⁹⁷⁶ In such a case, one would expect a greater lapse of time between the creation of the treaty norm and the emergence of its customary counterpart, and one would probably expect a more rigorous demonstration of both State practice and *opinio juris*.

b. State Practice and Opinio Juris

⁹⁷³ Art. 1(4), Protocol I.

⁹⁷⁴ See Sofaer (1988); see, also, Aldrich (1991), pp. 129-130 & 134.

⁹⁷⁵ [1969] ICJ Rep. 3, par. 70.

⁹⁷⁶ Nowhere does the ICJ elaborate on exactly what is meant by the reference to the treaty's "own impact" as distinct from State practice. It is significant, however, that the two factors are not treated as mutually exclusive explanations for the development of customary law, but rather, are seen as running together. See further, below.

There is a requirement of both *quantitative* and *qualitative* elements of State practice.⁹⁷⁷ In terms of quantum, the required level of State practice has been expressed as “extensive and virtually uniform” (in the *North Sea Continental Shelf Cases*),⁹⁷⁸ or “constant and uniform” (in the *Asylum Case*),⁹⁷⁹ although differing expressions have also been formulated, including the more flexible statement in the *Nicaragua Case* that there need not be “absolute rigorous conformity”, but that “the conduct of States, should, in general, be consistent” with the putative rule and that inconsistent conduct should have been treated as violative of it.⁹⁸⁰ The qualitative element is expressed in the *North Sea Continental Shelf Cases* as a requirement that the relevant practice includes “that of States whose interests are specially affected”.⁹⁸¹ The International Law Association’s London Statement of Principles Applicable to the Formation of General Customary International Law and accompanying Commentary (2000), concluded that:

A State or group of States which is important in a particular area of activity can, by its opposition, prevent any rule of general (as opposed to particular) customary law from developing...If States of sufficient importance in the area of activity in question manifest their dissent, the requisite condition [for the emergence of the rule] is not fulfilled.⁹⁸²

What is significant in the assessment of both the quantitative and qualitative aspects of State practice, according to the *North Sea Continental Shelf*

⁹⁷⁷ See International Law Association (ILA), Final Report of the Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, as amended at the London Conference (2000), London, 2000, available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf> (hereinafter London Statement of Principles), Section 14, Commentary, p. 26, par. (e).

⁹⁷⁸ [1969] ICJ Rep. 3, par. 74.

⁹⁷⁹ [1950] ICJ Rep. 266, p. 276.

⁹⁸⁰ [1986] ICJ Rep. 14, par. 186.

⁹⁸¹ [1969] ICJ Rep. 3, par. 74.

⁹⁸² London Statement of Principles, p. 27; see Resolution 16/2000 of the ILA, adopting the London Statement of Principles and requesting that it be transmitted to the Secretary-General of the United Nations (available at <http://www.ila-hq.org/pdf/RESCust.pdf>). The ICRC has emphasized the need to consider all forms of State practice, rather than simply the conduct of belligerents, in order to enable all States to contribute to the creation of customary humanitarian law (ICRC, Report on the Follow-up to the International Conference for the Protection of War Criminals, 26th International Conference of the Red Cross and Red Crescent, Commission I, Item 2, Doc. 95/C.I/2/2 (1995), p. 8). But as the London Statement of Principles explains: “The fact that the test is not purely quantitative may appear undemocratic. But leaving aside the question what is meant by ‘democratic’ in this context, it should be noted that customary systems are rarely completely democratic: the more important participants play a particularly significant role in the process. And certainly, the international system as a whole is far from democratic. So, in this regard, customary international law is at least in touch with political reality.” (Section 14, Commentary, p. 26, par. (e)).

Cases, is whether there is sufficient practice which emulates the treaty-norm in question by *non-party* States, and whether that practice is supported by *opinio juris*. Although the extent of participation in the treaty itself was viewed as potentially relevant to the question of whether the treaty had come to generate customary norms (and this is dealt with below), the central consideration in terms of sufficiency of practice and *opinio juris* was the conduct of non-party States. Relevant State practice, stated the ICJ, excluded the practice of States “acting actually or potentially in the application of the Convention.”⁹⁸³ This leads to the so-called “Baxter Paradox”,⁹⁸⁴ whereby the greater the number of parties to a treaty, the more difficult it becomes to pinpoint State practice outside the treaty;⁹⁸⁵ the more universal a treaty becomes, the less scope there is for concluding that it has entered general international law. It is of significance here that there are (following Japan’s accession on 31 August 2004) 162 Parties to Protocol I.⁹⁸⁶ This leaves us with only a relatively small pool of non-party States to consider in terms of their conduct *vis-à-vis* the Protocol I norms. There are, however, a number of significant military powers who are not party to the provisions of Protocol I. These include the United States as well as India, Pakistan, Turkey and Israel.

c. Active Undertakings

Although there have been undertakings by non-parties to Protocol I to apply certain provisions of the Protocol in certain or all circumstances, these undertakings have tended to relate to provisions of the Protocol which were viewed by the undertaking State as declaratory of customary law. For instance, in relation to the Gulf War of 1990-1991, Protocol I was not in force for Iraq, the United States, France or the

⁹⁸³ See [1969] ICJ Rep. 3, par. 76. By “potentially” the reference here is to States which were shortly to become Parties to the Convention, though the Convention was not strictly binding at the time of the relevant conduct. Meron notes, in the context of the Geneva Conventions of 1949, that the practice of States parties may merely indicate that those States are complying with their obligation under common Article 1 to “ensure respect” for the Conventions (Meron (1989), p. 30). The same point may be made in relation to Protocol I – Article 1(1) of which is materially identical to common Article 1 of the Geneva Conventions.

⁹⁸⁴ The term is employed, for instance, by Meron (1989), p. 50.

⁹⁸⁵ Baxter (1970), pp. 64 & 73.

⁹⁸⁶ List of States Parties available at www.icrc.org.

United Kingdom during the period of hostilities,⁹⁸⁷ yet the Final Report to Congress on the conduct of the war justified a number of targeting decisions in terms of the provisions of Protocol I, and expressly considered portions of the Protocol to be binding on the basis of pre-existing customary law.⁹⁸⁸ Rogers, asserting that coalition forces undertook great efforts to ensure that collateral damage was reduced to a minimum (for *e.g.* by the use of low altitude bombing and precision guided missiles) concludes that “the allied bombing campaign can be seen as a good example of the application in practice of the principles of Art. 57 of Protocol I”, requiring precautions in attack,⁹⁸⁹ even though that Article was not binding on coalition forces *qua* treaty law. It has also been noted, in relation to *Operation Allied Force*, the 1999 NATO air campaign against the Federal Republic of Yugoslavia, that certain provisions of Protocol I which were not strictly binding on the United States were nevertheless applied in practice.⁹⁹⁰ Despite instances of the unilateral application of

⁹⁸⁷ Rogers notes that of the main protagonists, only Syria was a party to Protocol I (Rogers (1996), p. 63).

⁹⁸⁸ See US Dept. of Defense, *Final Report to Congress: Conduct of the Persian Gulf War*, Dept. of Defense, Washington D.C., 1992, Appendices A-S; see, also, US Field Manual No. 27-10, par. 41; US Dept. of the Air Force, *International Law – The Conduct of Armed Conflict and Air Operations*, Pamphlet AFP 110-31, Dept. of the Air Force, Washington D.C., 1976, pars 1-3a(2), 5-3c(1)(b); see, however, Parks (1990), pp. 173-4.

⁹⁸⁹ Rogers (1996), pp. 63-65; see, also, C. Greenwood, “Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict”, in P. Rowe (ed.), *The Gulf War 1990-1991 in International and English Law*, Routledge, New York, 1993, p. 63ff. See, however, statement by Mr Al-Anbari (Iraq) to the Security Council during deliberations over Security Council Resolution 687 (1991):

The American media portrayed the aerial bombardment as being conducted with the use of the latest military technology, aircraft launching laser-guided bombs or “smart” bombs to hit only strategic and military targets, and not civilian targets. However, the reality was different. The reality was that the offensive forces placed great reliance on the B-52s, which carry only “dumb” bombs launched from an altitude of more than 30,000 feet, thus making it almost impossible to distinguish between civilian and military targets.

(Provisional Verbatim Record of the Two Thousand Nine Hundred and Eighty-First Meeting, 3 April 1991, UN Doc. S/PV.2981, available at www.casi.org.uk/info/undocs/sc910403.pdf; see, also, Human Rights Watch, *Needless Deaths in the Gulf War*, Human Rights Watch, New York, 1991, especially at pp. 5-6. Rogers states that bombing by B-52 aircraft was directed in large part against Iraqi Republican Guard positions and was unlikely to have been carried out in populous areas (Rogers (1996), p. 64)

⁹⁹⁰ See W. Hays Parks, “Rules of Conduct during Operations Other Than War: The Law of War Does Apply”, *American Diplomacy*, 2001, available at http://www.unc.edu/depts/diplomat/archives_roll/2001_07-09/hum_intervention/hum_08_parks.html. In fact three of NATO’s alliance members were not party to Protocol I at the time of that campaign: The United States, France and Turkey.

some of the terms of Protocol I, one would be hard pressed to find instances of non-party States undertaking to be bound by the prohibitions on reprisals in Articles 51-56. For instance, while United States military manuals and instructions have incorporated the principles of proportionality, precautions in attack, and the requirement to undertake legal reviews of new weapons, in similar terms to those found in Protocol I,⁹⁹¹ on the basis that they are a part of general international law, they steadfastly maintain that the prohibitions on reprisals in Articles 51-56 are not.⁹⁹² Were evidence located as to unilateral undertakings to abide by the reprisal prohibitions in Articles 51-56 of Protocol I, the issue would still remain as to the *animus* behind those undertakings. In the *North Sea Continental Shelf Cases*, the Court found in relation to States which were not party to the 1958 Continental Shelf Convention, yet which nevertheless applied the equidistance principle, that the basis of their compliance in practice with Article 6 of the Convention “must remain entirely speculative” and that there was “‘not a shred of evidence’ that they believed themselves to be applying a mandatory rule of international law”⁹⁹³ The *de facto* application of humanitarian law rules on policy grounds, for *e.g.* the desire for uniform or near-uniform rules of engagement in multi-State operations, would not tend towards the generation of customary norms on this approach.

d. Restraint as State Practice

Evidence of practice in relation to prohibitive rules (such as prohibitions on reprisals) can also be located in the non-employment of the prohibited conduct. But there is an issue of sufficiency of evidence here. If States, within their military manuals, and through their public pronouncements, continue to maintain a right to engage certain reprisals, but in their operational conduct do not in fact do so, the evidence of State practice could at best be described as ambiguous. But even if there can be shown to be, in effect, a usage in place whereby States refrain from engaging certain (or all) reprisals, the question would still be whether that usage is backed up by *opinio juris*.

⁹⁹¹ See US Field Manual No. 27-10, par. 41; US Dept. of Defence, Instruction 5500.15, Review of Legality of Weapons under International Law, 16 October 1974.

⁹⁹² See Greenwood (1991), p. 103.

⁹⁹³ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Federal Republic of Germany v Netherlands)* [1969] ICJ Rep. 3, par. 76.

If such a usage exists merely due to the absence of conflict, or because it is felt that the conditions that would warrant reprisals against civilians are extreme and have not presented themselves (perhaps even over a period of decades), then there is no basis for asserting the existence of a customary rule to the effect that reprisals against civilians or civilian objects are impermissible. In the course of the *Lotus* case France argued that an absence of State prosecutions in relation to collisions on the High Seas – except by the flag State of the ship aboard which the wrongful act occurred – indicated the existence of a customary rule prohibiting the initiation of prosecutions by non-flag States. The PCIJ rejected the argument on the basis that there was no evidence that any such restraint was grounded in States being conscious of having a duty to abstain.⁹⁹⁴ The United States Department of Defense review and analysis of Protocols I and II indicated that although it would be unlikely that the United States would ever have resort to reprisals against civilian populations except in the context of nuclear warfare, nevertheless the United States “might want to preserve the right of reprisals in some types of widespread conventional warfare.”⁹⁹⁵ In the context of the law of armed conflict, it would be a particularly perverse result if a State was forced into employing each and every weapon and method of warfare in its arsenal at regular intervals in order to maintain their continued legality.⁹⁹⁶ Customary law does not recognise a doctrine of desuetude, except where the absence of a particular usage can be shown assertively to be grounded in *opinio juris* as to the illegality of that usage.⁹⁹⁷

e. Treaty Practice as State Practice?

⁹⁹⁴ *S.S. Lotus (France v Turkey)*, 1927 PCIJ (Ser. A) No. 10, p. 28.

⁹⁹⁵ United States Department of Defense Law of War Working Group Review and Analysis of Protocols I and II Adopted by the Diplomatic Conference on International Humanitarian Law I-51-9 (1987), discussed in Parks (1990), p. 95, n. 297.

⁹⁹⁶ Waxman notes in another context: “Somewhat perversely, an argument that the consistent U.S. practice of using only precision-guided munitions (PGMs) against urban targets generates a legal norm despite U.S. protestations to the contrary might in theory create incentives for the United States to deviate from its practice in order to manifest dissent.” (M.C. Waxman, *International Law and the Politics of Urban Air Operations*, MR-1175-AF, 2000, Ch. 2, p. 14, n. 30, available at <http://www.rand.org/publications/MR/MR1175/MR1175.chap2.pdf>).

⁹⁹⁷ On this point, see R. Higgins, *Problems & Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, pp. 19-22. Higgins states, for *e.g.*, that “an existing [customary] norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinio juris*.” (p. 22).

It will be recalled that the ICJ, in the *North Sea Continental Shelf Cases*, attempted to determine whether Article 6 of the Geneva Convention on the Continental Shelf had generated a parallel customary law “partly because of its own impact, partly on the basis of subsequent State practice.”⁹⁹⁸ Although the Court did not elaborate upon the notion of a conventional provision generating custom as a result of “its own impact” (as opposed to subsequent State practice) it may be that the Court had in mind some notion of treaty-practice as State practice. The Court stated, in addition to the requirement that the treaty rule be of a fundamentally norm-creating character, that:

it might be that even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself [to generate a “general rule of international law”], provided it included that of States whose interests were specially affected.⁹⁹⁹

It is difficult to reconcile this passage with the rest of the Court’s judgment. The practice of States acting in accordance with their treaty obligations was viewed as irrelevant to the formation of customary law:¹⁰⁰⁰ States bound by treaties would tend to locate the basis of their obligation in the treaty itself (and the principle *pacta sunt servanda*) rather than in any belief that a parallel norm to that in the treaty was also binding as a matter of general international law (*i.e. opinio juris*). The London Statement of Principles attempts to explain the ICJ’s reasoning by stating that it may be possible, in exceptional cases, for a multilateral treaty to create customary law “of its own impact” if it is widely adopted and if it is clear that by adopting the treaty the States specifically intended to create customary law.¹⁰⁰¹ As the Commentary to the Statement explains:

the consent of States to a rule of customary law, whilst not a necessary condition of their being bound, is a *sufficient condition*. In other words, if States indicate *by any means* that they intend to be bound as a matter of customary law, being bound will be the consequence, so long as their intention is clear. They can evince that intention by a public statement, for instance. That being so, there is no *a priori* reason why they cannot instead evince it through, in conjunction with, or subsequent to the

⁹⁹⁸ [1969] ICJ Rep. 3, par. 70.

⁹⁹⁹ *Id.*, par. 73.

¹⁰⁰⁰ *Id.*, par. 76.

¹⁰⁰¹ See London Statement of Principles, Section 27, p. 50.

conclusion of a treaty, *provided that it is their clear intention to accept more than a merely conventional norm.*¹⁰⁰²

In that sense, the process of entering into a treaty is neither to be viewed as State practice, nor as *opinio juris*; rather, in certain exceptional cases, it may (or so it is argued) stand as evidence of a *consent* to be bound by a rule of general international law. Consent differs here from *opinio juris* in that consent corresponds to a *will* to be bound as opposed to a *belief* that one is already bound.¹⁰⁰³ Yet it is difficult to see how the consent of a certain pool of States to be bound by a rule of law is constitutive of that rule as general law in the absence of State practice and *opinio juris*. Perhaps that is why the Court stated that a treaty may give rise to customary law “partly because of its own impact, *partly on the basis of subsequent State practice*”:¹⁰⁰⁴ Whatever the juridical status of a treaty’s “own impact” on general international law – *i.e.* whether as consent, State practice, or *opinio juris* – State practice by non-parties in relation to specific treaty provisions was viewed as necessary to convert those provisions into general international law. Ultimately, however, the potential for a treaty to create customary law “of its own impact” was dealt with cursorily by the Court. It was dismissed in the context of the particular case on the basis that the number of ratifications and accessions to the Convention was “respectable” though “hardly sufficient”.¹⁰⁰⁵ In the context of Protocol I, it has already been noted that there are 162 parties: considerable, though not quite the near-universality of the 192 parties to the Geneva Conventions of 1949 (following the Marshall Islands’ accession on 1 June 2004).¹⁰⁰⁶ Nevertheless, the fact that a number of major military powers have neither ratified nor acceded to Protocol I indicates that the Protocol could not have resulted in the generation of customary law “of its own impact”.

¹⁰⁰² London Statement of Principles, Section 27, Commentary, pp. 51-2, par. (b) (emphasis in original).

¹⁰⁰³ London Statement of Principles, Section 18, Commentary, p. 38, par. (a).

¹⁰⁰⁴ [1969] ICJ Rep. 3, par. 70.

¹⁰⁰⁵ *Id.*, par. 73.

¹⁰⁰⁶ List of States Parties available at www.icrc.org.

2. BEYOND THE NORTH SEA CONTINENTAL SHELF CASES

The *North Sea Continental Shelf Cases* adopted a conservative approach to the determination of the customary status of treaty provisions which were innovative (or only emerging) at the time of their promulgation. The practice, particularly in more recent times, of international courts and tribunals appears to indicate a more flexible approach to the ascertainment of customary rules. This practice can be seen in relation to the full spectrum of international law rules, but is most marked in relation to those appearing in humanitarian law treaties. As Higgins asked:

Applying the same tests that it enunciated in the *Continental Shelf Cases* to the question of genocide, would the Court have determined that there were relatively few ratifying parties to the Genocide Convention, that they did not include most of the potential butchers, and that the basis of the practice of most states in not committing genocide has to remain 'entirely speculative'?¹⁰⁰⁷

Her answer was that "[t]he character of the alleged emerging norm seems important in the analysis."¹⁰⁰⁸ It may be, particularly in light of the "purely humanitarian and civilizing purpose"¹⁰⁰⁹ of Protocol I, that a great number of its provisions, including those prohibiting reprisals, will come to be accepted as reflecting the current state of customary law despite an absence of clear and extensive practice in their favour. Numerous examples can be cited of international courts and tribunals applying lesser standards of proof in the determination of the customary status of humanitarian treaty provisions than those set out in the *North Sea Continental Shelf Cases*. In the *Trial of the Major War Criminals*, the International Military Tribunal at Nuremberg held, without any systematic analysis, that the Hague Regulations of 1907 had entered customary law by 1939.¹⁰¹⁰ In *United States v von Leeb* (the High Command Case), the U.S. Military Tribunal accepted that many of the provisions of the Geneva

¹⁰⁰⁷ Higgins (1994), p. 31.

¹⁰⁰⁸ *Id.*

¹⁰⁰⁹ G. Abi-Saab, "The 1977 Additional Protocols and General International Law: Some Preliminary Reflections", in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991, p. 121 (borrowing from the language used by the ICJ in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep. 16, p. 23).

¹⁰¹⁰ *Trial of the Major War Criminals*, Cmd. 6964, Misc. No. 12, p. 65 (1946); Greenwood (1991), p. 98; T. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", (1996) 90 *American Journal of International Law* 238, p. 239.

Prisoners of War Convention of 1929 had entered into customary law by the same date, once again without systematic analysis.¹⁰¹¹ In the *Nicaragua Case*, the ICJ accepted that common Articles 1 and 3 of the Geneva Conventions of 1949 had entered customary law, yet again without any real examination of State practice.¹⁰¹² Meron states that in each of these cases (as well as in *Prosecutor v Tadić*, discussed directly below) the courts looked primarily to *opinio juris* rather than State practice in reaching their conclusions.¹⁰¹³

The ICTY Appeals Chamber in the *Tadić* decision on jurisdiction found that the “core” of Protocol II has become part of customary international law.¹⁰¹⁴ The Appeals Chamber stated that many provisions of Protocol II “can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.”¹⁰¹⁵ The evidentiary basis for this conclusion rested largely on (1) a pronouncement made by the government of El Salvador to the effect that although Protocol II did not apply as such to El Salvador’s civil war, the government would nevertheless comply with its provisions on the basis that it merely “developed and supplemented” common Article 3 which was in turn of universal application;¹⁰¹⁶ and (2) a statement by the Deputy Legal Adviser to the United States State Department, made in his official capacity, to the effect that “the basic core” of Protocol II is reflected in common article 3 and is therefore a part of generally accepted customary law.¹⁰¹⁷ The Appeals Chamber’s conclusion in this respect was *obiter* and that may excuse the sparseness of the evidence cited, but the specific conclusion as to Protocol II was merely part of a broader conclusion concerning the application of the laws of armed conflict to “internal” conflicts as a matter of customary law, a conclusion which was essential to the finding that the ICTY had subject-matter jurisdiction over

¹⁰¹¹ (1948) 11 TWC 462, pp. 533-535; Greenwood (1991), p. 98; Meron (1996), p. 239.

¹⁰¹² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, pars 218-220; Greenwood (1991), p. 98; Meron (1996), p. 239.

¹⁰¹³ Meron (1996), p. 239. Whether the sparse evidence cited in the various cases indicates a legal opinion as such is, however, open to question (*see, e.g.*, I.G. Corey, “The Fine Line between Policy and Custom: *Prosecutor v Tadic* and the Customary International Law of Armed Conflict”, (2000) 166 *Military Law Review* 145, pp. 154-5).

¹⁰¹⁴ *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 98.

¹⁰¹⁵ *Id.* par. 117.

¹⁰¹⁶ *See id.*

¹⁰¹⁷ *Id.*

the acts alleged against Tadic under Article 3 of its Statute regardless of whether they occurred in the context of an internal or international armed conflict.¹⁰¹⁸ Nevertheless, even in relation to the broader proposition, the evidence cited was limited in nature; it included statements and protests by governments,¹⁰¹⁹ and insurgents,¹⁰²⁰ declarations of international organisations,¹⁰²¹ and military manuals and instructions,¹⁰²² but the only examples of “physical” State practice in the classical sense (*i.e.* evidence of what States actually do, as opposed to what they say) cited by the Appeals Chamber were the conduct of hostilities in the Spanish Civil War,¹⁰²³ and the enforcement by Nigeria of its military Code against its own officers in the context of its military operations against Biafran rebels (including the execution by firing squad of those officers).¹⁰²⁴

Any departure from the type of rigorous analysis of the customary status of rules as mandated in the *North Sea Continental Shelf Cases* must be supported upon some doctrinal basis. Otherwise, the principle of legality is infringed, and this has particularly serious implications in the context of international criminal law which is grounded, *inter alia*, in the principle *nullum crimen sine lege*.¹⁰²⁵ Thus, it is insufficient to argue that some multilateral treaties operate as “quasi-international legislation” on the basis that this is “dictated by the necessity of solving global problems”;¹⁰²⁶ or to put the following form of argument flagged as a possible process of reasoning in relation to the customary status of Protocol I and II by Abi-Saab:

Even where there is a normative increment, *i.e.*, where the Protocols introduce new law, we have to keep in mind that they belong to a special category of treaties, the law-making multilateral conventions (*traités-lois*), and more particularly and significantly to a sub-species of this category which has, to use the language of the ICJ, ‘a purely humanitarian and civilizing purpose’.

¹⁰¹⁸ *See id.*, par. 137.

¹⁰¹⁹ *See id.*, pars 100, 105, & 121-123.

¹⁰²⁰ *See id.*, par. 107.

¹⁰²¹ *See id.*, pars. 101, 110-115 & 119-120.

¹⁰²² *See id.*, pars 102, 106 & 118.

¹⁰²³ *See id.*, par. 100. Even here, no concrete evidence was cited, although its existence was adverted to.

¹⁰²⁴ *See id.*, par. 106.

¹⁰²⁵ *See above*.

¹⁰²⁶ G. Tunkin, “Is General International Law Customary Law Only?”, (1993) 4 *European Journal of International Law* 534, part III (available at <http://www.ejil.org/journal/Vol4/No4/art4.html>).

This explains their special technical and substantive characteristics (e.g., the absolute and *erga omnes* character of their obligations); but above all it makes for their universal vocation and explains the general tendency to consider them as having a particular propensity to 'generalize', i.e., to pass into general international law, and to view this contingency as a normal stage or the normal outcome of their development. It has sometimes been suggested – on the basis of the findings of the post-war International Military Tribunals – that there is a presumption to that effect, whether rebuttable (Tokyo) or irrebuttable (Nuremberg).¹⁰²⁷

Typically, to say that something is “law-making” is to assert a legal fact; i.e. that the norm was constructed in a manner recognised as formally conferring the status of law upon that norm. But that cannot be the sense in which *Abi-Saab* means it here, for treaties are not recognised, formally, as creating general law.¹⁰²⁸ He seems to be asserting, therefore, something else; perhaps something about the expectations of those who promulgated the treaty. In fact, there is something highly circular in the argument, for he is intending to show why a treaty creates general law, and he begins this illustration by telling us that first we have to keep in mind that the Protocols are “law-making multilateral conventions”! Surely he’s not suggesting that a treaty creates general law whenever the parties to a treaty expect that result. This is to claim the treaty as a legislative platform; a claim which has no basis in international law. Perhaps in light of the radical (and groundless) nature of the assertion, he chooses to narrow the claim, arguing that the Protocols belong not simply to the category of “law-making multilateral conventions”, but “more particularly and significantly to a

¹⁰²⁷ *Abi-Saab* (1991), p. 121. For a strong critique of the tendency to view treaty norms as having easily ascended to the status of customary law, see P. Weil, “Towards Relative Normativity in International Law?”, (1983) 77 *American Journal of International Law* 413, especially pp. 434-439.

¹⁰²⁸ See, however, Lauterpacht who appears to have suggested that “universal” or “general” international law can be created through multilateral treaties even in the absence of universal participation in those treaties (H. Lauterpacht, *Oppenheim’s International Law*, 8th ed., David McKay Co., New York, 1955, vol. I, p. 28). This is contrary to the orthodox position as evinced by Kelsen when he noted that as no treaty is adhered to by every State in the world without exception, there is no such thing as “general” conventional law, only “general” customary law (H. Kelsen, *Principles of International Law*, Holt, Rinehart & Winston, NY, 1952, p. 188). See, also, the opposition of the U.S. and the U.K. to the ILC’s use of the term “general multilateral treaties” during the ILC’s drafting of articles on the law of treaties. The final draft contained no reference to the term (see G. Tunkin, *Theory of International Law*, Harvard University Press, Cambridge, MA, 1974, pp. 137-142). Whilst the ICJ in the *Barcelona Traction case* did make reference to “international instruments of a universal or quasi-universal character” (1970 ICJ Rep. 3, p. 32), Weil has stated that it is by no means certain that such *dicta* bear the expansive construction sometimes placed on them (Weil (1983), p. 435). The history of international law, particularly in the nineteenth century, nevertheless indicates that multilateral treaties between a relatively small number of “Great Powers” were often treated as generating general international law (Cassese (1984), pp. 115-117). This approach is of course long obsolete.

sub-species of this category which has, to use the language of the ICJ, ‘a purely humanitarian and civilizing purpose’”. So the argument becomes: Whenever you have a treaty which the parties expect to enter into general law, and which has a humanitarian and civilizing purpose, then that treaty enters into customary law.

There are, however, a number of possible grounds which could be asserted for lowering the evidentiary threshold in terms of the ascertainment of custom in relation to humanitarian law rules, without radically distorting the formal sources of international law or contravening the requirements of legality:

a. Lack of Alternative Evidence

The ICTY Appeals Chamber in the *Tadić* decision on jurisdiction appears to have suggested that the process of determining the customary status of the rules and principles of the law of armed conflict is *sui generis* in that the elements of custom may more readily be evinced by official statements and documents than is the case for other rules of international law. According to the Appeals Chamber:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.¹⁰²⁹

¹⁰²⁹ *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 99. The position adopted here appears somewhat similar to Kirgis’ position that evidence of State practice and *opinio juris* are largely interchangeable. Kirgis argued that evidence of State practice and *opinio juris* may be assessed on a “sliding scale” whereby “very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris* so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.” (F.L. Kirgis, Jr., “Custom on a Sliding Scale”, (1987) 81 *American Journal of International Law* 146). Meron asks, however, whether the Appeals Chamber in *Tadić* decision on jurisdiction could not have made a

Naturally, if evidence of operational or other physical practice exists then it is probably fair to assert that the evidentiary value of that practice should be accorded primacy or at least sufficient weighting depending on the quality of that evidence.¹⁰³⁰ The practice of the ICTY, however, appears only partly consistent with this *caveat*. For example, in relation to the assessment of whether the violation of certain rules gives rise to individual criminal responsibility under customary law, physical practice in the form of national prosecutions and punishment has been examined,¹⁰³¹ but only cursorily, with far greater emphasis being placed on official statements and documents including military manuals and domestic legislation.¹⁰³² Looking to official pronouncements or documents in order to pinpoint State practice is, however, unlikely to lead to the conclusion that any of the Protocol I prohibitions on reprisals have entered customary law. The military manuals of non-party States do not appear to have adopted the Protocol's aversion to reprisal measures, and the international community speaking through fora such as the United Nations General Assembly does not appear to have clearly spelled out the position that the full spectrum of reprisal prohibitions in protocol I is reflective of customary law.

b. Treaty Practice as State Practice

greater effort to identify "actual state practice". He notes that without some significant discussion of operational practice governments may not be persuaded by the Tribunal's pronouncements on the substance of customary law (Meron, 1996, p. 240).

¹⁰³⁰ See, however, Baxter's argument that: "The actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts." (R. Baxter, "Multilateral Treaties as Evidence of Customary International Law", (1965-6) 41 *British Yearbook of International Law* 275, p. 300); see, also, Cheng, who viewed *opinio juris*, rather than State practice, as constitutive of customary law. State practice was significant only as evidence of *opinio juris* (B. Cheng, "Custom: The Future of General State Practice in a Divided World", in McDonald & Johnston (eds.), *The Structure & Process of International Law*, Martinus Nijhoff Publishers, The Hague, 1983, p. 515; Cheng (1965)).

¹⁰³¹ See, e.g., *Prosecutor v Duško Tadić*, Case No. IT-94-1, Trial Chamber, Decision on the Defence Motion on the Jurisdiction of the Tribunal, 10 August 1995, par. 68; see, also, *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 130.

¹⁰³² See *Prosecutor v Duško Tadić*, Case No. IT-94-1, Trial Chamber, Decision on the Defence Motion on the Jurisdiction of the Tribunal, 10 August 1995, par. 68.

Greenwood has suggested that the ease with which international courts and tribunals have moved towards the recognition of treaty rules as custom suggests a refinement to the test set out in the *North Sea Continental Shelf Cases*, such that the adoption of the treaty text itself may be viewed as an important piece of State practice.¹⁰³³ Although the ICJ in that case recognised the possibility of a treaty entering customary law partly “of its own impact”, it remains uncertain precisely what the Court had in mind by that phraseology.¹⁰³⁴ If Greenwood is correct, then judicial practice has moved towards a more flexible calculus of State practice whereby the practice of non-party States and the practice of party States may be considered cumulatively.¹⁰³⁵ Greenwood warns, however, that:

If abused, this approach runs the risk of obliterating the distinction between conventional and customary law and of ignoring the often delicate ‘package deal’ nature of treaty negotiations. Nevertheless, it is suggested that it is acceptable - and is, indeed, applied in practice - in cases where the treaty provision concerned commands general acceptance (amongst the international community as a whole) not merely as part of a treaty package but as the statement of a rule of general application.¹⁰³⁶

The approach is therefore no substitute for ascertaining the existence of widespread support for the rule in question, and the fact still remains that a number of significant military powers have not only refrained from embracing the reprisal prohibitions in Protocol I, but have, in some cases, actively displayed their opposition to those prohibitions.

c. Treaty Law as Clarification of Pre-Existing Custom

An alternative approach is to view, where applicable, subsequent treaty provisions as merely applying and clarifying pre-existing customary law. Greenwood has stated that treaty law provisions may more easily enter custom where they are merely “a detailed application of a more general principle which is already well established in

¹⁰³³ Greenwood (1991), p. 99.

¹⁰³⁴ See above.

¹⁰³⁵ This was the position taken by Judge Lachs in his Dissenting Opinion in the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Federal Republic of Germany v Netherlands)* [1969] ICJ Rep. 3, p. 228.

¹⁰³⁶ Greenwood (1991), p. 99.

customary law”.¹⁰³⁷ Baxter noted that this trend was particularly prevalent in the context of humanitarian law treaties where:

each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague.¹⁰³⁸

These observations are confirmed by the practice of the ICTY, for *e.g.* in relation to Article 75 of Protocol I or the “core” of Protocol II, both of which were accepted as having entered into custom on the basis that they were merely an elaboration on Common Article 3.¹⁰³⁹ There is nothing wrong with this approach, in principle, given that the new provisions are merely viewed as clarifications which are accepted by a large number of States. As the approach taken is not that a new rule is come into being, but rather that an old rule is being interpreted, the standard of proof is presumably lower. Could it be argued that the prohibitions on reprisals in Protocol I are merely detailed applications of more general proscriptions in customary law? Abi-Saab has stated that:

the greatest contribution of the Protocols is not in introducing new rules, but in specifying the meaning and import of the general principles and provisions of the [Geneva] Conventions – and to a lesser extent the Hague Regulations – in the conditions of present-day warfare. Most of the provisions of the Protocols fall into this category.¹⁰⁴⁰

While this may certainly be viewed as true for certain provisions of Protocol I – such as the requirement to assess the legality of new weapons under Article 36, which may be argued to be implicit in general international law on the basis that it logically flows, for *e.g.*, as an application of the principle of good faith, from rules prohibiting

¹⁰³⁷ *Id.*, p. 98.

¹⁰³⁸ Baxter (1965-6), p. 286. Meron treats Baxter’s argument as supporting the proposition that the repetition of particular terms in subsequent treaties strengthens the claim that those terms are declaratory of customary law (Meron (1989), pp. 28-29).

¹⁰³⁹ *See above.*

¹⁰⁴⁰ Abi-Saab (1991), p. 119. Abi-Saab’s position is that eventually the *whole* treaty enters customary law, not just individual provisions: “As time passes and the circle of formal participants widens, the new updated instrument as a normative whole – and not some of its isolated provisions here and there – (with the possible exception of those establishing new institutional and procedural arrangements), ends up structuring expectations and the legal environment as the only standard of reference; whence *opinio juris* if you like.” (*id.*, p. 122)

or restricting the use of weapons,¹⁰⁴¹ – it is less likely to be true for the prohibitions on reprisals. The reprisal prohibitions, subject to what is stated in the next chapter of this thesis, do not add meaning or content to a pre-existing nebulous set of norms, but rather mark a clear and unambiguous departure from prior principles. Rules on the legal review of new weapons, or precautionary measures to be taken in attack, for example, can easily fit into the ambit of the hazy standards that existed before. But with reprisals, the law prior to Protocol I was clear in terms of the permissibility of reprisals other than those expressly precluded in treaty form; and it was clear that the reprisal prohibitions in Articles 51-56 marked a definite and purely innovative departure from pre-existing law.¹⁰⁴² There is therefore, subject to what is stated below, no ambiguity upon which we can “piggy-back” the new reprisal prohibitions into customary law. It is important to contrast, in this context, rules which essentially reaffirm, but still develop, pre-existing law, by adding precision, detail or clarification with those rules which are largely innovative.¹⁰⁴³ The prospect for “piggy-backing” new rules into general law on the basis that they merely apply and clarify pre-existing customary law is limited to the former class of new rules and does not extend to the latter.

3. CONCLUSION AS TO CUSTOMARY STATUS OF REPRISAL PROHIBITIONS

There would appear to be only the most limited basis upon which the reprisal prohibitions in Protocol I, to the extent that they add to those prohibitions found in the Geneva Conventions of 1949, could be asserted to have entered customary law. The prohibitions were widely viewed as innovative at the time of their promulgation, and since that time no significant body of practice has emerged (outside of compliance with treaty requirements) that would indicate that reprisals no longer form a part of the methods of armed conflict. The right to reprisals is maintained in

¹⁰⁴¹ See Cassese (1984), p. 77. Another example is Article 57 of Protocol I requiring precautionary measures to be taken in the context of any attack. Cassese states that this Article is based on obligations arising under customary law, but that Article 57 “greatly develops [customary law] by clarifying and spelling out aspects of existing regulations that were obscure or controversial; it also gives precision to loose legal provisions.” (*id.*, p. 95)

¹⁰⁴² See Cassese (1984), pp. 88-94.

¹⁰⁴³ Cassese (1984), p. 113. Cassese identified a third class of rules; namely those that merely re-state and codify customary law (*id.*)

military manuals,¹⁰⁴⁴ and the prohibition on reprisals in Protocol I has been the subject of recent reservations.¹⁰⁴⁵ Thus even if we have moved to a position where the elements of customary law are more readily evinced by official statements and documents than the conduct of hostilities in the field, it would be exceedingly difficult to conclude that those elements are made out in relation to the reprisal prohibitions in Protocol I. Similarly, the fact that there are an appreciable number of significant military powers which have either refrained from ratifying or acceding to Protocol I or reserved the right of reprisals in the context of their obligations under the Protocol, would suggest that even if we could treat practice pursuant to a treaty as State practice for the purpose of ascertaining customary law, that practice is insufficient in relation to the reprisal prohibitions in Protocol I. The ICTY Trial Chamber in *Kupreškić* therefore appears to concede that the reprisal prohibitions in Protocol I are not backed up by State practice for the purpose of positing their entry into customary law:

As for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977, whereas reprisals against civilian objects are outlawed by Article 52(1) of the same instrument. The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol (which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape.¹⁰⁴⁶

The Trial Chamber nevertheless suggests (in *obiter*) that the reprisal prohibitions in Protocol I may have entered general international law by virtue of the Martens clause and the principles of humanity.¹⁰⁴⁷ Whether the Martens clause or principles of

¹⁰⁴⁴ See above.

¹⁰⁴⁵ See above.

¹⁰⁴⁶ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 527. It should be noted that France and Japan are now Parties to Protocol I, although France has submitted a reservation in relation to the reprisal prohibitions.

¹⁰⁴⁷ See *id.*, par. 527ff.

humanity can properly be asserted as a basis of obligations in the context of international criminal law is addressed in the next chapter.

In relation to the reprisal prohibitions introduced in accordance with the Conventional Weapons Convention, there is clearly insufficient evidence of *opinio juris* or State practice to conclude that those prohibitions have entered customary law.

4. PERSISTENT OBJECTOR RULE AND *JUS COGENS*

In the event that the prohibitions on reprisals in Protocol I have entered customary international law, it could be asserted by some States not party to Protocol I that those prohibitions are non-opposable to the States in question on the basis that those States have consistently objected to the emergence and crystallisation of the prohibitions as customary law.¹⁰⁴⁸ There is, however, some argument that the “persistent objector rule” has never attained the status of an extant rule of international law;¹⁰⁴⁹ this proceeds partly on the basis that the ICJ’s jurisprudence on the matter is in fact *obiter dicta*.¹⁰⁵⁰ It certainly remains to be seen whether the rule will come to be accepted in the context of humanitarian law norms, particularly where those norms come to attain the status of *jus cogens*.¹⁰⁵¹ There must, however, be considerable doubt as to whether the reprisal prohibitions in Protocol I could be viewed as attaining the status of *jus cogens* (even if it were accepted that they had entered customary law). Given that a number of significant military powers openly maintain a continued (theoretical) right to engage in reprisals,¹⁰⁵² it is difficult to see how any one of the reprisal prohibitions in Protocol I could be viewed as a “norm

¹⁰⁴⁸ See *Anglo-Norwegian Fisheries Case (UK v Norway)* [1951] ICJ Rep 116, p. 131; *Asylum Case (Columbia v Peru)* [1950] ICJ Rep 266, pp. 277-8; see also *Nuclear Tests Cases (Australia v France)* [1974] ICJ Rep. 253, pp. 286-93 (Separate Opinion of Judge Gross); I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford University Press, Oxford, 1998, p. 10; R.Y. Jennings and A.D. Watts, *Oppenheim’s International Law*, 9th ed., Longman, London, 1992, vol. 1, p. 29; G. Tunkin, *Theory of International Law*, Harvard University Press, Cambridge, MA, 1974, p. 130.

¹⁰⁴⁹ See J.I. Charney, “The Persistent Objector Rule and the Development of Customary International Law”, (1985) 56 *British Yearbook of International Law* 1; T.L. Stein, “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law”, (1985) 26 *Harvard International Law Journal* 457.

¹⁰⁵⁰ See especially Charney (1985). This argument has been challenged (see, e.g., M.H. Mendelson, “The Formation of Customary International Law”, (1998) 272 *Recueil des Cours* 155, pp. 227ff.)

¹⁰⁵¹ See M. Bos, *A Methodology of International Law*, T.M.C. Asser, Amsterdam, 1984, pp. 247-255.

¹⁰⁵² See above.

accepted and recognized by the international community as a whole as a norm from which no derogation is permitted".¹⁰⁵³ The situation of reprisals is therefore entirely different to that of genocide or torture. While torture, for *e.g.*, may be routinely practiced by a number of States,¹⁰⁵⁴ Higgins notes that the prohibition on torture retains its quality as customary law (and the same observation may be made in relation to its quality as *jus cogens*)¹⁰⁵⁵ on the basis that not a single torturing State publicly asserts its right to engage in torture.¹⁰⁵⁶ Higgins' point is that despite violations of international law by torturing States, there is neither sufficient State practice nor *opinio juris* to posit a new and contrary customary law that permits torture.¹⁰⁵⁷ The right to engage in reprisals, however, is publicly advocated, including through military manuals and reservations to Protocol I.¹⁰⁵⁸ Therefore it would not appear open to form the conclusion that the prohibitions on reprisals in Protocol I have attained the status of *jus cogens*, even if it were conceded that they are binding as a matter of customary law.

¹⁰⁵³ Art. 53, Vienna Convention (definition of "peremptory norm" (*jus cogens*)).

¹⁰⁵⁴ See Higgins (1994), p. 22.

¹⁰⁵⁵ For the conclusion that the prohibition on torture is a norm of *jus cogens*, see, *e.g.*, *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 454.

¹⁰⁵⁶ Higgins (1994), p. 22.

¹⁰⁵⁷ *Id.*

¹⁰⁵⁸ See above.

7

additional bases of the illegality of reprisals

i. INTRODUCTION

As suggested above, there is little basis for asserting the general applicability of the prohibitions on reprisals in Protocol I, and even less for prohibitions beyond that (such as those located within the framework of the Conventional Weapons Convention). Nevertheless, the question was flagged above as to whether we can “piggy-back” a prohibition on reprisals (whether generally, or in relation to certain classes of reprisals such as those prohibited in Protocol I) onto other nebulous rules or principles of international law.

ii. THE PROHIBITION ON COLLECTIVE PUNISHMENT

One potential means of positing the outlawry of reprisals against persons and property protected under the terms of the Hague Regulations, the Geneva Conventions or the additional Protocols is to raise the prohibition on collective punishment. The prohibition appears in Article 50 of the Hague Regulations which provides that “[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”¹⁰⁵⁹ Article 33 of Geneva Convention IV provides that “[c]ollective penalties and likewise all measures of intimidation or

¹⁰⁵⁹ Art. 50, Hague Regulations of 1907.

of terrorism are prohibited”;¹⁰⁶⁰ and Article 75 of Protocol I and Article 4 of Protocol II both provide that “collective punishments” are prohibited “at any time and in any place whatsoever”.¹⁰⁶¹ The ICRC’s Commentary on Protocol II asserts that the concept of “collective punishments” should be understood in its widest sense, and extends to any kind of “sanction”.¹⁰⁶² The Commentary concludes that “to include the prohibition on collective punishments amongst the acts unconditionally prohibited by Article 4 is virtually equivalent to prohibiting ‘reprisals’ against protected persons.”¹⁰⁶³ The difficulty with this conclusion, however, is that reprisals are an *exception* to treaty-based and customary norms in force. Thus, assuming that acts amounting to “reprisals” could be described as acts of “collective punishment”,¹⁰⁶⁴ it would need to be shown that the prohibition on collective punishment was not itself subject to exception in the case of reprisals. The basis of the conclusion in the Commentary on Protocol II would appear to rest in part on the fact that Protocol II (as with Protocol I) expressly prohibits collective punishment “at any time and in any place whatsoever”. Presumably, these words were viewed as sufficient to oust the possibility of any exception to the prohibition (including the case of reprisals). Each of the four Geneva Conventions of 1949, as well as Protocol I, provides that the terms of the treaty are to be respected “in all circumstances” (no such provision appears in Protocol II).¹⁰⁶⁵ There must be some considerable doubt as to whether a long-established exception such as reprisals could be ousted without a provision expressly and directly providing for such ouster (such as those appearing in Articles 51-56 of Protocol I).¹⁰⁶⁶ Nevertheless, whether general terms providing for treaty provisions to be respected in all circumstances, or in any time and place whatsoever, are sufficient to oust the exception of reprisals is addressed below. The

¹⁰⁶⁰ Art. 33, Geneva Convention IV.

¹⁰⁶¹ Art. 75(2)(d), Protocol I; Art. 4(2)(b), Protocol II.

¹⁰⁶² Sandoz *et al.* (1987), par. 4536.

¹⁰⁶³ *Id.*

¹⁰⁶⁴ Reprisals, *stricto sensu*, are those carried out for the specific purpose of coercing compliance with the law and any reprisal carried out, instead, for the purpose of “punishment”, loses, *ipso jure*, its justification as a reprisal (*see above*). Thus, “collective punishments” and “reprisals” may, strictly speaking, relate to mutually exclusive acts. Of course, if, as asserted in the ICRC’s Commentary on Protocol II (Sandoz *et al.* (1987)), the term “collective punishments” is to be construed expansively and includes any form of “sanction” then collective punishments and reprisals may overlap or be entirely co-extensive.

¹⁰⁶⁵ Art. 1, Geneva Conventions I-IV; Art. 1(1), Protocol I.

¹⁰⁶⁶ Arts. 51-56, Protocol I.

question addressed here is whether the prohibition on collective punishment, in and of itself, operates to preclude reprisals as a defence at least in relation to persons and property protected against collective punishment.

As indicated above, the Oxford Manual explicitly recognised reprisals as an “exception” to the prohibition on collective punishment.¹⁰⁶⁷ It appears that the prohibition on collective punishment in the Hague Regulations was enacted without prejudice to the question of reprisals.¹⁰⁶⁸ While a number of decisions of the post-World War II military tribunals impugned “reprisal” attacks on the basis that they failed to comply with the prohibition on collective punishment in Article 50 of the Hague Regulations,¹⁰⁶⁹ (as well as Article 46, which provides, *inter alia*, that the lives of persons and private property in occupied territory must be respected),¹⁰⁷⁰ nevertheless these decisions do not confirm or establish that the prohibition on collective punishment ousts, or in any way restricts, the right to engage reprisals. In *In re Wintgen*¹⁰⁷¹ the accused was a member of the German Security Police during the occupation of Holland who, under orders, set fire to a number of houses near Amsterdam as a reprisal for acts of sabotage committed by unknown persons on a near-by railway line. He was convicted by the Special Criminal Court in Amsterdam and appealed to the Court of Cassation. The Court of Cassation upheld the lower court’s conviction on the grounds that the arson constituted, *inter alia*, a violation of the prohibition on collective punishment under Article 50 of the Hague Regulations. The Court stated that it was no defence that provisions exist in military manuals permitting reprisals, including the burning of villages and houses (as provided, for *e.g.*, in the U.S. *Basic Field Manual* at paragraph 356E).¹⁰⁷² The Court found that, “[i]n order to be permissible under the laws of war, such a provision may not extend beyond the limits defined in Article 50 of the Hague Regulations of 1907”.¹⁰⁷³ Similarly, in *In re Fullriede*,¹⁰⁷⁴ the accused ordered the deportation of approximately five hundred men from a Dutch village as well as the destruction of

¹⁰⁶⁷ See above.

¹⁰⁶⁸ See above.

¹⁰⁶⁹ See, *e.g.*, *In re Wintgen* (1949) 16 AD 484; *In re Fullriede* (1949) 16 AD 548.

¹⁰⁷⁰ Art. 46, Hague Regulations of 1907. See, *e.g.*, *In re “Silbertanne” Murders* (1946) 13 AD 397; *In re von Lewinski* (1949) 16 AD 509; see, also, *In re Heinemann* (1946) 13 AD 395.

¹⁰⁷¹ *In re Wintgen* (1949) 16 AD 484.

¹⁰⁷² *Id.*, p. 484.

¹⁰⁷³ *Id.*

¹⁰⁷⁴ *In re Fullriede* (1949) 16 AD 548.

part of the village as a reprisal for an attack by Dutch citizens on a car containing four German officers and soldiers. The Special Criminal Court at Arnhem accepted, in principle, the admissibility of a plea of reprisals against innocent persons for acts committed by their fellow citizens, but rejected the plea in the circumstances of the case on the basis, *inter alia*, of the lack of proportionality. On appeal, the Special Court of Cassation found (in the words of the law reporter) that:

As to the reasoning of the Court below regarding the permissibility of reprisals against the innocent for acts of violence committed by their fellow citizens, the Court completely rejected it on the grounds fully set out in the leading case of *Rauter*, where such reprisals were held to be contrary to the rules of war, in particular to the principle underlying Article 50 of the Hague Regulations as to proportionality.¹⁰⁷⁵

The case there cited (namely that of *In re Rauter*) clarifies, however, that neither Article 50 of the Hague Regulations, nor Article 46, in any way limits the right to take reprisals *stricto sensu*. Those authorities that impugned certain “reprisal” measures on the basis that they did not conform with the requirements in Article 50 of the Hague Regulations¹⁰⁷⁶ may be explained on the basis that they did not involve reprisals *stricto sensu*. *In re Rauter* concerned, in part, the so-called “Silbertanne” murders which were carried out by members of the Netherlands S.S. against innocent members of the population in purported reprisal for attacks by the Dutch resistance. The Special Criminal Court at the Hague held that “the shooting of innocent persons by way of reprisals was contrary to Articles 46 and 50” of the Hague Regulations.¹⁰⁷⁷ On appeal, the Special Court of Cassation held, in relation to the defence plea of reprisals, that:

the appellant has not sufficiently distinguished between two types of cases which must be sharply differentiated. One can only properly speak of reprisals when a State resorts, by means of its organs, to measures at variance with international law, on account of the fact that its opponent – in this case the State with which it is at war – had begun, through one or more of its organs, to commit acts contrary to international law. The measures which the appellant describes as ‘reprisals’ bear an entirely different character. They are in fact retaliatory measures taken in time of war by the Occupant of enemy territory as retaliation not against unlawful acts of the State with which he is at war, but against hostile acts of the population of the territory in question or of individual members thereof,

¹⁰⁷⁵ *In re Fullriede* (1949) 16 AD 548, p. 550.

¹⁰⁷⁶ See, e.g., *In re Wintgen* (1949) 16 AD 484; *In re Fullriede* (1949) 16 AD 548.

¹⁰⁷⁷ *In re Rauter* (1949) 16 AD 526, p. 531.

which, in accordance with the rights of occupation, he is not bound to tolerate.

With regard to the right of the then German Reich to take genuine reprisals against the population of the Netherlands territory occupied by it, if the Netherlands could be rightly charged with any previous offence under international law against the then German State, the latter would be justified in striking against the population by taking counter-measures. This is recognised in the official explanation contained in the Rolin Report of 1899 concerning Article 50 of the Rules of Land Warfare, which remained unchanged on this point in 1907. In that report it is expressly stated that the said Article was enacted without prejudice to the question of reprisals, this being a subject distinct from that of the *mesures de repression* covered by the said Article. The objects against which genuine reprisals can be directed by an injured State on account of an offence previously committed in violation of international law by another State, need not be identical with the objects affected by the original wrong. Accordingly, the genuine reprisals, provided that they are taken within certain limits and provided that attention is paid to the requirements of proportionality, can in principle be directed against all objects which in the given circumstances can be considered for this purpose, whether these be the land, sea or air forces of the enemy, his organs, his territory, his merchant navy or property, his subjects wherever they may be, or their property.

Unlike the genuine reprisals dealt with above, which the Hague Peace Conference did not wish to prejudice and which they left unsettled, the 'so called reprisals', being retaliatory measures against inhabitants of occupied territory on account of punishable acts by other inhabitants, are certainly covered by a rule of law, namely the final part of Article 50 of the Hague Regulations of 1907. This Article expressly forbids the imposition of collective penalties, of a financial or other nature, against the population in the matter of individual acts for which they could not be considered jointly and severally responsible.¹⁰⁷⁸

The jurisprudence arising out of the Second World War therefore appears to confirm that reprisals *stricto sensu* (i.e. those preceded, *inter alia*, by a violation of international law attributable to the target of the reprisal attack), are not limited or affected by the prohibition on collective punishment. It would be exceedingly difficult to assert that the prohibition on collective punishment embodied in the treaties enacted post-World War II (i.e. in Geneva Convention IV and Protocols I and II) is of fundamentally different effect to the prohibition on collective punishment in the earlier instruments and now incorporates an implicit prohibition on reprisals. There is certainly a facial similarity between the notion of "collective punishment" and "reprisals" (although of course, they are juridically distinct)¹⁰⁷⁹ – but to assert that reprisals must be prohibited because collective punishments are is to engage in an impermissible form of analogical reasoning contrary to the principle *nullum*

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ *See, e.g., id.*

crimen sine lege.¹⁰⁸⁰ The assertion that reprisals are prohibited by virtue of the prohibition on collective punishment must be established through juridical reasoning, yet putting aside isolated opinion (such as that expressed in the Commentary on Protocol II that the prohibition on collective punishment in Protocol II is “virtually equivalent” to a prohibition on reprisals against protected persons)¹⁰⁸¹ there is no authority, at least of the status of the decision of an international criminal tribunal, clearly establishing that the prohibition on collective punishment excludes the possibility of reprisals.¹⁰⁸²

iii. THE PRINCIPLES OF HUMANITY

A number of authorities cite, as an additional limitation on the taking of reprisals, the requirement, purportedly derived from customary international law, that reprisals not violate elementary considerations or principles of “humanity”. It has been noted that the practical impact of the principles of humanity as an overriding limitation on the permissibility of reprisals would be substantial if it rendered illegal those reprisal measures currently falling into *lacunae* or “loopholes” left by the conventional prohibitions.¹⁰⁸³ The arbitral tribunal in the *Naulilaa Incident* stated that “[t]he most recent doctrine [provides that reprisals] are limited by considerations of humanity and the rules of good faith, applicable in the relations between states.”¹⁰⁸⁴ The *Institut de Droit International* in its 1934 resolution on recourse to reprisals stated that reprisals cannot be engaged which are contrary to the laws of humanity or public conscience (*lois de l’humanité et aux exigences de la conscience publique*).¹⁰⁸⁵ Both authorities were specifically concerned with the situation of peace-time reprisals, and it may well be (in line with the view expressed by the ICJ in the *Corfu Channel* case that elementary considerations of humanity are more exacting in peace-time than in war)¹⁰⁸⁶ that the principle expressed by the arbitral tribunal in the *Naulilaa Incident* and by the *Institut de Droit International* cannot be translated across to the context of

¹⁰⁸⁰ See above.

¹⁰⁸¹ See above.

¹⁰⁸² See, e.g. Jones & Powles (2003), par. 4.2.523.

¹⁰⁸³ Provost (1994), p. 423.

¹⁰⁸⁴ Green (2000), p. 629.

¹⁰⁸⁵ Art. 6(4), (1934) AIDI 692, pp. 708-711, translated in Kalshoven (1971), p. 8..

¹⁰⁸⁶ *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep. 1, p. 6.

belligerent reprisals. Nevertheless, the 1880 Oxford Manual, which was concerned specifically with the law of armed conflict, provided that belligerent reprisals “must conform in all cases to the laws of humanity and morality”.¹⁰⁸⁷ A.P. Higgins, writing in 1927 in the context of the law of naval warfare stated that “[t]he only limitation on the right of [reprisals] is the overriding law of humanity; for instance, because state A sinks the merchant ships of state B, state B does not become entitled to retaliate by doing the like.”¹⁰⁸⁸ In the case of the *Cervignano*, a decision of an Italian Prize Court, the Court held that reprisals were permissible in naval warfare provided they did not violate the “imperious obligations of humanity”.¹⁰⁸⁹ According to A.P. Higgins:

reprisals must not violate the imperious obligations of humanity; and to this rule Anglo-French reprisals conformed. In no single case did the application of these principles involve the loss of life to either enemy noncombatant or neutral, this differing in a striking manner from the proceedings of their adversary.¹⁰⁹⁰

Thus in A.P. Higgins’ view, the principle of humanity immunised non-combatants (but not their property) from reprisal attack. He stated, in the context of the First World War, that:

Reprisals ordered by the Anglo-French Orders and Decrees were directed against property and involved the detention and, under the Order in Council of February 1917, the condemnation of neutral property; but...[i]n the course of the execution of their Decrees the Central Powers destroyed no less than 1,716 *neutral* ships, involving a loss of over 2000 lives...¹⁰⁹¹

The practice of States in the Second World War, and the decisions of national military tribunals in the post-World War II war crimes trials, creates a far more ambiguous picture as to whether reprisals are limited by the principles of humanity. The United Nations War Crimes Commission stated in its Notes on the

¹⁰⁸⁷ Art. 86(3), Oxford Manual.

¹⁰⁸⁸ A.P. Higgins, “Retaliation in Naval Warfare”, (1927) 8 *British Yearbook of International Law* 129, p. 131.

¹⁰⁸⁹ Fauchille and Basdevant, *Jurisprudence Italienne*, p. 178, cited in Higgins (1927), p. 140.

¹⁰⁹⁰ A. Higgins (1927), p. 142.

¹⁰⁹¹ A. Higgins (1927), p. 141 (emphasis in original). Property belonging to neutrals or other innocents have long been held to be subject to reprisal measures under the law of naval warfare (see, e.g., *The Lucy* (1809) Edw. 122, 165 ER 1054; *The Zamora* [1916] 2 AC 77; *The Stigstad* [1919] AC 279; *The Leonara* [1919] AC 974).

Trial of General von Mackensen and General Maelzer before the British Military Court at Rome,¹⁰⁹² that “[i]t is the opinion of almost all writers on the subject that if reprisals are inflicted they must be...[i]n accordance with the fundamental principles of war, e.g., respect for lives of non-combatants or the interest of neutrals.”¹⁰⁹³ Neither the practice of belligerents during the Second World War, nor the war crimes trials examined by the UNWCC, appear, however, to bear consistency with this principle. For instance, the UNWCC, after offering the above observation, proceeded immediately to state, in relation to the specific facts of the case, that “the crime for which reprisals were being inflicted was committed by non-combatants, so that the question of sparing non-combatants did not arise as a separate issue.”¹⁰⁹⁴ The accused were jointly charged with committing a war crime by being concerned in the killing of 335 Italians in the Ardeatine Cave. The facts, as agreed between the defence and prosecution, were that on 23 March 1944 a bomb exploded amongst a company of German police officers as they marched through the *Via Rasella* in Rome killing 28 immediately, and wounding a number of others, at least four of whom died later that day. In response, Hitler’s Headquarters issued an order to shoot, within 24 hours, ten Italians for every one German police officer killed. The German Security Service in Rome carried out the order by herding 335 prisoners into the Ardeatine Cave the very next day and shooting them in the back at close range. The prisoners consisted of individuals awaiting execution for partisan activity, but also others “worthy of death” including a significant number of Jews who were innocent of any involvement in partisan crimes. There is no indication arising out of the Military Court’s decision that reprisal actions against non-combatants were considered improper. In fact, the prosecution conceded that it was proper for the German authorities to carry out reprisals in answer to the partisan attack and that the German authorities would have been entitled to blow up the houses in the *Via Rasella*¹⁰⁹⁵ (although, strictly speaking, this amounts to no more than a concession as to the propriety of reprisal measures against civilian property as opposed to civilians themselves).

¹⁰⁹² *Trial of General von Mackensen and General Maelzer* (1945) 8 LRTWC 1.

¹⁰⁹³ UNWCC, Notes on the Case, *Trial of General von Mackensen and General Maelzer* (1945) 8 LRTWC 1, p. 5.

¹⁰⁹⁴ *Id.*

¹⁰⁹⁵ *Trial of General von Mackensen and General Maelzer* (1945) 8 LRTWC 1, p. 5.

In the *Trial of Albert Kesselring* before the British Military Court at Venice (also in relation to the Ardeatine Cave massacre), the Prosecutor conceded that the Germans were justified in imposing reprisals, but argued that whereas there was authority for the destruction of property and incarceration of nationals of occupied territory as reprisals, there was no authority for the taking of human life.¹⁰⁹⁶ The Judge Advocate stated, however, in his summing up, that:

I have come to the conclusion that there is nothing which makes it absolutely clear that in no circumstances and especially in the circumstances which I think are agreed in this case that an innocent person properly taken for the purpose of a reprisal cannot be executed...¹⁰⁹⁷

In the case of *In re Kappler* (a further matter concerning the Ardeatine Cave massacre),¹⁰⁹⁸ the Military Tribunal of Rome appeared to subject reprisal measures to the principles of humanity and the Martens Clause, when it stated that:

Reprisals are subject to a general limitation which consists in the duty not to violate those rights which are intended to safeguard fundamental needs. This principle was formulated by writers in the last century. It now finds clear expression in the preamble to the Hague Convention of 18 October 1907 where the activities of States are set a limit by the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

This formulation is a little vague, but if one turns to the most authoritative writings prior to the Convention and to the opinions of subsequent writers who have attempted to define its sphere of operation, it is not difficult to determine its content. For the purpose of this inquiry precedents are of special importance inasmuch as they have been treated as a practice which corresponds to the requirements of the law. It is true that not all practices are relevant in the quest for a rule of customary law, but only those which have been accepted as lawful...¹⁰⁹⁹

There are, however, two important considerations in relation to the apparent conclusion above that reprisals must abide by the principles of humanity. The first is that the Military Tribunal did not hold the reprisal measure to be unlawful on the basis of the principles of humanity (but rather, on the grounds of disproportionality). The second point to consider is that the principles of humanity and the Martens Clause as expounded by the Military Tribunal are in fact co-extensive with *extant*

¹⁰⁹⁶ *Trial of Albert Kesselring* (1947) 8 LRTWC 9, p. 12.

¹⁰⁹⁷ *Id.*, pp 12-13.

¹⁰⁹⁸ *In re Kappler* (1948) 15 AD 471.

¹⁰⁹⁹ *In re Kappler* (1948) 15 AD 471, p. 474.

principles of customary international law. Thus, rather than limit the right to reprisals by reference to nebulous standards of humanity or the public conscience, the Military Tribunal had in mind (as is apparent in the second paragraph of the above citation) only those limitations that belong to the *lex lata* and have the status of customary international law. Further examples from the post-World War II war crimes trials may be given in which the principles of humanity or the Martens Clause (or similar notions) were cited as a limitation on the right to reprisals; but in no such case did the principles of humanity stand as an independent substantive basis for positing the illegality of the acts in question. Thus in *In re von Lewinski*, the Judge Advocate advised the British Military Court at Hamburg that the killing of hostages or reprisal prisoners was a violation of the usages of war. The Judge Advocate relied in this respect on Article 46 of the Hague Regulations of 1907 as well as the Martens Clause.¹¹⁰⁰ There was no reliance on the Martens Clause as a stand-alone provision. In *In re "Silbertanne" Murders*, the Dutch Court of Cassation held that "[t]he killing of persons as a reprisal for attacks of which they were in no way guilty ran counter to Christian morality and to the most elementary notions of military honour."¹¹⁰¹ Nevertheless, the substantive basis of the Court's decision was grounded in Article 46 of the Hague Regulations.

The writings of contemporary authors tends to doubt whether reprisal measures are in fact limited by any principles of humanity. According to Greenwood:

It has sometimes been suggested that there is a customary law requirement that reprisals must not infringe basic principles of humanity. This requirement appears most frequently in some of the nineteenth century statements of the law. In that context it probably reflects the fact that, at the time texts like the Oxford manual were drawn up, there were no treaty provisions expressly prohibiting reprisals against the wounded or prisoners of war.¹¹⁰²

Greenwood concludes that while principles of humanity are probably the inspiration behind many of the treaty-based prohibitions on reprisals, "it must be questioned whether they constitute a separate customary law requirement."¹¹⁰³ Kalshoven concludes that:

¹¹⁰⁰ *In re von Lewinsky* (1949) 16 AD 509, pp. 519-520.

¹¹⁰¹ *In re "Silbertanne" Murders* (1946) 13 AD 397, p. 398.

¹¹⁰² Greenwood (1989a), pp. 47-8.

¹¹⁰³ *Id.*, p. 48, n. 48; *see, also*, Greenwood (1989b), pp. 232-3.

As far as the alleged requirement of humanity is concerned...this is not a legal requirement of the law of reprisals, not even a flexible one, that would of itself suffice to render particular retaliatory measures illegal.¹¹⁰⁴

The difficulty with the modern conclusion that reprisals need not conform with the principles of humanity, however, is that given that early sources clearly and unambiguously expressed the requirement of conformity with humanity it would appear to be incumbent on those denying the applicability of humanity to indicate precisely how that requirement no longer came to apply. For *e.g.*, it would appear necessary to establish that the requirement fell into desuetude in terms of usage and in terms of the emergence of a new *opinio juris*, both negating the requirement that reprisals conform to the principles of humanity. Greenwood's principal explanation for the requirement in older texts such as the Oxford Manual of a requirement of humanity was that at the time such texts were drawn up there were no treaty provisions expressly prohibiting reprisals against classes of persons such as the wounded or prisoners of war. As indicated above, however, there is still some question as to the customary status of the reprisal prohibitions in Protocol I, and in any event the *lacunae* arising from that Protocol appear to leave certain classes of non-combatant persons and property unprotected. It could hardly be said, therefore, that a principle of humanity is no longer needed from the perspective of the protection of the human person. There are, for *e.g.*, no express reprisal prohibitions in the context of naval warfare, even in favour of civilians. Does this mean then that the post-World War I statements on the requirements of humanity in the context of naval warfare continue to apply?¹¹⁰⁵ It is necessary in addressing this question to distinguish two distinct issues: The first is whether "humanity" is recognised by today's customary international law as applying as an independent formal source of law; the second is whether distinct obligations which were previously justified under the banner of "humanity" attained the status of customary international law and apply today *qua* customary law.

In answering the second question first, there appears to be some basis for asserting that the inviolability of neutral persons and enemy non-combatants during reprisal attacks was recognised in the context of naval warfare during the First World

¹¹⁰⁴ Kalshoven (1971), p. 344.

¹¹⁰⁵ See above.

War.¹¹⁰⁶ What is uncertain is whether that principle attained the status of customary international law. By virtue of the principle of inter-temporal law¹¹⁰⁷ and in light of the fact that the Central Powers, at least, engaged reprisals against neutrals and enemy non-combatants,¹¹⁰⁸ it could be doubted as to whether the immunity of neutrals and enemy non-combatants from reprisal attacks ever reached the consistency of practice necessary at that time to attain the status of customary law.¹¹⁰⁹ In any event, any gains made from the perspective of civilian protections *vis-à-vis* reprisals in the First World War could be considered to have been undone during and in the aftermath of the Second World War. The jurisprudence arising out of the military tribunals convened after the Second World War appear to recognise the right to carry out reprisals against enemy civilians.¹¹¹⁰ Further, military manuals recognised that right and the extinguishment of the right to carry out reprisals against civilians protected under Geneva Convention IV and under Protocol I were considered novel developments at the conferences which promulgated the Geneva Conventions of 1949 and Protocol I respectively.¹¹¹¹ Thus any suggestion that the immunity of civilians from reprisals was established as a principle of customary international law by the First World War and continued to apply as such to the present day would be entirely difficult to make out and appears to be contradicted by the evidence. On the other hand, there could be some highly limited basis for asserting the inviolability of civilians against reprisal attacks in the context of naval warfare given that the decisions of national military tribunals cited above permitting reprisal attacks against civilians related, strictly speaking, to the law of land warfare only.¹¹¹² Nevertheless, the position at best must be considered highly uncertain or ambiguous, and the evidential basis for the inviolability of civilians in naval warfare against reprisal attacks must be considered tenuous. It would hardly seem open to any international criminal tribunal to announce that it was free from doubt that civilians were protected against reprisal attacks in the context of naval warfare, this

¹¹⁰⁶ See discussion above.

¹¹⁰⁷ See, e.g., D.W. Greig, *Intertemporality and the Law of Treaties*, British Institute of International and Comparative Law, London, 2001.

¹¹⁰⁸ See above.

¹¹⁰⁹ See, e.g., W. Friedmann, *The Changing Structure of International Law*, Columbia University Press, New York, 1964.

¹¹¹⁰ See above.

¹¹¹¹ See above.

¹¹¹² See above.

being the progeny of a rule of customary international law deriving in or before the First World War.

The other issue raised above is whether “humanity” is recognised by today’s customary international law as applying as a formal source of law. If so, then it would not matter that putative rules such as the inviolability of neutral or enemy naval merchants from reprisal attacks may have entered customary law and then fallen into desuetude, as the basis for the rule today could be posited on the principles of “humanity” rather than customary international law. If, however, “humanity” does not apply as a formal source of international law (perhaps having fallen into desuetude), then it may be that early statements requiring that reprisals abide by the principles of humanity are no longer to be considered applicable – either because they are based on a misconception of the formal sources of international law, or because they are based on an earlier conception of the formal sources of international law that was once correct but no longer applies. It is probably fair to conclude that early sources such as the Oxford Manual of 1880 and even the Martens clause of 1899 and 1907 (with its reference to “the laws of humanity”) were drafted during a period in which there was still some lingering uncertainty concerning the formal sources of international law. In particular, lingering uncertainty concerning the continued applicability of the law of nature, from which the “laws of humanity” would appear to derive.¹¹¹³ Of course, by the turn of the twentieth century, legal positivism had indisputably established its ascendancy over natural law theory.¹¹¹⁴ Nevertheless, there were still some voices that claimed a residual role for “the law of nature” within the framework of international law.¹¹¹⁵ Oppenheim, writing in 1908, declared that:

there is no generally recognized method of the science of international law. The three schools of the Grotians, the Naturalists and the Positivists are still in the field...All these schools are to-day represented by prominent men...To many it would therefore seem ridiculous to take part in the fray and to join one group and fight the others.¹¹¹⁶

¹¹¹³ See, generally, R. Coupland, “Humanity: What is it and how does it influence international law?”, (2001) 83 IRRC 969.

¹¹¹⁴ E.D. Dickinson, “Changing Concepts and the Doctrine of Incorporation”, (1932) 26 AJIL 239, p. 253.

¹¹¹⁵ See, e.g., R. Lansing, “Notes on World Sovereignty”, (1921) 15 AJIL 13, esp. pp. 22-25.

¹¹¹⁶ L. Oppenheim, “The Science of International Law: Its Task and Method”, (1908) 2 AJIL 313, pp. 326-7.

While Oppenheim stated that in his own opinion “we are now-a-days no longer justified in teaching a law of nature and a ‘natural’ law of nations”,¹¹¹⁷ he nevertheless conceded that such a view point would be treated as controversial by a number of his contemporaries:

I know quite well that this emphatic denial of the law of nature exposes me to attacks. Most French and other Romanic and also some British and American Jurists will stigmatize my standpoint as ‘unscientific’, for they consider it inferior work to collect the ‘crude’ real rules of international law without regard to the ‘higher’ rules of the law of nature.¹¹¹⁸

While natural law theory continued to receive some isolated support among international jurists,¹¹¹⁹ it is generally regarded as long having fallen into obsolescence.¹¹²⁰ It could be asserted, therefore, that if “humanity” ever held the status of a formal source of international law it lost that status contemporaneously with the law of nature.

1. IS “HUMANITY” A FORMAL SOURCE OF LAW?

If one examines the terms of the Martens clause, there is no express provision for the direct applicability of principles of “humanity” or the requirements (or dictates) of the public conscience as formal sources of law. This is an interpretation which has been implied into the terms of the Martens clause by some authorities.¹¹²¹ The

¹¹¹⁷ *Id.*, p. 328.

¹¹¹⁸ *Id.*, p. 330.

¹¹¹⁹ See, e.g., Fitzmaurice, (1958), p. 174.

¹¹²⁰ H.H. Sprout, “Theories as to the Applicability of International Law in the Federal Courts of the United States”, (1932) 26 AJIL 280, p. 281. See, e.g., *North American Dredging Company of Texas v United Mexican States* (1926) 20 AJIL 800, p. 804, par. 12:

The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of the inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean, but they have failed as a durable foundation of either municipal or international law; and cannot be used in the present day for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements on the other hand.

¹¹²¹ See, e.g., *United States v Krupp von Bohlen* (1948) 10 LRTWC 69, p. 133; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, Dissenting Opinion of Judge Shahabuddeen, p. 408.

Martens clause itself states merely that, until a more complete code of the law of war is issued, in cases not dealt with by the Hague Conventions and Regulations, populations and belligerents “remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”¹¹²² The clause does not state that populations and belligerents remain under the protection of the laws of humanity or the requirements of the public conscience; populations and belligerents remain, instead, under the protection of the “principles of international law” *as they result* from certain sources. Thus nothing in the Martens clause indicates whether those sources (including the laws of humanity and the requirements of the public conscience) exist as sources of international law in a formal or only material sense. In fact, if anything it should be clear that the sources listed were intended as material sources. The third listed source, besides the laws of humanity and the public conscience, is “the usages established between civilized nations”. It is uncontroversial that the mere usages of nations is only a material source of international law and requires *opinio juris* to ripen into its formal counterpart – customary international law.¹¹²³ In *Prosecutor v Kupreškić* Judge Cassese stated that the Martens clause “may not be taken to mean that the ‘principles of humanity’ and the ‘dictates of public conscience’ have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice.”¹¹²⁴ According to Meron, the Martens clause “does not allow one to build castles of sand. Except in extreme cases, its references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases.”¹¹²⁵ Elementary considerations or principles of humanity, appear to be invoked in order to justify conclusions reached on other legal grounds rather than as a formal source of substantive law in their own right. They appear, in short, to add nothing to the totality of legal obligations already existing in international law. Though the principles of humanity may be invoked

¹¹²² Preamble, Hague Regulations of 1899.

¹¹²³ See, e.g., Art. 38(1)(b), ICJ Statute.

¹¹²⁴ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 525.

¹¹²⁵ T. Meron, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, (2000) 94 AJIL 78, p. 88.

from time to time in the decisions of international courts or tribunals that does not necessarily indicate their status as a formal source of law. Akehurst, for instance, noted in a discussion in the parallel context of the status of equity under international law that:

[t]he fact that tribunals often invoke equity does not necessarily mean that equity is a formal Source of law. Counsel and judges in national courts frequently appeal to considerations of equity and justice when the law is uncertain, but this does not lead to equity being regarded as a Source of national law. When deciding a doubtful case, a judge may point out that the rule he is laying down is just; he may also point out that it is a workable rule, which will be easy to apply and will yield predictable results in future cases. In both national and international law, similar appeals are often made to other extra-legal factors – religion, morality, good manners, neighbourliness, logic, reason, reasonable-ness, common sense, convenience, and political, economical, socio-logical, geographical and scientific factors. These factors are material Sources of law; they are not formal Sources. The same may well be true of equity...¹¹²⁶

And indeed, the same may well be true of the principles of humanity. Consider, for instance, the role of “elementary considerations of humanity” in the reasoning of the ICJ in the *Corfu Channel* case.

a. The *Corfu Channel* Case

That case, it will be recalled, concerned, *inter alia*, Albania’s international law responsibility for the explosion of moored contact mines in its territorial waters resulting in damage to two British destroyers and the death and injury of a number of naval officers and men.¹¹²⁷ The United Kingdom asserted that the minefield was laid by or with the connivance or knowledge of the Government of Albania, or else that its presence was known to the Government. Albania contested these claims. The Court concluded that the laying of the minefield which caused the explosions could

¹¹²⁶ M. Akehurst, “Equity and General Principles of Law”, (1976) 25 ICLQ 801.

¹¹²⁷ The Special Agreement entered into between Albania and the United Kingdom for the purpose of transmitting the case to the ICJ raised two questions for the Court’s determination: The first asked whether Albania was responsible under international law for the explosions which occurred on 22 October 1946 and whether there was a duty to pay compensation; the second asked whether the United Kingdom had violated Albania’s sovereignty under international law by reason of the acts of its navy on 22 October and 12 and 13 November 1946 and whether there was a duty to give satisfaction (*see Corfu Channel Case (UK v Albania)* [1949] ICJ Rep. 1, p. 6.)

not have been accomplished without the knowledge of the Albanian Government.¹¹²⁸ Crucially, the Court noted that “[t]he obligations resulting for Albania from this knowledge are not disputed between the Parties.”¹¹²⁹ Those obligations consisted in “notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them.”¹¹³⁰ The Court proceeded to elucidate the underlying basis of these obligations, which it noted did not rest upon the Hague Convention VIII of 1907 (indeed the explosions took place on 22 October 1946, a date subsequent to the cessation of hostilities and therefore outside of the Convention’s period of operation; in any event the Convention would not have applied during the course of hostilities *qua* treaty law as Albania was not a Party). Instead, the Court stated that the obligations were based upon:

certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.¹¹³¹

The question then, is what the Court intended by its reference to “elementary considerations of humanity” as a basis of Albania’s legal obligations, and, in particular, whether these considerations of humanity stood as an independent formal source of international law. It might be pointed out that “humanity” is listed conjunctively, together with the two other bases of Albania’s legal obligation (freedom of maritime communication and the obligation not to allow knowingly territory to be used for acts contrary to the rights of other States). Thus each stands as a separate basis of obligation; “humanity” cannot be reduced to the other two. On the other hand, it might be pointed out that there was no dispute between Albania and the United Kingdom as to the concrete obligations accruing to Albania once the Court was of the opinion that the Albanian Government had knowledge of the mine-laying operation. Thus, it cannot be asserted that elementary considerations of humanity, at least in the context of the *Corfu Channel* case, created for Albania any concrete

¹¹²⁸ *Id.*, p. 22.

¹¹²⁹ *Id.*

¹¹³⁰ *Id.*

¹¹³¹ *Id.*

obligation that exceeded those clearly arising under conventional or customary law. Albania would not have conceded the presence of any obligation arising from a novel or controversial source of international law. It may be that the reference to “elementary considerations of humanity” was simply intended to signify the presence of certain positive obligations inhering in a State over its sovereign territory tantamount to the positive aspects of the delictual duties of “due diligence” or “duty of care”. While the Court cited the obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”, this could be characterised as a reference to the negative component of a broader catalogue of delictual duties that includes both negative and positive obligations. The duty “not to allow knowingly...” prohibits a State from directly harming the rights of other States (e.g. through mine-laying) or from complicity or acquiescence in the harming of the rights of other States by third parties (e.g. complicity in or tacit knowledge of mine-laying), but it is difficult to subsume a positive duty to warn approaching British warships of the imminent danger they face into this negative formulation (“not to allow knowingly its territory to be used...”). The obligation to actively warn third parties of the relevant danger may well have followed from “elementary considerations of humanity”, but it should not be assumed that the legal basis of that obligation was not explicable by reference to customary international law. That positive delictual duties inhere in a State in respect of its sovereign territory has long been recognised in customary international law. In the 1928 *Island of Palmas* case, the sole arbitrator, Max Huber, recognised that territorial sovereignty entailed “the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.”¹¹³² The obligation to “protect” such rights must extend beyond the purely negative obligation to refrain from actively harming such rights (directly, or indirectly through third parties) and include a positive duty to minimise, and if possible, bring to an end, the harmful consequences of the actions of third parties operating within the territorial State. This obligation is not absolute, but limited by the principle of “due diligence”. In his dissenting opinion in the *Lotus* case

¹¹³² *Island of Palmas (Netherlands v US)* 2 RIAA 829, p. 839.

Judge Moore, citing favourably from the US Supreme Court,¹¹³³ stated that “[i]t is well settled that a State is bound to use due diligence to prevent the commission within its dominion of criminal acts against another nation or its people.”¹¹³⁴ Thus Albania’s international law obligations, as found by the ICJ, were explicable by *extant* principles of customary international law.

b. The *Nicaragua* Case

Elementary considerations of humanity were also considered by the ICJ in the Merits phase of the *Nicaragua* case. The applicable law in that case did not include multilateral treaties as a result of a reservation entered by the United States upon its acceptance of the jurisdiction of the Court under Article 36(2) of the ICJ Statute. In relation to the applicability of the principles embodied in Article 3 common to the Geneva Conventions of 1949, the Court found that they constituted “general principles of humanitarian law” and as such were subsumed within the applicable law of the Court for the purposes of the case.¹¹³⁵ The Court stated that:

the conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in [the Court’s] view, the Geneva Conventions are in some respects a development, and in other respects no more than an expression, of such principles...Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’ (*Corfu Channel*, ICJ Reports 1949, p. 22...). The Court may therefore find them applicable to the present dispute...¹¹³⁶

It is not immediately clear whether the Court viewed common Article 3 as codifying, or otherwise embodying customary law, or whether common Article 3 was viewed instead as binding *ipso jure* by virtue of its reflecting “elementary considerations of humanity”. It certainly does not follow inexorably from the above passage that

¹¹³³ *United States v. Arjona*, 120 US 479 (1887).

¹¹³⁴ PCIJ, Series A, No. 10, p. 88. The dissenting opinion of Judge Moore in the *Lotus* case and the decision of Max Huber in the *Island of Palmas* case are both discussed in the Dissenting Opinion of Judge Winiarski in the *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep. 1

¹¹³⁵ See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, par. 220; see, also, *id.*, *dispositive*, par. 9.

¹¹³⁶ *Id.*, par. 218.

“elementary considerations of humanity” are automatically binding as a matter of international law. It is significant that the Court implied that common Article 3 was binding as a matter of general international law *before* it addressed on “elementary considerations of humanity”. The Court stated that “the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles” – *i.e.*, “fundamental general principles of humanitarian law”.¹¹³⁷ It is only later in the passage, perhaps even in the manner of a tangential observation, that the Court notes “and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’”.¹¹³⁸ It has thus been observed that when the ICJ in the *Nicaragua* case considered general principles of humanitarian law, it did so clearly and specifically in the context of treaties in force,¹¹³⁹ rather than by reference to nebulous standards of “humanity”. Subsequent judicial consideration of the passage clearly supports the conclusion that the ICJ viewed common Article 3 as binding by virtue of customary international law. For *e.g.*, the ICTY Appeals Chamber in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in *Tadić* held that:

The emergence of international rules governing general internal strife has occurred at two different levels; at the level of customary international law and at the level of treaty law. Two bodies of rules have thus crystallised...Indeed the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (*Nicaragua Case*, at para. 218)...¹¹⁴⁰

¹¹³⁷ *Id.*

¹¹³⁸ *Id.*

¹¹³⁹ See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, Oral Submissions of the UK, UN Doc. CR 95/34 (1995), p. 46.

¹¹⁴⁰ *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 98. See, also, *Prosecutor v Duško Tadić*, Case No. IT-94-1-T, Trial Chamber, Opinion and Judgment 7 May 1997, par. 609; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 316; *Prosecutor v Tihomir Blaškić*, Case No. IT-95-14-T, Trial Chamber I, Judgment, 3 March 2000, par. 166; *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998, par. 608. Judge Ago in his Separate Opinion in the *Nicaragua* case also understood the ICJ to have posited the binding nature of common Article 3 on customary international law, although he found it difficult to reach the same conclusion: “I am more-over most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain ‘fundamental general principles of humanitarian law’, which, according to the Court, were pre-existent in customary law...” (*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, Separate Opinion of Judge Ago, *Nicaragua* case, p. 184). See, however, the Dissenting Opinion of Judge Sir Robert Jennings in the *Nicaragua* case, where his Honour expressed his concern with “the

In the same Decision, the Appeals Chamber noted that the ICJ “has confirmed that [the rules in common Article 3] reflect ‘elementary considerations of humanity’ applicable under customary international law.”¹¹⁴¹ This statement perhaps captures the crux of what the ICJ intended: The *ethical* basis of common Article 3 lies in “elementary considerations of humanity”, but its *normative* or formally binding basis lies in its having entered customary international law: *i.e.*, while the rules “reflect” elementary considerations of humanity, they are formally “applicable” through customary international law.

2. HUMANITY AND THE REQUIREMENTS OF SPECIFICITY

Even if we assume that humanity does exert force as a formal source of international law, the problem with applying it in the context of international criminal law (*e.g.* to ouster the defence of reprisals in certain contexts) is that it is difficult to envisage how it comports with the requirements of specificity (a corollary of the principle *nullum crimen sine lege*). Provost has stated that “very little guidance is provided by the relevant humanitarian conventions or past State practice in warfare as to which rules might constitute the nucleus of a principle of humanity.”¹¹⁴² “Humanity” is of course a highly nebulous and undefined standard. Provost does however suggest that:

Given that the law of war is already the product of a compromise between military necessity and considerations of humanity, the breach of its minimal rules will more often than not violate a broad principle of humanity.¹¹⁴³

While the above statement is somewhat equivocal (the “minimal” rules of the law of war will not necessarily always, but only “more often than not”, violate humanity) nevertheless it suggests some means for positing the content of the principles of humanity in a concrete manner. Of course there may still be issues of specificity in

Court’s view” that the rules of common Article 3 “are applicable as ‘elementary considerations of humanity’” (*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, Dissenting Opinion of Judge Sir Robert Jennings, p. 537).

¹¹⁴¹ *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 102.

¹¹⁴² Provost (1994), p. 425.

¹¹⁴³ *Id.*, p. 425.

so far as determining which rules of the law of armed conflict are “minimal” ones, but the jurisprudence of international courts and tribunals provides at least some guidance in that respect. According to the ICJ in the *Nicaragua* case:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a *minimum yardstick*, in addition to the more elaborate rules which are also to apply in international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called, “elementary considerations of humanity”...¹¹⁴⁴

This reasoning has been endorsed, *inter alia*, in the decisions of the ICTY¹¹⁴⁵ and ICTR.¹¹⁴⁶ The ICTY Appeals Chamber in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in *Tadić* identified common Article 3 as embodying certain “minimum mandatory rules” applicable under customary international law to any armed conflict, whether international or non-international in character.¹¹⁴⁷ Nevertheless there may be some difficulty in attempting to posit the content of the principles of “humanity” by examining minimal applicable rules in armed conflict. According to Pictet, the underpinning of Article 3 common to the Geneva Conventions of 1949 is found in “the rudiments of humanity, a minimum applicable at all times, in all places and circumstances...part of the customs of peoples from which none may disengage himself.”¹¹⁴⁸ If common Article 3 is viewed

¹¹⁴⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, par. 218 (emphasis added).

¹¹⁴⁵ See, e.g., *Prosecutor v Duško Tadić*, Case No. IT-94-1-T, Trial Chamber, Opinion and Judgment 7 May 1997, par. 609; *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 102; *Prosecutor v Tihomir Blaškić*, Case No. IT-95-14-T, Trial Chamber I, Judgment, 3 March 2000, par. 167.

¹¹⁴⁶ See, e.g., *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998, par. 608. Nevertheless, the assertion that common Article 3 constitutes a “minimum yardstick”, applicable in both international and non-international armed conflicts, was *obiter* in the context of the *Nicaragua* case (see, e.g., *Prosecutor v Anto Furundžija*, Case No. IT-95-17/1, Decision on the Defendant’s Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), 29 May 1998, par. 14). Further, it has been pointed out that as a result of the limitation on cumulative charging under the procedure applicable in the ICTY, it will never be necessary to charge an individual with a violation of common Article 3 in the context of an international armed conflict: Where a conviction is entered under Article 2 of the ICTY Statute (relating to Grave Breaches of the Geneva Conventions applicable in international armed conflict), it would be impermissible to convict on the basis of a violation of common Article 3 (under Article 3 of the ICTY Statute) for the same violation (Jones & Powles (2003), par. 4.2.467).

¹¹⁴⁷ *Prosecutor v Duško Tadić*, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 102.

¹¹⁴⁸ J. Pictet, *Principles of International Humanitarian Law*, ICRC, Geneva, 1966, p. 26.

as constituting a minimal standard of rules *because* it reflects humanity, it would be entirely circuitous to assert that common Article 3 constitutes humanity *because* it reflects a minimal standard of rules. In addition, there must clearly be some question as to what, exactly (beyond common Article 3) constitutes the minimal rules applicable in armed conflict. For instance, are the “fundamental guarantees” in Article 75 of Protocol I included? While examining minimal applicable rules may offer some means of overcoming the requirements of specificity in relation to applying principles of “humanity” directly as law, the conclusion would still appear to be that “humanity” has no status as a formal source of international law. Nevertheless, there are suggestions that it may operate indirectly as an interpretative criterion in the interpretation of international law – and to this end, the sort of concrete guidance as to the meaning of “humanity” offered by the minimal rules approach indicated above could still prove useful. The possibility of “humanity” operating as an interpretative criterion is addressed below.

iv. HUMANITY AND THE GENERATION OF CUSTOMARY LAW

A related argument to that relying on the principles of humanity as an independent formal source of law is to rely on the principles of humanity as a generating force behind the emergence of customary international law. The ICTY Trial Chamber, in its Judgment in *Kupreškić*, noted the apparent absence of State practice indicating the outlawry of those reprisals prohibited in Articles 51(6) and 52(1) of Protocol I (pertaining to civilians and civilian objects),¹¹⁴⁹ nevertheless, the Trial Chamber proceeded to state that:

This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity

¹¹⁴⁹ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 527.

or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.¹¹⁵⁰

It has been suggested above that where the “fog of war” prevents an examination of the actual conduct of hostilities on the field, it may be sufficient to examine official statements and documents (such as the content of military manuals) in order to determine State practice. In this sense, elements that may be thought in some respects as indicia of *opinio juris* could be viewed as elements of State practice. Nevertheless, on the basis of the evidence we have before us – including, not only military manuals and other documents, but reservations to reprisal prohibitions – these indicia hardly point overwhelmingly to the emergence of a customary norm in favour of the prohibition on certain reprisals.

If the suggestion in the above passage is that the principles of humanity or the public conscience may, by themselves, generate or create customary international law, the suggestion would have to be viewed as groundless. Firstly, as indicated above, humanity is not an independent formal source of law (and viewing humanity as directly leading to the formation of customary law is to treat humanity as a formal source). A new rule of customary law cannot be derived simply from humanitarian principles.¹¹⁵¹

V. HUMANITY AS AN INTERPRETATIVE CRITERION

There is a suggestion that the Martens clause mandates a particular interpretative criterion, namely one that requires that in the interpretation of customary or treaty-based rules of humanitarian law doubt be resolved in favour of that position most consistent with “humanity” or the “public conscience”.¹¹⁵² In *Prosecutor v Kupreškić* the ICTY Trial Chamber stated that while the Martens clause may not be taken to mean that the “principles of humanity” and the “dictates of public conscience” have been elevated to the status of independent sources of international law, nevertheless the clause:

¹¹⁵⁰ *Id.*

¹¹⁵¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, Oral Submission of UK, CR 95/34 (1995), pp. 45-46.

¹¹⁵² See Meron (2000), pp. 87-88.

enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.¹¹⁵³

Yet how can this be the case? It is a corollary of the principle *nullum crimen sine lege* that ambiguous provisions be interpreted *contra proferentem*.¹¹⁵⁴ This is a rule which applies both to the interpretation of treaty-based norms and customary ones.¹¹⁵⁵ The interpretative criterion *contra proferentem* would appear to be diametrically opposed to “humanity” as an interpretative criterion, at least to the extent that “humanity” and the “public conscience” tend towards maximum restraint of belligerents. The Trial Chamber in *Kupreškić* suggested that the Martens clause would entail that Articles 57 and 58 of Protocol I (concerning precautions in attack and precautions against the effects of attacks) must be interpreted “so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians”.¹¹⁵⁶ The Trial Chamber went on to suggest that:

As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.¹¹⁵⁷

The above passage appears to imply that conduct which is ostensibly lawful, and in any event cannot be said without doubt to entail criminality under treaty or customary law, may be construed as criminal on the basis of the Martens clause. This

¹¹⁵³ *Prosecutor v Kupreškić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 525.

¹¹⁵⁴ *See above*.

¹¹⁵⁵ *See above*.

¹¹⁵⁶ *Prosecutor v Kupreškić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 525.

¹¹⁵⁷ *Id.*, par. 526.

suggestion is made in the context of provisions of Protocol I which are described by the Trial Chamber as “loose prescriptions” and therefore presumably ambiguous. As indicated above, the requirement of strict construction as a corollary of *nullum crimen sine lege* does not technically apply to ambiguous provisions;¹¹⁵⁸ further, the suggestion that the cumulative effect of attacks may contravene Protocol I even where each attack viewed in isolation does not, cannot be viewed as a form of analogical reasoning and thus does not raise concerns from the point of view of the ban on analogy.¹¹⁵⁹ Nevertheless, it appears to entail a form of reasoning which interprets ambiguity *against* the interests of the accused, even in the face of real doubt. The statement, however, is *obiter* and given the cursory nature of the discussion in the passage cited above some caution is necessary in order not to read into the passage conclusions that are not intended.¹¹⁶⁰

The suggestion that “humanity” may operate as an interpretative criterion is directly and irreconcilably at odds with the international law requirements of *nullum crimen sine lege*. There is a direct inconsistency here between two legal philosophies – substantive justice on the one hand and strict legality on the other. Cassese has discussed these competing philosophies as follows:

National legal systems tend to embrace, and ground their criminal law on either the doctrine of *substantive justice* or that of *strict legality*. Under the former doctrine the legal order must primarily aim at prohibiting and punishing any conduct that is socially harmful or causes danger to society, whether or not that conduct has already been legally criminalized at the moment it is taken. The paramount interest is defending society against any deviant behaviour likely to cause damage or jeopardize the social and legal system. Hence this doctrine favours society over the individual (*favor societatis*). Extreme and reprehensible applications of this doctrine can be found in the Soviet legal system (1918-58) or in the

¹¹⁵⁸ See above.

¹¹⁵⁹ See above.

¹¹⁶⁰ The Trial Chamber does not suggest that a conviction may follow even where real doubts remain as to the illegality of the actions concerned. Instead, the Trial Chamber states that where there are doubts as to the legality of each individual attack when taken in isolation, criminality may still attach to the cumulative effect of such attacks. Of course there must be no real doubt as to the illegality of the cumulative effect of the attacks before criminality may follow – that follows from the requirements of *nullum crimen sine lege*, and nothing in the passage cited above adopts in any direct manner a contrary position. It may be, for instance, that a single attack on foreign terrain, unfamiliar to the attacking forces, produces extensive collateral loss without necessarily entailing a violation of Protocol I on the basis that all feasible precautions were taken (see Art. 57(2)(a)(ii), Protocol I.) Where the very same attack is repeated on numerous occasions, even as attacking forces develop a level of familiarity with the terrain (and an ability, for instance, to engage in more precise targeting), it may become perfectly clear that the method of attack is in fact a stratagem employed to maximise civilian casualties, or at least that there are feasible precautions not being taken.

Nazi criminal law (1933-45). However, one can also find some variations of this doctrine in modern democratic Germany, where the principles of 'objective justice' (*materielle Gerechtigkeit*) have been upheld as a reaction to oppressive governments trampling upon fundamental human rights...

In contrast, the doctrine of strict legality postulates that a person may only be held criminally liable and punished if at the moment when he performed a certain act, the act was regarded as a criminal offence by the relevant legal order or, in other words, under the applicable law...¹¹⁶¹

Plainly...the purpose of these principles is to safeguard citizens as far as possible against both the arbitrary power of government and possible excessive judicial discretion. In short, the basic underpinning of this doctrine lies in the postulate of *favor rei* (in favour of the accused) (as opposed to *favor societatis* or in favour of society).¹¹⁶²

Cassese notes that "for a long period, and until recently, international law has applied the doctrine of *substantive justice* and it is only in recent years that it is gradually replacing it with the doctrine of *strict legality*, albeit with some important qualifications."¹¹⁶³ He concludes that "nowadays this principle [of *strict legality*] must be complied with...at the international level, albeit subject to a number of significant qualifications..."¹¹⁶⁴ Justice Robertson in his Dissenting Opinion in *Prosecutor v Sam Hinga Norman*, agreed with Cassese that "the *nulla crimen* doctrine of strict legality, originating in Article 39 of the Magna Carta has replaced the 'substantive justice' doctrine initially adopted by international law."¹¹⁶⁵ It is impermissible in the context of the ICC Statute to delegate to the principles of "humanity" any role inconsistent with the principle *nullum crimen sine lege*, whether as a direct and formal source of legal obligations, as an evidentiary basis for ascertaining custom (in lieu of the establishment of State practice or *opinio juris*) or as an interpretative criterion in international law.

vi. THE OBLIGATION TO RESPECT THE GENEVA CONVENTIONS AND PROTOCOL I IN "ALL CIRCUMSTANCES"

¹¹⁶¹ Cassese (2003), pp. 139-141.

¹¹⁶² *Id.*, pp. 139-142.

¹¹⁶³ *Id.*, pp. 142-143.

¹¹⁶⁴ *Id.*, p. 145.

¹¹⁶⁵ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, par. 15.

Article 1 common to the Geneva Conventions of 1949 provides that, “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”¹¹⁶⁶ Article 1(1) of Protocol I provides for an obligation in respect of the Protocol in identical terms.¹¹⁶⁷ The obligation to “respect” the Conventions and Protocol is an obligation which inheres in each Party, in any event, by the principle *pacta sunt servanda* and the obligation to abide by each conventional undertaking in good faith.¹¹⁶⁸ The obligation to “ensure respect” appears to add an additional layer of obligation, although whether it creates anything beyond a duty to refrain from actively encouraging external parties to engage in acts inconsistent with the Conventions and Protocol is open to doubt.¹¹⁶⁹ Both obligations, to respect, and to ensure respect, apply “in all circumstances”.

It has been argued that the obligation to respect and ensure respect for the Conventions and Protocol I “in all circumstances” has the effect of excluding the right of reprisals.¹¹⁷⁰ If this were so, then it would be impermissible to carry out, in reprisal, any violation of the terms of the Geneva Conventions and Protocol I – and not just those the subject of express reprisal prohibitions. This appears to be the interpretation adopted by Trial Chamber I of the ICTY in its Rule 61 decision in *Prosecutor v. Martić*.¹¹⁷¹ There the accused was alleged to have ordered the bombardment of civilians in Zagreb using Orkan rockets fitted with “cluster bomb” warheads. The Prosecution alleged that this was in retaliation for a massive attack by the Croatian army against the armed-forces of the self-proclaimed Republic of Serbian Krajina of which the accused was the president. In its review of the indictment against the accused pursuant to Rule 61 of the Rules of Procedure, the

¹¹⁶⁶ Article 1 common to the Geneva Conventions I-IV.

¹¹⁶⁷ Article 1(1), Protocol I (“The High Contracting Parties undertake to respect and to ensure for this Protocol in all circumstances.”)

¹¹⁶⁸ See J. Klabbbers, *The Concept of Treaty in International Law*, Kluwer Law International, The Hague, 1996, pp. 38-40.

¹¹⁶⁹ This was the limited interpretation of the phrase “ensure respect” in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, par. 220

¹¹⁷⁰ See, e.g., *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, Written Statement of the Government of the Solomon Islands, 20 June 1995, p. 67.

¹¹⁷¹ *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Trial Chamber I, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 8 March 1996, (1998) 108 ILR 39.

Trial Chamber addressed the question, “does the fact that the attack was carried out as a reprisal reverse the illegality of the attack?”.¹¹⁷² It concluded that it does not:

The prohibition against attacking civilians must be respected in all circumstances regardless of the behaviour of the other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimize an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party. The exclusion of the application of the principle of reprisals in the case of such fundamental norms is confirmed by Article 1 common to all Geneva Conventions. Under this provision, the High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances, even when the behaviour of the other party might be considered wrongful. The International Court of Justice considered that this obligation does not derive only from the Geneva Conventions themselves but also from the general principles of humanitarian law (*Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America*, merits, *ICJ Reports*, 1986, paragraph 220).¹¹⁷³

This view is entirely inconsistent with the drafting history of Article 1 common to the Geneva Conventions of 1949 and of the substantively identical Article 1(1) of Protocol I.

1. THE *TRAVAUX PRÉPARATOIRES*

A provision of this nature first appeared in the two Geneva Conventions of 27 July 1929 – the Sick and Wounded Convention and the Prisoners of War Convention – both of which provide that, “The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.”¹¹⁷⁴ During the course of the 1929 Geneva Diplomatic Conference, which resulted in the adoption of both Conventions, the ICRC sought to ensure that the new conventions did not include any remnant of the so-called *si omnes* clause (which may be found in the 1906 Sick and Wounded Convention)¹¹⁷⁵ whereby the convention is not triggered, or ceases to be binding, where even a single belligerent is not party to the

¹¹⁷² *Id.*, par. 15.

¹¹⁷³ *Id.*

¹¹⁷⁴ Art. 25, 1929 Wounded and Sick Convention; Art. 82, 1929 Prisoners of War Convention.

¹¹⁷⁵ Art. 24, 1906 Wounded and Sick Convention.

convention.¹¹⁷⁶ The ICRC's draft Sick and Wounded Convention was quite clumsy in its phraseology, leading Britain to propose a much clearer amendment stating that parties shall respect the Convention in all circumstances *except* in one, namely where a non-contracting belligerent is engaged in the war; in that case, the Convention will not govern the relations between the parties to the Convention and the non-contracting belligerent, but it will still govern the relations between each contracting belligerent *inter se*.¹¹⁷⁷ The Drafting Committee was left with the task of giving the draft article its final shape, and this consisted in a re-working of the British proposal, including its division into two separate paragraphs.¹¹⁷⁸ Thus, both the Sick and Wounded Convention and the Prisoners of War Convention came to contain the following identical article:

- (1) The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.
- (2) If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto.¹¹⁷⁹

The drafting history of the above article, therefore, indicates that the reference to "all circumstances" was intended, originally, as part of the abolition of the *si omnes* clause.¹¹⁸⁰

During the course of the Geneva Diplomatic Conference of 1949, draft common Article 1 engendered some small debate centred around the addition of the undertaking "to ensure respect",¹¹⁸¹ but otherwise the article proved entirely inconspicuous and uncontroversial, being accepted without challenge or substantive discussion.¹¹⁸² The drafting history of Article 1(1) of Protocol I is even sparser. During the course of the Geneva Diplomatic Conference of 1974-77 only one delegate offered any interpretation of the meaning of the obligation to "respect and ensure respect in all circumstances". Ambassador B. Akporode Clark of Nigeria

¹¹⁷⁶ F. Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", (1999) 2 *Yearbook of International Humanitarian Law* 3, p. 7.

¹¹⁷⁷ *Id.*, pp. 7-8.

¹¹⁷⁸ *Id.*, p. 8.

¹¹⁷⁹ Art. 25, 1929 Wounded and Sick Convention; Art. 82, 1929 Prisoners of War Convention.

¹¹⁸⁰ See Kalshoven (1999), p. 10.

¹¹⁸¹ See *Id.*, p. 21.

¹¹⁸² See *Id.*, pp. 27-8.

stated that common Article 1 of the Geneva Conventions had broken “new ground in 1949 by introducing the idea of unilateral obligation not subject to reciprocity: from that point of view, paragraph 1 [of the proposed amendment], which reaffirmed already recognized principles, was acceptable.”¹¹⁸³ Once again, the article was entirely uncontroversial and engendered no substantive debate. It is clear from the identical terminology employed in the Geneva Conventions and Protocol I and the lack of debate or exposition that Article 1(1) of Protocol I was not intended, by those involved in the drafting process, to have added anything to the development of the principle as enunciated in the Geneva Conventions of 1949, except to incorporate and reaffirm it.

Neither common Article 1 of the Geneva Conventions of 1949, nor Article 1(1) of Protocol I, is limited in its effects to confirming the abolition of the *si omnes* clause as that is explicitly confirmed elsewhere in each of the Conventions and the Protocol.¹¹⁸⁴ It now appears uncontroversial (as apparent for instance, in the unchallenged interpretation of Clark, above)¹¹⁸⁵ that the obligation to respect and ensure respect “in all circumstances” goes beyond this and operates to overturn the doctrine of reciprocity, at least in its strictest sense,¹¹⁸⁶ in relation to the Conventions and the Protocol: If States X, Y and Z are each Parties to an armed conflict, but only X and Y are parties to the Geneva Conventions and Protocol I, the abolition of the *si omnes* clause ensures that the Conventions and Protocol remain in force in the mutual relations between X and Y, but not between X and Z or Y and Z. The obligation to respect and ensure respect for the Conventions and Protocol “in all circumstances” in common Article 1 and Article 1(1) respectively ensures X and Y must abide by the obligations in the Conventions and Protocol even in relation to Z as those obligations are assumed unilaterally and not on a reciprocal basis.

¹¹⁸³ CDDH/I/SR.4, par. 35, *reprinted in* Official Records, vol. VIII, p. 25 (discussed in *id.*, pp. 46-7).

¹¹⁸⁴ Article 2(3) common to the Geneva Conventions I-IV: “Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof”; Article 96(2), Protocol I: “When one of the Parties to the conflict is not bound by this Protocol, the parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the parties which are not bound by it, if the latter accepts and applies the provisions thereof.”

¹¹⁸⁵ *See, also, below.*

¹¹⁸⁶ *See below.*

While some very limited support may be found in the speeches of delegates to the Geneva Diplomatic Conference of 1949 and of 1974-77 for the view that common Article 1 of the Geneva Conventions and Article 1(1) of Protocol I operate to overturn the doctrine of reciprocity as indicated above,¹¹⁸⁷ at no point is there any explicit support (even veiled support) for the notion that those articles excluded the application of the principle of reprisals. Such an interpretation would be directly inconsistent with the negotiating record of Protocol I in particular, which indicates that the delegates abandoned attempts to introduce a provision outlawing reprisals against all persons and objects protected by the Protocol on the basis that it would not succeed.¹¹⁸⁸ While each of the provisions prohibiting reprisals in Protocol I proved controversial and was the subject of considerable negotiation,¹¹⁸⁹ no such controversy attached to Article 1(1).¹¹⁹⁰

The attempt to subsume a general prohibition on reprisals into treaty provisions requiring respect for the treaties “in all circumstances”, appears to involve an erroneous conflation of reciprocity and reprisals.

2. RECIPROCITY v REPRISALS

The non-reciprocal nature of the Geneva Conventions and Protocol I is affirmed by customary international law (at least in relation to those provisions relating to the protection of the human person). Article 60(5) of the 1969 Vienna Convention on the Law of Treaties provides that the right to suspend or terminate a treaty on the basis of a material breach by another party:

do[es] not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.¹¹⁹¹

¹¹⁸⁷ In relation to the 1974-77 conference, *see* the statement of Clark above. In relation to the 1949 conference, *see* the statement of the delegate of Monaco, Professor de Geouffre de la Pradelle, referring to the “super-contractual” character of the Geneva Conventions (Final Record, Vol. IIB, p. 79; 24th meeting, 15 June 1949, *cited* in Kalshoven (1999), p. 22)

¹¹⁸⁸ *See above.*

¹¹⁸⁹ *See above.*

¹¹⁹⁰ *See above.*

¹¹⁹¹ Art. 60(5), Vienna Convention.

Although neither the Geneva Conventions nor Protocol I are governed by this provision *qua* treaty law (due to the non-retroactivity provision of the Vienna Convention),¹¹⁹² the ICJ has formed the opinion that the inadmissibility of reciprocity in the sense provided for in Article 60(5) is embodied in general international law. The ICJ in its Advisory Opinion in the *South West Africa Case* stated as a “general principle of law”, the rule whereby:

a right of termination on account of breach must be presumed to exist in respect of treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, paragraph 5 of the Vienna Convention).¹¹⁹³

The ICRC’s commentary to Protocol I takes the view that this principle is reflected in the undertaking to respect and to ensure respect for the Protocol “in all circumstances”, as provided for in Article 1(1) of Protocol I. According to the commentary, Article 1(1):

does not allow the suspension of the application of the law either in part or as a whole, even if this is aimed at obtaining reparations from the adversary or a return to a respect for the law from him. This was confirmed quite unambiguously in Article 60 of the Vienna Convention on the Law of Treaties, which lays down under what conditions a material breach can permit its suspension or termination; that article specifically exempts treaties of a humanitarian character.¹¹⁹⁴

¹¹⁹² Art. 4, Vienna Convention.

¹¹⁹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep. 16, p. 47.

¹¹⁹⁴ Sandoz *et al.* (1987), par. 51. If this view is correct, Article 1(1) in fact exceeds the principle laid down in Article 60(5) of the Vienna Convention, as the latter article only relates to provisions relating to the protection of the human person, whereas Article 1(1) of Protocol I relates to all provisions of the Protocol including those relating to the protection of objects and other interests. *See also* the ICRC’s Commentary on common Article 1 of the Geneva Conventions of 1949:

By undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties draw attention to the special character of that instrument. It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations *vis-à-vis* itself and at the same time *vis-à-vis* the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that one feels the need for its assertion, as much because of the respect one has for it oneself as because of the respect for it which one expects from one’s opponent, and perhaps even more for the former reason than for the latter.

By referring to action aimed at ensuring compliance with the law, the ICRC's commentary evokes the notion of reprisals, but the above passage, as with the terms of Article 60 of the Vienna Convention, relate only to the *suspension* or *termination* of treaties in whole or in part,¹¹⁹⁵ and reprisals involve neither. In fact reprisals are predicated on the assumption that the underlying obligation remains in tact; the reprisal merely precludes wrongfulness to the extent that it remains within the strict limitations governing reprisals under international law.¹¹⁹⁶ If the operation of reprisals in this sense is ousted by virtue of the obligation to respect and ensure respect for the Conventions and Protocol I "in all circumstances", then taken to its logical conclusion this would negate *any* circumstances precluding wrongfulness, and thus deny *any* defence to a defendant.

The inadmissibility of reciprocity in war crimes proceedings has a long history, but it has been treated as distinct from that of reprisals. In oral proceedings at the Nuremberg Trial, United States Chief Prosecutor Justice Jackson clearly rejected the operation of the principle of reciprocity in relation to the law of war obligations applicable during the course of World War II, while nevertheless conceding the theoretical admissibility of reprisals.¹¹⁹⁷ The term "reciprocity" may be understood in its broadest sense to refer to any state of interdependence between the obligations owed by respective participants within the international legal order,¹¹⁹⁸ and hence, in this broad sense, reprisals may be an example of "reciprocity". But reciprocity in its strictest sense – sometimes referred to as the "condition of reciprocity", or known more formally as *inadimplenti non est adimplendum* – refers to only one aspect of this broad conception of reciprocity; namely that rule of the law of treaties which permits one State to suspend or terminate its treaty obligations upon the material

(Pictet (1952), p. 25).

¹¹⁹⁵ Sandoz *et al.* (1987), par. 51; Article 60, Vienna Convention.

¹¹⁹⁶ See discussion of "reciprocity", above.

¹¹⁹⁷ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, IMT, Nuremberg, 1947-49, vol. 9, p. 187:

If Your Honour please, I believe it is a well-established principle of international law that a violation on one side does not excuse or warrant violations on the other side. There is, of course, a doctrine of reprisal, but it is clearly not applicable here, in any basis that has been shown.

¹¹⁹⁸ See Provost (1994), p. 383.

breach of another State.¹¹⁹⁹ It is only reciprocity in this strict sense that is ousted by Article 1(1) of Protocol I or common Article 1 of the Geneva Conventions of 1949.

Although Trial Chamber I in its Rule 61 decision in *Prosecutor v Martić* limited itself to a consideration of the admissibility of reprisals against the civilian population or individual civilians in any armed conflict,¹²⁰⁰ its reasoning – resting at least in part on the obligation to respect and to ensure respect for the Geneva Conventions “in all circumstances” – implicates reprisals against *any* persons and objects protected by the Geneva Conventions. It further implicates reprisals against any persons or objects protected by Protocol I (due to the identical language in Article 1(1)), and any persons or objects falling under the protection of provisions similarly worded. Trial Chamber I noted, for instance, that a prohibition on reprisals against civilians must be inferred from Article 4 of Protocol II which, while not incorporating a provision equivalent to Article 1(1) of Protocol I or common Article 1 of the Geneva Conventions, nevertheless prohibits a catalogue of atrocities against all persons who do not take a direct part or who have ceased to take part in hostilities “at any time and in any place whatsoever”.¹²⁰¹

The *Martić* decision, as with all Rule 61 decisions,¹²⁰² should be followed only with the utmost caution. Rule 61 of the ICTY’s Rules of Procedure and Evidence creates a procedure which may be employed in cases where attempts to execute a warrant of arrest have been frustrated, due for *e.g.* to the failure of the State in which the accused is located to cooperate with the Tribunal or the unknown whereabouts of the accused.¹²⁰³ The procedure involves a public hearing to examine the evidence against the accused in order to reconfirm the indictment.¹²⁰⁴ The irregular nature of the Rule 61 apparatus (serving a largely pedagogic function,

¹¹⁹⁹ *Id.*, p. 383, n. 1.

¹²⁰⁰ See *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Trial Chamber I, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 8 March 1996, pars 15-17.

¹²⁰¹ *Id.*, par. 16.

¹²⁰² The Rules of Procedure and Evidence of the ICTY and ICTR both contain a Rule 61 procedure that may be followed in the case of failure to execute a warrant (*see* Rule 61, International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, as amended up to and including the amendment of 11 March 2005, UN Doc, IT/32/Rev.34 (2005) (hereinafter ICTY Rules of Procedure and Evidence); Rule 61, International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, as amended up to and including the amendment of 15 May 2004, UN Doc. ITR/3/Rev.6 (2004)).

¹²⁰³ Rule 61, ICTY Rules of Procedure and Evidence.

¹²⁰⁴ Rule 61(B)-(C), *id.*

intended to highlight the atrocities alleged against the accused)¹²⁰⁵ leads to a decision which lacks both precedential value and authoritative weight. As defence counsel are barred from participation in the proceedings,¹²⁰⁶ the decision is arrived at through a non-adversarial process within a system that is otherwise, largely adversarial.¹²⁰⁷ The transcript of the Rule 61 proceedings in *Martić* indicates that minimal substantive discussion took place on the question of the law relating to reprisals.¹²⁰⁸ Had defence counsel been present (and had they considered the defence of reprisals as potentially exculpatory in relation to their client) they may have raised points going to the legality of reprisals which were completely ignored, both at the oral stage and in the decision itself.

The Trial Chamber's decision in *Martić* – both as to the narrower claim concerning the inadmissibility of reprisals against civilians in any armed conflict, as well as to the wider implication indicated above – is in any event, *obiter*. In proceedings brought under Rule 61 of the ICTY's Rules of Procedure, the trial chamber must test whether there are "reasonable grounds" for believing that the accused has committed one or more of the crimes charged in the indictment.¹²⁰⁹ In his Separate Opinion in the Rule 61 decision in *Prosecutor v. Rajić*, Judge Sidhwa stated that Rule 61 proceedings are somewhat akin to committal proceedings in

¹²⁰⁵ In the Rule 61 decision in *Prosecutor v. Rajić*, the Trial Chamber stated that Rule 61 proceedings "are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in which they were treated." (*Prosecutor v. Ivica Rajić*, Case No. IT-95-12-R61, Trial Chamber, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, par. 2); see, also, *id.*, Separate Opinion of Judge Sidhwa, par. 9.

¹²⁰⁶ See, e.g., *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case Nos IT-95-5 and IT-95-18, Trial Chamber I, Decision Rejecting the Request Submitted by Mr. Medvene and Mr. Hanley III Defence Counsels for Radovan Karadžić and Ratko Mladić, 5 July 1996, in which the Trial Chamber rejected the request of Karadžić's defence counsels to be present continuously in the courtroom during the Rule 61 proceedings and to have free access to the documents and case-files submitted by the Prosecutor. The Chamber stated instead that the counsels should be escorted to the public gallery where they could sit in reserved seating as observers throughout the proceedings. The Chamber considered that only once the accused appeared before the Tribunal would "the nature of the proceedings change and become *inter partes*, accompanied with the guarantees inherent in an equitable trial".

¹²⁰⁷ In Rule 61 proceedings, the Prosecutor makes submissions of law and fact prejudicial to the accused in the same manner in which this may occur at trial.

¹²⁰⁸ See *Prosecutor v. Martić*, Case No IT-95-11, Transcript of hearing, 27 February 1996.

¹²⁰⁹ *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Trial Chamber I, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 8 March 1996, pp. 42-3.

certain national jurisdictions.¹²¹⁰ With the possible exception of certain general threats, issued by the Republic of Serbian Krajina, to target civilians in the event of a Croatian attack,¹²¹¹ there was no evidence before the Chamber that the legal preconditions for reprisals had been met. This in itself would have been sufficient cause to confirm the indictment. Further, while the prosecution pointed to the initial Croatian attack as spurning the accused's retaliatory response, they did not raise any evidence of a single violation of the law of armed conflict by Croatia.¹²¹² Although evidence indicated that the accused had characterised the attack as an act of "aggression",¹²¹³ it is undisputed that *jus ad bellum* violations do not give rise to the right to reprisals.¹²¹⁴ The discussion of reprisals was therefore not merely hypothetical, but related to a defence which was wholly unsupported on the facts.

In the event that the reasoning in *Martić* comes to be accepted in the jurisprudence of international law, it might be pointed out that the duty to respect and ensure respect for the Conventions and Protocol I "in all circumstances" cannot relate to those provisions which are not binding, either as a result of non-ratification or accession to the treaty, or by virtue of an existing reservation. The ICJ, in the *Nicaragua* case held the obligation in Article 1 common to the Geneva Conventions of 1949 to derive not merely from the Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression".¹²¹⁵ That was stated in the context of a decision in which the Court was prepared to accept a broad identity of content between the Geneva Conventions and customary law.¹²¹⁶ It is significant that the ICJ in that case was silent about the corresponding duty, to respect and ensure respect in all circumstances, in Protocol I. Where the primary conventional obligation is not binding as a matter of customary

¹²¹⁰ *Prosecutor v. Rajić*, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, Separate Opinion of Judge Sidhwa, par. 9; see, also, Jones & Powles (2003), par. 8.4.132.

¹²¹¹ See *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Trial Chamber I, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 8 March 1996, Transcript of hearing, 27 February 1996, pp. 35-38.

¹²¹² See *id.*

¹²¹³ *Id.*, p. 51.

¹²¹⁴ See above.

¹²¹⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 14, par. 220.

¹²¹⁶ See, e.g., *id.*, pars. 218, 220.

law, nor can it be said that any duty to respect or ensure respect for that provision arises.

*

conclusion

In order to assess the admissibility of reprisals as a defence to war crimes under Article 31(3) of the ICC Statute, it is necessary to establish (1) that reprisals constitute a ground for excluding criminal responsibility under the applicable law set forth in Article 21 of the ICC Statute; and (2) that no discretionary barrier operates to prevent the admissibility of the defence. Whether or not both elements are satisfied must be determined in light of the interpretative criteria that govern the interpretation of the ICC Statute and its applicable law.

i. APPLICABLE LAW

Reprisals are an institution of customary international law which have been outlawed in certain circumstances by treaty,¹²¹⁷ and limited generally, both in terms of the conditions precedent to their lawful use and the manner of their use, by customary law.¹²¹⁸ There are also suggestions that the legality of reprisals may be governed, in addition, by general principles of law¹²¹⁹ and the laws of “humanity”.¹²²⁰ It is necessary to determine which sources of law governing reprisals belong to the applicable law of the ICC Statute, and whether and how they are to be applied in light of the hierarchy of sources set out in Article 21 of the Statute.

The defence of reprisals is not expressly provided for in the ICC Statute, the Elements of Crimes or the Rules of Procedure and Evidence (the first tier of applicable law under Article 21 of the ICC Statute);¹²²¹ nor may the doctrine of reprisals be located in “general principles of law derived by the Court from national laws of legal systems of the world” (*i.e.* the third tier of applicable law).¹²²² Reprisals are a doctrine of the international law of armed conflict and emerged, originally, as

¹²¹⁷ *See above.*

¹²¹⁸ *See above.*

¹²¹⁹ *See below.*

¹²²⁰ *See above.*

¹²²¹ Art. 21(1)(a), ICC Statute.

¹²²² Art. 21(1)(c), ICC Statute.

an institution governing the relations between States *inter se*.¹²²³ Although it is true that the right to reprisals is enunciated in a number of national military manuals,¹²²⁴ and acts by military personnel contrary to the rules regarding reprisals may be punished by national military authorities exercising domestic jurisdiction,¹²²⁵ nevertheless, such national laws are invariably only a reflection of the State's international law obligations.¹²²⁶ The admissibility of the defence of reprisals under Article 31(3) of the ICC Statute depends, therefore, upon the particular reprisal measure being justified under that law deriving from the second tier of applicable law under Article 21 of the ICC Statute, namely "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict",¹²²⁷ a formulation which includes customary international law.¹²²⁸ Indeed, the legality of reprisals as a ground excluding criminal (as well as delictual) responsibility is clearly recognised under customary law.¹²²⁹ The question is, however, to what extent is the defence of reprisals limited, or even excluded altogether, by competing sources of applicable law?

1. THE FIRST TIER OF APPLICABLE LAW

The formulation of the hierarchy in Article 21 of the ICC Statute ("in the first place", "in the second place" and "failing that") may imply that the ICC is to apply the ICC Statute as written, as well as the Elements of Crimes and Rules of Procedure and Evidence (at least to the extent that the latter two do not conflict with the Statute),¹²³⁰ and only in the case of ambiguity or a *lacuna* is the Court to proceed to the additional sources located in the second and third tier of applicable law. If this is what is implied by Article 21 of the ICC Statute, then it may be that there is no room for a defence of reprisals. Reprisals, after all, do not purport to derive their legality from any ambiguity or *lacunae* in the terms of customary or treaty-based provisions in force, but rather, stand as an *exception* to the law otherwise in force, even where that

¹²²³ See above.

¹²²⁴ See above.

¹²²⁵ See above.

¹²²⁶ See, e.g., US Field Manual No. 27-10, where each prescription cites international law authority.

¹²²⁷ Art. 21(1)(b), ICC Statute.

¹²²⁸ See above.

¹²²⁹ See above.

¹²³⁰ Art. 9(3), ICC Statute; Art. 51(5), ICC Statute.

law is clear and unambiguous. It could be argued, therefore, that the hierarchy of applicable law under Article 21 of the ICC Statute extinguishes the legality of reprisals by giving primacy to the terms of the Statute (and the obligations described therein) over any competing rights (or exceptions) located in inferior sources of applicable law, such as customary international law. Nevertheless, as indicated above, second and third tier sources of applicable law may operate by way of clarification, or even exception, to the terms of the ICC Statute.¹²³¹ A relevant defence which is located in the second or third tier of applicable law, and admitted under Article 31(3) of the ICC Statute, is effectively given primacy over that part of the ICC Statute which enumerates and defines the relevant crime. Given that Article 31(3) of the ICC Statute expressly provides for non-enumerated grounds excluding criminal responsibility, the application of any such defence (or exception) to the terms of the Statute must be considered as consistent with the terms of the Statute itself, and therefore consistent with the requirement, under Article 21 of the ICC Statute, that the Statute and its related instruments be applied “[i]n the first place”. In particular, it should be noted that nowhere does the ICC Statute expressly exclude the admissibility of reprisals (something one would expect if that was what was intended by those involved in the negotiating and drafting process). The *travaux préparatoires* in fact indicates that reprisals were considered as a potential defence: The *Ad Hoc* Committee on the Establishment of the International Criminal Court established a Working Group whose mandate involved the preparation of guidelines for the consideration of the question of general principles of criminal law.¹²³² The guidelines in their final form comprised a point-form list of relevant matters to be discussed by the Committee, and they expressly suggest the possibility of a defence of reprisals.¹²³³ By leaving open the possibility of raising defences not expressly provided for, those who negotiated and drafted Article 31(3) of the ICC Statute must have had reprisals in mind as one of the very defences which could potentially be raised. The effect of Article 31(3) is to provide a Statutory basis for applying the

¹²³¹ *See above.*

¹²³² Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), par. 9.

¹²³³ *Id.*, Annex II, p. 60.

lesser (customary) norms providing for reprisals, at least potentially,¹²³⁴ notwithstanding its direct opposition to the Statutory provisions on crimes.

2. THE THIRD TIER OF APPLICABLE LAW

The third tier of applicable law consists of general principles of law derived from national laws of the legal systems of the world.¹²³⁵ It was concluded above that if international law recognises a species of “general principles” derived, not from principles of municipal law, but rather, from legal conscience generally, then that species of general principles must be applicable under the second tier of applicable law under the ICC Statute.¹²³⁶ If “humanity” is a source of international law, it may well be that it belongs to this second-tier species of general principles of law.

It is sometimes suggested that the right to resort to reprisals derives *axiomatically* from the decentralised nature of the international community.¹²³⁷ The right to reprisals is thereby conceived as a general principle of law; it continues only so long as the international community remains devoid of an effective central mechanism aimed at enforcing the law of armed conflict. If this is truly the theoretical basis of reprisals in international law, then the right to reprisals would disintegrate upon the creation of the ICC, assuming that the ICC was an effective law enforcement mechanism. It may be difficult to assess whether what is described here is a general principle of law derived from national laws of legal systems of the world, or whether it is, instead, a general principle derived from legal conscience generally.

¹²³⁴ That is, provided the requirements of Art. 31(3), ICC Statute are satisfied in the case of reprisals.

¹²³⁵ *See above.*

¹²³⁶ *See above.*

¹²³⁷ *See, e.g.,* Kalshoven (1971), p. 10: “to deny the status of reprisals as an institution of international law can hardly be correct, in view of the uncommonly high degree of decentralization which characterizes international society to the present day and which must needs be reflected in international law, if only by the recognition for the time being of a legal power of the States, as the decentralized authoritative power units, to act unilaterally in defence of their rights and of the international legal order.”; The ICTY Trial Chamber in *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, stated that: “...while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner. A means of inducing compliance with international law is at present more widely available and, more importantly, is beginning to prove efficacious: the prosecution and punishment of war crimes and crimes against humanity by national or international courts.” (par. 530).

As reprisals are an institution of the international law of armed conflict, they do not form a part of municipal law except to the extent that national military laws and regulations reflect or incorporate the international law of armed conflict. Thus, if it is indeed a principle of law that the legality of reprisals ceases upon the creation of an effective central mechanism aimed at ensuring compliance with the law of armed conflict, this is not a principle which finds any counterpart in national laws. Nevertheless, it may be that this principle is merely a concrete reflection of more abstract principles, relating generally to self-help mechanisms, applicable under national laws. It may be, for instance, a general principle of law deriving from national laws of the legal systems of the world, that measures of self-help such as self-defence or the right of abnegation, may be employed only to the extent that there is no effective, available, centralised law enforcement mechanism capable of enforcing law in the circumstances. It is more likely, however, that where there are alternatives to self-help this is merely a factual consideration to be taken into account in determining whether self-help was employed, in the context of the concrete case, as a measure of last-resort.¹²³⁸ The right to self-defence in interpersonal relations, for example, continues to exist in the legal systems of the world, despite the near universal existence of domestic police forces and municipal courts.

In any event, while it is true that the institution of public reprisals arose amid the disappearance of centralised authority,¹²³⁹ the current legal basis of reprisals lies in customary international law.¹²⁴⁰ As such, the institution of reprisals will remain in place until it falls into desuetude, or is otherwise repealed by treaty or subsequent custom. The existence of the ICC will however, impact upon the availability of reprisals in that the existence of the ICC is another factor to be taken into account in assessing the rule of subsidiarity. If reprisals are subsidiary to all other effective sanctions, then was sufficient opportunity given to having the ICC address the matter? Was it necessary in light of the existence of the ICC to resort to reprisals? These are factual questions to be answered in the context of each particular case. It is unlikely, however, that the existence of the ICC could lead to the

¹²³⁸ See, e.g., Ashworth (1999), p. 138.

¹²³⁹ Kalshoven (1971), p. 3.

¹²⁴⁰ Greenspan (1959), p. 408; Kalshoven (1971), p. 3; Bristol (1979), p. 397; Greenwood (1989a), p. 39; Tucker (1972), p. 587.

conclusion that there is an absence of subsidiarity in each and every case. First, it may be necessary to engage in *immediate* corrective action, especially where the enemy's violation results in decisive gains on their part;¹²⁴¹ and secondly, the effectiveness of the ICC in terms of its deterrent capacity is not something that can simply be assumed.¹²⁴² Despite the successes of the ICTY and ICTR, for instance, in securing a number of high-level prosecutions,¹²⁴³ there are indications that the presence of those tribunals has had only a limited deterrent effect in securing widespread compliance with the law of armed conflict.¹²⁴⁴

3. THE BATTLEGROUND FOR REPRISALS: THE SECOND TIER OF APPLICABLE LAW

The second tier of applicable law under Article 21 of the ICC Statute includes customary international law, "applicable" treaties, and to the extent, if any, that they are recognised as sources of international law, general principles of law derived from legal conscience generally (as opposed to municipal law).¹²⁴⁵ Within the second tier of applicable law, one finds rules and principles *justifying* reprisals, *regulating* the general recourse to reprisals, and *prohibiting* reprisals, either against specific classes of persons and property protected under the law of armed conflict, or, according to certain authorities, against all classes of persons and property protected under the law of armed conflict. As concluded above, the ICC is duty-bound to arrive, where possible, at a concrete and final determination of the law in relation to any issue that genuinely presents itself, taking cognisance, in such determination, of those rules and principles that belong to the applicable law. Thus, just as the ICC must admit the defence of reprisals where the reprisal measure is justified under customary law

¹²⁴¹ See the statements of M. Girard for the French delegation in Main Committee I at the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), CDDH/I/SR.46, pars 15-27, *reprinted in* Official Records, vol. IX, p. 55 (discussed in Nahlik (1978), p. 53).

¹²⁴² See Almond (1980), p. 197, noting that "the law of war cannot be readily enforced, particularly during combat, nor illegal actions deterred, except by reprisals." See, also, Albrecht (1953), p. 613.

¹²⁴³ See, e.g., *Prosecutor v Slobodan Milošević*, Case No. IT-02-54 (before the ICTY).

¹²⁴⁴ See P. Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia?", (1999) 20 *Human Rights Quarterly* 737; D. Wippmann, "Atrocities, Deterrence and the Limits of International Justice", (1999) 23 *Fordham International Law Journal* 473; M.M. Penrose, "Lest We Fail: The Importance of Enforcement in International Criminal Law", (2000) 15 *American University International Law Review* 321; see, also, M.L. Smidt, "The ICC: An Effective Means of Deterrence?", (2001) 167 *Military Law Review* 156.

¹²⁴⁵ See above.

(notwithstanding that the ICC Statute, on its face, criminalises the conduct in question), equally, where the right to reprisals is restricted by any one rule or principle of applicable law, that restriction must be given effect, and the defence of reprisals will not be admissible to the extent that it is contrary to the restriction in question.¹²⁴⁶ The question is, however, which restrictions on the right to reprisals fall within the applicable law of the ICC Statute, and how are these restrictions to be interpreted for the purpose of application?

The restrictions on reprisals discussed in Part II of this thesis (including general limitations on the preconditions to, and exercise of, reprisals, as well as outright prohibitions on their use) derive from customary international law, treaties and the principles of “humanity”. A fourth possible source of restrictions, namely general principles of law derived from municipal law, has been discussed above within this conclusion. Restrictions located in customary international law clearly belong to the applicable law of the ICC Statute.¹²⁴⁷ In relation to restrictions located in treaty form only, it is only those derived from “applicable” treaties which belong to the applicable law of the ICC.¹²⁴⁸ There has been some discussion in Part I of this thesis as to the possible meanings of “applicable” treaties under the second tier of applicable law. Whatever is meant by the phrase “applicable” treaties, in its widest sense the term could include any treaty which is in force and governs the conduct of the parties in question *qua* treaty law. There may be some question, in light of the principle *nullum crimen sine lege*, as to whether the proper interpretation of the term “applicable” treaties should be a wide or a narrow one. It is probably fair to conclude that the wider the class of “applicable” treaties, the greater the extent of obligations accruing to any one belligerent or individual. In this sense, a narrower interpretation of the phrase “applicable” treaties would probably be in the best interest of any one defendant. On the other hand, one cannot rule out the possibility that one or more treaties could set out provisions which are beneficial to a defendant appearing before the ICC, whether exculpatory in nature or beneficial in some other sense. The ICTY has taken a wide view of the treaties (applicable *qua* treaty law) which may be

¹²⁴⁶ This follows from the principle of international law, *lex posterior derogat priori*.

¹²⁴⁷ See above.

¹²⁴⁸ Art. 21(1)(b), ICC Statute.

applied by the ICTY.¹²⁴⁹ In fact there has been judicial consideration by the ICTY on the question of the applicability of reprisal prohibitions (express and implied) located in treaty law. In its Judgment in *Prosecutor v Kupreškić*, the ICTY Trial Chamber held (in *obiter*) that whatever the customary status of the prohibition on reprisals, reprisals against civilians in the context of the attack on Ahmici were prohibited as a matter of treaty law on the basis that in 1993 both Croatia and Bosnia and Herzegovina had ratified Additional Protocol I and II, in addition to the four Geneva Conventions of 1949.¹²⁵⁰ Thus no defence of reprisals would have been admissible. While it may be fair to assert that the principle *contra proferentem* requires a narrow view of the meaning of “applicable” treaties under Article 21 of the ICC Statute, it would be open to the ICC to conclude, in light of the jurisprudence of the ICTY in particular, that there was no doubt that remained to be resolved, and that “applicable” treaties includes any treaty in force and applicable in the context *qua* treaty law. Thus a particular reprisal prohibition located in treaty form and binding only *qua* treaty law would, on this view, provide a basis for denying to an individual, who belonged to the armed forces of a party to that treaty, the right to rely on any defence of reprisals where the reprisal measure was contrary to the prohibition in question.

On the question of limitations on reprisals purportedly derived from the principles of “humanity”, here there may be some real doubt as to whether “humanity” is a source of applicable law under the ICC Statute. Nevertheless, the real point of contention must be whether “humanity” is a source of international law *per se*. If it is, then it would probably be included within the second tier of applicable law under the ICC Statute (which extends to “applicable treaties and the principles and rules of international law”).¹²⁵¹

ii. “APPLICABLE” TREATIES / CUSTOMARY LAW

1. EXPRESS PROHIBITIONS ON REPRISALS

¹²⁴⁹ See above.

¹²⁵⁰ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 536.

¹²⁵¹ Art. 21(1)(b), ICC Statute.

There are, as indicated in Chapter 5 above, prohibitions on reprisals against certain targets, set out in a number of treaties currently in force. Express prohibitions are located in the four Geneva Conventions of 1949,¹²⁵² the 1954 Hague Cultural Property Convention,¹²⁵³ Additional Protocol I of 1977,¹²⁵⁴ and the Mines Protocol and Amended Mines Protocol annexed to the UN Convention on Certain Conventional Weapons.¹²⁵⁵ While the wide interpretation of “applicable” treaties outlined above would result in the prohibitions within any one of these treaties being applied as against a national of a party to the treaty, the prohibition would not be applicable as against nationals of non-parties unless the prohibition had entered customary international law. It was argued, in Chapter 6, that the reprisal prohibitions in the four Geneva Conventions of 1949 are widely viewed as having entered customary international law, while there is little, if any, evidential basis for the assertion that the reprisal prohibitions in the Protocols annexed to the Conventional Weapons Convention have entered customary law. The position of the reprisal prohibitions in Protocol I and the 1954 Hague Cultural Property Convention is far more contentious.

The difficulty lies in the fact that while the prohibitions in Protocol I and the 1954 Hague Convention were widely viewed as innovative at the time of their promulgation (at least to the extent that they added to those prohibitions located in the Geneva Conventions of 1949), no significant body of State practice has emerged, outside of compliance with treaty norms, to indicate that reprisals no longer form part of the lawful methods of warfare.¹²⁵⁶ A number of significant military powers are not party to Protocol I, and the right to reprisals is expressly maintained in certain military manuals and in reservations to the Protocol.¹²⁵⁷ The position of reprisals is thus wholly different to that of torture or genocide where, although such acts may continue to be perpetrated by some States,¹²⁵⁸ the official position of each State is a repudiation of the legality of such acts.¹²⁵⁹ While the requirements for the emergence

¹²⁵² There is also an express prohibition in the 1929 Prisoners of War Convention.

¹²⁵³ *See above.*

¹²⁵⁴ *See above.*

¹²⁵⁵ *See above.*

¹²⁵⁶ *See above.*

¹²⁵⁷ *See above.*

¹²⁵⁸ *See above.*

¹²⁵⁹ *See above.*

of customary law may no longer be as stringent within the practice of international law today (as compared with the position under the *North Sea Continental Shelf Cases*), nevertheless, there must remain a pressing and real doubt as to whether the reprisal prohibitions in Protocol I and the 1954 Hague Convention can be viewed as having attained customary status. Even if we accept that the elements of customary law may now more readily be evinced by official statements and documents, or that the practice of States in conformity with treaty obligations may be viewed as “practice” for the purpose of ascertaining the customary status of those same obligations, there are still significant difficulties in reaching the conclusion that the reprisal prohibitions in Protocol I and the 1954 Hague Convention have entered customary law.¹²⁶⁰ The only basis for such a conclusion would be to adopt a wholly radical view of the requirements of customary law, for *e.g.*, the conclusion that humanitarian treaties act as legislative platforms, transmitting their content into customary law by virtue of the necessity of solving global problems or their “humanitarian and civilizing” function.¹²⁶¹ Any such conclusion is precluded under the ICC Statute by virtue of the principle *nullum crimen sine lege*. Such reasoning appears violative of that corollary of *nullum crimen sine lege* prohibiting the retroactive application of criminal law: To dramatically alter the basis of one of the sources of international law is to effectively create a new source of international law, and thus a new branch of obligation. In any event, such reasoning could hardly be supported on any juridical basis. As argued in Chapter 6 above, if it can be established that international courts or tribunals are prepared to find for the existence of norms of customary law without engaging in the type of rigorous analysis mandated in the *North Sea Continental Shelf Cases*, then the reasoning behind that is likely to be based on a more expansive or inclusive approach to the assessment of the elements of customary law, for *e.g.* through an assessment of official pronouncements and documents, or practice pursuant to treaty obligations, in the determination of the presence of State practice. Where there are contrary indications of State practice (for *e.g.*, assertions of the legality of certain conduct in military manuals, or – where practice pursuant to treaty obligations is considered in the determination of State practice – reservations to the treaty obligations), then it cannot

¹²⁶⁰ See above.

¹²⁶¹ See above.

be concluded that a particular treaty provision has entered customary law merely because of the significant number of parties to the provision. While international courts and tribunals may today adopt a less rigorous approach to the determination of customary norms than that suggested in the *North Sea Continental Shelf Cases*, especially in the context of humanitarian law obligations, the conflation of treaty-based obligations and customary law does not fit within any predictable trajectory of juridical reasoning. Thus any such approach violates the requirements of specificity (a corollary of *nullum crimen sine lege*).¹²⁶² In addition, the existence of contrary indications of State practice must create some real doubt as to whether the treaty-based provision can be considered binding as customary law. Thus, conflating treaty and customary law in such circumstances would appear to be precluded by the principle *contra proferentem*. Stripping away the demarcating lines between the elements of treaty law and the elements of customary law involves a multi-faceted violation of the principle *nullum crimen sine lege*, in that the corollaries of non-retroactivity, specificity and *contra proferentem* are each likely to be contravened.

If the reprisal prohibitions in Protocol I and the 1954 Hague Convention are binding only as a matter of treaty law, then a number of reprisal measures would, at least potentially, remain lawful when conducted by agents of States not party to those conventions. Neither Protocol I nor the 1954 Hague Convention offer any express protection against reprisals to persons or objects in non-international armed conflicts, or, in the case of international armed conflicts, to persons or objects at sea, in the air or outer space, or to other persons entitled only to the Fundamental Guarantees under Article 75 of Protocol I.

2. IMPLIED PROHIBITIONS ON REPRISALS

The view has been expressed by some authorities that reprisals are *impliedly* prohibited, either generally or as against particular enumerated targets, by virtue of certain provisions in the Hague Regulations of 1899 and 1907, the Geneva Conventions of 1949, and Protocols I and II of 1977. It has been suggested that reprisals are prohibited by virtue of the prohibition on collective punishment which

¹²⁶² See above.

features in the Hague Regulations of 1899 and 1907, Geneva Convention IV and Protocols I and II.¹²⁶³ It has also been suggested that reprisals are prohibited against all persons and objects receiving any protection under the Geneva Conventions of 1949 and Protocol I of 1977 by virtue of the requirement to respect these conventions “in all circumstances”.¹²⁶⁴ A similar argument could be put in relation to the “fundamental guarantees” in Article 4 of Protocol II which provides, *inter alia*, that all persons *hors de combat* shall “in all circumstances be treated humanely”,¹²⁶⁵ and that such persons are entitled to protections against certain enumerated acts which “shall remain prohibited at any time and in any place whatsoever”.¹²⁶⁶

a. The Prohibition on Collective Punishment

It was concluded in Chapter 7 above that prohibitions on collective punishment have historically been enacted without prejudice to the right to reprisals, and that, in any event, as reprisals are an exception to extant provisions of the law of armed conflict the prohibition on collective punishment would be equally open to exception in the case of reprisals.¹²⁶⁷ Some confusion may have been produced by a number of decisions of national military tribunals in the aftermath of World War II (acting pursuant to Control Council Law No. 10) which adjudged a number of “reprisal” measures according, *inter alia*, to whether they abided by Article 50 of the Hague Regulations of 1899 and 1907 (concerning the prohibition on collective punishment).¹²⁶⁸ Those decisions nevertheless indicate that reprisals *stricto sensu* are not restricted by the prohibition on collective punishment to any extent.¹²⁶⁹

Collective “punishment” would appear to relate to the imposition of certain measures against civilians for a punitive purpose. The requirement, for the purpose of the crime, of some purpose or animus behind the imposition of any measure adversely affecting civilians or the civilian population is supported by the

¹²⁶³ Art. 50, Hague Regulations of 1907; Art. 33, Geneva Convention IV; Art. 75, Protocol I; Art. 4, Protocol II. *See, also*, Art. 46, Hague Regulations of 1907 (discussed in Chapter 7 above).

¹²⁶⁴ Art. 1 common to Geneva Conventions I-IV; Art. 1(1), Protocol I.

¹²⁶⁵ Art. 4(1), Protocol II.

¹²⁶⁶ Art. 4(2), Protocol II.

¹²⁶⁷ *See above*.

¹²⁶⁸ *See above*.

¹²⁶⁹ *See above*.

fact that Article 33 of Geneva Convention IV prohibits “[c]ollective penalties and likewise *all measures of intimidation or of terrorism*”.¹²⁷⁰ Reprisals, however, may never be imposed for a punitive purpose and thus reprisals are, strictly speaking, not acts of collective “punishment”. To assimilate reprisals to collective punishment is to engage in a form of analogical reasoning prohibited by the principle *nullum crimen sine lege*. At the crucial level of purpose or animus, reprisals and collective punishments are entirely distinct. It is only facial similarity that leads to the conclusion that reprisals are a form of collective punishment. It could be argued, however, that “collective punishment” should not be viewed in any narrow or literal sense, and that it should extend to the imposition of any form of sanction affecting civilians. The ICRC’s Commentary on Protocol II certainly suggests such an approach.¹²⁷¹ It could therefore be argued that treating reprisals as a form of collective punishment is not to engage in analogical reasoning at all, but rather follows from juridical reasoning following in turn from an evolutive process in the accepted meaning of “collective punishment”. The problem with this view, however, is that there is a paucity of judicial consideration of “collective punishment” in the jurisprudence of the contemporary international criminal tribunals.¹²⁷² One would be hard-pressed, therefore, to identify the trajectory of juridical reasoning according to which collective punishment has moved from a category that was considered to be unrelated, and without prejudice, to the right to reprisals, to the position where the prohibition on collective punishment in fact prohibits reprisals. To treat the prohibition on collective punishment as a prohibition on reprisals therefore entails a violation of the requirement of specificity: There is no predictable trajectory of juridical reasoning involved. For the same reason, it could not be asserted in good faith that there was no doubt that the prohibition on collective punishment entails a prohibition on reprisals. The requirement of *contra proferentem* would preclude such a conclusion.

b. “In All Circumstances” and Analogous Provisions

¹²⁷⁰ Art. 33, Geneva Convention IV.

¹²⁷¹ Sandoz *et al.* (1987), par. 4536.

¹²⁷² See, e.g., Jones & Powles (2003), par. 4.2.523.

As indicated in Chapter 7 above, the ICTY Trial Chamber I in its Rule 61 decision in *Prosecutor v Martić* adopted the view that the requirement to abide by the terms of the Geneva Conventions of 1949 “in all circumstances” entails a refutation of the right to engage any reprisal measure contrary to the terms of those Conventions.¹²⁷³ Protocol I includes an identical provision,¹²⁷⁴ and an analogous provision may be found within the “fundamental guarantees” of Protocol II.¹²⁷⁵ This is certainly an innovative approach to the question of the legality of reprisals. It is, however, an entirely unhistorical approach. The argument not only finds no support within the *travaux préparatoires* of the Geneva Conventions and Protocol I, but it is directly at odds with the drafting history of those Conventions and with the understanding of States as to the obligations they were adopting under those Conventions.¹²⁷⁶ The obligation to respect the Geneva Conventions and Protocol I “in all circumstances” operates to overturn the doctrine of reciprocity *stricto sensu*, but to go further and assert that it overturns the right to engage reprisals is to conflate the doctrines of reciprocity and reprisals, which, in their strict senses, are entirely distinct.¹²⁷⁷ The question for our purposes is whether the reasoning adopted in the Rule 61 decision in *Prosecutor v Martić* may permissibly be adopted by the ICC: Does it, in any sense, violate the principle *nullum crimen sine lege*?

One must start, here, with the requirement of strict construction. It has been concluded above that the principles relating to strict construction apply only where there is no ambiguity in the terms of a provision.¹²⁷⁸ The requirement to respect and ensure respect for the Geneva Conventions and Protocol I “in all circumstances” appears to entail some level of ambiguity. It is ambiguous, for instance, as to whether the requirement ousts all, or certain, defences (whether criminal or delictual) to violations of the terms of the Conventions, and, if so, which defences.

¹²⁷³ See above.

¹²⁷⁴ Art. 1(1), Protocol I.

¹²⁷⁵ Art. 4, Protocol II.

¹²⁷⁶ See above.

¹²⁷⁷ See above.

¹²⁷⁸ See above.

In the case of ambiguity, the relevant interpretative criterion is *contra proferentem*.¹²⁷⁹ As indicated in Chapter 2 above, there may be some confusion as to how the rule *contra proferentem* is to be applied. The ICTY Trial Chamber in *Prosecutor v Delalić* suggested that it is only where “an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning *which the canons of construction fail to solve*” that the benefit of the doubt should be given to the accused.¹²⁸⁰ One could assert that the effect of this is to relegate *contra proferentem* to an interpretative criterion of last resort, and that one must apply *all* other interpretative criteria first (such as those in the Vienna Convention on the Law of Treaties); only if the law is still unclear or uncertain is the court to interpret the law *contra proferentem*. It is fair to conclude, however, that this is not what was intended by the ICTY Trial Chamber. Given the prohibition on *non liquet* in international law,¹²⁸¹ it would appear that the “canons of construction” will always lead to a result one way or another. The above passage of the ICTY Trial Chamber appears, therefore, to suggest that one must attempt to interpret international penal provisions according to the ordinary canons of construction (presumably those located in the Vienna Convention), but that each canon applied must point, without any reasonable doubt, to a particular meaning – and that if the canons of construction do not point to a concrete result at that high threshold of “[no] reasonable doubt”, then any remaining reasonable doubt must be interpreted *contra proferentem*. *Contra proferentem* is therefore to be applied simultaneously with other canons of construction applicable under international law, with the effect that each canon is to be applied only to the extent that it produces a clear, certain result, free of reasonable doubt. Thus, one would only adopt, for *e.g.*, the “ordinary meaning [of] the terms of the treaty in their context and in light of its object and purpose”,¹²⁸² if such an enquiry produced a single clear result, free of reasonable doubt. Nevertheless, whether there is “doubt” remaining after the attempted application of any canon of construction is not, in itself, a question that necessarily produces an unequivocal answer. In fact it may leave some scope for the application of discretion in the

¹²⁷⁹ See above.

¹²⁸⁰ *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, par. 413.

¹²⁸¹ See above.

¹²⁸² Art. 31(1), Vienna Convention.

interpretation of penal provisions. For instance, in *DPP v Ottewell*, Lord Reid stated, in relation to the meaning of s. 37(2) of the *Criminal Justice Act 1967*, that:

The Court of Appeal (Criminal Division) refer to the well-established principle that in doubtful cases a penal provision ought to be given that interpretation which is least unfavourable to the accused. I would never seek to diminish in any way the importance of that principle within its proper sphere. But it only applies where after a full enquiry and consideration one is left in real doubt. It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings. The imprecision of the English language (and, so far as I am aware, of any other language) is such that it is extremely difficult to draft any provision which is not ambiguous in that sense. This section is clearly ambiguous in that sense: the Court of Appeal (Criminal Division) attach one meaning to it, and your Lordships are attaching a different meaning to it. But if, after full consideration, your Lordships are satisfied, as I am, that the latter is the meaning which Parliament must have intended the words to convey, then this principle does not prevent us from giving effect to our conclusions.¹²⁸³

Similarly, in an earlier House of Lords decision, *Kirkness v John Hudson & Co. Ltd*, Viscount Simonds stated that:

It would have been easy then to say that, since judicial opinion differed as to the meaning of these words, there was such an ambiguity as to justify recourse to a later Act to resolve it. But the decision of this House was unanimously to the contrary. That means that each one of us has the task of deciding what the relevant words mean. In coming to that decision he will necessarily give great weight to the opinion of others, but if at the end of the day he forms his own clear judgment and does not think that the words are “fairly and equally open to divers meanings” he is not entitled to say that there is an ambiguity. For him at least there is no ambiguity and on that basis he must decide the case.¹²⁸⁴

The question of the existence of “doubt” therefore appears to be treated as a subjective question, rather than an objective one. The question is not (at least in the two decisions cited immediately above) one of ambiguity in the objective sense that two or more authorities differ as to the meaning, but rather a question of personal conviction or judgement on the part of the decision maker. Nevertheless, that personal conviction or judgement must be grounded in legal reasoning, and where there is a paucity of evidence as to the content (or existence) of a customary norm, or differing opinion as to the meaning of a treaty provision, it may be that no court could, in good faith, form the conclusion that it was left in no doubt as to the content

¹²⁸³ *DPP v Ottewell* [1970] AC 642, p. 649.

¹²⁸⁴ *Kirkness v John Hudson & Co. Ltd* [1955] AC 696, p. 712.

of the customary norm or the meaning of the treaty provision. It may therefore be that it is not, in the circumstances, open to a court to decline to apply the rule *contra proferentem*. That is certainly the conclusion reached above on the question of whether the prohibition on collective punishment entails a prohibition on reprisals. In relation to the reasoning in the Rule 61 decision in *Prosecutor v Martić* that the obligation to abide by the Geneva Convention “in all circumstances” outlaws reprisals against persons and objects protected by the Geneva Conventions (and, by implication, Protocol I); the question is whether that is a form of reasoning that would be precluded by the rule *contra proferentem*. It has already been objected that such reasoning is unhistorical and contrary to the *travaux préparatoires* of the Geneva Conventions and Protocol I. The two Geneva Conventions of 1929 each included a provision that the Convention be “respected by the High Contracting Parties in all circumstances”.¹²⁸⁵ It was indicated above that this provision was intended as part of the abolition of the *si omnes* clause (whereby the convention is not triggered, or ceases to be binding, where even a single belligerent is not party to the convention).¹²⁸⁶ Nevertheless, the requirement in common Article 1 of the Geneva Conventions of 1949 and in Article 1(1) of Protocol I to respect the Conventions and Protocol “in all circumstances” cannot be limited in its effects to the abolition of the *si omnes* clause as that is achieved elsewhere in the four Geneva Conventions and in Protocol I.¹²⁸⁷ It is argued above that the requirement now goes beyond the abolition of the *si omnes* clause and entails an abolition of reciprocity, *stricto sensu*.¹²⁸⁸ Yet one may well ask why the requirement only entails an abolition of reciprocity *stricto sensu* and not an abolition of other forms of reciprocity such as reprisals. By what juridical principle is the requirement limited in its effects to one form of reciprocity only? The answer may well be, by virtue of the intention of the parties: The suggestion that the parties to Protocol I intended a prohibition, within Article 1(1) of Protocol I, on reprisals against all persons and property protected by the Protocol would appear to be directly contradicted by the Protocol’s drafting history.¹²⁸⁹ Nevertheless, the intention of the parties at the time of the promulgation

¹²⁸⁵ Art. 25, 1929 Wounded and Sick Convention; Art. 82, 1929 Prisoners of War Convention.

¹²⁸⁶ See above.

¹²⁸⁷ See above.

¹²⁸⁸ See above.

¹²⁸⁹ See above.

of Protocol I would not necessarily prevent a development, over time, of the meaning of the obligation to respect the Protocol “in all circumstances”, beyond that originally envisaged by the signatories. Can such a development as that suggested in the Rule 61 decision in *Prosecutor v Martić* be said to have occurred without any doubt? It is probably the case that a fair and objective decision-maker would be left in some doubt as to whether the words “in all circumstances” effects an outlawry of reprisals against all persons and objects protected by the convention. Nevertheless, as tenuous as the line of reasoning that resulted in that conclusion, it is a conclusion that is now grounded in the case law of the ICTY.¹²⁹⁰ On that basis, it could theoretically be open to the ICC to conclude that it is left in no doubt that the obligation to respect the Geneva Conventions and Protocol I “in all circumstances” has the effect of outlawing reprisals against all persons and objects protected by the Geneva Conventions and Protocol I. The existence of such case law would also appear to satisfy the requirements of specificity, in that any conclusion in line with that in the Rule 61 decision in *Prosecutor v Martić* is both accessible and predictable,¹²⁹¹ notwithstanding the limited precedential value of Rule 61 decisions.¹²⁹²

iii. THE PRINCIPLES OF “HUMANITY”

There is nothing in terms of modern case-law that provides a clear and unequivocal statement as to the validity of the principles of “humanity” as a formal source of international law. It would not, therefore, appear to be open to the ICC to form the conclusion that it was left in no doubt that “humanity” was such a source and to criminalise conduct on that basis (for *e.g.* by denying reprisals as a defence where those reprisals violated the principles of “humanity”). In fact, to the extent that the international criminal tribunals have examined the status of “humanity” under international law, they have formed the conclusion that humanity is not a formal source of international law.¹²⁹³

¹²⁹⁰ That is, it is located in the Rule 61 decision in *Prosecutor v Martić*.

¹²⁹¹ *See above*.

¹²⁹² *See above*.

¹²⁹³ *See above*.

iv. DISCRETIONARY BARRIERS

The conclusion of this thesis is that it is theoretically open to the ICC to form the view that reprisals are impliedly prohibited by “applicable” treaties against (1) all persons and objects protected under the Geneva Conventions including common Article 3; (2) in relation to agents of States party to Protocol I, all persons and objects protected by Protocol I; and (3) in relation to agents of States party to Protocol II, all persons and objects protected under the “fundamental guarantees” in Protocol II. Nevertheless, it could equally be open to the ICC to form the view that there is some plausible doubt in relation to these reprisal prohibitions, and thus interpret those alleged prohibitions *contra proferentem*. The question of whether the ICC experiences doubt in its interpretation of the law is to some extent discretionary in that it is grounded in questions of personal conviction or judgement as to the state of the law. Nevertheless, that conviction or judgement must be firmly grounded in juridical reasoning. If the ICC forms the view that there is doubt as to the illegality of certain reprisal measures (and must therefore interpret the legality of those measures *contra proferentem*), is it open to the ICC to deny the defence of reprisals on discretionary grounds?

There are two potential points at which the ICC could be said to have discretion in the admissibility of grounds excluding criminal responsibility. Firstly, Article 31(3) of the ICC Statute states that “the court *may* consider a ground for excluding criminal responsibility”¹²⁹⁴, indicating, by use of the word “may” an ostensible grant of discretion. Second, Article 21(1)(b) of the ICC Statute states, in the context of the applicable law, that the ICC “shall apply...[i]n the second place, *where appropriate*, applicable treaties and the principles and rules of international law...”.¹²⁹⁵ It could be argued that the appropriateness of the defence of reprisals is something that could factor into this determination. One of the chief arguments commonly raised against reprisals is that they are ineffective as sanctions, and that they provoke counterreprisals, leading to an escalation not only in the level of

¹²⁹⁴ Art. 31(3), ICC Statute (emphasis added).

¹²⁹⁵ Art. 21(1)(b), ICC Statute (emphasis added).

violence, but in the extent of violations of the law of armed conflict,¹²⁹⁶ The ICTY Trial Chamber in its Judgment in *Kupreškić* stated that:

It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation.¹²⁹⁷

Nevertheless, it was concluded in Chapters 1 and 3 above that neither the term “where appropriate” in Article 21(1)(b) nor the term “may” in Article 31(3) of the ICC Statute respectively, is discretionary in nature, and that they are provisions which must be applied *de jure*. The inappropriateness, even abhorrence, of certain defences is not something that can be tabulated in the determination of the admissibility of that defence, except to the extent that it factors into a factual determination of whether the defence is made out. The non-discretionary nature of the admissibility of non-enumerated defences under the ICC Statute is an element of the principle *nullum crimen sine lege*. As Justice Robertson stated in his Dissenting Opinion in the Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) in *Prosecutor v Sam Hinga Norman*:

There are some European Court of Human Rights decisions which suggest that [*nullum crimen sine lege*] is primarily a safe-guard against arbitrary conduct by government. But it is much more than that. It is the very basis of the rule of law, because it impels governments (in the case of national law) to take positive action against abhorrent behaviour, or else that behaviour will go unpunished. It thus provides the rationale for legislation and for treaties and Conventions – *i.e.* for a system of justice rather than an administrative elimination of wrongdoers by command of those in power. It is the reason why we are ruled by law and not by police.¹²⁹⁸

¹²⁹⁶ See Bristol (1979), pp. 427-8; Kalshoven (1990), p. 79.

¹²⁹⁷ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, par. 528.

¹²⁹⁸ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, par. 14.

bibliography

I. TEXTS

ABIEW (1999)

F. K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Kluwer Law International, The Hague, 1999

ACKERMAN & O'SULLIVAN (2000)

J.E. Ackerman & E. O'Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, Kluwer Law International, The Hague, 2000

ASHWORTH (1999)

A. Ashworth, *Principles of Criminal Law*, 3rd ed., Oxford University Press, Oxford, 1999

AUST (2000)

A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2000

BASSIOUNI (1999)

M.C. Bassiouni (ed.), *International Criminal Law*, Transnational Publishers, Ardsley, NY, 1999

BASSIOUNI (1992)

M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, The Hague, 1992

BANTEKAS ET AL. (2001)

I. Bantekas, S. Nash & M. Mackarel, *International Criminal Law*, Cavendish Publishing, London, 2001

BENNION (1984)

F. Bennion, *Statutory Interpretation*, Butterworths, London, 1984

BLACK'S LAW DICTIONARY

J.R. Nolan and J.M. Nolan-Haley, *Black's Law Dictionary*, 6th ed., West Publishing Co., St. Paul, Minn., 1990

BOS (1984)

M. Bos, *A Methodology of International Law*, T.M.C. Asser, Amsterdam, 1984

BOTHE ET AL. (1982)

M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982

BREDIMAS (1978)

A. Bredimas, *Methods of Interpretation and Community Law*, North-Holland Publishing Company, Amsterdam, 1978

BROWNLIE (1998)

I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford University Press, Oxford, 1998

BROWNLIE (1963)

I. Brownlie, *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1963

BUNN-LIVINGSTONE (2002)

S.L. Bunn-Livingstone, *Juriscultural Pluralism vis-à-vis Treaty Law: State Practice and Attitudes*, Martinus Nijhoff Publishers, The Hague, 2002

CASSESE (2003)

A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003

CASSESE ET AL. (2002)

A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, 2 volumes, Oxford University Press, 2002

CHENG (1987)

B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Grotius Publications, Cambridge, 1987

DETTER (2000)

I. Detter, *The Law of War*, 2nd ed, Cambridge University Press, Cambridge, 2000

DICEY (1959)

A.V. Dicey, *The Law of the Constitution*, 10th ed., Macmillan, London, 1959

DINSTEIN (2001)

Y. Dinstein, *War, Aggression and Self-Defence*, 3rd ed., Cambridge University Press, Cambridge, 2001

DINSTEIN & TABORY (1996)

Y. Dinstein and M Tabory (eds), *War Crimes in International Law*, Martinus Nijhoff Publishers, The Hague, 1996

DIXON & MCCORQUODALE (2003)

M. Dixon and R. McCorquodale (eds), *Cases and Materials on International Law*, 4th ed., Oxford University Press, Oxford, 2003

DWORKIN (1977)

R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge, 1977

FALK (1969)

R.A. Falk, "The Beirut Raid and the International Law of Retaliation", (1969) 63 *American Journal of International Law* 415

FERENCZ (1975)

B.B. Ferencz, *Defining International Aggression: The Search for World Peace; A Documentary History and Analysis*, 2 volumes, Oceana Publications, New York, 1975

FITZMAURICE (1958)

G. Fitzmaurice, *Symbolae Verzijl*, M. Nijhof Publishers, The Hague, 1958

FLANZ (1971-2004)

G.H. Flanz (ed.), *Constitutions of the Countries of the World*, 20 binders, Oceana Publications Inc., Dobbs Ferry, NY, 1971-2004

FLECK (1995)

D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995

FLETCHER (1978)

G. Fletcher, *Rethinking Criminal Law*, Little, Brown and Company, Boston, 1978

FRIEDMANN (1964)

W. Friedmann, *The Changing Structure of International Law*, Columbia University Press, New York, 1964.

GREEN (2000)

L.C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Manchester University Press, Manchester, 2000

GREEN (1959)

L.C. Green, *International Law Through the Cases*, 2nd ed., Stevens & Sons Ltd., London, 1959

GREENSPAN (1959)

M. Greenspan, *The Modern Law of Land Warfare*, University of California Press, Berkeley, 1959

GREIG (2001)

D.W. Greig, *Intertemporality and the Law of Treaties*, British Institute of International and Comparative Law, London, 2001

GROTIUS (1646)

H. Grotius, *De Jure Belli ac Pacis Libri Tres*, 1646 (trans. by F. W. Kelsey, in J. Scott (ed.), *The Classics of International Law*, vol. II, book III, Carnegie Endowment for International Peace, Washington D.C., 1925)

J. HALL (1960)

J. Hall, *General Principles of Criminal Law*, 2nd ed, Bobbs-Merrill, Indianapolis, 1960

HALSBURY'S LAWS OF ENGLAND

Halsbury's Laws of England, 4th ed. Reissue, Butterworths, London, 1995

HARRIS (1998)

D.J Harris, *Cases and Materials on International Law*, 5th ed., Sweet & Maxwell, London, 1998

HART (1968)

H.L.A. Hart, *Punishment and Responsibility*, Clarendon Press, Oxford, 1968

H.M. HART & SACKS (1994)

H.M. Hart and A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Foundation Press, Westbury, N.Y., 1994 (W.N. Eskridge, Jr., & P.P. Frickey eds)

HIGGINS (1994)

R. Higgins, *Problems & Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994

HUSAK (1992)

D.N. Husak, "The Serial View of Criminal Law Defenses" (1992) 3 *Criminal Law Forum* 369.

JASENTULIYANA (1999)

N. Jasentuliyana, *International Space Law and the United Nations*, Kluwer Law International, The Hague, 1999

KALSHOVEN (1987)

F. Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva, 1987

KALSHOVEN (1971)

F. Kalshoven, *Belligerent Reprisals*, Sijthoff, Leiden, 1971

KELSEN (1952)

H. Kelsen, *Principles of International Law*, Holt, Rinehart & Winston, New York, 1952

KLABBERS (1996)

J. Klabbers, *The Concept of Treaty in International Law*, Kluwer Law International, The Hague, 1996

KNOOPS (2001)

G.J.G.J. Knoops, *Defenses in Contemporary International Criminal Law*, Transnational Publishers, Ardsley, NY, 2001

KOSKENNIEMI (1989)

M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Finnish Lawyer's Publishing Company, Helsinki, 1989

LEE (1999)

R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues Negotiations, Results*, Kluwer Law International, Dordrecht, 1999

LEVIE (1993)

H.S. Levie, *Terrorism in War – the Law of War Crimes*, Oceana Publications, Dobbs Ferry, NY, 1993

LEVIE (1980)

H.S. Levie (ed.), *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, 4 vols, Oceana Publications Inc., Dobbs Ferry, NY, 1980

MACADAM & SMITH (1989)

A.I. MacAdam and T.M. Smith, *Statutes: Rules and Examples*, 2nd ed., Butterworths, Sydney, 1989

MCCORMACK & SIMPSON (1997)

T.L.H. McCormack and G.J. Simpson, *The Law of War Crimes: National and International Approaches*, Kluwer Law International, The Hague, 1997

MACCORMICK (1978)

D.N. MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1978

MCDUGAL ET AL. (1994)

M.S. McDougal, H.D. Lasswell and J.C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure*, New Haven Press, New Haven, 1994

MCDUGAL & FELICIANO (1961)

M.S. McDougal & F. Feliciano, *Law and Minimum World Public Order*, Yale University Press, New Haven, 1961

MACQUARIE DICTIONARY

A. Delbridge, J.R.L. Bernard, D. Blair, P. Peters and S. Butler (eds), *The Macquarie Dictionary*, 2nd ed., The Macquarie Library, Sydney, 1991

MERON (1989)

T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989

MERRYMAN (1985)

J. H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed., Stanford University Press, Stanford, 1985

MORRIS & SCHARF (1995)

V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, (2 vols), Transnational Publishers Inc, Irvington-on-Hudson, 1995

NORRIE (1993)

A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, Butterworths, London, 1993

OPPENHEIM (1906)

L. Oppenheim, *International Law: A Treatise*, Longmans, London, 1906

OPPENHEIM'S INTERNATIONAL LAW (9TH ED.)

R.Y. Jennings and A.D. Watts, *Oppenheim's International Law*, 9th ed., 2 vols, Longman, London, 1992

OPPENHEIM'S INTERNATIONAL LAW (8TH ED.)

H. Lauterpacht, *Oppenheim's International Law*, 8th ed., 2 vols, David McKay Co., New York, 1955

PICTET (1966)

J. Pictet, *Principles of International Humanitarian Law*, ICRC, Geneva, 1966

PICTET (1960a)

J. Pictet (ed.), *Commentary on the Second Geneva Convention of 12 August 1949*, ICRC, Geneva, 1960, available at www.icrc.org

PICTET (1960b)

J. Pictet (ed.), *Commentary on the Third Geneva Convention of 12 August 1949*, ICRC, Geneva, 1960, available at www.icrc.org

PICTET (1958)

J. Pictet (ed.), *Commentary on the Fourth Geneva Convention of 12 August 1949*, ICRC, Geneva, 1958, available at www.icrc.org

PICTET (1952)

J. Pictet (ed.), *Commentary on the First Geneva Convention of 12 August 1949*, ICRC, Geneva, 1952, available at www.icrc.org

ROBERTS & GUELFF (2000)

A. Roberts and R. Guelff, *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000

ROBERTSON (1999)

G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, Allen Lane, London, 1999

ROBINSON (1997)

P.H. Robinson, *Structure and Function in Criminal Law*, Clarendon Press, Oxford, 1997

ROGERS (1996)

A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996

SANDOZ ET AL. (1987)

Y. Sandoz, C. Swinarski and B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Hijhoff Publishers, Geneva, 1987, available at www.icrc.org

SCHABAS (2001)

W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001

SCHABAS (2000b)

W.A. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge, 2000

SCHINDLER & TOMAN (1988)

D. Schindler and J. Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1988

SCHWARZENBERGER (1968)

G. Schwarzenberger, *International Law as Applied by Courts and Tribunals*, Stevens, London, 1968

SINCLAIR (1984)

I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd rev. ed., Manchester University Press, Manchester, 1984

SMITH & HOGAN (1983)

J.C Smith and B. Hogan, *Criminal Law*, 4th ed, Butterworths, London, 1983

SUNGA (1997)

L.S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, Kluwer Law International, The Hague, 1997

TUCKER (1955)

R.W. Tucker, *The Law of War and Neutrality at Sea*, US Government Printer, Washington D.C., 1955 (US Naval War College International Law Studies, Vol. 50)

TRIFFTERER (1999)

O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999

TUNKIN (1974)

G. Tunkin, *Theory of International Law*, Harvard University Press, Cambridge, MA, 1974

VAN SLIEDREGT (2003)

E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, The Hague, 2003

VON GLAHN (1986)

G. von Glahn, *Law Among Nations*, 6th ed., MacMillan Co., New York, 1986

WALZER (1977)

M. Walzer, *Just and Unjust Wars*, Basic Books, New York, 1977

WILLIAMS (1983)

G. Williams, *Textbook of Criminal Law*, 2nd ed., Stevens and Sons, London, 1983

WILLIAMS (1961)

G. Williams, *Criminal Law: The General Part*, 2nd ed, Stevens, London, 1961

WOETZEL (1962)

R. Woetzel, *The Nuremberg Trials in International Law*, Praeger, New York, 1962

**

II. ARTICLES / CHAPTERS

ABI-SAAB (1991)

G. Abi-Saab, "The 1977 Additional Protocols and General International Law: Some Preliminary Reflexions", in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991

ABTAHI (2001)

H. Abtahi, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia", (2001) 14 *Harvard Human Rights Journal* 1

AKEHURST (1976)

M. Akehurst, "Equity and General Principles of Law", (1976) 25 *ICLQ* 801

AKHAVAN (1999)

P. Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia?", (1999) 20 *Human Rights Quarterly* 737

ALBRECHT (1953)

A.R. Albrecht, "War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949", (1953) 47 *American Journal of International Law* 590

ALDISERT (1999)

R.J. Aldisert, "The Brennan Legacy: The Art of Judging", (1999) 32 *Loyola of Los Angeles Law Review* 673

ALDRICH (1991)

G.H. Aldrich, "Why the United States of America Should Ratify Additional Protocol I" in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991

ALLEN (1992)

C.A. Allen, "Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity", (1992) 86 *American Society of International Law Proceedings* 39

ALMOND (1980)

H.H. Almond, Jr., "Reprisals: The Global Community is Not Yet Ready to Abandon Them", (1980) 74 *Proceedings of the American Society of International Law* 196

AMBOS (1999)

K. Ambos, "General Principles of Criminal Law in the Rome Statute", (1999) 10 *Criminal Law Forum* 1.

ARMSTEAD (1998)

J.H. Armstead, Jr., "The International Criminal Court: History, Development and Status", (1998) 38 *Santa Clara Law Review* 745.

BASSIOUNI (2002)

M.C. Bassiouni, "World War I: 'The War to End All Wars' and the Birth of a Handicapped International Criminal Justice System", (2002) 30 *Denver Journal of International Law and Policy* 244

BASSIOUNI (1997)

M.C. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", (1997) 10 *Harvard Human Rights Journal* 11

BAXTER (1970)

R. Baxter, "Treaties and Custom", (1970-I) 129 *Recueil des Cours* 25

BAXTER (1965-6)

R. Baxter, "Multilateral Treaties as Evidence of Customary International Law", (1965-6) 41 *British Yearbook of International Law* 275

BAXTER (1951)

R. Baxter, "So-Called 'Unprivileged Belligerency', Spies, Guerrillas, and Saboteurs", (1951) 28 *British Yearbook of International Law* 323

BEDERMAN (2002)

D.J. Bederman, "Counterintuiting Countermeasures", (2002) 96 *American Journal of International Law* 817

BENISON (1999)

A.I. Benison, "War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court", (1999) 88 *Georgetown Law Journal* 141

BIERZANEK (1979)

R. Bierzanek, "Reprisals as a Means of Enforcing the Law of Warfare: The Old and the New", in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Napoli, 1979

BLUM (1970)

Y. Blum, "The Beirut Raid and the International Double Standard", (1970) 64 *American Journal of International Law* 73

BODANSKY & COOK (2002)

D. Bodansky and J.R. Cook, "The ILC's State Responsibility Articles: Introduction and Overview", (2002) 96 *American Journal of International Law* 773

BOWETT (1972)

D.W. Bowett, "Reprisals Involving Recourse to Armed Forces", (1972) 66 *American Journal of International Law* 1

BRISTOL (1979)

M.C.C. Bristol III, "The Laws of War and Belligerent Reprisals Against Enemy Civilian Populations", (1979) 21 *Air Force Law Review* 397

BROOMHALL (1999)

B. Broomhall, "Article 22: *Nullum Crimen Sine Lege*", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999

CALLEN (2004)

J. Callen, "Unlawful Combatants and the Geneva Conventions", (2004) 44 *Virginia Journal of International Law* 1025

CASSESE (1984)

A. Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law", (1984) 3 *UCLA Pacific Basin Law Journal* 55

CHARNEY (1985)

J.I. Charney, "The Persistent Objector Rule and the Development of Customary International Law", (1985) 56 *British Yearbook of International Law* 1

CHENG (1983)

B. Cheng, "Custom: The Future of General State Practice in a Divided World", in McDonald & Johnston (eds), *The Structure & Process of International Law*, Martinus Nijhoff Publishers, The Hague, 1983

CHENG (1965)

B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", (1965) 5 *Indian Journal of International Law* 23

CLARK (1999)

R.S. Clark, "Article 123: Review of the Statute", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999

COREY (2000)

I.G. Corey, "The Fine Line between Policy and Custom: *Prosecutor v Tadic* and the Customary International Law of Armed Conflict", (2000) 166 *Military Law Review* 145

COUPLAND (2001)

R. Coupland, "Humanity: What is it and how does it influence international law?", (2001) 83 *International Review of the Red Cross* 969

CRAWFORD ET AL. (2001)

J. Crawford, J. Peel & S. Olleson, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading", (2001) 12 *European Journal of International Law* 963

CRAWFORD (1995)

J. Crawford, "The ILC Adopts a Statute for an International Criminal Court", (1995) 89 *American Journal of International Law* 404

CRAWFORD (1994)

J. Crawford, "The ILC's Draft Statute for an International Criminal Tribunal", (1994) 88 *American Journal of International Law* 140

DEGUZMAN (1999)

M.M. deGuzman, "Article 21: Applicable Law", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999

DICKINSON (1932)

E.D. Dickinson, "Changing Concepts and the Doctrine of Incorporation", (1932) 26 *AJIL* 239

ESSER (1996)

A. Eser, "'Defences' in War Crime Trials" in Y. Dinstein and M. Tabory (eds), *War Crimes in International Law*, Martinus Nijhoff Publishers, Boston, 1996

ESSER (1993)

A. Esser, "The Need for a General Part", (1993) 11 *Nouvelles Études Pénales* 43

FENRICK (1982)

W.J. Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare", (1982) 98 *Military Law Review* 91

FITZMAURICE (1957)

G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", (1957-II) 92 *Hague Recueil* 1

FITZMAURICE (1951)

G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points", (1951) 28 *British Yearbook of International Law* 1

FLETCHER (1998)

George P. Fletcher, "Truth in Codification", (1998) 31 *University of California Davis Law Review* 745

FORD (1994)

C.A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(c) and 'General Principles of Law'", (1994) 5 *Duke Journal of Comparative and International Law* 35

GALLANT (2000)

K.S. Gallant, "The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court", (2000) 34 *International Lawyer* 21

GALLANT (1999)

K.S. Gallant, "Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court", in M.C. Bassiouni (ed.), *International Criminal Law*, Transnational Publishers, Ardsley, 1999

GARDAM (1993)

J. G. Gardam, "Proportionality and Force in International Law", (1993) 87 *American Journal of International Law* 391

GARDNER (1998)

J. Gardner, "On the General Part of the Criminal Law", in Duff, A. (ed), *Philosophy and the Criminal Law: Principle and Critique*, Cambridge University Press, Cambridge, 1998

GEHRING (1980)

R.W. Gehring, "Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I", (1980) 90 *Military Law Review* 49

GLASER (1942)

S. Glaser, "Nullum Crimen Sine Lege", (1942) 24 *Journal of Comparative Legislation and International Law* 29

GREEN (1989)

L.C. Green, "Superior Orders and Command Responsibility", (1989) 27 *Canadian Yearbook of International Law* 167

GREENWOOD (1993)

C. Greenwood, "Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict", in P. Rowe (ed.), *The Gulf War 1990-1991 in International and English Law*, Routledge, New York, 1993

GREENWOOD (1991)

C. Greenwood, "Customary Law Status of the 1977 Additional Protocols" in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991

GREENWOOD (1989a)

C. Greenwood, "The Twilight of the Law of Belligerent Reprisals", (1989) 20 *Netherlands Yearbook of International Law* 35

GREENWOOD (1989b)

C. Greenwood, "Reprisals and Reciprocity in the New Law of Armed Conflict", in M.A. Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989

C. HALL (1998)

C.K. Hall, "The First Proposal for a Permanent International Criminal Court", (1998) 322 *International Review of the Red Cross* 57

C. HALL (1997)

C.K. Hall, "The First Two Sessions of the UN Preparatory Committee on the establishment of an International Criminal Court", (1997) 91 *American Journal of International Law* 177

J. HALL (1937)

J. Hall, "*Nulla Poena Sine Lege*", (1937) 47 *Yale Law Journal* 165

HAMPSON (1988)

F.J. Hampson, "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949" (1988) 37 *International and Comparative Law Quarterly* 818

A. HIGGINS (1927)

A.P. Higgins, "Retaliation in Naval Warfare", (1927) 8 *British Yearbook of International Law* 129

HOFFMAN (2002)

M.H. Hoffman, "Terrorists are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law", (2002) 34 *Case Western Reserve Journal of International Law* 227

HOLMES (1998)

J. Holmes Armstead Jr, "The International Criminal Court: History, Development and Status", (1998) 38 *Santa Clara Law Review* 745

HORWITZ (1981)

M.J. Horwitz, "The Historical Contingency of the Role of History", (1981) 90 *Yale Law Journal* 1057

HUSAK (1992)

D.N. Husak, "The Serial View of Criminal Law Defenses", (1992) 3 *Criminal Law Forum* 369

LANSING (1921)

R. Lansing, "Notes on World Sovereignty", (1921) 15 *American Journal of International Law* 13

JEFFRIES (1985)

J.C. Jeffries, Jr., "Legality, Vagueness and the Construction of Penal Statutes", (1985) 71 *Virginia Law Review* 189

KALSHOVEN (1999)

F. Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", (1999) 2 *Yearbook of International Humanitarian Law* 3

KALSHOVEN (1990)

F. Kalshoven, "Belligerent Reprisals Revisited", (1990) 21 *Netherlands Yearbook of International Law* 43

KIRGIS (1987)

F.L. Kirgis, Jr., "Custom on a Sliding Scale", (1987) 81 *American Journal of International Law* 146

KIRSCH & HOLMES (1999)

P. Kirsch and J.T. Holmes, "Developments in International Criminal Law: The Rome Conference of an International Criminal Court: The Negotiating Process", (1999) 93 *American Journal of International Law* 2

KLABBERS (1997)

J. Klabbers, "Some Problems Regarding the Object and Purpose of Treaties", (1997) 8 *Finnish Yearbook of International Law* 138

KRUG (2000)

P. Krug, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", (2000) 94 *American Journal of International Law* 317

KWAKWA (1990)

E. Kwakwa, "Belligerent Reprisals in the Law of Armed Conflict" (1990) 27 *Stanford Journal of International Law* 49

LAMB (2002)

S. Lamb, "*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law" in A. Cassese, P. Gaeta, and J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002

LEITER (2003)

B. Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence", (2003) 48 *American Journal of Jurisprudence* 17

LEVENFELD (1982)

B. Levenfeld, "Israel's Counter-*Fedayeen* Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law", (1982) 21 *Columbia Journal of Transnational Law* 1

LEVIE (1991)

H.S. Levie, "The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders", (1991) 31 *Revue Internationale de Droit Militaire et de Droit de la Guerre* 183

LIPPMANN (1996)

M. Lippmann, "Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War", (1996) 15 *Dickinson Journal of International Law* 1

LISS (1992)

F. R. Liss, "A Mandate to Balance: Judicial Protection of Individual Rights Under the Canadian Charter of Rights and Freedoms", (1992) 41 *Emory Law Journal* 1281

MCLEAN (2001)

J. McLean, "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act", (2001) 4 *New Zealand Law Review* 421

MASSEY (1986)

S.J. Massey, "Individual Responsibility for Assisting the Nazis in Persecuting Civilians", (1986) 71 *Minnesota Law Review* 97

MATHESON (1987)

M.J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions" (1987) 2 *American University Journal of International Law and Policy* 419

MENDELSON (1998)

M.H. Mendelson, "The Formation of Customary International Law", (1998) 272 *Recueil des Cours* 155

MERON (2000)

T. Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", (2000) 94 *American Journal of International Law* 78

MERON (1998)

T. Meron, "War Crimes Law Comes of Age", (1998) 92 *American Journal of International Law* 462

MERON (1996)

T. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", (1996) 90 *American Journal of International Law* 238

MEZZETTI (1998)

E. Mezzetti, "Grounds for Excluding Criminal Responsibility", in F. Lattanzi (ed), *The International Criminal Court: Comments on the Draft Statute*, Editoriale Scientifica, Naples, 1998

MITCHELL (2001)

A. Mitchell, "Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law", (2001) 170 *Military Law Review* 155

MOFIDI & ECKERT (2003)

M. Mofidi and A.E. Eckert, "'Unlawful Combatants' or 'Prisoners of War': The Law of Politics and Labels", (2003) 36 *Cornell International Law Journal* 59

MORTON (2003)

F.L. Morton, "Can Judicial Supremacy be Stopped?", [October 2003] *Policy Options* 25

NAHLIK (1991)

S.E. Nahlik, "From Reprisals to Individual Penal Responsibility", in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991

NAHLIK (1978)

S.E. Nahlik, "Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva, 1974-1977", (1978) 42 *Law and Contemporary Problems* 36

O'BRIEN (1990)

W.V. O'Brien, "Reprisals, Deterrence and Self-Defence in Counterterrorism Operations", (1990) 30 *Virginia Journal of International Law* 421

OETER (1995)

S. Oeter, "Methods and Means of Combat" in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995

OPPENHEIM (1908)

L. Oppenheim, "The Science of International Law: Its Task and Method", (1908) 2 *American Journal of International Law* 313

PARKINSON (1996)

P. Parkinson, "Estoppel", in P. Parkinson (ed.), *The Principles of Equity*, LBC Information Services, Sydney, 1996

PARKS (2001)

W. Hays Parks, "Rules of Conduct during Operations Other Than War: The Law of War Does Apply", *American Diplomacy*, 2001, available at http://www.unc.edu/depts/diplomat/archives_roll/2001_07-09/hum_intervention/hum_08_parks.html

PARKS (1990)

W. Hays Parks, "Air War and the Law of War", (1990) 32 *Air Force Law Review* 1

PELLET (2002)

A. Pellet, "Applicable Law", in A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, Oxford University Press, 2002

PENROSE (2000)

M.M. Penrose, "Lest We Fail: The Importance of Enforcement in International Criminal Law", (2000) 15 *American University International Law Review* 321

PROVOST (1994)

R. Provost, "Reciprocity in Human Rights and Humanitarian Law", (1994) 65 *British Yearbook of International Law* 383

RATNER (2002)*

S.R. Ratner, "*Jus ad Bellum* and *Jus in Bello* After September 11", (2002) 96 *American Journal of International Law* 905

ROBERTS (1987)

G.B. Roberts, "Self-Help in Combating State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals", (1987) 19 *Case Western Reserve Journal of International Law* 243

ROBERTS (1985)

G.B. Roberts, "The New Rules for Waging War: The Case Against Ratification of Additional Protocol I", (1985) 26 *Virginia Journal of International Law* 109

ROBINSON (1982)

P.H. Robinson, "Criminal Law Defenses: A Systematic Analysis", (1982) 82 *Columbia Law Review* 199

SADAT & CARDEN (2000)

L.N. Sadat and S.R. Carden, "The New International Criminal Court: An Uneasy Revolution", (2000) 88 *Georgetown Law Journal* 381

SALAND (1999)

P. Saland, "International Criminal Law Principles", in R.S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, Dordrecht, 1999

SCHABAS (2000a)

W.A. Schabas, "Perverse Effects of the *Nulla Poena* Principle: National Practice and the Ad Hoc Tribunals", (2000) 11 *European Journal of International Law* 52

SCHABAS (1998)

W.A. Schabas, "General Principles of Criminal Law in the International Criminal Court Statute (Part III)", (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 400

SCHACHTER (1982)

O. Schachter, "International Law in Theory and Practice", (1982-V) 178 *Recueil des Cours* 13

SICILIANOS (1993)

L.-A. Sicilianos, "The Relationship Between Reprisals and Denunciation or Suspension of a Treaty" (1993) 4 *European Journal of International Law* 341

SIMPSON (1997)

G.J. Simpson, "War Crimes: A Critical Introduction", in T.L.H. McCormack and G.J. Simpson, *The Law of War Crimes: National and International Approaches*, Kluwer Law International, The Hague, 1997

SMIDT (2001)

M.L. Smidt, "The ICC: An Effective Means of Deterrence?", (2001) 167 *Military Law Review* 156

SOFAER (1988)

A.D. Sofaer, "The Rationale for the United States Decision Not to Ratify" (1988) 82 *American Journal of International Law* 784

SPENCE (1996)

M. Spence, "Equitable Defences", in P. Parkinson (ed.), *The Principles of Equity*, LBC Information Services, Sydney, 1996

SPROUT (1932)

H.H. Sprout, "Theories as to the Applicability of International Law in the Federal Courts of the United States", (1932) 26 *AJIL* 280

STEIN (1985)

T.L. Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law", (1985) 26 *Harvard International Law Journal* 457

STOWELL (1942)

E. Stowell, "Military Reprisals and the Sanctions on the Laws of War", (1942) 36 *American Journal of International Law* 643

TUCKER (1972)

R.W. Tucker, "Reprisals and Self-Defense: The Customary Law", (1972) 66 *American Journal of International Law* 589

TUNKIN (1993)

G. Tunkin, "Is General International Law Customary Law Only?", (1993) 4 *European Journal of International Law* 534, available at <http://www.ejil.org/journal/Vol4/No4/art4.html>

VIERDAG (1988)

E.W. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", (1988) 59 *British Yearbook of International Law* 75

WALDOCK (1962)

H. Waldock, "General Course on Public International Law" (1962-II) 106 *Hague Recueil* 1

WAXMAN (2000)

M.C. Waxman, *International Law and the Politics of Urban Air Operations*, MR-1175-AF, 2000, available at <http://www.rand.org/publications/MR/MR1175/MR1175.chap2.pdf>

WEIL (1997)

P. Weil, "'The Court Cannot Conclude Definitively...' Non Liqueat Revisited", (1997) 36 *Columbia Journal of Transnational Law* 109

WEIL (1983)

P. Weil, "Towards Relative Normativity in International Law?", (1983) 77 *American Journal of International Law* 413, especially pp. 434-439

WEINSTEIN (1999)

I. Weinstein, "The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion under the Guidelines", (1999) 79 *Boston University Law Review* 493

WHIPPMANN (1999)

D. Wippmann, "Atrocities, Deterrence and the Limits of International Justice", (1999) 23 *Fordham International Law Journal* 473

WISE (1997)

E.M. Wise, "General Rules of Criminal Law", (1997) 25 *Denver Journal of International Law and Policy* 313

**

III. JUDGMENTS / DECISIONS

INTERNATIONAL COURT OF JUSTICE / PERMANENT COURT OF INTERNATIONAL JUSTICE

Anglo-Norwegian Fisheries Case (UK v Norway) [1951] ICJ Rep 116

Asylum Case (Columbia v Peru) [1950] ICJ Rep 266

Barcelona Traction, Light and Power Co. (Belgium v Spain), [1970] ICJ Rep. 3

Case Concerning the Factory at Chorzów (Germany v Polish Republic), 1927 PCIJ (ser. A) No. 9

Case Concerning Gabčíkovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep. 7

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits) [1986] ICJ Rep. 14

Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Merits) [2003] ICJ Rep. 1

Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City (Advisory Opinion), 1935 PCIJ (Ser. A/B) No. 65

Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion) [1950] ICJ Rep. 4

Corfu Channel Case (UK v Albania) [1949] ICJ Rep. 1

Frontier Dispute Case (Burkina Faso v Mali) [1985] ICJ Rep. 6

International Status of South West Africa (Advisory Opinion) [1950] ICJ Rep. 128

Interpretation of Peace Treaties Case (Second Phase) (Advisory Opinion) [1950] ICJ Rep. 221

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion) [1971] ICJ Rep. 16

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep. 226

S.S. Lotus (France v Turkey), 1927 PCIJ (Ser. A) No. 10

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) [1995] ICJ Rep. 6

Northern Cameroons Case (Cameroon v UK) [1963] ICJ Rep. 15

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Federal Republic of Germany v Netherlands) [1969] ICJ Rep. 3

Norwegian Loans Case (France v Norway) [1957] ICJ Rep. 9

Nuclear Tests Cases (Australia v France) [1974] ICJ Rep. 253; *(New Zealand v France)* [1974] ICJ Reports 457

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep. 16

Territorial Dispute Case (Libyan Arab Jamahiriya v Chad) [1994] ICJ Rep. 6

INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946 (Trial against H.W. Göring, R. Hess, J. von Ribbentrop, R. Ley, W. Keitel, E. Kaltenbrunner, A. Rosenberg, H. Frank, W. Frick, J. Streicher, W. Funk, H. Schacht, G. Krupp von Bohlen und Halbach, K. Dönitz, E. Raeder, B. von Schirach, F. Sauckel, A. Jodl, M. Bormann, F. von Papen, A. Seyss-Inquart, A. Speer, C. von Neurath, and H. Fritzsche, individually and as members of any groups or organizations to which they belonged), 42 vols, IMT, Nuremberg, 1947-49, available at www.yale.edu/lawweb/avalon/imt/imt.htm.

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

Judgment of the International Military Tribunal for the Far East, 1 November 1948, reprinted in B.V.A. Röling and C.F. Fülér (eds), *The Tokyo Judgment: The International Military Tribunal For the Far East (I.M.F.T.E.)*, 29 April 1946-12 November 1948, 2 vols, University Press Amsterdam BV, Amsterdam, 1977.

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v Zlatko Aleskovski, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000 (available at www.icty.org).

Prosecutor v Tihomir Blaškić, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004 (available at www.icty.org).

Prosecutor v Tihomir Blaškić, Case No. IT-95-14-T, Trial Chamber I, Judgment, 3 March 2000 (available at www.icty.org).

Prosecutor v Radoslav Brdjanin, Case No. IT-99-36-R77, Trial Chamber II, Decision on Motion by *Amicus Curiae* Prosecutor to Amend Allegations of Contempt of the Tribunal, 6 February 2004 (available at www.icty.org).

Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997 (available at www.icty.org).

Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998 (available at www.icty.org).

Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001 (available at www.icty.org).

Prosecutor v Anto Furundžija, Case No. IT-95-17/1-A, Appeals Chamber, Judgment, 21 July 2000 (available at www.icty.org).

Prosecutor v Anto Furundžija, Case No. IT-95-17/1-T, Trial Chamber II, Judgment, 10 December 1998 (available at www.icty.org).

Prosecutor v Anto Furundžija, Case No. IT-95-17/1, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), 29 May 1998, (available at www.icty.org).

Prosecutor v Stanislav Galić, Case No. IT-98-29-T, Trial Chamber I, Judgment and Opinion, 5 December 2003 (available at www.icty.org).

Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, Case No. IT-01-47-T, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002 (available at www.icty.org).

Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, Case No. IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003 (available at www.icty.org).

Prosecutor v Radovan Karadžić and Ratko Mladić, Case Nos IT-95-5 and IT-95-18, Trial Chamber I, Decision Rejecting the Request Submitted by Mr. Medvene and Mr. Hanley III Defence Counsels for Radovan Karadžić and Ratko Mladić, 5 July 1996 (available at www.icty.org)

Prosecutor v Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001 (available at www.icty.org).

Prosecutor v Milorad Krnojelac, Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003 (available at www.icty.org).

Prosecutor v Radislav Krstić, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001 (available at www.icty.org).

Prosecutor v Radislav Krstić, Case No. IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004 (available at www.icty.org).

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vuković, Case No. IT-96-23-T, Judgment of the Trial Chamber, 22 February 2001 (available at www.icty.org).

Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000 (available at www.icty.org).

Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, Case No. IT-95-16-T, Trial Chamber, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999 (available in www.icty.org).

Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, Case No. IT-95-16-T, Trial Chamber, Decision on Defence Motion to Summon Witness, 3 February 1999.

Prosecutor v Milan Martić, Case No. IT-95-11-R61, Trial Chamber I, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 8 March 1996, (1998) 108 ILR 39.

Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 (available at www.icty.org).

Prosecutor v Ivica Rajić, Case No. IT-95-12-R61, Trial Chamber, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996 (available at www.icty.org).

Prosecutor v Duško Tadić, Case No. IT-94-1, Trial Chamber, Decision on the Defence Motion on the Jurisdiction of the Tribunal, 10 August 1995 (available at www.icty.org).

Prosecutor v Duško Tadić, Case No. IT-94-1/AR72, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (available at www.icty.org).

Prosecutor v Duško Tadić, Case No. IT-94-1-T, Trial Chamber, Decision on Prosecution Motion for Production of Defence Witness Statements, 27 December 1996 (available at www.icty.org).

Prosecutor v Duško Tadić, Case No. IT-94-1-T, Trial Chamber, Opinion and Judgment 7 May 1997 (available at www.icty.org).

Prosecutor v Duško Tadić, Case No. IT-94-1-A, Appeals Chamber, Judgment 15 July 1999 (available at www.icty.org).

Prosecutor v Duško Tadić, Case No. IT-94-1-A-R77, Appeals Chamber, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 (available at www.icty.org).

Prosecutor v Duško Tadić, Case No. IT-94-1-A-AR77, Appeals Chamber, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001, (available at www.icty.org).

Prosecutor v Mitar Vasiljević, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002 (available at www.icty.org).

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Prosecutor v Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998 (available at www.icty.org).

Prosecutor v Jean-Paul Akayesu, Case No. ICTR-96-4-A, Appeals Chamber, Judgment, 1 June 2001 (available at www.icty.org).

Prosecutor v Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Trial Chamber, Judgment and Sentence, 21 May 1999 (available at www.icty.org).

Prosecutor v Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3, Trial Chamber I, Judgment and Sentence, 6 December 1999 (available at www.icty.org).

SPECIAL COURT FOR SIERRA LEONE

Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Case No. SCSL-04-16-PT, Trial Chamber, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to Infringement of the Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, 31 March 2004 (available at www.sc-sl.org).

Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Case No. SCSL-04-16-PT, Trial Chamber, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, (available at www.sc-sl.org).

Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Case No. SCSL-04-16-PT, Trial Chamber, Brima – Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004 (available at www.sc-sl.org).

Prosecutor v Morris Kallon, Case No. SCSL-03-07-PT, Trial Chamber, Decision on the Defence Motion on the Denial of Right to Appeal, 7 November 2003, (available at www.sc-sl.org).

Prosecutor v Santigie Borbor Kanu, Case No. SCSL-03-13-PT, Trial Chamber, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003 (available at www.sc-sl.org).

Prosecutor v Sam Hinga Norman, Case No. SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004 ([available at www.sc-sl.org](http://www.sc-sl.org)).

Prosecutor v Sam Hinga Norman, Case No. SCSL-03-08-PT, Trial Chamber, Decision on the Defence Motion on the Denial of Right to Appeal, 7 November 2003, ([available at www.sc-sl.org](http://www.sc-sl.org)).

Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T, Trial Chamber, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004 ([available at www.sc-sl.org](http://www.sc-sl.org)).

Prosecutor v Issa Hassan Sesay, Case No. SCSL-03-05-PT, Trial Chamber, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003 ([available at www.sc-sl.org](http://www.sc-sl.org)).

Prosecutor v Issa Hassan Sesay, Case No. SCSL-03-05-PT, Trial Chamber, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003 ([available at www.sc-sl.org](http://www.sc-sl.org)).

Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Case No. SCSL-04-15-T, Trial Chamber, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004 ([available at www.sc-sl.org](http://www.sc-sl.org)).

SPECIAL PANELS FOR THE TRIAL OF SERIOUS CRIMES, DISTRICT COURT OF DILI

Prosecutor v Domingos Amati and Fransisco Matos, Case No. 12/2003, District Court of Dili, Special Panel for the trial of Serious Crimes, Decision on the Defence Motion to Dismiss Count 1 of the Indictment for Failure to Establish a Prima Facie Case, 11 July 2003 ([available at www.jsmp.minihub.org](http://www.jsmp.minihub.org)).

Prosecutor v Leonardus Kasa, Case No. 11/CG/2000, District Court of Dili, Special Panel for the trial of Serious Crimes, Judgment, 9 May 2001 ([available at www.jsmp.minihub.org](http://www.jsmp.minihub.org)).

Prosecutor v Sabino Gouveia Leite, Case No. 04a/2001, District Court of Dili, Special Panel for the trial of Serious Crimes, Judgment, 7 December 2002 ([available at www.jsmp.minihub.org](http://www.jsmp.minihub.org)).

Prosecutor v Joao Franca da Silva Alias Jhoni Franca, Case No. 04a/2001, District Court of Dili, Special Panel for the trial of Serious Crimes, Judgment, 5 December 2002 ([available at www.jsmp.minihub.org](http://www.jsmp.minihub.org)).

EUROPEAN COURT OF HUMAN RIGHTS

Belilos v Switzerland (1988) 10 EHRR 466

Golder v United Kingdom (1975) 1 EHRR 524

Kokkinakis v Greece (1994) 17 EHRR 397

Loizidou v Turkey (Preliminary Objections) (1995) 20 EHRR 99

Masson v Netherlands (1996) 22 EHRR 491

CR v United Kingdom (1995) 21 EHRR 363

INTERNATIONAL ARBITRATIONS

- Abu Dhabi Arbitration (Petroleum Development Ltd v Sheikh of Abu Dhabi)* (1951) 18 ILR 144
- Air Service Agreement between the United States of America and France (United States v France)* (1978) 15 RIAA 417
- El Oro Mining and Railway Co. Arbitration (Great Britain v Mexico)* (1931) 5 RIAA 191
- Finnish Shipowners Arbitration (Finland v Great Britain)* (1934) 3 RIAA 1479
- Island of Palmas (Netherlands v US)* 2 RIAA 829
- North American Dredging Company of Texas v United Mexican States* (1926) 20 AJIL 800
- Responsabilité de L'Allemagne a Raison des Dommages Causés dans les Colonies Portugaises du Sud L'Afrique (Portugal v Germany)* (1928) 8 Trib. Arb. Mixtes 409 (*The Naulilaa Incident*), extracted in L.C. Green, *International Law Through the Cases*, 2nd ed., Stevens & Sons Ltd., London, 1959*
- Robert E. Brown Arbitration (United States v Great Britain)* (1923) 6 RIAA 120
- Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Award on Jurisdiction and Admissibility, 4 August 2000 (available at www.worldbank.org/icsid/bluefintuna/award080400.pdf)

NATIONAL COURT DECISIONS

- Alderman Backell's Case* (1687) 2 Chan. Cas. 190
- Attorney-General of the Government of Israel v Adolf Eichmann* (1961) 36 ILR 5
- Attorney-General of Israel v Eichmann* (1962) 36 ILR 277 (Supreme Ct.)
- Re Baker, Nichols v Baker* (1890) 44 Ch D 262
- Becke v Smith* (1836) 2 M&W 191; 150 ER 724
- Bell v Crane* (1873) LR 8 QB 481
- In re Best* (1950) 17 ILR 434
- Bodega Co v Martin* [1915] 2 Ch 385
- Border RDC v Roberts* [1950] 1 KB 716
- Brettell v Dawes* (1852) 7 Exch 307; 155 ER 963
- Bristol City Council v Rawlins* (1977) 34 P&CR 12
- Caledonian Railway Co v North British Railway Co* (1881) 6 App Cas 114
- Cave v Horsell* [1912] 3 KB 533
- Clarkson Co. Ltd. v White* (1979) 32 CBR (NS) 25

Clinchfield Coal Co. v FMSHRC, 895 F.2d 773 (1990)

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297

Delhi & London Bank v. Orchard (1877) LR 4 Ind App 127 (Privy Council)

Dixon v Harrison (1669) Vaugh 36; 124 ER 958

The Dover Castle (1921) 16 AJIL 704

DPP v Ottewell [1970] AC 642

Re Falconbridge Nickel Mines Ltd and Minister of Revenue for Ontario (1981) 121 DLR (3d) 403

Fenson v City of New Westminster (1897) 5 BCR 624

Forbes v Lee Conservancy Board (1879) 4 Ex D 116

In re Fullriede (1949) 16 AD 548

Ex parte Gilbert (1873) 14 NBR (1 Pug) 231

Grey v Pearson (1857) 6 HLC 61

In re Heinemann (1946) 13 AD 395

Heydon's Case (1584) 3 Co. Rep. 7a

Howard v Bodington (1877) 2 PD 203

Re Jenkins, Jenkins v Davies (1931) 100 LJ Ch 265

John Sainsbury & Co (a firm) v Roberts [1975] 2 All ER 801

Jones v Harrison (1851) 2 LM&P 257

Julius v. Lord Bishop of Oxford (1880) 5 App Cas 214

In re Kappler (1948) 15 AD 471

In re Kooymans (1946) AD 398

Kirkness v John Hudson & Co Ltd [1955] AC 696

Knüller v DPP [1973] AC 435

The Leonara [1919] AC 974

In re Lepeschkin (1923-4) 2 AD 323

The Llandovery Castle (1921) 16 AJIL 708

Lowther v Bentink (1874) LR 19 Eq 166

The Lucy (1809) Edw. 122, 165 ER 1054

Lyde v Barnard (1836) 1 M&W 101; 150 ER 363

M v Law Society (Alberta) [1941] 1 DLR 213

McCormick v Horsepower Ltd [1981] 2 All ER 746

MacDougall v Paterson (1851) 11 CB 755; 138 ER 672

Re Mayfair Property Co, Bartlett v Mayfair Property Co [1898] 2 Ch 28

Montgomery v Wanda Modes Ltd [2002] 1 BCLC 289

Netherlands v Rauter (1949) 14 LRTWC 89

Re Nicholson, Ex parte Nyberg (1882) 8 VLR (L) 292

Norwegian Resistance Case (1969) 61 ILR 663

Parker v Sanders (1617) Cro Jac 418; 79 ER 357

In re Rauter (1949) 16 AD 526

Reference Re the Seabed and Subsoil of the Continental Shelf Off-Shore Newfoundland (1984) 5 DLR 4th 385

Rex et Regina v Barlow, 2 Salk. 609 (year of judgment not published)

R v. Boylan [1979] 3 WWR 435

R v City of Westminster Housing Benefit Review Board, Ex parte Mehanne [2001] 2 All ER 690

R v Collins [1987] 1 SCR 265

R v Finta (1994) 104 ILR 284

R v Ireland (1970) 126 CLR 321

R v Mitchell, Ex parte Livesey [1913] 1 KB 561

R v Northumbrian Water Ltd, Ex parte Newcastle and North Tyneside Health Authority [1999] JPL 704

R v Smith, (1900) 17 SC 561

R v Turner [1897] 1 QB 445

R v Wandsworth District Board of Works (1858) 6 WR 576

R v West Yorkshire Coroner, Ex p Smith [1982] 3 All ER 1098

River Wear Comrs v Adamson (1877) 2 App Cas 743

Sheffield Corporation v Luxford, Same v Morrell [1929] 2 KB 180

Shimoda v. The Japanese State (1964) 8 Japanese Annual of International Law 212

In re "Silbertanne" Murders (1946) 13 AD 397

Simpson v Unwin (1832) 3 B&Ad 134; 110 ER 50

Stallwood v Tredger (1815) 2 Phillim 287; 161 ER 1147
The Stigstad [1919] AC 279
Stock v Frank Jones (Tipton) Ltd [1978] 1 All ER 948
Trial of Albert Kesselring (1947) VIII LRTWC 9
Trial of Carl Krauch (1948) X LRTWC 1
Trial of General von Mackensen and General Maelzer (1945) VIII LRTWC 1
United States v Altstoetter (1947) VI LRTWC 1
United States v. Arjona, 120 US 479 (1887)
United States v Flick, 174 F.2d 983 (1949)
United States v Krupp von Bohlen (1948) X LRTWC 69
United States v Leon, 468 US 897 (1984)
United States v List (1948) 15 AD 632; (1950) 11 TWC 757
United States v Ohlendorf (1948) 4 TWC 1
Vacher & Sons Ltd v London Society of Compositors [1913] AC 107
In re von Lewinski (1949) 16 AD 509
Wallis v Smith (1804) 1 Smith KB 346
Warburton v Loveland (1832) 2 Dow&Cl 480; 5 ER 499
In re Wintgen (1949) 16 AD 484
The Zamora [1916] 2 AC 77

**

IV. TREATIES / INTERNATIONAL INSTRUMENTS

1841

US Secretary of State Daniel Webster's letter of 24 April 1841 to the British Minister at Washington Mr. Fox, *reprinted in* R.Y. Jennings, "The Caroline and McLeod Cases" (1938) 32 A.J.I.L. 82

1856

Declaration Respecting Maritime Law, 16 April 1856, *reprinted in* A. Roberts and R. Guelff, *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000, p.48

1880

The Laws of War on Land, adopted by the Institute of International Law at Oxford, 9 September 1880, *available at* www.icrc.org

1899

Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, [1901] UKTS 11

Regulations Concerning the Laws and Customs of War on Land, *annexed to* Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, [1901] UKTS 11

Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 29 July 1899, [1901] UKTS 10

1906

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies on the Field, 6 July 1906, [1907] UKTS 15

1907

Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, [1910] UKTS 9

Regulations Concerning the Laws and Customs of War on Land, *annexed to* Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, [1910] UKTS 9

Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 18 October 1907, [1910] UKTS 10

Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships, 18 October 1907, [1910] UKTS 11

Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, [1910] UKTS 12

Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 18 October 1907, [1910] UKTS 13

Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 18 October 1907, 36 Stat. 2371

Convention (XI) Relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, 18 October 1907, [1910] UKTS 14

Convention (XII) Relative to the Creation of an International Prize Court, 18 October 1907, 205 Consol. T.S. 381

Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, 205 Consol. T.S. 395

Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 October 1907, [1910] UKTS 15

1909

Declaration Concerning the Laws of Naval Warfare, 26 February 1909, 208 Consol. T.S. 338

1919

Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol, 28 June 1919, [1919] UKTS 4

1923

Draft Rules on Aerial Warfare, 19 February 1923, (1923) 17 AJIL Supplement 245

1925

Protocol for the Prohibition on the Use in War of Asphyxiation, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 LNTS 65

1928

General Treaty for the Renunciation of War, 27 August 1928, 94 LNTS 57

1929

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, 118 LNTS 303

Convention Relating to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343

1930

Treaty for the Limitation and Reduction of Naval Armaments, (Part IV, Art. 22, relating to submarine warfare), 22 April 1930, 112 LNTS 65

1936

Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, 6 November 1936, 173 LNTS 353

1945

Charter of the United Nations, 26 June 1945, [1946] UKTS 67

Statute of the International Court of Justice, *annexed to* Charter of the United Nations, 26 June 1945, [1946] UKTS 67

Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 82 UNTS 79

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50

1946

Nuremberg Principles, G.A. Res. 95(I), UN Doc A/64/Add.1 (1946)

1948

Universal Declaration of Human Rights, G.A. Res 217A (III), UN Doc. A/811 (1948)

Convention on the Prevention and Punishment of the Crime of Genocide, 11 December 1948, 78 UNTS 277

1949

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31

Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85

Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135

Geneva Convention (IV) Relative to the Treatment of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287

1950

Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950, U.N. G.A.O.R., 5th Session, Supplement No. 12, U.N. Doc. A/1316 (1950)

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221

1952

Report of the Committee on International Criminal Jurisdiction on its Session held from 1-31 August 1951, U.N. G.A.O.R., 7th Session, Supplement No. 11, UN Doc A/2136 (1952)

1954

Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953, U.N. G.A.O.R., 9th Session, Supplement No. 12, UN Doc A/2645 (1954)

1964

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1964, 249 UNTS 240

1966

International Covenant on Civil and Political Rights, 16 December 1966, 993 UNTS 171

Report of the International Law Commission on the second part of its seventeenth session (Monaco, 3 - 28 January 1966) and on its eighteenth session, 4 May to 19 July 1966, [1966-II] *Yearbook of the International Law Commission* 1

1967

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205

1969

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331

American Convention on Human Rights, 22 November 1969, 1144 UNTS 123

1970

Principles for the Protection of Civilian Populations in Armed Conflicts, UN G.A. Res. 2675 (XXV) of 1970, UN Doc. A/8028 (1970)

1976

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 10 December 1976, 1108 UNTS 151

1977

Protocol (I) Additional to the Geneva Conventions of 12 August 1949, Relative to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3

Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609

1978

Federal Political Department (Switzerland), *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*, 17 volumes, Federal Political Department, Bern, 1978

1979

Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 18 December 1979, UN Doc. A/RES/34/68 (1979), Annex

1980

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, UN Doc A/CONF.95/15 (1980)

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *annexed to* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, UN Doc A/CONF.95/15 (1980)

Addendum to the Eighth Report on State Responsibility, [1980-II] *Yearbook of the International Law Commission* 1

1981

African [Banjul] Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5

Study on Ways and Means of Ensuring the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, Including the Establishment of the International Jurisdiction Envisaged by the Convention, U.N. Doc E/CN.4/1426 (1981)

1982

United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3

1988

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, U.N. Doc. E/Conf.82/15 (1998)

1991

Provisional Verbatim Record of the Two Thousand Nine Hundred and Eighty-First Meeting, 3 April 1991, UN Doc. S/PV.2981 (1991), *available at* www.casi.org.uk/info/undocs/sc910403.pdf

1992

Report of the International Law Commission on the Work of its Forty-Fourth Session, 4 May-24 July 1992, U.N. G.A.O.R., 47th Session, Supplement No. 10, U.N. Doc A/47/10 (1992)

1993

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 (1993)

Report of the International Law Commission on the Work of its Forty-Fifth Session, 3 May-23 July 1993, UN GAOR, 48th Sess., Supp. no. 10, U.N. Doc. A/48/10 (1993)

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Regulation 808 (1993), UN Doc. S/25704 (1993)

1994

San Remo Manual of International Law Applicable to Armed Conflicts at Sea, 12 June 1994, *reprinted in* A. Roberts and R. Guelff, *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000, p. 573

Report of the International Law Commission on the Work of its Forty-Sixth session, 2 May-22 July 1994, UN GAOR, 49th Session, Supplement No. 10, UN Doc. A/49/10 (1994)

Establishment of an International Criminal Court, Resolution adopted by the General Assembly, UN Doc A/Res/49/53 (1994)

1995

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994, UN Doc. SC/5974 (1995)

Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary-General, 20 March 1995, UN Doc A/AC.244/1 (1995)

Concluding Observations of the Human Rights Committee: New Zealand 3/10/1995, UN Doc. A/50/40 (1995)

Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, U.N. G.A.O.R., 50th Session, Supplement No. 22, UN Doc A/50/22 (1995)

1996

Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 3 May 1996, UN Doc CCW/CONF.I/14 (1996)

Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. G.A.O.R., 6 May-26 July 1996, 51st Session, Supplement No. 10, U.N. Doc A/51/10 (1996)

Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. G.A.O.R., 51st Session, Supplement No. 22, U.N. Doc. A/51/22 (1996)

1998

Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zutphen, the Netherlands, U.N. Doc. A/AC.249/1998/L.13 (1998)

Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1 (1998)

Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (1998) as corrected by UN Doc C.N.577.1998.TREATIES-8 (1998), UN Doc C.N.604.1999.TREATIES-18 (1999) and UN Doc C.N.1075.1999.TREATIES-28 (1999)

2000

International Criminal Court, Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000)

United Nations Transitional Administration in East Timor, Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15 (2000)

J. Crawford, Third Report on State Responsibility, 15 March 2000, UN Doc. A/CN.4/507 (2000)

International Law Association (ILA), Final Report of the Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, as amended at the London Conference (2000), London, 2000, available at

<http://www.ila-hq.org/pdf/CustomaryLaw.pdf>

Resolution 16/2000 of the ILA, adopting the London Statement of Principles and requesting that it be transmitted to the Secretary-General of the United Nations, available at <http://www.ila-hq.org/pdf/RESCust.pdf>

2001

Report of the International Law Commission on the Work of its Fifth-third Session, 23 April-1 June and 2 July-10 August, 2001, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001)

Amendment to Article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 21 December 2001, UN Doc. CCW/CONF.II/2 (2001)

Comments and Observations received from Governments, 19 March 2001, UN Doc. A/CN.4/515 (2001)

2002

Statute of the Special Court for Sierra Leone, *available at* www.sc-sl.org

2003

Statute of the Special Iraqi Tribunal, *available at* www.cpa-iraq.org

2004

International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, as amended up to and including the amendment of 15 May 2004, UN Doc. ITR/3/Rev.6 (2004) (*available at* www.ictt.org)

2005

International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, as amended up to and including the amendment of 11 March 2005, UN Doc. IT/32/Rev.34 (1995) (*available at* www.icty.org)

**

V. CONSTITUTIONS / LEGISLATIVE INSTRUMENTS

Basic Law: Human Dignity and Liberty 1992 (Israel)

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1990 (China)

Bill of Rights Act 1990 (NZ)

Canada Act 1982 (UK)

Constitution Act 1982 (Can)

Constitution of American Samoa (available at www.asbar.org*)*

Constitution of Australia, reprinted in G.H. Flanz (ed.), *Constitutions of the Countries of the World*, Oceana Publications Inc., Dobbs Ferry, NY, 1971-2004, binder I.

Constitution of Antigua and Barbuda, reprinted in G.H. Flanz (1971-2004), binder I.

Constitution of the Bahamas, reprinted in G.H. Flanz (1971-2004), binder I.

Constitution of Bangladesh, reprinted in G.H. Flanz (1971-2004), binder II.

Constitution of Barbados, reprinted in G.H. Flanz (1971-2004), binder II.

Constitution of Belize, reprinted in G.H. Flanz (1971-2004), binder II.

Constitution of Cameroon, reprinted in G.H. Flanz (1971-2004), binder III.

Constitution of the Cook Islands (available at www.paclii.org)

Constitution of Cyprus, reprinted in G.H. Flanz (1971-2004), binder V.

Constitution of Dominica, reprinted in G.H. Flanz (1971-2004), binder VI.

Constitution of the Fiji Islands, reprinted in G.H. Flanz (1971-2004), binder VI.

Constitution of Ghana, reprinted in G.H. Flanz (1971-2004), binder VII.

Constitution of Grenada, reprinted in G.H. Flanz (1971-2004), binder VII.

Constitution of Guyana, reprinted in G.H. Flanz (1971-2004), binder VIII.

Constitution of India, reprinted in G.H. Flanz (1971-2004), binder VIII.

Constitution of Ireland (Bunreacht na hÉirann), reprinted in G.H. Flanz (1971-2004), binder IX.

Constitution of Israel, reprinted in G.H. Flanz (1971-2004), binder IX.

Constitution of Jamaica, reprinted in G.H. Flanz (1971-2004), binder IX.

Constitution of Kenya, reprinted in G.H. Flanz (1971-2004), binder X.

Constitution of Kiribati, reprinted in G.H. Flanz (1971-2004), binder X.

Constitution of Lesotho, reprinted in G.H. Flanz (1971-2004), binder X.

Constitution of Malawi, reprinted in G.H. Flanz (1971-2004), binder XI.

Constitution of Malaysia, reprinted in G.H. Flanz (1971-2004), binder XI.

Constitution of Malta, reprinted in G.H. Flanz (1971-2004), binder XI.

Constitution of the Marshall Islands, reprinted in G.H. Flanz (1971-2004), binder XII.

Constitution of Mauritius, reprinted in G.H. Flanz (1971-2004), binder XII.

Constitution of Micronesia, reprinted in G.H. Flanz (1971-2004), binder XII.

Constitution of Mozambique, reprinted in G.H. Flanz (1971-2004), binder XII.

Constitution of Namibia, reprinted in G.H. Flanz (1971-2004), binder XII.

Constitution of Nauru, reprinted in G.H. Flanz (1971-2004), binder XII.

Constitution of Nigeria, reprinted in G.H. Flanz (1971-2004), binder XIV.

Constitution of Niue (available at www.paclii.org.)

Constitution of Pakistan, reprinted in G.H. Flanz (1971-2004), binder XIV.

Constitution of Papua New Guinea, reprinted in G.H. Flanz (1971-2004), binder XIV.

Constitution of Saint Kitts and Nevis (available at www.georgetown.edu/pdba/Constitutions/Kitts/stkitts-nevis.html.)

Constitution of Saint Lucia, reprinted in G.H. Flanz (1971-2004), binder XV.

Constitution of Saint Vincent and the Grenadines, reprinted in G.H. Flanz (1971-2004), binder XV.

Constitution of Sierra Leone, reprinted in G.H. Flanz (1971-2004), binder XVI.

Constitution of Singapore, reprinted in G.H. Flanz (1971-2004), binder XVI.

Constitution of the Solomon Islands, reprinted in G.H. Flanz (1971-2004), binder XVI.

Constitution of South Africa, reprinted in G.H. Flanz (1971-2004), binder XVI.

Constitution of Sri Lanka, reprinted in G.H. Flanz (1971-2004), binder XVII.

Constitution of Tanzania, reprinted in G.H. Flanz (1971-2004), binder XVIII.

Constitution of Tonga, reprinted in G.H. Flanz (1971-2004), binder XVIII.

Constitution of Trinidad and Tobago, reprinted in G.H. Flanz (1971-2004), binder XVIII.

Constitution of Tuvalu, reprinted in G.H. Flanz (1971-2004), binder XVIII.

Constitution of Uganda, reprinted in G.H. Flanz (1971-2004), binder XVIII.

Constitution of the United States of America, reprinted in G.H. Flanz (1971-2004), binder XX.

Constitution of Vanuatu, reprinted in G.H. Flanz (1971-2004), binder XX.

Constitution of Western Samoa (available at www.paclii.org)

Constitution of Zambia, reprinted in G.H. Flanz (1971-2004), binder XX.

Corporations Act 2001 (Cth)

Hong Kong Bill of Rights Ordinance 1991 (HK)

Human Rights Act 1998 (UK)

Interpretation Act 1987 (NSW)

Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea 2003 (as amended up to 27 October 2004) (Cambodia)

Nazis and Nazi Collaborators (Punishment) Law 5710-1950 (Israel)

Northern Ireland Act 1998 (UK)

Scotland Act 1998 (UK)

**

vi. OTHER OFFICIAL DOCUMENTS / MISC.

Amnesty International, *The International Criminal Court: Making the Right Choices – Part I (Defining the Crimes and Permissible Defences and Initiating a Prosecution)*, January 1997, AI Index: IOR 40/01/97

Amnesty International, *The International Criminal Court: Making the Right Choices – Part V (Recommendations to the Diplomatic Conference)*, May 1998, AI Index: IOR 40/10/98

British War Office, *Manual of Military Law*, HMSO, London, 1929

Draft Statute for an International Criminal Court, Suggested Modifications to the 1994 ILC-Draft (“Siracusa-Draft”), reproduced in J. Holmes Armstead Jr, “The ICRC, Report on the Follow-up to the International Conference for the Protection of War Criminals, 26th International Conference of the Red Cross and Red Crescent, Doc. 95/C.I/2/2 (1995)

International Criminal Court: History, Development and Status”, (1998) 38 *Santa Clara Law Review* 745, Annex A

General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, 24 April 1863, *reprinted in* D. Schindler & J. Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1988

Human Rights Watch, *Needless Deaths in the Gulf War*, Human Rights Watch, New York, 1991

“Nasiriya Hospital Shows Signs of Military Use”, *ABC News Online*, 26 March 2003, *available at* <http://www.abc.net.au/news/newsitems/s816684.htm>).

Netherlands Red Cross Society, *The New Humanitarian Law in War and Conflict: Report of an international symposium held on 25 and 26 September 1978 under the auspices of the Netherlands Red Cross Society, at the Peace Palace in The Hague*, Netherlands Red Cross Society, The Hague, 1978

Report of Captain Crozier to the Commission of the United States of America to the International Conference at the Hague, Regarding the Work of the Second Sub-Committee of the Second Committee of the Conference, 31 July 1899 (*available at* www.yale.edu/lawweb/avalon/lawofwar/hague99/hag99-09.htm)

Rights Brought Home: The Human Rights Bill, Cmd 3782, 1997

UK War Office, *Manual of Military Law: Part III The Law of War on Land*, HMSO, London, 1958

United Nations Press Release, 29 March 1996, U.N. Doc. L/2770 (1996)

United Nations Press Release, 28 March 1996, U.N. Doc. L/2767 (1996)

United Nations Press Release, 4 April 1995, U.N. Doc. GA/8870 (1995)

United Nations Press Release, 4 April 1995, U.N. Doc. GA/8869 (1995)

United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 15 volumes, HMSO, London, 1949

US Dept. of Defense, *Final Report to Congress: Conduct of the Persian Gulf War*, Dept. of Defense, Washington D.C., 1992

US Dept. of Defence, Instruction 5500.15, Review of Legality of Weapons under International Law, 16 October 1974.

US Dept. of the Air Force, *Commander's Handbook on the Law of Armed Conflict*, Pamphlet AFP 110-34, Dept. of the Air Force, Washington D.C., 1980

US Dept. of the Air Force, *International Law – The Conduct of Armed Conflict and Air Operations*, Pamphlet AFP 110-31, Dept. of the Air Force, Washington D.C., 1976

US Dept. of the Army, Field Manual No. 27-10, *The Law of Land Warfare*, Dept. of the Army, Washington D.C., 1956 (incorporating changes required on 15 July 1976)

US War Dept., Field Manual No. 27-10, *The Law of Land Warfare*, US Govt. Printing Office, Washington D.C., 1940