Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals

*By Milan Kuhli & Klaus Günther**

A. Introduction

Without presenting a full definition, it can be said that the notion of *judicial lawmaking* implies the idea that courts create normative expectations beyond the individual case. That is, our question is whether courts' normative declarations have an effect which is abstract and general. Our purpose here is to ask about judicial lawmaking in this sense with respect to international criminal courts and tribunals. In particular, we will focus on the International Criminal Tribunal for the Former Yugoslavia (ICTY). No other international criminal court or tribunal has issued so many judgments as the ICTY, so it seems a particularly useful focus for examining the creation of normative expectations.

This issue of judicial lawmaking can be examined from different points of view. One viewpoint is the perspective of third parties. Here, the question is how and in what way third parties refer to judicial decisions in regulating their own conduct, thus giving the decisions an impact that goes beyond the individual case. Another viewpoint – and this is the main focus of our paper – is the perspective of the courts themselves, or more precisely: The perspective of the courts and judges as

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decision-makers. Our inquiry concerns whether and to what extent the ICTY judges should regard themselves as creative in arriving at some of their decisions.

The tradition of discourse theory provides tools with which to identify instances of judicial lawmaking on an analytically principled basis. As discussed at length below, discourse theory makes a distinction between discourses of norm *justification* and discourses of norm *application* – two ideal types. We will be modifying this traditional distinction; for our purposes, the distinction is between norm *justification* and norm *identification*. The first (norm justification) is paradigmatically the business of legislatures; when courts engage in a discourse of norm justification, they are engaged in judicial lawmaking. Now, a judiciary might engage in lawmaking without formally presenting arguments of a justificatory sort; a court could, for example, simply announce a new norm. But where a court does engage in norm justification, it is always engaging in or at least shading into lawmaking. Norm identification, by contrast, although it has a creative element, is not *essentially* creative.

This distinction in hand, we argue that elements of norm justification, rather than merely norm identification, can be seen in the ICTY's work, and specifically in its handling of the issue of belligerent reprisals. The article is divided into four main parts. Part B highlights the history of the establishment of the ICTY and the content of the ICTY Statute. This background will prove indispensable in comprehending the ICTY's lawmaking character. Part C probes the theoretical background of the norm justification/identification distinction. Part D provides a case study of the ICTY engaging in a discourse of norm justification: The case against Zoran, Mirjan, and Vlatko Kupreškić from 14 January 2000, concerning the issue of belligerent reprisals.[1] We will show that in this case, the ICTY did not identify particular norms of international customary law, but rather determined the validity of those norms – a justificatory form of discourse. Part E takes up the question of the legitimacy of judicial lawmaking.

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[1] ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment of 14 January 2000.

B. The Establishment of the ICTY

The ICTY was established in 1993 in response to mass atrocities committed in the territory of the former Yugoslavia beginning in 1991.[2] The immediate grounds for this development were "continuing reports of widespread violations of international humanitarian law … including reports of mass killings and the continuance of the practice of 'ethnic cleansing.'"[3] But of crucial importance for making the new tribunal realizable – being the first of its kind since the Nuremberg and Tokyo tribunals after World War Two – was the end of the Cold War and with it the end of an "animosity that had dominated international relations for almost half a century."[4]

The ICTY is based, not on a multilateral treaty, but on a resolution of the United Nations Security Council. With Resolution 808 (1993) the Security Council requested that the Secretary General submit a report on the possibility of establishing an ad hoc international tribunal for the former Yugoslavia.[5] The Secretary General carried out this request and submitted a report which contained, among other things, a draft Statute of the Tribunal.[6] The Security Council adopted the draft Statute without amendment, establishing the ICTY with Resolution 827 on 25 May 1993.

This Statute defines the ICTY's mandate, determining its purpose, jurisdiction, organizational structure, and (to a limited extent) even its criminal procedure.[7] The ICTY is an ad hoc tribunal whose jurisdiction is limited temporally and territorially but not personally.[8] Under Arti-

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[2] *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 426 (2003); Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in: 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 3, 12 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds, 2002).

[3] S.C. Res. 808, UN Doc. S/RES/808 (1993) of 22 February 1993, para. 7.

[4] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 324 (2008).

[5] UN Doc. S/RES/808 (note 3), para. 15.

[6] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 of 3 May 1993.

[7] *See* Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics*, in: THE PROSECUTION OF INTERNATIONAL CRIMES, 125, 129 (Roger S. Clark & Madeleine Sann eds, 1996).

[8] BASSIOUNI (note 2).

cle 1, the ICTY "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Articles 2 through 5 define those violations: Grave breaches of the Geneva Conventions of 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4) and crimes against humanity (Article 5).

Now, since the ICTY was the first international war crimes tribunal in more than four decades, the creators of the ICTY Statute could rely only upon small portions of existing jurisprudence.[9] In addition, crimes against humanity had never been part of a treaty.[10] And finally, the ICTY Statute was drafted in a compressed period of time. Naturally enough, then, parts of the Statute were and are vague in the extreme.[11] For example, the Statute names crimes without providing any explicit definitions of those crimes, trusting the Tribunal to uncover those definitions by reference to customary international law – in contrast to, say, the Rome Statute of the (permanent) International Criminal Court. In addition, the ICTY Statute does not precisely fix the Tribunal's jurisdiction – for example, providing jurisdiction over prosecutions of persons accused of violating the laws or customs of war (in Article 3), but also stating that the Tribunal's jurisdiction *is not limited to* such violations (also in Article 3). Thus the Statute gives us a floor but is vague about the ceiling.[12] As Allison Danner puts it: "[T]he ICTY Statute resembled the bold outlines of a coloring book: much remained for the judges to fill in."[13]

Despite this statutory vagueness, the Secretary General claimed that the Tribunal could not create new law. In his original report containing the draft Statute, he stated:

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[9] *See* CASSESE (note 4), 17.

[10] Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VANDERBILT LAW REVIEW 1, 41 (2006).

[11] *Id.*, 19.

[12] *See* Karin Oellers-Frahm, *Das Statut des Internationalen Strafgerichtshofs zur Verfolgung von Kriegsverbrechen im ehemaligen Jugoslawien*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 416, 423 (1994); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS. THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 76 (2006); Christopher J. Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EJIL 265, 282 (1996).

[13] Danner (note 10), 46.

> [T]he 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 so that the problem of adherence of some but not all States to specific conventions does not arise … The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims … the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907 … the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 … and the Charter of the International Military Tribunal of 8 August 1945.[14]

But apart from those examples, what in international humanitarian law is genuinely "beyond any doubt" part of customary international law? The Secretary General's explanation demonstrates the vagueness as much as dispels it. And, of course, vague statutes are a means of delegating lawmaking authority; they are *de facto* delegations.[15]

For what reasons did the Security Council give the ICTY *de facto* lawmaking authority in 1993? That is, why was the Security Council willing to leave the ICTY alone with such a vague statute? First, it must be borne in mind that the Yugoslavian conflict was ongoing at the time. Both the Council and the Secretary General were acting under immense time pressure. Resolution 827 expressed the Security Council's belief, or rather its hope, that "the establishment of an international tribunal and the prosecution of persons responsible for the … violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed"[16] – *halted and* redressed, because it was too early to aim only for redress. Second, as remarked already, there was little existing jurisprudence upon which one could rely in 1993. Given this time pressure and lack of precedent, writing a comprehensive, detailed statute was unrealistic. Third, to some extent the participating states were willing to leave the ICTY alone with a vague statute because the court was created for a limited purpose connected to the Yugoslavian conflict. In 1993, it seemed unlikely that a citizen of a

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14 UN Doc. S/25704 (note 6), paras 34-35; *see* Oellers-Frahm (note 12), 420.

15 *See* CASSESE (note 4), 17; Danner (note 10), 4.

16 S.C. Res. 827, UN Doc. S/RES/827 (1993) of 25 May 1993, para. 8.

state sitting on the Security Council at the time would ever face the ICTY as a defendant.[17]

C. Theoretical Background: Discourses of Norm Justification

From the vantage point of discourse theory, one can distinguish between discourses of norm justification and discourses of norm application. To understand this distinction, we need to think about two ways of challenging a norm in any particular case. On the one hand, one could challenge the norm as invalid – that is, as wrongly specified, or ill-considered, or simply mistaken. On the other hand, one could challenge the norm as inapplicable – that is, as inappropriate in this particular circumstance. Consider the norm: "One should never lie." Someone could think this norm invalid as stated, perhaps regarding it as excessively rigid. Or someone could think that the norm is valid, but not applicable in the case of, for example, social "white lies," such as pleasantries. The former would be a position regarding the norm's justification, the latter a position regarding the norm's application.[18]

In parallel to this distinction between norm justification and norm application, there is a distinction between two kinds of *discourse*: A *discourse* of norm justification, which as an ideal type is characteristic of legislatures, and a *discourse* of norm application, which as an ideal type is characteristic of courts. In a discourse of norm justification, we determine the validity of a particular norm by testing whether the norm lies in the common interest of all participants in the discourse. In a discourse of norm application, the decision is whether a norm, already determined to be valid, is appropriate in a given factual context.[19] Each of these two types of discourse, which arise vividly in the legal context, is marked by its own distinctive patterns of argumentation.[20] Participants

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[17] Danner (note 10), 22.

[18] KLAUS GÜNTHER, THE SENSE OF APPROPRIATENESS. APPLICATION DISCOURSES IN MORALITY AND LAW 2 *et seq.* (trans. by John Farrell, 1993).

[19] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 172 (1996); Klaus Günther, *Ein normativer Begriff der Kohärenz. Für eine Theorie der juristischen Argumentation*, 20 RECHTSTHEORIE 163, 172 (1989).

[20] HABERMAS (note 19), 192.

in a legal discourse of justification enjoy unlimited access to normative, pragmatic, and empirical reasons, whereas participants in a discourse of application are required to treat the norm in view as settled and are limited to a constrained set of "moves" with regard to whether the norm applies to the facts of a case.[21] Thus discourse theory allows us to identify lawmaking by the types of reasons to which the lawmaker refers: To the extent the reasons in view concern a norm's validity, the institution involved – whether legislature or court – is engaged in lawmaking. That is not to say that all lawmaking involves a discourse of norm justification. But it is to say that all discourses of norm justification, at least in a legal context, involve lawmaking.

In international criminal law, norm identification is particularly difficult because the norms in question are often unclear. Consider the situation facing the ICTY. This Tribunal is tasked with applying customary international law. But the norms of customary international law are famously elusive and vague. And so part of the enterprise of a court working with international customary law is identifying these elusive and vague customary norms. Norm identification is distinct, even here, from norm justification, for when a court is authentically engaged in norm identification with respect to customary international law, it is not trying to answer the *prescriptive* question of whether a norm is valid or desirable. Rather, it is trying to answer the (more or less) *descriptive* question of whether a norm is already acknowledged in the international community.

Therefore, the distinction in this article is between a discourse of norm justification and a discourse of norm identification. This opens the question of whether international courts only identify norms in a (more or less) descriptive way or if they make decisions as to the validity of norms in a normative (and therefore prescriptive) way. What we must do is examine the arguments that are presented for the identification of international law to see what types of arguments they are.

Note, incidentally, that Habermas himself sees the possibility of judicial discourses of justification, and therefore the possibility of judicial lawmaking. In *Between Facts and Norms*, Habermas states: "To the extent that legal programs are in need of further specification by courts – because decisions in the gray area between legislation and adjudication

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[21] Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 14 (2010).

tend to devolve on the judiciary, all provisos notwithstanding – juristic discourses of application must be visibly supplemented by elements taken from a discourse of justification."[22] But from his point of view, these elements of a quasi-legislative sort require another kind of legitimation than does adjudication proper. This is a point to which we shall return later.

D. The ICTY Judgment in the *Kupreškić* Case

On 14 January 2000, the ICTY Trial Chamber made a decision in the case against Zoran, Mirjan, and Vlatko Kupreškić, as well as three other defendants. The case concerned a massacre of Muslims committed at a small Bosnian village named Ahmići in April 1993 during the conflict between Bosnian Muslims and Bosnian Croats. The village is located in central Bosnia in the Lašva Valley. It had been under Croatian control since October 1992. According to a census in 1991, Muslims represented 32% of the population in the area, Croats 62%, and minority groups 5%.[23]

Prior to the attack, most of the Croatian inhabitants of Ahmići had been warned of the planned massacre. On 16 April 1993, Croat forces attacked the Muslim population, targeting civilians and civilian objects (such as homes). A large number of the Muslim citizens of Ahmići were killed or expelled from their homes as part of a campaign of "ethnic cleansing." The purpose of the attack was to kill all men of military age, to destroy as much Muslim property as possible, and thereby to prompt all others to leave the village and move elsewhere. The Trial Chamber determined that there were no Muslim military forces in the village and that the village contained no military objectives.[24]

The defense stated that the massacre could be justified as a form of belligerent reprisal. There had undoubtedly been attacks, as the Trial Chamber itself agreed, by Muslim forces on Croat villagers in the region in early 1992.[25] To support this thesis the defense provided a list of Croatian villages from which Croats allegedly had been expelled and

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[22] HABERMAS (note 19), 439 *et seq.*

[23] *Prosecutor v. Kupreškić et al.* (note 1), para. 149.

[24] *Id.*, paras 31 *et seq.*

[25] *Id.*, para. 68.

their houses burnt.[26] Therefore the question arose of whether the subsequent massacre committed in Ahmići could be justified as a reprisal.[27]

Below, this paper introduces the doctrine of belligerent reprisals (Part D.I), then gives an account of the kind of argumentation used in the *Kupreškić* case (Part D.II), and finally takes up the development of this area of law after the *Kupreškić* case (Part D.III).

I. The Doctrine of Belligerent Reprisals

Generally speaking, the doctrine of belligerent reprisals refers to an act which occurs within the context of an armed conflict, and which in the ordinary course of events would be a violation of the law of armed conflict, but which is taken in retaliation by one party to a conflict in order to stop an adversary from violating international law.[28] The ICTY Statute itself does not expressly address the subject of belligerent reprisals. However, this does not mean that reprisal justification is unavailable under the ICTY Statute: Conduct that is a legitimate belligerent reprisal cannot constitute a war crime since it is not a violation of the law of armed conflict. The extent to which the parties to an armed conflict are entitled to take belligerent reprisals is one of the most controversial issues in modern international humanitarian law.[29]

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[26] *Id.*, paras 125 & 515 (note 767).

[27] The *Kupreškić* Case was actually the second ICTY decision regarding the issue of belligerent reprisals. Four years earlier, on 8 March 1996, the ICTY had addressed the reprisal issue in the case against Milan Martić. (ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-R61, Trial Chamber, Decision of 8 March 1996.) However, this earlier decision is not as important for our examination as the *Kupreškić* decision because the reasoning in the later case was much more detailed than in the earlier one.

[28] Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 43, 44 (1990); Christopher J. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 20 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 35, 37 (1989); Stefan Oeter, *Methods and Means of Combat*, in: THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, para. 476 (Dieter Fleck ed., 2008); Drucksachen des Deutschen Bundestags (BT-Drs.), No. 14/8524, 15.

[29] Christopher J. Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, in: INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL

Belligerent reprisals force an adversary who is committing a violation of international humanitarian law to stop the violation and respect the law in the future.[30] From this vantage point, the law of reprisals serves the enforcement of international law.[31] But on the other hand the use of reprisals can involve serious dangers, particularly concerning questions of effectiveness and abuse. Regarding the former, there can be cases in which reprisals fail to make the adversary obey international humanitarian law and even do the opposite, prompting new unlawful reactions by the other side and therefore leading to a spiral of violence.[32] And as to abuses, it is easy to imagine breaches of humanitarian law being committed on the pretext of reprisals. Thus there have been trends for a long time in international law to limit belligerent reprisal doctrine and to demand a strict observance of legal preconditions.[33]

What are these preconditions? The law of armed conflict requires first that a reprisal be reasonably proportionate to the prior illegal act committed by the adversary.[34] This principle of proportionality "entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued."[35] Apart from that, reprisals must be a last resort: They must be preceded by a warning and are legal only if other means of enforcing compliance have failed.[36] The decision to take reprisals must be made at the highest political or military level of the particular state; an individual soldier or local commander is not au-

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LAW. CURRENT DEVELOPMENTS, 539 (Horst Fischer, Claus Kreß & Sascha Rolf Lüder eds, 2001); Kalshoven (note 28).

[30] Oeter (note 28).

[31] Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in: THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, para. 1406 (Dieter Fleck ed., 2008).

[32] Kalshoven (note 28); Oeter (note 28).

[33] *See* Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICKINSON JOURNAL OF INTERNATIONAL LAW 1, 99 (1996).

[34] Michael A. Newton, *Reconsidering Reprisals,* 20 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 361, 374 (2010); Greenwood (note 29), 542.

[35] *Prosecutor v. Kupreškić et al.* (note 1), para. 535; *see* Newton (note 34).

[36] *See Prosecutor v. Kupreškić et al.* (note 1), para. 535; Oeter (note 28), para. 478.

thorized to order reprisals.[37] Thus the extent to which reprisals are motivated by emotive acts of personal revenge can be minimized.[38] And reprisals must be taken for the *purpose* of enforcing compliance with international law.[39] Thus they must be publicized and taken openly, since otherwise they could not be expected to facilitate deterrence.[40]

Apart from these preconditions, international treaties have limited the subjects against whom reprisals can be legally directed.[41] Reprisals may not be directed against, for example:

- the wounded, sick, or shipwrecked (Article 46 GC I; Article 47 GC II; Article 20 AP I);
- medical or religious personnel (Article 46 GC I; Article 47 GC II; Article 33[1] GC III; Article 20 AP I);
- prisoners of war (Article 13[3] GC III);
- medical facilities or supplies (Article 46 GC I; Article 47 GC II; Article 20 AP I);
- the natural environment (Article 55[2] AP I); and
- works or installations containing dangerous forces (such as atomic power) (Article 56[4] AP I).[42]

One of the most important provisions in this area is Article 33 of the Fourth Geneva Convention, prohibiting reprisals against civilians who qualify as protected persons under the Convention, i.e., 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" (Article 4[1] GC IV). Additional Protocol I extends these categories, indeed prohibiting all reprisals against civilians (Article 51[6]) and civilian objects (Article 52[1]).[43]

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[37] *Prosecutor v. Kupreškić et al.* (note 1), para. 535; Oeter (note 28), para. 477.

[38] Newton (note 34).

[39] Wolfrum & Fleck (note 31).

[40] Greenwood (note 29), 541.

[41] *See* CHRISTIANE NILL-THEOBALD, "DEFENCES" BEI KRIEGSVERBRECHEN AM BEISPIEL DEUTSCHLANDS UND DER USA 291 *et seq.* (1998); Greenwood (note 28), 39.

[42] *See* Oeter (note 28), para. 479.

[43] Greenwood (note 29), 543.

II. Discourses of Norm Justification in the ICTY?

As mentioned above, in the *Kupreškić* case, the question arose of whether the attacks on Muslim civilians and civilian objects in the Ahmići village could be justified as a belligerent reprisal. Doctrinally, this meant that the ICTY had to determine whether Articles 51(6) and 52(1) of the Additional Protocol I – the provisions prohibiting all reprisals against civilians and civil objects – had "been transformed into general rules of international law,"[44] that is, whether "a customary rule of international law has emerged on the matter under discussion."[45] (The Chamber does not distinguish between "general" and "customary" rules in this context.[46]) The Trial Chamber states: "In other words, are those States which have not ratified the First Protocol (which include such countries as the United States, France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions?"[47] What is striking in this context is that the Tribunal, by *expressly* referring to those states, decided the customary law question with a view toward possible future cases (involving the United States, France, etc.) over which the ICTY itself would almost certainly have no jurisdiction.

The Trial Chamber first concluded that the weight of state practice did not support the conclusion that all reprisals against civilians are prohibited.[48] And indeed one has to take into consideration that a number of major military powers, as just mentioned, have not ratified the First Protocol.[49] Yet the Trial Chamber did *not* then decide against the existence of a general rule of customary law prohibiting reprisals against civilians. Rather, it raised the question of whether the provisions of the First Additional Protocol *should* apply – and therefore *do* apply – to those states that have not ratified both provisions.[50] The ICTY answered that question, as we will see, in the affirmative. In short, it con-

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44 *Prosecutor v. Kupreškić et al.* (note 1), para. 527.

45 *Id.*, para. 531.

46 Kai Ambos, Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung 305 *et seq.* (2002).

47 *Prosecutor v. Kupreškić et al.* (note 1), para. 527.

48 *Id.*, para. 527; *see* Ambos (note 46).

49 *See Prosecutor v. Kupreškić et al.* (note 1), para. 527; Greenwood (note 29), 543; *see* BT-Drs. 14/8524, 16.

50 *Prosecutor v. Kupreškić et al.* (note 1), para. 527; *see* Ambos (note 46).

cluded that the treaty provisions prohibiting all reprisals against civilians and civilian objects *has* become customary law because the requirement of humanity dictates that it *should* become customary law.

What arguments did the ICTY use in reaching this conclusion? First, the ICTY invoked the "Martens Clause." This general rule of humanity has been expressed in different ways,[51] but to quote the version in Article 1(2) of Additional Protocol I: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience."

The Chamber expressed the view that:

> [T]his 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 or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[52]

(In the scholarly literature, this interpretation, according to which the Martens Clause could substitute considerations of humanity for State practice, has been criticized for being "unduly extensive."[53]) Against this background, the Trial Chamber states that "the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights."[54]

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[51] The Martens Clause first appears in the preamble of the 1899 Hague Convention on Land Warfare. For details, *see* Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EJIL 187 (2000).

[52] *Prosecutor v. Kupreškić et al.* (note 1), para. 527; *see* ROBERT HEINSCH, DIE WEITERENTWICKLUNG DES HUMANITÄREN VÖLKERRECHTS DURCH DIE STRAFGERICHTSHÖFE FÜR DAS EHEMALIGE JUGOSLAWIEN UND RUANDA 306 (2007).

[53] Greenwood (note 29), 556; *see also*, for a critical view, Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239, 250 (2000).

[54] *Prosecutor v. Kupreškić et al.* (note 1), para. 529.

In addition to this argument from humanity, the ICTY also makes an argument from effectiveness. The Tribunal states that, in comparison to reprisals, the punishment of war crimes and crimes against humanity by national or international courts constitutes a more effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in the future with international law than reprisals.[55] This also legitimizes, of course, the ICTY's own function, namely, applying international criminal law.

It is striking to note the *types* of reasons that the ICTY is providing here. We hear practical arguments concerning the effectiveness of reprisals relative to the effectiveness of courts. We hear purely moral arguments concerning the inhumanity of attacking civilians and civilian objects. These are not the kinds of reasons that bear on the task of identifying existing international law. They are reasons taken from a discourse of norm justification. Effectively, the ICTY is arguing that customary law in this instance should be *created*.

So, again, the Chamber concluded that the Additional Protocol's provisions prohibiting all reprisals against civilians and civilian objects has become customary law. And regarding the *Kupreškić* case, the Trial Chamber rejected a defense of belligerent reprisals. Now, our point here is not to speak to the issue of legitimacy. That issue will be taken up later. Our point here is simply that the ICTY was engaged in the construction of international criminal law, and not just for the case at hand or even for its own possible future cases, but for other international tribunals that do exist or might later exist. This leads to the next Part.

III. After the Kupreškić Case

Judicial discourses of norm justification become more important when they are taken up by reference – implicit or explicit – in future legal instruments. This consideration in the *Kupreškić* case leads, among other things, to the Rome Statute of the International Criminal Court (the ICC Statute) and to the German *Völkerstrafgesetzbuch* (VStGB), a code of crimes against international law.

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[55] *Id.*, para. 530; *see* Meron (note 53).

1. The ICC Statute

The ICC Statute does not expressly address the subject of belligerent reprisals. But this does not mean that justification under the doctrine of belligerent reprisals is impossible under the ICC Statute: As remarked above concerning the ICTY Statute, conduct which is a legitimate belligerent reprisal cannot constitute a war crime since it is not a violation of the law of armed conflict.[56] This view is confirmed by Article 31 of the ICC Statute, a provision that deals with grounds for excluding criminal responsibility. Article 31(1) recognizes four such grounds: (a) mental disease or defect, (b) intoxication, (c) self-defense, and (d) duress/necessity.[57] However, Article 31(3) states that the International Criminal Court will not be limited to the defenses explicitly mentioned in the ICC Statute:

> 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 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.

Article 21 makes reference to "applicable treaties and the principles and rules of international law." As Kai Ambos points out: "It was generally accepted in Rome that such a 'window' is necessary since the Statute cannot possibly foresee all defenses which could become relevant in a concrete case."[58] Therefore, this window leaves room also for the defense of belligerent reprisals – and any such defense will likely take into account the interpretation of that doctrine given by the ICTY in the *Kupreškić* case. It remains to be seen whether, when such a case arises, the ICC will refer to the ICTY's decision.

2. The German Völkerstrafgesetzbuch (VStGB)

The VStGB is a German penal code concerning international crimes and created to bring German criminal law into accordance with the ICC Statute. It contains provisions concerning genocide, crimes against

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[56] Greenwood (note 29), 540.

[57] Kai Ambos, *Other Grounds for Excluding Criminal Responsibility*, in: 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 1003 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds, 2002).

[58] *Id.*, 1028.

humanity, and war crimes, among other things.[59] Like the ICC Statute and ICTY Statute, the VStGB does not expressly address the subject of belligerent reprisals. However, Article 2 of the VStGB states that the general criminal law shall apply to VStGB offenses so long as there are no conflicting, special VStGB provisions.[60] According to the legislative commentary, Article 2 of the VStGB refers *inter alia* to international customary law, and in this context – the commentary though not the penal code itself – the German legislature refers explicitly to both the issue of belligerent reprisals and the *Kupreškić* case specifically.[61]

Although the commentary expresses some doubts about the customary law character of Articles 51 and 52 of Additional Protocol I prior to the *Kupreškić* decision, it states that those Articles may have become customary law on account of the *Kupreškić* decision. The commentary thus argues that international law in the area of belligerent reprisals is still in flux and that it is therefore best to leave the development of the law in this area to the criminal courts, rather than regulating it directly in the VStGB.[62] This is a remarkable openness to judicial legal development for the German criminal system, given the centrality in that system of the "*nullum crimen, nulla poena sine lege*" principle of Article 103(2) of the German constitution ("no penalty without a law").[63]

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[59] *See* Milan Kuhli, *Bestrafung aufgrund von Gewohnheitsrecht? Zum Menschlichkeitsverbrechen der Vertreibung und zwangsweisen Überführung nach § 7 Abs. 1 Nr. 4 VStGB*, in: JAHRBUCH ÖFFENTLICHE SICHERHEIT 2010/2011 (vol. 2) (Martin H. W. Möllers & Robert Chr. van Ooyen eds, 2011) 387 *et seq.*; MILAN KUHLI, DAS VÖLKERSTRAFGESETZBUCH UND DAS VERBOT DER STRAFBEGRÜNDUNG DURCH GEWOHNHEITSRECHT 35 *et seq.* (2010).

[60] The German wording of Art. 2 VStGB is:

Auf Taten nach diesem Gesetz findet das allgemeine Strafrecht Anwendung, soweit dieses Gesetz nicht in den §§ 1 und 3 bis 5 besondere Bestimmungen trifft.

[61] Bt-Drs. 14/8524, 16.

[62] The German wording is:

Angesichts dieser Tendenz der Völkerrechtsentwicklung, die sich noch im Fluss befindet, empfiehlt es sich nicht, die Repressalie als Rechtfertigungsgrund im Völkerstrafgesetzbuch zu regeln. Für den schmalen Bereich, in dem die Repressalie derzeit noch als Rechtfertigungsgrund in Betracht kommt, kann es der Rechtsprechung überlassen bleiben, im Einzelfall unter Berücksichtigung des jeweiligen Entwicklungsstandes des humanitären Völkerrechts zu entscheiden (BT-Drs. 14/8524, 16).

[63] *See* KUHLI (2010) (note 59), 113 *et seq.*

But for immediate purposes, what is important is the clear effect of the *Kupreškić* decision beyond the *Kupreškić* case itself.

E. The Question of Legitimacy

Obviously in the *Kupreškić* case, the ICTY did more than observe a norm of state practice. Whether what it did constitutes an example of judicial lawmaking, however, depends on how we understand a coordinate concept: the concept of norm identification. On the one hand, norm identification is not the mere observation of legal habits from an external, observer's point of view. On the other hand, the legitimacy of norm identification depends on the difference between it and straightforward procedures of lawmaking that are reserved to legislative bodies alone.

One crucial point is that a practice of norm identification always presupposes that the law *is already there* and only has to be identified correctly. The process of identification is thus more akin to a process of discovery than to a process of invention, construction, or creation. This is even true if one admits that there is no discovery without some elements of invention, construction, and creation. What is important here is that the presupposition that there already is a norm (which has only to be identified correctly) includes also the presupposition that the norm has validity and acceptance, that it is binding upon those to whom it applies. Thus the identification of the norm does not add anything to its validity but always already presupposes it. The procedure of norm identification does not lead to a practical discourse about the acceptability of the norm on the basis of reasons and justifications which could be brought forward by participants in a legislative body or by a global audience. The criteria according to which a norm is identified are independent of those sorts of reasons and justifications. In particular, the state practice criterion presupposes that somebody else, for example, the states, and not the judges, have already come to a decision about the norm's validity.

Furthermore, the identification of a norm is accompanied by the attitude that the valid norm will serve as a reason and justification for legal claims and demands – that it will serve as a standard according to which certain kinds of behavior will be criticized, evaluated, and judged. The expectation is that, a norm having been correctly identified, there will be no adjudicative ground on which to criticize the use of the norm as

justification or standard. If a norm is identified in this spirit of, let's say, critical and reflective acceptance, norm identification is done from an internal point of view in the sense of H.L.A. Hart.[64]

This is why norm identification requires more than a mere observation of state practice as one might find in anthropology or social science. Of course, norm identification requires the collection of data about factual patterns of behavior. Those factual observations are empirical, as well as theoretical, and can be criticized as either true or false. But in the context of judicial norm identification, this is not the whole story. The collection of data is done from an external point of view; it only prepares the way for a shift of attitude to the internal point of view. If a judge has identified the norm with the help of the collection of data, the judge then has to change from the observer's to the participant's point of view. The theoretical discourse about the correct identification of a norm operates under the hypothesis that once a norm has been identified correctly, then it has to serve as a normative, legal standard for the judges. We see now why norm identification falls within the larger category of norm application: Both take place within the internal point of view. We see also more clearly why norm application (including norm identification) is distinct from norm justification, which does not adopt the internal point of view: Participants in a discourse of norm application refrain from arguing about the validity of a (correctly identified) norm, while participants in a discourse of norm justification engage in just that argument.

In the ICTY's *Kupreškić* decision, when the Tribunal switches from the discourse of norm identification to a discourse of norm justification, it starts to make law. But even then, what seems to be judicial lawmaking on a first level (applying the Additional Protocol to non-member states) turns out to be an act of norm identification on a second level. The Court did not enter into straightforward lawmaking but put itself into a position of a critical reflective attitude to the principles of humanity and public conscience. These principles are regarded and treated as being already there, and as principles whose validity shall not be contested or put into question. At least one could say that there is a kind of judicial lawmaking that includes inventive and creative elements, but nonetheless takes place from within an internal point of view.

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[64] Here we are following the illuminating analysis of Scott Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM LAW REVIEW 1157 (2006).

This would be a paradoxical result. How can a judge create new law from a point of view which is defined as a critical reflective *acceptance* of a norm? Perhaps – and this is a tentative suggestion – this has to do with the enigmatic status of the principles of humanity and public conscience. They are given, but they are given in such a way as to lack a plain and determinate meaning.[65] The problem of indeterminacy in legal concepts, of their contestability with regard to new and unforeseeable facts and cases, is notorious with almost all legal norms, but becomes severe in the case of principles like humanity and public conscience. But a closer look reveals that these principles cannot be applied as rules according to a limited range of necessary and sufficient conditions. They require courts to broaden their view, to justify some proposed norm according to principles that are shared by all human beings. They thus require courts to broaden the scope of their critical reflective attitude to valid norms in such a way as to include not only norms accepted by a particular group of states or by one region only, but by humanity in general. Furthermore, there is a way by which the principles of humanity and public conscience become more explicit within a legal system over time: The meaning of the principles becomes more determinate through concrete cases of violation. From an historical point of view, moral learning processes are dependent on experiences of injustice.[66] If one looks at the *Kupreškić* decision with this broader view, the following features become more relevant:

(1) The Court refers to an already ongoing public discussion. It does not invent the norm but takes it from this ongoing discussion.

(2) The Court participates in that public debate with a concrete case that has something to teach us about what different interpretations of the principles of humanity and public conscience might mean.

(3) The Court's decision regarding the principles of humanity and public conscience can be criticized by the public and overruled by legislative bodies (as the ICC Statute overruled various other ICTY decisions). To some extent, any published judicial

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[65] *See* Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law is Law*, 78 FORDHAM LAW REVIEW 2451, 2478 (2010).

[66] Klaus Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in: THE EU AND HUMAN RIGHTS, 117 (Philip Alston ed., 1999).

decision is subject to public criticism. But the criticism is especially important where a court has engaged in a discourse of norm justification. For when a court has entered into such a discourse, the court acts with less singular authority than when it decides a particular case according to a given, valid, and already identified norm. With regard to the ICTY, which is facing a fragmented and pluralist global public, the possibility of a public debate can and should be secured by institutional arrangements and procedural rules. For example, NGOs could be given the opportunity to participate via amicus curiae briefs.

(4) The norms and principles of humanity and public conscience are of a moral, as well as a legal, kind. In international law, the procedures by which moral norms become legal norms are complex and tangled. The decisions of the ICTY are part of this process. They recognize some moral norms as legal norms and integrate them into the web of legal principles and rules, while at the same time treating those moral norms as if they were already there in the law, and already valid.[67] This is characteristic of lawmaking from an internal point of view.

(5) Insofar as judges enter into a discourse of norm justification, they are only one participant among others. In the particular case at hand, the ICTY had to reach a decision from an internal point of view, i.e., to justify its ruling by referring to other valid rules and principles, though those rules and principles might be as abstract and indeterminate as those mentioned in the Martens Clause. But the legally binding nature of such a rule for other cases has to be contested publicly in an ongoing discourse of justification. Whereas judges are authorized to decide and settle the discourse of legal norm application in concrete cases, its lawmaking remains subject to the acceptance of later participants in the normative discourse whose number is – in principle – infinite. In this later practice, the validity that a court claims for a norm, which it has created and justified to resolve a singular case, remains defeasible. Indeed, the ICTY Statute and the ICC Statute themselves are good examples of the power of other discourse participants to overcome the

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[67] Klaus Günther, *Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory*, 5 NO FOUNDATIONS – JOURNAL OF EXTREME LEGAL POSITIVISM (FOR KAARLO TUORI ON HIS SIXTIETH BIRTHDAY) 5 (2008).

> opinions of courts in a discourse of norm justification. They overcame the traditional ruling of courts, which had prevailed throughout the world for some years, that measures taken by members of a government are considered acts of state and are immune from criminal prosecution even if those governments have ordered a humanitarian atrocity.

The ICTY's ruling on belligerent reprisals in the *Kupreškić* case was thus an instance of judicial lawmaking, but not an illegitimate one when correctly understood. It was an instance of the court as participant in a discursive community and of a ruling that sets forth a claim of international law that remains contestable. Time will tell whether the discursive community as a whole will accept it.