

**THE USE OF EXCESSIVE FORCE IN RIOT CONTROL: LAW  
ENFORCEMENT AND CRIMES AGAINST HUMANITY UNDER  
THE ROME STATUTE.**

**SYLVIE NAMWASE**

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## **Abstract**

This thesis explores state-sanctioned violence used as part of law enforcement in riot control with a view to determine whether the definition of crimes against humanity under the Rome Statute effectively criminalises the use of force by state actors in riot control contexts. It analyses tensions arising from criminalising the use of lethal force against a ‘civilian population’ under the Rome Statute, while recognising the responsibility of states to enforce law and order through force, including through lethal force. The study is qualitative and uses doctrinal analysis to identify definitional gaps and paradoxes within relevant laws. It uses positivist theory and the Hobbesian concept of sovereignty to illuminate how the fusion of power, law and violence perpetuate circularity around the standards regulating state use of force in riot control situations, and how this in turn hinders specificity of culpability under article 7 of the ICC Statute.

This study explores the effect of merging and applying without reflection, two prescriptive regimes; human rights and humanitarian law, within an international criminal law framework under the ICC Statute which is proscriptive and punitive. It also analyses definitional circularity under relevant national laws which are viable interpretive sources under the Rome Statute. The study concludes that article 7 is ineffective as a basis for criminalising excessive force in riot control contexts. The legal frameworks regulating use of force in these contexts, and those regulating crimes against humanity still operate in isolation and states retain a high level of discretion over the definition of national of standards of lawful force. The study argues that state parties never intended the application of crimes against humanity under the Statute to riot control contexts and that the internationalization of criminal liability for force used in internal riot situations is premature.

## **Declaration**

I declare that this thesis is my original work and that it has never been submitted for publication or for examination in any institution of higher learning.

.....

Sylvie Namwase

## Table of Contents

Abstract.....	ii
Declaration.....	iii
List of Tables, Cases and Laws.....	viii
Abbreviations.....	xix
Acknowledgements.....	xxi
Dedication.....	xxii

### CHAPTER ONE

#### RIOT CONTROL AND CRIMES AGAINST HUMANITY

1.Introduction and Background to the study .....	1
2. Research questions.....	3
3. Context of the research .....	3
4. Significance and objective of the study .....	4
5. Analysis of definitional problems .....	5
Attack against a civilian population.....	5
The requirement of an “attack” as a state or organizational policy versus law enforcement .....	7
6. Existing scholarship .....	8
Civilian population.....	11
‘Policy’ and ‘attack’ .....	13
Murder and ‘Other inhumane acts’ .....	16
Attack, use of force and law enforcement.....	16
7. Research methodology .....	19
7.1 Limitations of methodology.....	20
7.2 Theory and Method.....	21
8. Thesis outline .....	22
9. Ethical issues.....	23
10. Conclusion .....	23

## **CHAPTER TWO**

### **LAW AND POLITICS: A REVIEW OF THEORY AND METHOD FOR THE USE OF FORCE IN RIOT CONTROL AS A CRIME AGAINST HUMANITY**

1. Introduction.....	25
2. Contextualising Law, politics and method.....	27
3. The content and sources of law: Exploring natural law theories .....	30
3.1 The substance and source of law: comparing positivist and natural law approaches .....	30
4. Assessing Dworkin's third theory of law.....	33
4.1 Comparing Dworkin and Hart's positivist theory of judicial interpretation .....	34
5. Critical legal theory.....	37
5. 1 Comparing critical legal theory to positivism.....	39
6. Exploring legal positivism: .....	40
6.1 Exploring modern positivism.....	41
6.2 Positive law and politics in Thomas Hobbes' philosophy .....	42
6.3 The Hobbesian sovereign.....	45
6.4 The 'force' of law .....	46
6.5 Why the Hobbesian sovereign and not other sovereigns? .....	47
6.6 Rejecting an absolute sovereign.....	49
6.7 The Hobbesian sovereign, indeterminacy and legitimacy .....	50
6.8 Legal legitimacy.....	52
7. Conclusion .....	53

## **CHAPTER THREE**

### **THE HOBBSIAN SOVEREIGN, AMBIGUITY OF THE ICC STATUTE AND ITS INTERPRETIVE SOURCES OF LAW**

1. Introduction.....	56
2. The principle of legality and ambiguity under the ICC Statute .....	57
2.1 Antecedents of the principle of legality under international law .....	59
2.1.1 The International Military Tribunal of 1945.....	59
2.1.2 The Ad Hoc International Criminal Tribunals (Rwanda and Yugoslavia) .....	61
2.2 Exploring a methodological approach to the principle of legality under the ICC Statute .....	64
2.2.1 Antecedents of legality under the ICC Statute.....	64
2.2.2 ICC's strict legality and the illusion of legal certainty .....	66
2.2.3 Grover's ICC legality methodology.....	67
2.2.4 Grover's mandatory legality guidelines .....	69
2.2.5 Critiquing Grover's mandatory guidelines .....	70
3. The principle of legality and crimes against humanity under the ICC statute .....	72

3.1 Crimes against humanity: antecedents of armed conflict and theoretical inadequacies .....	74
3.1.2 The theoretical ambiguity of ‘crimes against humanity’ .....	76
3.1.3 Crimes against humanity as victor’s justice.....	78
4. The ICC Statute and Elements of Crimes as a source for defining crimes against humanity in riot control contexts .....	80
4.1 The ambiguity of ‘murder’, ‘other inhumane acts’ and the policy requirement .....	81
4.1.1 The policy requirement dilemma .....	83
4.1.2 Murder and other inhumane acts.....	84
4.1.3 Legislative inaction and judicial innovation .....	87
4.1.4 ‘Attack’ and ‘civilian population’ .....	89
4.1.5 Elements of crimes and the circularity of defining ‘attack against the civilian population’ .....	89
4.1.6 The Decision pursuant to article 15 of the Rome Statute authorizing an investigation into the situation of Kenya (ICC-01/09, 31 March 2010). .....	92
4.1.7 ‘Attack against the civilian population’ .....	93
4.1.8 The Decision on the confirmation of charges in the case of <i>Prosecutor v. Laurent Gbagbo</i> (ICC-02/11-01/11, 12 <sup>th</sup> June 2014). .....	95
4.2 Crimes against humanity and legality: applicable treaties, principles and rules of international law.....	98
4.2.1 Applicable treaties .....	99
4.2.2 ‘Other situations of violence’ and the lack of an external boundary .....	101
4.2.3 The Hobbesian sovereign and the ambiguity of armed conflict and riot control boundaries .....	104
4.2.4 The absence of an internal boundary: proportionality of force in the protection of the right to life.....	108
4.2.5 <i>McCann and others v. UK</i> (Application no.18984/91 27 September 1995) .....	110
4.2.6 <i>Montero Aranguren et al v. Venezuela</i> (July 5 2006).....	114
4.3 The indefiniteness of proportionality and the challenge for prosecution: drawing from IHL discourse .....	116
4.4 Persistent ambiguity under customary law .....	120
5. Conclusion .....	121

## CHAPTER FOUR

### GENERAL PRINCIPLES FROM NATIONAL LAWS AND THE UN BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS

1. Introduction.....	124
2. General Principles of law as sources of law under international law.....	126
2.1 Problems with methodology and substance .....	128
2.1.1 Methodological disparities.....	128
2.1.2 Content and transposition of general principles of law.....	130
3.General principles of law under international courts and tribunals .....	132

3.1 The ICJ and PCIJ .....	133
3.2 International Criminal Tribunals.....	134
3.2.1 The vertical move: challenges with the substance of general principals of law under international criminal law .....	135
3.2.2 The horizontal move: challenges with methodology and representativeness .....	140
4. The International Criminal Court: General principles of law, the use of force in riot control and the ICC legality dilemma .....	142
4.1 Strict construction, effectiveness and legality.....	143
4.1.1 Strict construction and general principles as a source of law under the ICC Statute.....	144
4.1.2 Effective interpretation, analogy and strict construction .....	145
4.1.3 Methodological criticisms.....	148
5. National laws on the use of force in riot control .....	149
5.1 Methodological challenges .....	150
5.2 Method of categorizations: TABLES A, B and C.....	151
5.3 Analysis of tabulated laws: .....	152
5.3.1 Fundamental disparities of standards .....	153
5.3.2 The vertical and horizontal moves: extracting general principles and the requirement of effective interpretation .....	155
5.3.3 The enduring circularity of law on the use of force in national application .....	158
a) Report of the Marikana Commission 2012.....	158
b) 2012 Metropolitan Police Service (MPS) Report of the Strategic Review into the Disorder of the August 2011 London riots .....	160
c) Her Majesty's Inspectorate of Constabulary (HMIC) Report into the London Riots of 2011. ....	161
5.4 Transposing use of force standards: analogy and strict construction: Attack, murder and inhumane acts.....	163
5.4.1 The duality of law enforcement laws and criminal laws.....	164
5.4.2 Implications of duality for transposing standards on the use of force .....	165
6. UN Basic Principles on the Use of Force and Firearms as a source of law for the ICC .....	168
6.1 The enduring circularity of use of force standards under the UN Basic Principles .....	169
6.2 Amnesty International's guiding principles to the interpretation of the Basic Principles on the use of Force and Firearms .....	172
7. Conclusion .....	175
 <b>CHAPTER FIVE</b>	
CONCLUSION.....	178
Bibliography and references .....	183
ANNEXURES: .....	206

## List of Tables, Cases and Laws

### Tables

Table B: *Coded representation of disparity in standards of selected laws on lawful state response to riot control contexts*

Table C: *Summarised categorization of the ways in which selected laws differ on the three pillars of measuring force.*

Table A: *A grouping of selected laws on lawful state response to riot control contexts*



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<i>Attorney General for Northern Ireland's Reference</i>	No.1 of 1975, [1975] AC 105.
<i>Beit Sourik Village Council v. The Government of Israel</i>	PD 24 [2004], HCJ 2056/04.
<i>Corfu Channel Case, Merits Judgement</i>	ICJ Reports, 9 April 1949.
<i>Decision Pursuant to Article 15 of the Rome Statute authorizing an investigation into the situation of Kenya</i>	(ICC-01/09), 31 March 2010.
<i>Decision on the confirmation of charges in the case of Prosecutor v. Laurent Gbagbo</i>	(ICC-02/11-01/11), 12 June 2014.
<i>France et al. v. Goring et al.</i> Trial of the Major War Criminals before the International Military Tribunal,	14 November 1945-1 October 1946.
<i>Case Concerning The Factory at Chorzow, jurisdiction, Judgement</i>	No. 8, PCIJ Series A, No.9. 26 July 1927.
<i>Jaworzina Advisory Opinion</i>	No.8. PCIJ, Series B, 6 December 1923.
<i>Judgment of the International Military Tribunal for the Trial of German Major War Criminals</i> (With the dissenting opinion of the Soviet Member)	Nuremberg, 30 September and 1 October, 1946.
<i>McCann and others v. UK</i>	(Application no.18984/91) 27 September 1995.
<i>Nachora and others v. Bulgaria</i>	(43577/98 and 43579/98) European Grand Chamber on Human Rights, 6 July 2005.

<i>Prosecutor v. Akayesu</i>	(Case No. ICTR-96-4-T) Judgment, 2 September 1998.
<i>Prosecutor v. Bagilishema</i>	(Case no. ICTR-95-1A-T), Judgment, 7 June 2001.
<i>Prosecutor v. Blaskic</i>	(Case no. IT-95-14-T), Judgment, 3 March 2000.
<i>Prosecutor v. Erdemovic</i>	(Case No. IT-96-22-A), App. Ch., Judgment, 7 October 1997.
<i>Prosecutor v. Fatmir Limaj</i>	(Case No. IT-03-66-T) Judgement, 30 October 2005
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<i>Prosecutor v. Kupreskic et al</i>	(Case No. IT-95-16-T), Judgment, 14 January 2000.
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<i>Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction</i>	(ICTY-94-1), Trial Chamber, 10 August 1995.
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<i>Situation of the Democratic Republic of Congo, Judgement on Application for Extraordinary Review of the Pre-Trial Chamber I</i>	(Appeal Case No.: ICC -01/04) 13 July 2006.
<i>S.S Lotus (Fr. v. Turkey)</i>	(1972) P.C.I.J. (Ser. A) No.10.

*The case of Montero Aranguren et al  
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Inter-American Court of Human Rights,  
July 5 2006, Series C No. 150.

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Israel et al v. The Government of Israel et  
al*

Supreme Court of Israel sitting as the  
High Court of Justice, (HCJ 769/02)  
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*Zambaro Velez et al v. Ecuador*

Inter-American Court of Human Rights,  
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## **Treaties**

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Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	12 August 1949.
Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	12 August 1949.
Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva	12 August 1949.
Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War	12 August 1949.
International Covenant on Civil and Political Rights	23 March 1976, UNGA Res. 2200.
International Criminal Court, Elements of Crimes	U.N. Doc. PCNICC/2000/1/Add.2 (2000).
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.
Rome Statute of the International Criminal Court	17 July 1998.
Statute of the International Criminal Tribunal for Yugoslavia	25 May 1993, UN SC Res. 827.

Statute of the International Criminal Tribunal for Rwanda	8 November 1994, UN SC Res. 955.
Statutes of the International Committee of the Red Cross	2013.
Universal Declaration of Human Rights	10 December 1948, UNGA Res. 217.
Vienna Convention on the Law of Treaties	1969.

## National Laws

*Citation of laws as extracted from the database of the UN special rapporteur on extra judicial, summary or arbitrary executions, Christof Heyns, (August 2010-July 2016) at <http://www.icla.up.ac.za/use-of-force/13-un/33-use-of-force>*

Argentina Minimum criteria for the development of protocols and the Police Forces Federal Security Forces in public Demonstrations	(Resolution no. 210/2011 of Ministry of Security) ( <i>Unofficial translation</i> ).
Argentina, Regulation No. 8 of Guns and Shooting	(ODI No. 25 of February 6, 2012) ( <i>Unofficial translation</i> ).
Armed Forces Act of Singapore	GN No. S 288 of 1975.
Azerbaijan Police Act	No.727-IQ, 1999.
Bhutan Police Act	2009.
Bosnia and Herzegovina, Law of Brcko District, (excerpts)	No. 2 of 2000.
Bosnia and Herzegovina, Law on the internal Affairs of the Sarajevo Canton (excerpts)	
Bosnia and Herzegovina, law on the internal Affairs of Tuzla. ( <i>excerpts</i> )	
Bosnia and Herzegovina, law on the internal Affairs of Posavina. ( <i>excerpts</i> )	
Code of Ethics for Officials of the Ministry of the Interior with on Police Functions, Bulgaria	2004.
Criminal Code of St. Lucia	No. 9 of 2004.
Criminal Code of Canada	2013.
Czech Republic, Act regulating the Police	1991.

Law of the People's Republic of China on Assemblies, Processions and demonstrations	No. 20 of 1989.
Croatia law on Police	2000.
Fiji Public Order Act	Cap. 20 <i>As amended by the Public Order Amendment Decree No.1 of 2012.</i>
Finland Police Act	1995 as amended up to Act 560 of 2007.
German Act on the use of Direct Force by Federal Police Officers exercising Public Authority	1961.
India, Armed Forces (Special Powers) Act	No. 28 of 1958.
Indonesia Police Regulations	No.8 of 2009.
Islamic Republic of Afghanistan Police Law	2005.
Law on the Establishment and Jurisdiction of the National Police, Rwanda	No. 9 of 2000.
Law on State Police, Albania No. 9749 of	2007.
Law on Police, Armenia	2004.
Law of Georgia on Police	2013.
Latvia Law on Police	1992 <i>as amended</i> , 1996.
Lithuania, law on Police	17 October 2000 No. VIII-2048 Vilnius, <i>(As last amended on 11 May 2006 No. X-603).</i>
Malaysia Police Act	344 of 1967 <i>(incorporating all amendments up to 1 January 2006).</i>
Malaysia Public Order Preservation Act	296 of 1958 <i>(incorporating all amendments up to 1 January 2006).</i>

Malta Public Meetings Ordinance	Cap. 68 of 1931.
Malta Police Act	Cap 164 of 1961.
National Police Service Act of Kenya	No.11 of 2011.
Organic Law of the National Police of Timor Leste	No.8 of 2004.
Police Act, Nicaragua	Law No. 288 of 1996.
Police Act, Uganda	Cap. 303, 1994.
Police Powers and Responsibilities Act, Australia	2000.
Public Order (protection of persons and property) Act, Australia	No. 26 of 1971.
Public Order Act, Brunei	Cap. 148 of 1998.
Public Order Act Kenya	Cap. 56, 2009.
Public Order and Security Act of Zimbabwe	Cap. 11:17 of 2007.
Plan of Operations of the National Gendarmerie Director for Personnel, Argentina	( <i>Unofficial translation</i> ), No. 01 of 2010
Pakistan Police Rules	1934.
Pakistan Police order	2002.
Pakistan Criminal Procedure Code	1898.
Protest Law, Egypt	107 of 2013
Philippines National Police Operational Procedures	2013
Russia Federal Law on Federal Security Service	1995
South African Police Service Standing Order	262 of 2004.



South Africa, Regulation of Gatherings Act	No. 205 of 1993.
South Africa, National Municipal Policing Standard for crowd management during	gatherings and demonstrations, GN 307 of 2008.
Sri Lanka Police Ordinance: Department Order	No. A/ 19.
The Nigeria Police Act	Cap. P19.
The Police Act of Iceland	No. 90 of 1996 as amended in 2000.
The Taiwan Act Governing the use of Police Weapons	2002.



## **Abbreviations**

ACPO	Association of Chief Police Officers
ASP	Assembly of State Parties
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
FAR	Forces Armées Rwandaises
HMIC	Her Majesty's Inspectorate of Constabulary
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Yugoslavia
ICCPR	International Covenant on Civil and Political Rights
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal of Rwanda
IHL	International humanitarian law
IHRL	International human rights law
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
MPS	Metropolitan Police Service
OHCHR	Office of the High Commissioner for Human Rights
OSVs	Other Situations of Violence
PCIJ	Permanent Court of International Justice
RPF	Rwandan Patriotic Front
RTI	Radiodiffusion Television Ivoirienne
SCSL	Special Court for Sierra Leone
SLDF	Sabot Land Defence Forces
STL	Special Tribunal for Lebanon

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Commission

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**Dedication:**

In memory of Ms Joan Kagezi who was the first lead Prosecutor of the International Crimes Division of the High Court in Uganda. Ms Kagezi was also a personal friend and mentor whose dedication to advancing accountability for atrocities in Uganda and at the international level inspired me to embark on this thesis. Her memory continues to inspire me and many others to advance international criminal justice within and outside Uganda.

## **CHAPTER ONE**

### **RIOT CONTROL AND CRIMES AGAINST HUMANITY.**

#### **1. Introduction and Background to the study**

Mobilization by citizens against governments takes various forms, including peaceful demonstrations, which may graduate to riots, or to full blown armed violence. This mobilization in the recent past has centred on a wide range of issues, from protests against the rising cost of living, protests against state backed development projects, rigged presidential elections, the demand that dictatorial regimes be removed and protests relating to national identity issues. The composition, organisation, and structure of the demonstrations have varied, so, too, has the incidence of fatalities and the extent of the damage caused. In Cote d'Ivoire, riots against disputed presidential election results culminated in the death of about 3,000 people (Van der Pol and Bax, 2011). In Uganda, riots over the rising prices of commodities left an unknown number of people dead from live bullets fired by anti-riot police, with an estimated 29 people arrested (Njoroge and Wanambwa, 2011). Libya's 2011 riots in Benghazi left an estimated 200 unarmed people dead after 'shoot to kill' orders were allegedly issued (BBC, 2011a). In Egypt, by November 2011, the death toll in riots against a new military regime had risen to 28 people (BBC, 2011b). In the Democratic Republic of Congo (DRC) an estimated 14 people died at the hands of state security forces in protests against ostensibly rigged presidential elections (BBC, 2011c). In Syria, the Office of the High Commissioner for Human Rights (OHCHR) estimates that 3,500 civilians were killed by government forces since March 2011 in riots against president Bashar al-Assad that year alone (UN Doc. A/HRC/S-17/2/Add.1 para 28). In areas of Syria deemed supportive of the anti-government riots several people were arrested arbitrarily, tortured and detained. In Ukraine, riots in 2014 allegedly left over 70 people dead, including some police officials following exchange of gun fire with armed protestors (RT television network, 2014). The Ethiopian government

reportedly killed over 400 people since November 2015. The alleged killings occurred amidst protests by the mostly Oromo land owners against the capital city's expansion, a move that would see them displaced from their land (Human Rights Watch, 2016).

Armed violence has also manifested at the horizontal level between opposition groups from among the population as was the case in Egypt between supporters and opponents of the Muslim brotherhood (The Times of Israel, 2013). In Kenya' the 2007 post-election violence between opposing ethnic groups and against the state resulted in the death of over 1,000 people, some of whom were allegedly killed by the Kenya Police Force (Kenya Situation ICC-01/09, 2010). All these examples of situations in which the populace expressed frustration with the incumbent regime resulted in violent state-sanctioned repression.

The commonest form of government retaliation to violent protests has been the use of force which in numerous instances has been lethal. Given the nature of the violence and the extent of deaths in some of the countries, allegations of crimes against humanity have even been made (UN. Doc. A/HRC/S-17/2/Add.1 para 108, 1973, UN Doc. S/RES/1973, 2011). The situations in Kenya (Kenya Situation ICC-01/09, 2010), Libya and Cote d'Ivoire became the subject of inquiry by the International Criminal Court (ICC) for, among others, crimes against humanity. While referring the situation in Libya to the ICC, the Security Council indicated that the crimes committed *may* amount to crimes against humanity (UN. Doc. S/RES/1973).

However, it could be argued by states, as was the case for Libya, that the force used in riot control constituted law enforcement in line with national law and was not in breach of international law (BBC, 2011a). Egypt's Interior Minister, Mohamed Ibrahim responded to accusations of excessive force against protestors in Rab'a and al-Nahda squares by stating that it was a justified state response to violence including gunfire from the crowd. He allegedly stated: "I am not saying everyone was firing, but it is more than enough if there are 20, 30, or 50 people firing live fire in a sit-in of that size." (HRW 2014: 8-10). These responses have thus far not been met with concrete legal responses under the ICC Statute framework.

This study analyses the current international legal regimes on right to life, crimes against humanity and certain concepts in international humanitarian law (IHL) which offer the



closest universal standard regulating use of force and explores them against the tensions between law enforcement in violent protests and crimes against humanity under the ICC Statute.

## **2. Research questions**

The central question this study seeks to answer is whether article 7 of the ICC Statute effectively criminalises the use of excessive force in riot control contexts as crimes against humanity. It also uses the concept of the Hobbesian sovereign to analyse the legal inadequacies and contradictions arising from the application of article 7 to riot control contexts.

The following sub-questions necessarily follow from the main question:

- Whether the threshold requirements of an attack against a ‘civilian population’ for crimes against humanity adequately address the use of force by state actors in riots or similar violent situations not amounting to armed conflicts.
- Whether the threshold requirement of a “State or organizational policy” provides an adequate standard for establishing liability for crimes against humanity in the context of law enforcement and use of force during riots

## **3. Context of the research**

The study analyses laws regulating use of force in riot control contexts. It makes a specific focus on the justifications for the application of force and the justified means and methods of force. The analysis is juxtaposed against the legal framework of crimes against humanity under the Rome Statute.

While there is no universal definition for a riot, the term is broad and includes a wide array of violent disturbances ranging from ad hoc episodes with small numbers of participants, to

major confrontations requiring control by regular or paramilitary police (Nigel 1991: 67). In any event, a riot is distinguishable from a demonstration, which is essentially peaceful and lawful (Gregory 1985: 53). In referring to riot control, this study contemplates any situations of violent protest against the state, or which have occasioned the use of force by the state forces in response to violent protests. As indicated above, these situations occur in a wide range of contexts including ethnic tensions, election protests, protests against state-backed development projects, protests concerning labour rights, among others. The study does not situate itself in any specific riot control context but rather adopts a perspective whose focus is on how the law regulates and justifies state forces' forceful response to unlawful and violent situations in general. Thus 'riot control' in this study is used as a generic term to represent the wide spectrum of violent crowd protests against state forces from low threshold situations of violence to high threshold contexts bordering on internal armed conflict.

As such, the study has no specific geographical scope or temporal scope. It draws general examples from events where states have used force against violent protests and the actions resulted in claims of crimes against humanity such as the Kenya and Cote d'Ivoire situations stated above.

#### **4. Significance and objective of the study**

While numerous authors have written about crimes against humanity, few, if any, have considered them in the context of the use of force by the police and security forces against violent protestors with a view to illuminating the definitional challenges arising there from. This thesis' modest objective is to discuss these legal challenges in such a context, drawing on examples of decided cases and reports of commissions of inquiry where the foregoing questions have arisen. It explores whether and how these challenges fit in with or push the boundaries of existing laws, particularly international criminal law and international humanitarian law. The thesis approaches these questions using the Hobbesian sovereign as an agent for analysis. I argue in chapter two that the Hobbesian sovereign represents a fusion between law, power, force and politics which reinforces circularity around limitations on state conduct in riot control contexts. It illuminates the nature and significance of the omissions and contradictions arising from the application of article 7 of

the ICC Statute to riot control contexts where the law on riot control remains largely state-centric. It enables a demonstration of how this circularity in turn affects interpretation under article 7.

## **5. Analysis of definitional problems**

Article 7 (1) of the ICC Statute defines crimes against humanity as follows:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

It then proceeds to list a series of acts including murder, extermination, torture and other inhumane acts. Article 7.2(a) proceeds to define an attack against a civilian population as follows:

For the purpose of paragraph 1:

(a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

This definition gives rise to a number of interpretation challenges as briefly explored below and as is further analysed in the ensuing chapters.

### ***Attack against a civilian population***

One of the threshold criteria for exercising jurisdiction in respect of any of the atrocities listed as crimes against humanity in the Rome Statute is that they must be committed against a *civilian population* (ICC Statute, Art.7). The term ‘civilian population’ is not

defined. However, the International Criminal Tribunal of Rwanda (ICTR, *Prosecutor v. Akayesu*: para 582) and the International Criminal tribunal for Yugoslavia (ICTY, *Prosecutor v. Tadic*: para 638) have adopted the definition in common article 3 of the Geneva Conventions and have held that ‘civilian’ in the context of crimes against humanity includes persons taking no active part in hostilities or are no longer taking an active part in hostilities, including members of the armed forces who have surrendered or are *hors de combat* by reason of sickness or injury. It has been held also that the presence of some combatants among the civilian population does not deprive a population of its civilian character as long as the population is *predominantly* civilian (*Prosecutor v. Kupreskic et al*: para 549, *Prosecutor v. Tadic* paras 636-8).

The problem, as some scholars like Sadat (2002:154) and Cassese (2003:90) have argued, is that there is no need, in situations where rules of international humanitarian law do not apply, to distinguish between combatants and non-combatants, as the rationale behind the supplementary and more inclusive protection afforded by proscribing crimes against humanity during peace time would otherwise be lost.

I also add to the foregoing observations, that without clear guidelines on the use of force in the context described above, balancing law enforcement and criminal liability may be problematic for the state. To illustrate this point, in Syria and Libya former armed state officials joined citizens in demonstrations against the state and even reportedly used lethal weapons to the extent that some state officials called them terrorists (BBC, 2011a). In such cases, that is, before internal violence qualifies as armed conflict, a technical question arises whether the state would still be bound to regard such armed demonstrators as ‘civilians’. In particular, what attributes should the state use to establish whether the demonstrators are *predominantly* a group of civilians? And if they are ‘non civilians’ would they then qualify to be identified as combatants in the sense of an armed conflict context or would they simply be ‘armed civilians’ in a violent context bordering on armed conflict? How can the state, in such circumstances, draw a balance between lawful use of force and avoiding liability for crimes against humanity? What principles apply in such a context; IHL or international human rights law? Or would they both apply? Is it the IHL or IHRL principles of proportionality that would apply in this context and what are the practical implications of a decision on either one? Would the defence of collateral damage apply? These are some of the critical questions that the study seeks to analyse under the main research question:

whether article 7 of the ICC Statute effectively criminalises the use of force in riot control contexts.

***The requirement of an ‘attack’ as a state or organizational policy versus law enforcement***

The other complication that arises in riot control contexts is the jurisdictional requirement of a state or organizational policy or plan for an ‘attack’ against the civilian population to qualify as a crime against humanity under the Rome Statute (Art 7.2). For this threshold requirement to be met, a state or organisation must *actively* promote or *encourage* the policy or plan, and such conduct can be inferred only from a *deliberate* failure by the government to take action against alleged crimes against humanity (Art 7.3). What amounts to a ‘deliberate failure’ is not defined.

While these requirements have been criticized (Sadat 2002: 157) as stringent and detrimental to the successful investigation and prosecution crimes against humanity. I also submit that they are ambiguous and inadequate as they do not reflect the current realities of law enforcement and use of force in violent riot contexts. The Rome Statute provides a list of acts, including murder, which would amount to an ‘attack against the civilian population’ (Art 7.1). It renders that list inclusive by referring to ‘other *inhumane* acts of a similar nature intentionally causing great human suffering’ (Art 7.1.k). However, for a provision creating a uniform standard of criminal liability at the international level, it offers no uniform guidance as to which conduct, otherwise lawful and part of national law enforcement policies, would translate into ‘murder’ or an ‘inhumane’ act amounting to a crime against humanity.

The foregoing criticism is pertinent in the current discourse on law enforcement and the use of force against violent demonstrations, as different countries have different standards in their national laws, practice or rules of conduct for their law enforcement officials regarding the dispersing of riotous assemblies and the use of lethal force. However, there are no universal rules for the use of force in such cases (UN. Doc. A/HRC/17/28, 2011). With these considerations, it would be difficult to decipher whether a state’s plan or policy

for riot control would amount to a plan or policy to commit crimes against humanity under the ICC Statute.

It is based on these and subsequent arguments in the study that I maintain it is doubtful that when states negotiated the definition of crimes against humanity they considered that it would extend to internal situations where matters so directly connected with their very functions as sovereign states to maintain law and order in quelling riotous demonstrations, would be the subject of international scrutiny, let alone through criminal liability before an international criminal court. This state of affairs is further extrapolated in the review of literature below.

## **6. Existing scholarship**

Since the Nuremberg trials to date, a comprehensive definition for crimes against humanity has been elusive. According to Bassiouni (1999: 60) the preambles of the First Hague Conventions of 1899 and 1907 bore the seeds of crimes against humanity in its reference to 'laws of humanity' also known as the Marten's Clause. The expression in that context referred to customary law and state practice in armed conflict; Bassiouni (2011a, 45). Some scholars trace the first use of the term crimes against humanity to the phrase "crime of lese-humanity" which was used in a condemnation by Belgium of Germany's destruction of its Louvain library in 1914 during the first world war (Kramer 2007: 24) Bassiouni has traced the use of the full expression 'crimes against humanity' to 1915 in a joint declaration made by France, Great Britain and Russia condemning the Ottoman Empire for massacring the Armenian population in Turkey, although it was not articulated as a treaty crime at the time (2011: 45). The expression metamorphosed into the first positive international law definition as a crime under Article 6 of the 1945 Charter of the International Military Tribunal at Nuremberg (London Charter), proscribing murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war and persecution whether or not in violation of the domestic laws of the country where perpetrated; Bassiouni (2011b: 3). The same definition, with a slight alteration (eliminating the reference to civilian population), was carried under the 1946 International Military Tribunal for the Far East Charter (IMTFE Charter) also known as the Tokyo Charter; Cryer (2005: 249). Indeed, according to Bassiouni (2011b,6) the London

Charter definition of this crime has provided a template for subsequent treaty definitions for crimes against humanity, citing examples such as the Statute of the International Criminal Tribunal for Yugoslavia (ICTY), The Statute of the International Criminal Tribunal for Rwanda (ICTR), The Statute of the International Criminal Court (ICC) and the statutes of mixed tribunals including the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Furthermore, Bassiouni (2011a: 51) points out that several countries have since the Second World War, incorporated variations of crimes against humanity as interpreted under international law, in their domestic legislation.

However, several scholars agree that despite these developments, the evolution of crimes against humanity has been rather varied and to date, there is no universal definition for the crime. Bassiouni himself highlights (2011a: 51) that there are twelve international definitions of crimes against humanity, while Sadat (2002, 148) points out that the disparate definitions posed one of the most difficult challenges during negotiations for the ICC Statute, the main bottlenecks being: the distinction between war crimes and crimes against humanity and separating international crimes punishable on the basis of individual criminal responsibility from acts amounting to state responsibility for human rights violations. In Cryer's estimation, the Nuremberg and Tokyo Tribunal judgments did not resolve many definition issues, so much so that he points to this as the reason for Bassiouni's proposal of a separate convention to harmonise the various definitions of crimes against humanity (2005:249).

For all this uncertainty, there appears to be some consensus that although the ICC Statute does not present the universal definition, at least it contains a more comprehensive delineation of the elements of crimes against humanity compared to its predecessors. According to Ambos (2011a: 280), Article 7 of the Rome Statute which defines crimes against humanity, is both a 'codification' and 'progressive development' of international law, combining the main features of the crime, that he refers to it as the 'common law' of crimes against humanity. He also refers to it as more reflective of historical developments in which spirit Cryer (2005:254) and Robinson (1999: 43) point to how it discarded the need for an armed conflict nexus that was crucial in the Nuremberg and Tokyo tribunals, as well as the requirement of discrimination as a mental element for the crime. Robinson (1994: 46) points out that the elimination of the armed conflict nexus was essential to the

effectiveness of the ICC in dealing with large scale internal atrocities that do not occur during armed conflict situations. Moreover, he also highlights that unlike its predecessors, Article 7 was not imposed as part of the World War II's victor justice but rather was crafted through negotiations between over 160 states which explains its more detailed definition (1994: 43). Bassiouni (2011b: 202) adds that almost all the specific crimes enumerated under article 7 including murder, extermination, enslavement, torture and rape, to mention but a few, are crimes in all domestic jurisdictions, excluding a few like persecution, apartheid, and 'other inhumane acts', which although not criminalized under all domestic laws, are criminalized under international law. Robinson (1994: 57) concludes with confidence that Article 7 is a modern and clarified position that presents a firm basis for prosecuting crimes against humanity in the future.

However, there is also a general recognition that while the participation of states in the drafting of the Rome Statute ensured a more detailed enumeration of crimes against humanity, Article 7 was also aimed at guarding against the ICC's autonomously to decide what conduct amounted to crimes against humanity, a concern which Cryer (2005: 261) identifies as one of the criticisms against the Nuremberg and Tokyo tribunals. As such, he argues that Article 7 in fact introduced a higher threshold for crimes against humanity with a cautionary definition that is less inclusive than customary international law (2005: 261). In particular, Cryer points out the introduction of the requirements of 'course of conduct' and a 'policy' which he argues that if read together with the requirement of 'wide spread' or 'systematic attack' in fact render the need for a conjunctive albeit weakened application of a wide spread 'and' systematic attack (2005: 254). In his assessment, this is a regression from the unfettered wide spread 'or' systematic requirement under customary international law. However, Robinson (1999: 47) explains that such a provision was necessary if a compromise was to be reached between the minimalist and maximalist agitators at the Rome negotiations. Bassiouni (2011b: 202) cautions that not everything in Article 7 reflects customary international law and that the article has not achieved customary international law status despite the high numbers of state ratifications. He further cautions that whereas it is estimated that 55 countries have criminalized crimes against humanity under national law, their provisions do not conform to Article 7 provisions (2011b: 202). Particularly, even with countries which use Article 7 as a foundation, he points to differences in with respect to elements of crimes. It is in this context that Bassiouni states (2011b: 204) that



Article 7 of the ICC statute was not drafted by the Diplomatic Conference's Drafting Committee, but rather was a result as a series of diplomatic compromises hinged on consensus rather than legal techniques and requirements and that as such, it is no wonder that Article 7 along with other similar provisions of the Rome Statute is troublesome to sound legal drafting and Judgment.

Bassiouni's observations put a dent in Robinson's confidence in the soundness of article 7, as a firm basis for prosecuting crimes against humanity in the future. But perhaps this difference in attitudes might be reflective of the time in which both scholars were writing, with Bassiouni (2011) having the benefit of time for reflection and context analogy nine years after the entry into force of the Rome Statute compared to Robinson who wrote before the treaty even entered into force.

This state of affairs appears to be true upon a survey of the literature concerning some of the threshold requirements and elements of crimes against humanity. While several controversies abound, of particular interest to this study are the threshold requirements of an 'attack against the civilian population', the nature and scope of the policy requirement, and the *mens rea* and scope of certain specific crimes such as murder and 'other inhumane acts'. An ensuing analysis of relevant law on the question of applying crimes against humanity to riot control contexts might add a dent to Robison's confidence in the soundness of Article 7 as a basis for prospective prosecutions of crimes against humanity as contexts of violence continue to evolve and present new definitional challenges for the ICC statutory framework.

### ***Civilian population***

According to Ambos and Wirth (2002: 22), the threshold requirement of 'civilian' in an 'attack against the civilian population' is most likely a result of confusion based on common article 3 of the Geneva Conventions of 1949 which offers protection to persons taking no active part in hostilities in non-international armed conflicts. The reason for such an assessment stems from the fact that Article 7 dispensed with the war nexus requirement

and as such there is no logic to the ‘civilian-combatant’ distinction. In her own consideration of this controversy, Sadat (2002: 154) points out that if Article 7 evolved to dispense with the required application of the Geneva Conventions, the presumption should be that no one in a ‘conflict’ is a ‘non civilian’ for purposes of Article 7. In further probing the ‘civilian’ requirement, Sadat (2002: 154) alludes to situations of massacres and atrocities in contexts not deteriorating to the level of an armed conflict and which therefore do not trigger the application of war crimes provisions. She rejects the ‘civilian-combatant’ distinction in such scenarios, considering a situation where Government soldiers and their family members might be part of or are victims of such a massacre. Sadat in fact points out that for a provision that was meant to fill the gap left by international humanitarian law (IHL); by the retaining this ‘civilian –combatant’ distinction the Rome Statute is in regression. In an attempt to suggest a remedy, Ambos (2002: 25) proposes a definition for ‘civilian’ which encompasses both the IHL meaning and a broader conception of the word that is applicable during ‘peace time.’ He then seems to suggest (supra), while recognizing that IHL does not apply directly to crimes against humanity in peace time, that it might nonetheless offer some useful guidance in such an exercise. He gives an example of the *Prosecutor v. Blaskic* case where he claims the court applied the broad Common Article 3 concept of a ‘civilian’ without distinguishing between situations of armed conflict and peace. Ambos also develops a curious concept which he refers to as the ‘specific situation’ context by which he claims that the Trial Chamber in *Prosecutor v. Bagilishema* clarified that the formal status of an individual does not limit the protection of their human rights for as long as they are not ‘active’ members of a ‘hostile’ armed force (2002: 25). He does not indulge further on this suggestion, leaving unexplored certain pertinent concepts such as ‘peace time’, and who a civilian would be in such a setting, or the scope of these concepts in scenarios of atrocities and massacre not amounting to armed conflict such as those alluded to above by Sadat. Neither does he address the fact that his ‘specific situation’ argument is still couched in an armed conflict and not a ‘peace time’ context. Interestingly, in a later publication, Ambos (2011: 287- 288) then states that recourse to the IHL definition of ‘civilian’ during ‘peace time’ is not possible and recommends that the term should be deleted from the Statute as it cannot be reconciled with the ‘humanitarian character’ of crimes against humanity. He in fact suggested that maintaining the reference to ‘civilian’ under Article 7 meant that its drafters still regarded crimes against humanity as

an extension of war crimes and not a crime in its own right (2011: 287-8). In all the foregoing discussions the main point of convergence appeared to be that maintaining the ‘civilian’ element as part of the threshold requirement meant that certain members of the state forces might be left unprotected in situations not amounting to armed conflict simply by virtue of their being part of the ‘armed forces’. While Sadat (2002: 154) makes this argument with reference to ‘members of the Government forces and their families’, Ambos (2002: 24) makes it with reference to “any individual” and later attempts to make it by reference to the police forces (2002: 25) although he still does so within the context of an armed conflict. In his 2011 analysis of the subject (2011: 287), Ambos cautions against the broad interpretation of the word ‘civilian’ in attempting to remedy this apparent anomaly for fear that it might violate the principle of legality. None of the scholars however analyse extensively their arguments under the ICC statute regime. But more specifically, none of them analyse their concerns from the context of riot control or situations of violence bordering on armed conflict where challenges with the qualification of conflict situations also means that the designation ‘civilian population’ presents a targeting challenge for law enforcement officials. This state of affairs regarding the threshold requirement for an attack against a ‘civilian population’ lends credence to Bassiouni’s warning (2011) about the troublesome nature of Article 7 of the Rome Statute and is further explored in chapter three of the study.

### ***‘Policy’ and ‘attack’***

Sub paragraph 2 (a) of Article 7 defines an ‘attack against the civilian population’ as:

*a course of conduct involving the multiple commission of acts referred to in paragraph 1..against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such an attack...* (emphasis added).

There is an apparent consensus among some writers that the foregoing definition has the effect of creating a conjunctive but low threshold test, which according to Robinson

(1999:51) requires the proof of multiple acts *and* a policy to commit these acts before proceeding to the higher threshold where the option may be taken to prove whether the acts were either wide spread or systematic. Ambos (2011: 284) refers to it as the ‘widespread-systematic’ test, reiterating that Article 7 obscures the otherwise clear disjunctive ‘wide spread or systematic’ test by replacing ‘wide spread’ with ‘multiple commission of acts’ and ‘systematic’ with ‘a state or organizational policy’ and interconnects them in so far as the multiple commission of the acts in paragraph 1 must be based on a ‘policy’. Thus in Robinson’s assessment, (1999:51) should the prosecutor opt to prove the widespread element, the conjunctive requirement of a state or organizational policy will minimize concerns about isolated acts being characterized as crimes against humanity, while if the choice is for the systematic approach, the concerns over the scale of the crimes will be addressed from the requirement of a course of conduct and the multiple commission of the acts in Paragraph 1. Indeed according to Lee (1999: 97) during the negotiations on the Rome Statute, the inclusion of the ‘policy’ requirement was essential in order to reach a compromise on crimes against humanity, as it was a means through which unrelated and isolated in humane acts could be collectively described as an *attack* against the civilian population. Triffterer (1999: 13) also emphasizes that the requirement of a policy is essential to the elements of the crime.

From such an analysis, Ambos (2011: 285) concluded that ultimately, the policy requirement is mandatory to prove crimes against humanity under article 7. According to him, the concept of crimes against humanity as a political crime confirms the mandatory requirement of a policy as the only thing that can turn isolated acts into crimes against humanity.

However, some scholars such as De Than and Shorts (2003: 92) argue that there seems to be no final agreement for the requirement of a policy under the Rome Statute, while Sadat (2002: 157) criticizes the policy requirement as stringent and a hindrance to the prosecution of crimes against humanity.

There is some consensus on what amounts to a ‘policy’. According to Bassiouni (1999: 249) ‘state action’ or ‘policy’ implies the use of public power and resources or of public or legal authorities acting under the law to perpetrate actions which if carried out by another person would be criminal. This definition seems to share common elements with the

threshold requirement of a 'systematic attack', the exception being that the latter requires a higher degree of organization and substantial public resources (Robinson 1999: 50). Ambos (2011: 286) points out that the policy requirements differ for 'a systematic attack', where one typically needs to show some guidance by the accused as to intended victims of the attack, while a widespread attack that is not systematic will require proof of a policy of deliberate inaction or acquiescence on the part of the accused. In other words, almost all state or organizational actions involving the application of public resources such as police or military personnel and weapons would logically require the application of the 'systematic attack test' which might very well go to prove the policy requirement.

However, for all the foregoing unanimity, there is not a comprehensive definition of state policy in juxtaposition with the concept of law enforcement. This omission, in light of the subsequent review of the literature concerning the use of force in law enforcement and riot control, evokes the same concerns about the legislative and judicial soundness of Article 7 as expressed by Bassiouni (2011). It is thus interesting to note that it is Bassiouni himself who states in an earlier publication (1999: 249-250) that a state policy can be established from a range of actions whose scale and nature requires the use of government resources acting under 'arbitrary' power. He then proceeds to state that such a policy can be perpetuated by an absolutist government claiming the legitimacy of positive law and rejecting any discrepancy between law as an instrument of ideology and power. In this regard he criticizes states which he claims have justified their excesses on the claim of necessity for the preservation of public order (1999: 250).

Bassiouni's self-contradiction seems apparent when juxtaposed with his admission in the very same book that owing to a lack of codification there does not exist a general part for international criminal law (ICL) to effectively regulate the particulars of whether or not certain conduct amounts to criminal liability (Bassiouni, 1999: 394). It is on this premise that Bassiouni admits that in fact, because ICL is not codified, it must rely on the domestic general part of criminal law, or the general principles of law, which he admittedly states could present inconsistencies that might compromise the principle of legality (Bassiouni 1999: 397).

### ***Murder and ‘Other inhumane acts’***

The foregoing dilemma is borne out by the lack of unanimity on the scope of culpability for ‘murder’ as a specific act and ‘other inhumane acts’ under article 7. In his analysis of this subject, Bassiouni (1999: 301) states that while the protection of life is a general principle, and all the major criminal justice systems include the offence of murder under their national laws, this does not automatically make murder an international crime. He traces (1999: 304) the formulations for murder as a crime against humanity under the London Charter and the Charters of the ICTY and ICTR and concludes that in his assessment, the definitions failed to fully address some major concepts of murder such as ‘lawful justifications’ in otherwise unlawful killings. In analyzing the ICC statute, he states that this omission remains and that as such, the ICC leaves unaddressed, the very questions that were raised under the ICTY and ICTR statutes. Moreover, Politi and Nesi (2001: 82) also seem unsure about the exact scope of the offence of murder envisaged under Article 7 of the Rome Statute. They state that it is uncertain whether mental elements such as the ‘intent to cause great bodily harm resulting in death’, ‘reckless’ or ‘negligent killing’ are also envisaged by the ICC statute, and point out that there is disagreement among some scholars on the issue.

Similar concerns arise for the inclusion of ‘other inhumane acts’, which albeit allegedly reined in by the requirement that they must be of a similar character to the acts enumerated in paragraph 7(1) still raise concerns under the principle of legality, in the view of some legal scholars and in light of some positivist legal systems (Bassiouni 2011b: 411).

### ***Attack, use of force and law enforcement***

As earlier stated, the foregoing discussion raises pertinent questions regarding the legitimate use of force by state actors as part of law enforcement in riot control contexts. A preliminary survey of the literature reveals two major sub topics under this subject, namely: the principle of proportionality under IHL and international human rights law (IHRL), and the concepts of means and methods of law enforcement in riot control. There is a paucity of

academic analysis on these subjects and where there is, the literature lacks any cross reference to crimes against humanity or to the ICC statute.

According to Watkin (2004: 10), IHL and IHRL share the right to life as a common ground and as such share the justified use of force to limit this right to life under their respective legal regimes. He further advances that since the state is required to maintain law and order, it may be required to use force, although such power must not be arbitrary (2004:9). Such power may be used for purposes such as self defense and defense of person and property, effecting an arrest, dispersing a riot, among others (2004:10). Watkin proceeds to point out that IHL has not evolved a comprehensive body of law for application in non-international armed conflicts and for that matter, situations could arise which might call for the closer interaction between IHL and IHRL. He points to some such scenarios including emergencies where the military may be called upon to perform internal policing duties (2004:14) or where law enforcement forces are responding to a scenario bordering on an armed conflict (2004:25) which is reminiscent of Sadat's allusion in discussing the threshold requirement of a 'civilian' under Article 7 of the ICC statute, or where there is presence or potential presence of firearms within a rioting crowd, calling into question the possible application of several methods of riot control (2004:33). Watkin further advances (2004, 26) that the exact nature of the distinction between such scenarios and armed conflict may not always be clear considering that Common article 3 of the Geneva Conventions does not offer a clear guidance on the conditions required before it can be invoked.

Sassoli and Olson (2008: 610) also deal with similar questions in tackling the interaction between IHL and IHRL, pointing out that while IHL does not apply the principle of proportionality in relation to combatants, the IHRL principle of proportionality is applied more generally provided there is no arbitrarily killing. They point out that most IHRL treaties do not define what amounts to arbitrary killing (2008: 610), calling to mind Bassiouni's reservations regarding the Article 7 definition of murder and the principle of legality. They refer to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement officers (UN Basic Principles) which they consider authoritative principles on the level of proportionate force that must be used in order to avoid arbitrary killings (2008: 610). However, these principles have been criticized by Osse (2006: 129) on account of their lack of a definition for what amounts to fire arms, or force,

the lack of a definition for how the rules are to be applied in practice, the lack of a definition of proportionality and ‘imminent threat’, and the lack of specific guidelines on avoiding the need to use force’. It is also pertinent to point out that as guiding principles, they are not binding and as such their significance in the determination of criminal liability under the ICC statute is largely uncertain.

In addition to the criticisms pointed out by Osse, reports by Amnesty International (2003) and the Omega Research Foundation<sup>1</sup> also reveal that there is no universal standard on what type of weapons are acceptable or would lead to disproportionate force when used under a crowd or riot control context, more so in the complex scenarios bordering on armed conflict highlighted above.

It follows therefore from this analysis that it is not clear from Article 7 of the Statute, whether certain state conduct that may be implemented pursuant to a state policy of law enforcement, might be equivalent to an ‘attack’ as a state policy of crimes against humanity.

Thus, from a review of the literature, the legitimate use of state force in riot control remains unexplored and unarticulated under Article 7 of the Statute, given the indeterminate scope of murder and ‘other inhumane acts’, and the threshold requirement of a ‘civilian population’ or the nature of a ‘State policy’ that would amount to crimes against humanity. The study will pursue the foregoing discussion further, analyzing the outstanding issues in light of the stringent requirements of the principle of legality and the sources of international law, while drawing upon some examples of violent protest situations including post-election violence, and ethnic violence which attracted allegations of crimes against humanity before the ICC.

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<sup>1</sup><http://www.omegaresearchfoundation.org/assets/downloads/publications/04.pdf>



## **7. Research methodology**

This study has used broadly doctrinal analysis. It has been done on an exploratory basis entailing across sectional analysis of laws and decisions of regional criminal tribunals and the international criminal court, relevant United Nations (UN) instruments, among others.

While cognizant of the experimental, longitudinal, case study, and comparative research designs, the study opted for a design suited to its scope, the nature of data it sought to use and the time and resources available to it. A cross sectional and exploratory design enables the coverage of a wide range of relevant cases in order to provide as comprehensive an answer as possible to the research question. As the study did not involve the study of variables, the experimental and longitudinal approaches were not relevant to it.

Additionally, given the time and resources available, the data for the study was to be collected simultaneously, which while not feasible for experimental and longitudinal designs, fit in well with the nature of the cross sectional and exploratory design.

Furthermore, the multifaceted and exploratory nature of evidence required for the research question under inquiry, rendered case study and comparative designs too limiting as these require a focused study of selected subject(s) with those subjects as the centre of interest. As indicated earlier, the study has been based on a general analysis of laws implicated in riot control and crimes against humanity and not specific case studies. It was anticipated that the answers to the research questions posed, the method adopted and the sources of such information could not be achieved through an isolated case(s).

This thesis has used broadly a doctrinal analysis of primary and secondary literature. It has relied on primary sources including: UN treaties, international judicial decisions, state reports to international and regional monitoring bodies, national laws, parliamentary documents, protocols, and policy documents. These were sourced using online searches on websites of relevant international and regional political systems and their bodies including: The United Nations, The European Union and The Organisation of American States; websites of judicial bodies including the International Criminal Court (ICC), International criminal Tribunal for Yugoslavia (ICTY), The International Criminal Tribunal for Rwanda

(ICTR), The Special Tribunal for Lebanon (STL), The International Court of Justice (ICJ), among others.

Secondary sources were obtained from electronic and where necessary, hard copy reports of key organisations including Human Rights Watch, Amnesty International, and International Committee of the Red Cross (ICRC), among others. Academic material including Journals, and books and e-books were accessed through physical and virtual library searches while media reports were drawn from online searches of mainstream international media houses including Aljazeera, BBC, CNN, as well as relevant local media houses. National laws on riot control were obtained from the database of the United Nations Special Rapporteur on Extrajudicial Summary and Arbitrary Executions and where necessary, from national law databases.

### **7.1 Limitations of methodology**

The main limitation with accessing national laws from online databases has been recognized by the UN Special Rapporteur on extrajudicial summary or arbitrary executions in his own compilation of national laws on riot control. The Rapporteur notes that in the first instance some of the national laws regulating use of force are not contained in statutes but rather in internal police regulations or court precedents. This means that accessing all countries' standard regulations on riot control is a near impossible task. Secondly, the laws are open to amendments and those available in online databases may not always contain the updated version (UN Doc. A/HRC/26/36, 2014: 6). Indeed, as is further argued in chapter four, these limitations are reflective of the broader challenge at the center of the research question, which is the lack of an objective and universal standard regulating the use of force in riot control contexts.

## 7.2 Theory and Method

This study proceeds on the premise that law can provide an objective understanding of minimum boundaries of culpability and in this particular case, the boundaries of culpability for state conduct in riot control contexts, and explores where and how the law contains a definitional gap for these contexts. As has been stated above, the study adopts an approach of doctrinal analysis using positivist theory.

The question whether article 7 of the ICC Statute effectively criminalizes the use of force in riot control contexts is for the aims of this study posed as a doctrinal as opposed to empirical or applied research question. As Chynoweth points out, doctrinal analysis is concerned with the analysis of ‘black letter law’ with the guiding research question being, ‘what is the law’?, unlike empirical approaches which may seek to understand or predict human behavior in relation to law, or the applied research approaches which are concerned with systematic explanation of a given legal doctrine (2008: 29-31). The main objective of the study therefore is to discover, through analysis and legal argument, what the law is, the gaps, paradoxes and ambiguities within it that limit article 7’s definitive scope for riot control contexts. There are a number of options from legal theoretical frameworks which might be adopted to aid in this inquiry including those that could aid in achieving a more prescriptive outcome, such as the natural law theory, those that might offer a more critical lens such as critical legal studies, and those that offer an interpretive approach such as Dworkin’s third theory of law. However, as it is the aim of this study to investigate the adequacy of the definition of crimes against humanity under in criminalizing force used in riot control contexts, a doctrinal approach that would enable a black letter law analysis of article 7 and other formal sources of law including treaties, statutes, and legal decisions implicated by the research question would be most suitable. As indicated, this has been pursued through the theoretical framework of modern legal positivism with a particular focus on the state-centric nature of law as laid down by a Hobbesian sovereign. Hobbes’ concept of sovereignty, as an agent which embodies the complex interconnectedness of law, force, power and politics represents the centrality of the fundamental question of the necessity of the state and the importance of force to the state. An analysis of black letter law coupled with an analysis which recognizes the fusion between force, power and politics in determining the legality of force used in riot control is most suitable as it illuminates the

nature of complexities and contradictions arising from the legal vacuum created by article 7's definitional inadequacies. This theoretical framework and method are further analysed in chapter two on law and politics.

## **8. Thesis outline**

Chapter one contains the introduction, setting out the background to the study, the research question, the significance of the study, methodology its limitations and a review of the relevant literature.

Chapter two explores the theoretical framework and method through which the study answers the research question. It contains a brief review of other theories and methods, explaining why they are not suited for the study and justifying the selected theory and method.

Chapter three analyses the current international legal frame work regulating the use of force during violent mass uprisings. It considers in detail, the historical development of Crimes against humanity and its definition under the Statute of the International Criminal Tribunal for Yugoslavia (ICTY 1993, UN SC Res. 827), the Statute of the International Criminal Tribunal for Rwanda (ICTR 1994, UN SC Res. 955) and the Statute of the International Criminal Court (ICC Statute). The chapter also analyses the threshold requirements of 'a State policy or plan' and 'an attack against the civilian population' and analyses the tension this presents for the use of force against 'armed civilians' during peace time. It analyses these tensions against the strict legality requirement of the ICC Statute. It also explores the complexities arising from the hybridization of international human rights law and international humanitarian law in the definition and application of crimes against humanity to riot control contexts.

Chapter four explores the adequacy of state laws on use of force in riot control as interpretive sources for establishing liability for crimes against humanity under the ICC Statute's article 7. The chapter also explores the effectiveness of the Basic Principles on the

Use of Force and Firearms for Law Enforcement Officers (UN Basic Principles on Firearms), which is the closest instrument to providing a universal standard on the use of force in riot control, but is not binding on states.

Chapter five contains a summary of findings from the study, conclusion and a general suggestion on further research into how the challenge might be managed for future applications.

## **9. Ethical issues**

The study does not involve the use of human participants. As such, there was no requirement for securing ethical clearance to conduct interviews. There was also no need to secure private state documents as the relevant statutes were readily available from public sources and as such, the study did not require ethical clearance in this regard either.

## **10. Conclusion**

This study aimed to answer the main question whether article 7 of the ICC Statute effectively criminalises the use of force in riot control contexts as crimes against humanity. It also investigates how the concept of the Hobbesian sovereign helps to explain the contradictions and legal vacuum in the definitional scope under Article 7 of the ICC Statute. The study does not consider specific riot control situations as case studies but rather adopts a general approach to the question of how states forces' response to violent protests are justified through the law and whether liability for such force can be established effectively as crimes against humanity under the ICC Statute. It undertakes this task through a doctrinal analysis of positive law, particularly of relevant treaties, statutes and judicial cases. It juxtaposes these sources of law against the strict legality requirement of

the ICC Statute in order to explore the definitional gap under article 7 and the extent and nature of contradictions arising from it. This is fundamental given states' recognised mandate to enforce law and order using force, including lethal force, and the purported criminalisation under the ICC Statute of state force in riot control contexts, without guidelines as to what law enforcement conduct might be criminal as a crime against humanity.

## **CHAPTER TWO**

### **LAW AND POLITICS: A REVIEW OF THEORY AND METHOD FOR THE USE OF FORCE IN RIOT CONTROL AS A CRIME AGAINST HUMANITY UNDER THE ICC STATUTE.**

#### **1. Introduction**

This chapter's central claim is that state parties to the ICC Statute have not engaged in consensus building and as such have not developed a shared understanding of the boundaries of liability under article 7 of the ICC Statute, for force used in riot control contexts as part of law enforcement activity. Moreover, other sources that would aid in clarifying these boundaries offer no remedy as they exist in the more prescriptive realms of human rights and humanitarian law which have no specific prohibitive standards on which to base a criminal prosecution under article 7. These observations render the article ambiguous and ineffective in criminalizing state officials' conduct in riot control contexts.

The foregoing claim is based on the argument that while politics may influence legal definition and interpretation under international law, states through a consensus building processes can agree on shared understandings on the boundaries of liability which offer legitimate standards for the prosecution of crimes under an international criminal law regime. However, the current law on use of force in riot control dissolves on application to actual situations of violence. It contains no structural framework within which to demarcate

lawful and unlawful use of force to enable a prosecution for crimes against humanity under the ICC statute.

However, these contentions are not made with the assumption that it is possible to achieve absolute certainty in definition and are rather made with the awareness of the inherently indeterminate nature of law itself. As such the study proceeds on the more modest premise that at the very minimum, article 7 ought to have articulated the critical question of the aspects of state responsibility implicated under it, and countered the indeterminate nature of state discretion in riot control contexts. The omission of these indicators renders a vacuum in the article which then makes it ineffective as a basis for criminal prosecution. This is particularly critical given the unique nature of the challenge which the ICC poses to the internal concept of sovereignty. As has been observed by Corrias and Gordon (2015: 106-7) an international criminal tribunal, unlike a human rights court, is distinguishable because it applies principles of humanity and public conscience and has the power to deprive individuals of liberty on the basis of law. This act is perceived to be the highest and most controversial power associated with political collectivity and which it might be added, is also a significant intrusion onto the sovereign's internal mandate to make and implement law over its subjects. A similar observation is made by Robinson (2015: 332-3) who argues that the acute nature of the foregoing tensions within international criminal law is because this system, unlike the prescriptive human rights systems, seeks to create a vertical system of legal coercion on a horizontal plane among state actors who are more accustomed to a consensual regime. Given the apparent disparity of state approaches to internal security threats as will be further explored in chapter four, this scenario appears stark in light of the significant role that the sovereign state structure continues to wield over the ICC framework. Whereas the ICC makes a significant advancement in piercing the veil of state sovereignty, it is still largely dependent on states' support given its treaty based nature. Compared to other international institutions, the ICC's more intrusive jurisdictional power leads it to the very site of conflicting internal forces between state and citizen, where it must contend with and challenge states' tools of power, and make a judgment about them all within the foregoing complex architecture.

Moreover, the ICC statute's strict legality requirement calls for an absolute specificity in definition which is paradoxical given the highly indeterminate nature of state discretion in law enforcement and particularly in riot control contexts. The principle of legality is



narrowly defined under article 22 of the ICC statute. It is highly positivist and state centric and offers in its current state no substantial guidelines on how the court as a mechanism for interpretation might legitimately proceed in this exercise without exceeding its interpretative mandate.

This chapter develops the foregoing arguments in six parts. Part two foregrounds the discussion around law and politics and explains the method of analysis adopted by the study. Part three explains the option and unsuitability of the natural law framework of analysis, part four explores the option of Dworkin's third theory of law, and part five explores critical legal theory, while part six will demonstrate the preference for modern positivist legal theory as the framework of analysis. This part will also address the concept of sovereignty and argue the Hobbesian sovereign as the most suitable agent through which to address the question under study. It will also briefly explore the concepts of legitimacy and indeterminacy in order to clarify the positivist premise of the study. It will then conclude in part seven with the main argument that the definition of crimes against humanity under article 7 of the ICC statute is ineffective in riot control contexts as it implicates the powers of the state to use of force as law enforcement in riot control contexts and yet offers no guidelines as to the boundaries of liability for such use of force. It will maintain further that the interpretive sources that would aid in clarifying these boundaries offer no remedy for the interpretation gap under study. This is because they exist in the prescriptive realms of human rights and humanitarian law, which have no specific prohibitive standards on which to base a criminal prosecution under article 7.

The overall conclusion is that the application of article 7 to riot control contexts is premature for an area of law which implicates state responsibility and for which there currently exists no shared understanding under international law on what conduct under state law enforcement processes would amount to criminal liability under article 7.

## **2. Contextualising Law, politics and method**

The brief survey of literature in chapter one indicates that questions concerning proportionality of force in both conflict and non-conflict situations have been articulated

using the language of law. Koskenniemi (2011: 2005) rejects the claim that law and in particular, international law is objective and devoid of political ideals or preferences. Robinson (2015) has contextualized this struggle between law and politics in a discussion of the dyads shaping the debate around the International Criminal Court's (ICC) mandate. In it he points to some criticisms levelled against the court for being too utopian where it does not acknowledge state interests and for being too politicized where it takes into account state interests. Both Koskenniemi (2011) and Robinson(2015) seem to agree that an attempt to find a middle ground between the two struggles is impossible as the end result is precisely that which the arguments seek to avoid, namely the criticism that the law is political. This dilemma is articulated by Robinson (2015: 332-3) in the following terms:

It is not just that you cannot please everyone, but rather that the Court has a fundamentally contradictory assignment. It is understandably expected to be *ideal* (normative, aloof, transcendental) and to be *real* (grounded, engaged, effective). The Court is expected to be 'in the world but not of it'. At every juncture, it can be credibly argued that it breached at least one of these expectations.

My point of departure from Robinson's observation is that the problem of law for the question under study is not the inherently political nature of international law but the inarticulation at the international level of the critical line between state functions and criminal liability. This omission at the international level can be overcome with 'language' and consensus building which through positive law can demarcate predictable avenues of liability. The thesis proceeds on the understanding of law's potential through definition, to provide some outer boundaries for the scope and substantive nature of crimes against humanity in riot control contexts. Combined with a more liberal understanding of the principle of legality, language can yield a 'legitimate meaning' that can avail some minimum predictability for state actors in riot control contexts.

This study does not adopt a pragmatic approach to the foregoing challenges or aim to provide a final solution to article 7's legal vacuum. The study merely proceeds on the premise that law can provide an objective understanding of boundaries of culpability and in this particular case, the boundaries of culpability for state conduct in riot control contexts. It does recognize international law's potential to shape the discourse on the issues raised. As

will be further illustrated below, the study adopts an analytical approach using modern positivist theory. Positivist theories while cognisant of law's indeterminacy depart from critical legal theory in their reference to 'legitimacy procedures' and 'language conferences' for managing indeterminacy without claiming an absolute determinism.

Thus, in gauging 'effectiveness' the thesis does not pretend at an absolute determinacy but rather aims at an analytical approach to article 7 which recognizes the manageability of the fundamental questions of state responsibility implicated in the article's equivocal and consequently ambiguous nature on three core issues: the demarcation between state responsibility and criminal liability, the combination of human rights, humanitarian law and international criminal legal regimes without reflection and the inherently abstract nature of the question of proportionality in ascertaining lawful or unlawful force in riot control contexts.

The question whether article 7 of the ICC Statute effectively criminalizes the use of force in riot control contexts is for the aims of this study posed as a doctrinal as opposed to empirical or applied research question. As Chynoweth points out, doctrinal analysis is concerned with the analysis of 'black letter law' with the guiding research question being, 'what is the law'?, unlike empirical approaches which may seek to understand or predict human behavior in relation to law, or the applied research approaches which are concerned with systematic explanation of a given legal doctrine (2008:29, 30-31). The main objective of the study therefore is to discover, through analysis and legal argument, what the law is, and what are the gaps, paradoxes and ambiguities within it which limit article 7's definitive scope for riot control contexts.

There are a number of options from legal theoretical frameworks which might be adopted as alternative approaches to this inquiry including those that would aid in achieving a more prescriptive outcome, such as the natural law theory, those that might offer a more critical lens and challenge law's determinacy, such as critical legal theories, and those that offer an interpretive approach such as Dworkin's third theory of law. However, as it is the aim of this study to demonstrate the inadequacy of article 7 in criminalizing force used in riot control contexts without dismissing law's definitional potential, a doctrinal approach that would enable a black letter law analysis of article 7 and other formal sources of law including treaties, statutes, and legal decisions implicated by the research question would

be most suitable. As indicated, this will be pursued through a positivist framework and with a particular focus on the state centric nature of law as laid down by a Hobbesian sovereign. But first, a brief discussion of the other theoretical frameworks and the basis for rejecting them in favour of positivism is undertaken below.

The ensuing sections are summarised analyses of only some basic aspects of the theories as they may relate to the thesis. This thesis does not purport to make a comprehensive study of the origins and substance of these theories or of the various conflicting views within and between them.

### **3. The content and sources of law: Exploring natural law theories**

Certain approaches to twentieth century legal theory were reportedly so “anti-political” and “anti sovereign” that they led one German scholar to observe that the sovereign who was the engineer of the machine (of the law) had been pushed aside and that ‘the machine now run by itself’. The key elements of ‘unity’ and ‘system’ in most normative theories of law have been viewed as strenuous attempts in their time to eliminate any understanding of law as an expression of political power but rather as a field of professional knowledge and practice (Cotterrell 1989: 112). However, questions about what the law is also involve inevitably, questions about the sources of the law and natural law principles do offer an answer which closely echoes equity, justice and ‘good faith’ as sources of law (Fastenrath 1993: 327, Harris 1980: 7-15) and these are briefly discussed below.

#### **3.1 The substance and source of law: comparing positivist and natural law approaches**

Natural law traces its foundations in concepts such as ‘nature’, ‘reason’ and ‘justice’, (Fuller 1969: 1968, Orakhelashvili, 2008). These foundations remain despite the evolving concepts and parameters which natural law has experienced over various periods of history (Orakhelashvili 2008: 71). Fuller notes a fundamental connection between law and justice, the universality of law and the existence of an ideal law laid down by God (1969: 157-9,

1968:162). Contemporary legal scholars like Fastenrath identify justice as the linchpin of all natural law theories, whose content was deduced by historical natural law philosophers including Augustine and Thomas Aquinas, from various sources including the will of God and an all-embracing world order (1993: 327). In relation to its substance, natural law theory contains many variations which it is beyond the objectives of this study to explore. However, some core claims of the theory include; a conceptual connection between law and morality, the belief that an unjust law is not law and ought not to be obeyed including by state officials, the God given nature of law and the centrality of reason in law making (Fuller 1969,1968, Doyle 2009: 206, Fernando 1991:2, Orrego 2004:302). Harris further states that natural law is universal and as such, is available at all times for those whose positions require them to enact or develop law and is superior to law made by man (1980: 7).

In contrast to positive law theory, natural law does not trace its origins to a human legislator and in asserting that its moral principles rank higher than human law, it implicates national legal systems, and positive international law (Cotterrell, 1989: 120, Orakhelashvili 2008: 71). However, its foundations in ‘God’, and ‘human nature’ have not escaped criticism for being logically inept and prone to internal and external inconsistencies including questions regarding the nature of ‘god’ and evidence of this ‘god’ who is creating law (Landman 2013: 19). Indeed the observation has been made that for positivists, the source of a law is approached as a technical question while for natural law; it has to be approached as a moral question. This is bound to present with various political controversies as moral reasoning when applied to social or public issues turns into a directive on how state power ought to be exercised (Cotterrell 1989: 125).

In establishing the law on proportionate force, a natural law approach would therefore obscure state legislation as the starting point of analysis and privilege concepts of humanity embodied in frameworks such as human rights law and general principles of international law where natural law precepts are predominant (Orakhelashvili 2008: 77). However, presently, the application of the natural law rules such as justice and equity cannot yield on their own, operational legal definitions, but rather play a role complementary to positive law. Furthermore, perceptions of justice are themselves bound to end up in subjectivity (Fastenrath 1993: 328, 330).

As indicated in the introduction, the main objective of this study is to demonstrate the argument that ICC statute article 7 is inadequate in criminalising force used in riot control contexts. It is as such not a study aimed at a prescriptive result of what article 7 ought to state in order to achieve a more just, moral or equitable result, which would be the inquiry under a natural law framework. In this particular study, the question of what article 7 of the ICC Statute covers or does not cover regarding force used in riot control contexts is grounded in positive law.

The positive law framework stands in opposition to the natural law theory in relation both to the source and content of law. The theory asserts, as will be further explored under part five, the separation between law and morality. As such, a rule does not lose validity simply because it violates standards of morality (Hart 1958: 599). This theory is represented in what Jeremy Bentham referred to as the command theory of law (Harris 1980: 24). Bentham as the founder of the command theory of law sought to see law in terms of political facts such as power, punishment and reward. This approach was later further developed by John Austin for whom the sovereign was one whose commands the subjects habitually obeyed and regarded as laws (1980: 25). On this basis, Austin argues that the core characteristics of these laws included the fact of a wish or desire laid down by a sovereign either in writing or through signs, and a penalty ensued where such desire or wish was not complied with. It followed from this that laws other than those from the sovereign or the sovereign's subordinates were not considered law in Austinian thinking.

In reference to the question of what amounts to proportionate force, a strict Austinian approach would thus centre around the sovereign's stated law on the subject and undermine references to undefined natural law precepts such as 'humanity'. According to Nagan and Haddad (2011-2012: 449) Austinian thinking influenced scholars such as Johann Jakob Moser and George Friedrich von Martens who advocated for a strong sovereign under international law and a positivist approach there under where only treaty law and customary law as opposed to natural law sentiment could be accepted as binding upon a sovereign expressly agreeing to be so bound.

However, as will be demonstrated under part six, this strict positivist approach to international law has been superseded by a more liberal modern approach which this study will adopt. In any event the positivist theory unlike natural law theory is aligned with the

inquiry of what the law on use of force in riot control contexts is, as it implicates the critical question of the sovereign's law making power. This question is central to the contention that article 7 fails to demarcate the boundaries between state responsibility and criminal liability. By centering transcendental concepts of justice and humanity, a natural law approach would obscure this contradiction within article 7, misdirect the study to a more prescriptive as opposed to an analytical approach and dissolve the main point of investigation in the study.

A different theory propounded by Ronald Dworkin would offer that establishing the scope of article 7 in riot control contexts poses no real legal challenge as questions of what the law on a particular issue is, including in hard cases where there is no clear legal position, always have a determinate objective answer which can be found within the wider and unified historical, social and political scheme of the law. However, as will be argued below, this theory is of limited practical application in the highly decentralized and varied international law system and is too centered on judicial interpretation when the question under study is first a matter for state officials' interpretation before it becomes a matter for judicial interpretation. Moreover, the theory is also more concerned with the apportioning of rights rather than the establishment of criminal liability which is the question this study is concerned with.

#### **4. Assessing Dworkin's third theory of law**

Dworkin's theory of law sought to establish a middle ground between strict positivism and natural law (Alexander 1987: 420, 438). Some scholars have labelled it the third theory of law (Himma, 2003: 346). However, aside from critiques regarding the theory's internal inconsistencies demonstrated below, Dworkin's theory of law is too abstract and oriented towards judicial interpretive considerations. Like the natural law theory approach, it obscures the analysis of critical questions regarding boundaries between state responsibility and criminal liability under article 7, which this study aims to demonstrate, as further argued below.

#### **4.1 Comparing Dworkin and Hart's positivist theory of judicial interpretation**

Dworkin's main point of departure with positivist theory and in particular, with leading legal positivist H.L.A Hart is in relation to the criteria of legality and on the law making power of judges in deciding hard cases (Himma, 2003:346). Hart's criteria for legality is entirely conventional while Dworkin considers legality criteria to be interpretive, with the result that for him, the question of what law is cannot be decided simply by reference to enacted statutes and rules but also ought to incorporate general principles such as justice and fairness that are implicitly justified within legal rules (Himma, 2003: 346).

Dworkin rejects Hart's view that courts make new law when they exercise judicial discretion in hard cases. He argues that for every hard case, there is an objective and correct answer in pre-existing law, which judges draw from when deciding cases rather than make new law (Himma 2003: 346, 348). Thus, if applied to the law on use of force in riot control contexts, Dworkin's approach would rely on the substantively indeterminate nature of pre-existing law on riot control to claim a pre-existing objective standard. Through his thesis, Dworkin departs from rigid positivist theory by propounding a more liberal approach to what the law is. He creates a contrast between rules and principles and considers principles to be part of law thereby discounting positivists' strict application of a master rule as the only law to the exclusion of other social standards (Dworkin 1977: 45). Dworkin (1977: 39) emphasizes that legal obligations consist not only of what positivists consider to be rules but also of principles, which strict positivists argue are outside the law and are only used by judges in exercising discretion and to create 'new law'.

According to Dworkin, in hard cases where the policy considerations may not be so clear or settled, applying the relevant principles to a case would still be well in line with the political goals of the legislature (1977: 83). In this way Dworkin manages to merge an approach to the law that is 'politically conscious'. To explain his approach, Dworkin creates a super hero of sorts, a lawyer with great learning skills and patience who he endows with the Herculean ability to juxtapose and analyse all possibly applicable principles and rules to the scenario at hand, and emerge with the best solution to the case under investigation (1977: 105). However, to arrive at this decision, this Hercules must



have considered not just the rules but all possible theories in light of the entire scheme of Government (1997: 107). In Dworkin's argument, by Hercules' methods there is clearly no 'norm creation' in judicial discretion as the norms already exist in the form of the principles he applies (1977: 109). However, Dworkin is cautious and clarifies that the interpretation Hercules arrives at might not necessarily be the right interpretation but is one of many possible solutions that a different panel of judges might arrive at using different principles and arguments. In so admitting he ends by cautioning judicial humility when deciding hard cases as a judge may well be wrong in his or her political judgments (Dworkin 1977: 130).

By contrast, Hart's positivist outlook leads him to argue that in certain cases, what renders cases hard is that there is a gap in pre-existing law and that law is substantively indeterminate and cannot provide a uniquely correct answer. As such, the only way judges can fill the gap during the interpretation process is to exercise a certain minimal law making power whilst ensuring they do not usurp the legislator's power (Himma 2003: 367). Hart's view is summed up as follows (Hart, 1994: 272):

[I]n any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete. If in such cases the judge is to reach a decision and is not, as Bentham once advocated, to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide, he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law. So in such legally unprovided-for or unregulated cases the judge makes new law and applies the established law which both confers and constrains his law making powers.

In line with positivist thinking, Hart cautions that the law creating power he ascribes to judges in his thesis are not the same as those of the legislature, as the judges' powers can only be exercised within the constraints laid down by the legislature as the main law making body. They are to be interstitial and avoid large scale innovation (Hart, 1994: 237). Hart's restrictions echo and foreground tensions around the interpretation of the ICC Statute's article 7 and its application to the indeterminate legal regime on riot control as well as the restriction on the ICC's judicial innovation via the strict legality principle under

article 22. By recognizing the tensions between legislative and interpretive questions of law Hart's approach offers a more suitable framework for an analytical inquiry of article 7.

Dworkin's approach on the other hand, would obscure the foregoing inquiry. His interpretive approach to the law is limited to a particular type of actor within the law, namely; legal experts and judges (Cotterrell, 1989). Certainly the Hercules that Dworkin creates does not represent an ordinary law enforcement official whose situation in a volatile riot control context would not afford him or her time for arm chair intellectual considerations as to what would be the best political or moral action to take within the wider scheme of the law. Dworkin's approach obscures legal actors whose interpretation of the law may warrant more practical considerations leading to immediate and physical responses. Indeed, questions concerning proportionality of force in riot control contexts do not only arise before a panel of judges and are not interpreted by just by this set of legal actors. They are bound to arise for determination and application by law enforcement officials acting in the name of a sovereign state. As the question under investigation seeks to explore the complexities of interpretation from both the state and judicial perspectives, Dworkin's approach offers a limiting framework of analysis in as far as it obscures the complexities of tactical decision making in riot control contexts.

In addition, his approach to legal theory is one that seeks to establish the most attractive political or moral principles which if followed can account for the most coercive decisions taken by a society bearing in mind such society's legal and political history (Alexander 1987: 419). It would be more suitable for a normative and prescriptive approach to the question rather than doctrinal analysis, which this study adopts. Moreover, Alexander (1987) criticizes Dworkin's theory for offering no clear indicators on how to determine which political moralities of a community should be considered in order to ensure that courts as well as legislatures cohere with past decisions and pre-existing law (1987 :426-7, 442). He uses the example of the Nazi community to demonstrate that a Dworkinian approach would require a Nazi judge to extend Nazi principles rather than undermine them by going outside the existing legal framework to create new law (1987: 427). In his view, Dworkin's response that there is a threshold of moral acceptability which gauges correct and incorrect political moralities is still unsatisfactory as he offers no criteria for determining which political moralities along a spectrum of incorrect political moralities

would be closest or furthest from moral acceptability in order to justify or reject certain legal rights (1987:428).

Finally, Dworkin's theory is built around the determination and distribution of rights in hard cases. It is of limited application to the determination of criminal liabilities, which is the focus of this study. While the right to life is implicated in the use of force during riot control, it is subsumed under the ICC Statute's article 7 in the context of this study, whose objective is criminal prosecution as opposed to rights distribution. Thus the Dworkinian theory is also rejected owing to the foregoing inconsistencies and inadequacies.

Critical legal theories offer critical approaches to law from non-judicial and non-state perspectives as well as from criminal liability and rights perspectives. However, as is analysed further below and as announced above, these theories maintain a pessimistic view towards positive law's ability to act as an indicator of shared understandings of boundaries of liability and rights, contrary to the premise upon which this study proceeds, and for these reasons, also prove unsuitable as its framework of analysis.

## **5. Critical legal theory**

There are numerous variations of critical legal theory which it is beyond the scope of this study to comprehensively describe (Ward 2004). However, some major common contentions of these theorists include that law is but an expression of power and politics (Ward 2004: 140-1, Purvis 1991:89, Standen 1986:995,997), the rejection of a liberal rights discourse, the assertion that law is indeterminate, and the inherent bias in liberal ideology (Purvis 1991, Standen 1986:997). To this end, some critical legal scholars are dismissive of neutral judicial processes, believing judges to be political actors whose decisions only serve their political agendas (Ward 2004: 145, Standen 1986:997). In relation to international law, critical scholars argue that the law is rhetorical and a reflection of ideology which is but a set of reified ideas about what the world is and affirmations that how the world is, is how it ought to be. They maintain that owing to law's political and indeterminate nature, competing yet equally convincing arguments can be made from opposing stand points,

rendering international law a useless means for judging international behaviour (Purvis 1991: 106, 108-9 ).

In a critique of international law's indeterminacy Koskenniemi argues in the statement below: (2005:590)

...the claim of indeterminacy here is not at all that international legal words are semantically ambivalent. It is a much stronger (and in the philosophical sense, more "fundamental") and states that even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors' preferences remain unsettled. To say this is not to say that much more than that international law emerges from a political process whose participants have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain future. Hence they agree to supplement rules with exceptions, have recourse to broadly defined standards and apply rules in the context of other rules and larger principles...It follows that it is possible to defend any course of action –including deviation from a clear rule –by professionally impeccable legal arguments that look from rules to their underlying reasons...and interpret rules in the context of evaluative standards.

This 'manipulable' character of international law is reflected in discourse around how states justify their actions in situations of violence using law. As observed by Kennedy, there is a more common occurrence of irresolvable debates around law in war as law is increasingly being employed as a strategic ally. He identifies the term 'lawfare' as coined by the American military in this discourse (2012: 160-161). He argues that with lawfare, international law's malleability allows the boundaries of war to be strategically managed and justified by all sides of a conflict. The result is that pertinent questions in war such as 'when does war end' are really answered through strategic decisions and legitimised using the rhetoric of law (2012: 165-6).

## **5. 1 Comparing critical legal theory to positivism**

The foregoing analysis offers a critical legal framework for the question under study, in particular, relating to determinations whether article 7 of the ICC Statute can be objectively interpreted to cover force used as part of a law enforcement activity in a riot control situation. However, as stated above, this approach is dismissive of law's potential to deliver a shared understanding (Fastenrath 1993, Brunnee and Toope 2010, Franck, 1990) of the boundaries of criminal liability, which is the premise upon which this study's analysis of article 7 proceeds. This dismissive approach to law's objectivity by critical legal theorists has been criticised by positivist scholars who point out that critical legal theory is highly 'inward looking in nature' and unable to offer operational solutions to practical questions such as how to punish human rights violators or indeed how to solve conflict (Ratner and Slaughter, Symposium on methodology 1999: 308), which questions are implicated in the analysis of article 7.

Furthermore, legal positivist theorists do not deny international law's indeterminacy (Ratner and Slaughter 1999: 306, Nalbandian 2009:140), their point of departure from critical legal theory, which is also this study's point of departure lies in the recognition that this indeterminacy can be managed in such a way as to secure predictability of the law while providing a legitimate process through which the law's ambiguities can be filled even in hard cases (Fastenrath 1993, Brunnee & Toope 2010, Franck, 1990). This is indeed partly the basis of Hart's disagreement with Dworkin on the nature of judicial officer's interpretive discretion and law making power (Hart, 1994: 272-6).

Modern positivism does not deny law's political nature. Its departure from critical legal theories is the insistence that political considerations must be rooted in formally recognized and binding sources of law in order to procure a balance between the dichotomies of idealism and realism or apology and utopia among others (Ratner and Slaughter, 308). Thomas Hobbes who was a prominent philosopher held arguments about law and politics which align with modern legal positivist theory. In articulating his approach to the law, he

centered politics and power within the sovereign's law making functions (Boyle: 1987-1988). As observed by Ward: (2004: 131,138-139)

Thomas Hobbes should not be remembered solely as one of the progenitors of English legal positivism. He was also considered, the original progenitor of power and thus a great prophet for the modern theories of the relationship between law, government and the modern political state. ...Hobbes wrote to rid us of any illusion that law or politics was anything other than an expression of power.....Hobbes signalled the end of natural law and heralded the emergence of a legal positivism which aligned law with politics rather than ,metaphysics or moral philosophy.

While positivist theory recognizes the role of politics and power in law, it does not view this as a hindrance to international law's functions as a source of solutions to international conflict. Indeed some scholars have observed that the critical legal theory's dismissal of international law's functionality is contradicted by states' general acceptance of it, as well as the authority and legitimacy it enjoys among them (Purvis 1991: 110).

While the approach taken in this study is analytical and not prescriptive, it does proceed on the basis that international law can -but simply has not yet- provided guidelines to remedy the ambiguity of article 7 in relation to its boundaries with state responsibility and the indicators for criminal liability for unlawful force in riot control contexts.

These arguments are developed further below in the analysis of the principal of legitimacy, the Hobbesian sovereign and modern legal positivism as the concepts, theoretical frameworks and methods of analysis adopted by this study.

## **6. Exploring legal positivism**

This study uses doctrinal analysis to approach the question whether article 7 of the ICC Statute effectively criminalises the use of excessive force in riot control contexts. The main claim the study makes is that as article 7 does not effectively criminalise force used in riot control contexts, as it does not articulate the boundaries of state responsibility and criminal

liability for force used as part of law enforcement in these contexts. Furthermore, the ICC Statute's recognized sources of law for interpretation of article 7 contain no guidelines regarding this demarcation and are prescriptive as opposed to the ICC Statute's prohibitive regime. As such they offer no clear standards for establishing criminal liability. This inadequacy of article 7 is further aggravated by the ICC Statute's strict legality requirement which is a paradox, given the highly abstract nature of the law force used in riot control contexts.

This analysis will entail an analysis and description of the black letter law in the ICC Statute and other sources including regional and national laws implicated in the investigation. The most suitable framework for this inquiry therefore is one which perceives the law in terms of what it is and not what it ought to be, accepts the law's functional nature as a tool that can be used to define and communicate shared understandings of meanings, which offers a basis and method for establishing culpability under international law and accepts that politics does influence law. Modern legal positivism possesses these attributes and in particular, the concept of the Hobbesian sovereign as a source of law as explored further below.

## **6.1 Exploring modern positivism**

There is an array of approaches to positivism which it is not the objective of this section to describe. Such discussions can be found elsewhere (Fastenrath 1993, Shauer 2011). However, the classic common attributes of positivist legal theories include the view that law emanates from a sovereign and that law and morality are separate concepts (Boyle 1987-1988:387, Ranter & Slaughter, Symposium on method, 1999, 303-4). Under international law, positivism propounds voluntarism as a critical basis for establishing whether or not a state is bound by a given treaty or custom and a lawyer's interpretation of the law is thus restricted to an interpretation that is in line with the concerned state(s)' authentic will within the treaty (Symposium on method, 1999 303-4). This strong positivist view manifests in the following statement by the Permanent Court of International Justice

(PCIJ) in the Lotus judgement (*S.S. "Lotus" (Fr. v. Turk.)*, 1927 PCU (ser. A) No. 10, at 18 (Sept. 7):

:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

In addition to the voluntarist approach under international law, positivist theory places emphasis on formal sources of law that are part of a unified legal system and rejects all extra legal sources such as morality, and political ideology through rigorous demands for legality (Symposium on method, 1999: 304).

However, in what Ranter and Slaughter refer to as modern positivism, positivist legal theory does recognise positive law's proximity to political realities and admits that political and moral considerations are not alien to law. It also recognises the role of soft law and non-state actors in defining what the law is. It however insists that those considerations would still have to be grounded in formal sources of law (Weil 1983, Symposium on method, 1999: 306, 308).

## **6.2 Positive law and politics in Thomas Hobbes' philosophy**

The foregoing recognised relationship between law and politics is central to an understanding of Hobbes' concept of a sovereign as a source of law and is critical for the analysis of the dilemmas inherent in article 7's ambiguity concerning force used by state actors in riot control contexts.

While Hobbes has been categorised as a natural law philosopher allegedly so much so that he is arguably mentioned in every natural law handbook, he is also recognised by some as a forerunner of legal positivism (Doliwa 2012: 95). It is beyond the aims of this study to investigate and conclude these conflicting claims or indeed to categorise Thomas Hobbes



under a specific legal tradition. However, the study takes the modest view that Hobbes' main principles about sovereignty and the command theory of law can be aligned with positivist legal theory and it is on this basis that it adopts the Hobbesian sovereign as an agent of analysis alongside a positivist analysis of the law. Hobbes' main point of departure from natural law theory lay in his observation that the law of nature or laws dictated by human reason were of no value without state sanction which enables them to function only once they have become part of positive sovereign law (Doliwa 2012: 97). His concept of social contract in the creation of the state is founded on convention and is argued by some to be evidence of alignment with positivist theory as the first assumption of his philosophy (2012:98). According to Hobbes, laws of nature did not bind the sovereign and the sovereign could exclude them from positive law (2012:101-3).

Contrary to classical positivism, in Hobbes' understanding extra legal considerations such as politics are in fact central to the law. It follows that he was skeptical of law's neutrality, which he perceived was about preserving the sovereign's power. In this regard, state voluntarism has been linked to Hobbes' theory (Fastenrath 1993: 324).

However, it is pertinent to distinguish Hobbes' skepticism of law's objectivity from that of the critical legal theorists above. For while they critique law's indeterminacy from a perspective which rejects status quo and which would question the justification and basis for the existence of the state, Hobbes' approach reinforces the state as a necessity and the law as a functional means for its preservation. To Hobbes the interpretation of law is bound to be in the interest of the sovereign and the meaning of reason bound to be understood from the same perspective.

These extra-legal considerations made Hobbes unattractive to positivists, but did not render him any less of a positivist to some scholars (Boyle 1987-1988: 393-4). His articulation of law as a command of the sovereign in *Leviathan* is well in line with the classical positivist tradition, as he stated in respect to civil law (Hobbes 1651, 311-312):

Civill law, is to every Subject, those Rules, which the Common-wealth hath commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule.

In light of Hobbes's approach to law, questions around what amount of force is reasonable or lawful under riot control contexts are bound to be answered from a state centric perspective at the national level and evoke defences grounded in state will and voluntarism at the international level. The definition and interpretation of lawful or unlawful force under law is also tied to the justification and preservation of the state. As detailed in the explanation below and as will be further propounded in an understanding of the Hobbesian sovereign, the state's ability to use force without limitation is perpetuated through the open ended nature of the legal language on the subject. Hobbes's main difference with positivist theorists and the reason for his rejection of the objectivity of law was because he articulated the meaning of law from the point of view of purpose, and his purpose was to tie the concept of law into politics. His concept of law was grounded in the justification of the state and of sovereign power and for this reason it was intricately tied to politics and power (Boyle 1987-1988: 397-8). To this end, Hobbes recognized the relationship between language and power and consequently, the importance definitions in law (Boyle 1987-1988: 401, 425).

This approach which recognizes the hybridity of law and power is central for the analysis of article 7 of the ICC Statute as it illuminates the tension that arises from article 7's equivocal stance on the boundaries of culpability for conduct that might otherwise be part of law enforcement and as such, might be lawful under state law. As is further argued below, the ambiguous state of the law on use of force in riot control contexts prevents the constriction of state power in the exercise of a function that is at the core of its justification for existing. On the other hand, Article 7 of the ICC statute operates from a premise that requires a specific constriction of such power but provides no definitive scope for it and neither do the other sources of law upon which it may rely for such a definition. This impasse then presents an interpretation dilemma for the ICC which this study seeks to demonstrate. But first, the conflation of sovereign power and state use of force through the language of law is discussed in a more in-depth understanding of Hobbes' concept of sovereignty below.

### **6.3 The Hobbesian sovereign**

Hobbes articulates his theory of the sovereign extensively in his book *Leviathan* (Hobbes, 1651). He founds his sovereign in the conviction that human beings in their “state of nature” are prone to anarchy, domination and destruction which creates insecurity and as such, for the sake of their own self-preservation, they impose upon themselves restriction in the form of one common wealth or under a common sovereign, without whom every human being would rely on their own strength and use force to conquer the other for their own security or to satisfy their own natural passions. This, according to Hobbes would see humankind in a perpetual state of war (Hobbes 1651:103). The common wealth is established by virtue of mutual covenants wherein individuals covenant with each other to give up their power to one common individual or assembly of individuals who will thenceforth use the terror of this power and strength to execute their multiple wills on their behalf, be it by securing peace at home or protecting them from attacks by external enemies (Hobbes 1651: 106). This common individual is referred to as a sovereign. Hobbes further argues that since the sovereign’s objective is to defend and ensure peace and security over his or her people, that sovereign reserves the right to decide what would amount to a threat to peace and security whether internal or external, and to the means required to counteract these threats to his or her people, and is not to be accused of injury or faulted in his or her choice or actions (Hobbes, 1651: 109-123). In further espousing this concept, Hobbes lists as one of the things which weaken or may lead to the dissolution of the sovereign: the acceptance of that sovereign of less power than is necessary to ensure peace and security over his or her territory (Hobbes, 1651: 197). This exposition of Hobbes’ sovereign sets the background for an understanding of the problem of the open-ended nature of laws concerning a state’s power to control violence within their territory, including during riots or violent protests as is further explored in the study.

#### **6.4 The ‘force’ of law**

As is evident from the foregoing theory, the use of force has been recognized as instrumental in the creation and sustenance of the state, as a work of man and not just as a natural occurrence. By Hobbes’ theory, in any society there is the need to govern and the distinction inevitably arises between sovereign and subjects. However, in order to govern, the sovereign depends on force allied with right or with law as brute force alone is not sustainable in governance. Thus as Edwards points out, the use of force by state security institutions such as the police is made discretionary by law. It is often measured by the statements such as: ‘No more force than is reasonably necessary’ (2005:166) with the test of what is ‘reasonable’ relating to the circumstances pertaining at the time force is used. In Edwards’ opinion, such evidence is so subjective that any successful prosecution for excessive use of force might only occur in the most obvious of cases where blatant excessive force was applied (2005: 167). This concept of police discretion also ties in well with Bittner’s use of force paradigm which according to Brodeur envisages two basic propositions, one being the police’s ability to non-negotiably use force in urgent situations and the characterization of the typical circumstances in which police action is required. These benefits and complexities of policing position the institution well for unfettered or minimal regulations on use of force standards. The subjectivity of use of force standards is rendered even more complex in light of the fact that policing structures and cultures tend to vary with different political backgrounds, and social-economic structures in different societies (Brodeur 2010:103).

From the foregoing analysis, the framework around policing and by necessary implication the law around use of force in riot control contexts seems to remain largely within the clutch of sovereignty-power discourse. In his observation, Brodeur (2010: 339) reinforces that the law sets out to protect policing agencies through the use of phrases such as ‘necessary force’, ‘reasonable grounds’, among others, so as to enable the policing machinery maintain law and order. It is no wonder, Brodeur argues, there is a reluctance of

people and even the courts themselves, to challenge the police as is evidenced by the almost non-existent prosecutions of police officers for excessive use of force (2010: 339).

The foregoing insights into the law's intricate connectivity to the state's monopolization and justification of force as part of the law enforcement enterprise provide an effective standpoint from which to analyse and comprehend the ambiguities around the law on riot control and the contradictions and tensions that are bound to arise in an article 7 application to this area of the law. Hobbes' sovereign provides the most suitable agent for this analysis because as indicated above, he links the theory of law to the fundamental and political question of the justification of the state. Other theories of sovereignty including those propounded by positivists such as Austin do not magnify this intricate connection between law and violence to the justification of the state. Other social contract theories foreground political questions of governance, democracy, the right to revolution among others and obscure the complex relationship between law, state power, and violence. As seen above in Hobbes' approach, the justification of the state's use of force is central to his functional understanding of the state and law. The same justification is central to the question of law on the use of force in riot control contexts. Hobbes' contrast with other theorists on this concept and thus his relevance for this study are briefly explained below.

## **6.5 Why the Hobbesian sovereign and not other sovereigns?**

Jeremy Bentham and John Austin were prominent legal positivists who propounded the command theory of law which stated in essence that law is that which is laid down by a sovereign backed by a threat of sanction. The principle thus concerned itself with the source of the law rather than its substantive merits (Austin 1968, Merriam 2001: 67-69). However, both Bentham and Austin rejected Hobbes' contract theory and adopted a utilitarian approach to the theory of sovereignty, maintaining that the reason for man's submission to a sovereign authority was a natural occurrence which followed from man's desire to attain the greatest level of happiness (Merriam 2001: 67-69, Austin 1968: 334-336). Austin dismisses as absurd the idea that a heterogeneous and amorphous community

could agree on a determinate objective as to how they wanted to be governed and for such a contract to then bind subsequent indeterminate generations (Austin 1968: 334-336).

It is here argued that while both scholars center the sovereign as a source of law, by rejecting the contract theory and adopting a utilitarian view of the sovereign, Austin and Bentham obscure discourse around the violent foundations of the state and the justification of state monopoly on force as a necessity for maintaining state law and order. Their explanations for the sovereign as a source of law do not offer a critical lens for how the sovereign makes law to facilitate its monopoly on violence and perpetuate its existence, which as stated above, is a fundamental aspect of this study. For this reason, both Benthamite and Austinian sovereigns are of limited analytical significance.

One other contractarian theorist, Jean Jacques Rousseau upheld Hobbes' contract theory but articulated it from a point of view which justified revolution. According to Merriam, Rousseau accomplished for the people what Hobbes accomplished for their ruler, as he rendered the people as the sovereign; an embodiment of the state and the government. His theory was the foundation for several constitutional expressions affirming the sovereignty of the people and as such, their right to revolution. By contrast, Hobbes' sovereign swallowed up the state to the point of absolute government (Merriam 2001: 18), although as is indicated below, he denied that his theory propounded an absolute sovereign. Thus, while Rousseau's legislator is founded in principles of popular sovereignty, democracy and general will (Ward 2014: 43, 50), the Hobbesian sovereign's law making power as propounded above, is very state centric and aimed at ensuring the state's monopoly on force, which is a major contention and stance taken by this study. Immanuel Kant adopts an approach similar to Rousseau's also articulating the role of law and state as one aimed at securing the general will, although he too like Austin and Bentham, rejects the contract theory of the state (Merriam 2001, 234: Madrid 2014).

Other social contract theorists have articulated political justifications for the state but offered minimal legal articulations of the same. John Locke who also propounds the contract theory differs from Hobbes to the extent that he relegates discourse around law and order and violence by maintaining that before the formation of the state, man's state of nature was not a state of war as Hobbes argues, but rather one where individual rights are

imperfectly secured. As such, the function of the state was to ensure access to the common good and secure these rights through law (Merriam 2001: 16, Leyden: 1956). By contrast, Hobbes' functional approach to the state is hinged on the need to ensure security and take man out of the state of war, which is attained through that sovereign ruler's monopoly on violence as analysed above. Moreover, Locke's contract theory, while political, is also intricately linked to natural law theory. Locke believed political power was limited by natural law and men's rights, especially to life and property, and that man was eternally subject to natural law (Leyden 1956: 26). As already noted above, this study is aimed at a positivist analysis of what the law is and renders natural law theories of no import. Other theories which focus on sovereignty and power like the Weberian sovereign are more focused on the bureaucratic aspects of power (Gerth and Wright 1948: 196,199,220-6), whilst the current study is narrowly focused on a legalistic and doctrinal analysis of a specific provision in the ICC Statute, which implicates questions of legal definition and not broader social political questions of bureaucracy.

## **6.6 Rejecting an absolute sovereign**

The Hobbesian sovereign theory like the Austinian theory has met with allegations of propounding an idea of an absolute sovereign who is unlimited by positive law (Dewey 1894: 32). These allegations of absolutism have however since been neutralized by arguments which point to the fact that both scholars recognize that the sovereign remains accountable to the people he or she governs and may have to defer to them on matters of governance (Dewey 1894: 36). Moreover Hobbes, it has also been pointed out, emphasized the role of the sovereign to protect his or her subjects and that if the sovereign failed in that objective, then there was no longer a need for the subjects to recognize him or her, effectively serving as a limit on that sovereign's absolutism (Nagan and Haddad 2011-2012: 444). As Larson and Jenks observe, the concept of sovereignty is pervasive but a review of contemporary scholarship indicates strong repudiation of absolute sovereignty (1965:463-465, Nagan and Haddad: 2011-12, 500). This study proceeds on the same premise, but maintains that while the Hobbesian sovereign as referenced in the study is not an absolute sovereign, its political and functional nature enables it to propagate state

centric definitions and interpretations of the law on the use of force, even within states that might be considered highly democratic, as will be illustrated in chapter four.

Of more critical significance from the foregoing understanding of the Hobbesian sovereign is the question whether a determinate limitation on force used in riot control contexts is achievable and more specifically, whether there is a clear limitation on such force upon which a prosecution under article 7 of the ICC Statute can be established. A critical legal approach as highlighted above would argue that such a standard is unattainable because of the highly political and by necessary implication, indeterminate nature of this question. The result of such an approach would be a dismissal altogether of the basis upon which the research question is founded. As counter argued, this study proceeds on the premise that a minimal standard of determinacy can be achieved, through legitimate processes of definition and interpretation. The aim of the study however, is to demonstrate that this has not yet occurred for the purposes of establishing culpability under article 7 of the ICC statute for force used in law enforcement contexts such as riot control. While this study does not proceed to prescribe how such a process is feasible, it is necessary to briefly discuss its feasibility and to demonstrate more clearly the study's point of departure from critical legal theory.

## **6.7 The Hobbesian sovereign, indeterminacy and legitimacy**

The intricate nature of law's connectivity to state power on the question of use of force in riot control contexts renders the question of definition and interpretation a highly political and complex one (Stahn 2010: 5, Wilmshurst 2004: 96). Like the crime of aggression under the ICC statute, it is too state centric, and indefinite (Paulus 2010, Creegan 2012: 65). These attributes in the case of the crime of aggression have led some scholars to argue that defining the crime should be postponed until more consensus has been built around the crime's scope and nature (Paulus 2010), while others have argued that it should never have



been codified in the Rome Statute as it is a political crime which should be addressed with political sanctions rather than criminal ones (Creegan 2012: 65).

While this concern may be easily accepted for the crime of aggression, the position is different for law enforcement in riot control contexts. This is because although using force to quell a riot might be about preserving the state, it is also a question that inherently requires determinations around harming rioters or protestors and implicates both political and human rights considerations which the ICC must prosecute. This requires a certain level of determinacy for what conduct in riot control is prohibited under the ICC statute.

Legal positivist theorists recognise the futility of absolute certainty of legal texts although as indicated earlier, they do not go as far as critical legal theorists to dismiss law's potential to communicate a shared understanding of words and offer a predictability of conduct for states (Fastenrath 1993: 310). This approach by critical legal theorists has been critiqued as failing to account for the importance that is attached to words in legislation or treaty making processes (Fastenrath 1993: 310). Treaties do not constitute the end process of legislation thereby requiring mere implementation. Rather, they require conveyance of meaning in a way that minimises the level of misunderstanding through habitually used, commonly expressed and agreed upon linguistic conventions, which includes the extensive use of soft law to supplement treaty definitions (Fastenrath 1993: 312). As such, even in complex situations like the use of force under international humanitarian law, states have agreed on certain means and methods of warfare that are prohibited on account of being inherently indiscriminate or causing superfluous injury and the violation of these standards has resulted in various criminal prosecutions by international criminal tribunals (see generally, Sassoli and Bouvier, et.al. 2011).

Admittedly, some level of indeterminacy and open-endedness in legal text may be necessary for achieving flexibility in interpretation and absolute certainty may actually lead to absurdities. However, indeterminacy may in certain cases compromise legal legitimacy as indeterminate normative standards compromise the predictability of required conduct, which in turn makes it easy to justify non-compliance (Franck 1990: 53, 68, 72). Determinate rules are less amenable to permissive interpretations and justifications (1990: 53).

The concept of legitimacy has a plurality of meanings which makes it hard to systematize and which it is beyond the scope of this paper to explore in-depth as has been done by other studies (Thomas 2013: 5, Wolfrum and Roben 2008). It has however been commonly used under international law scholarship to denote moral, legal and social legitimacy (Thomas 2013: 7). While moral legitimacy is concerned with how power is exercised and justified and has featured in debates around why international law is worthy of compliance (Thomas 2013: 11), legal legitimacy is concerned with signifiers of obligations to submit to a rule or system (Thomas 2013: 7, Wolfrum 2008: 6). Social legitimacy on the other hand, treats legitimacy as a question of fact and is concerned with an actor's belief that a rule or system is morally or legally legitimate (Thomas 2013: 14).

## **6.8 Legal legitimacy**

As indicated in the foregoing sections, this study adopts an analytical approach to positive law and as such moral and social legitimacy are of limited significance. The inquiry on which the study embarks; of article 7's ambiguity and article 22's legality requirements among other sources of legal interpretation, is one grounded in the concept of legal legitimacy. Franck defines legitimacy as a standard by which a given community establishes or measures the capacity of a rule to obligate the members of that community (1990, 206). In particular, legal legitimacy is a process through which communities build up shared understandings on the objective of a certain definition in law, and ensure that such definition meets the specified legality criteria which must be reinforced through a continuous legality process (Brunner and Stephen 2012, 55). Legal legitimacy in international law proceeds from the premise of international law treaties which are developed on a consensual basis (Wolfrum 2008: 7). The legitimacy of a rule requires its clear communication of what conduct is permitted and what is prohibited in such a way that the outer boundaries of its specificity have been established in a manner that limits self-serving exculpatory interpretations (Wolfrum 2008: 56-7). A rule's perceived legitimacy is achieved if its contents have relative transparency and can be determined easily and with

more certitude (Wolfrum 2008: 64). Where the rule is regulating a complex area of the law its determinacy and legitimacy becomes more dependent on the relevant community's understanding of its complex content and on the legitimacy of the process by which the rule is applied. Where such a rule has low textual determinacy it can be filled through a legitimate process of determinacy, which Franck refers to as 'process determinacy', generally perceived by relevant community members as operating within their approved methods of legitimisation (Franck 1990: 80, 85, 88).

As discussed above, the main contention of this study is that such a process of consensus building and a creation of shared understandings around the criminal limitations of force used by state actors in riot control contexts has not yet been attained. Article 7 obscures the complexity of the legal and political considerations it implicates while article 22 which regulates its interpretation is narrow and offers no 'process of determinacy' on which the ICC might rely for an interpretation without criticism for exceeding its interpretative mandate. This renders the article ineffective in criminalizing force used in riot control contexts

## **7. Conclusion**

The question of under investigation in this study, namely the legality or otherwise under the ICC Statute of force used as part of law enforcement during violent protests, is particularly crucial considering the prediction of new types and environments for conflict which are wont to present new legal challenges. Hopgood (2013: 21) has warned of new challenges for the ICC and the broader human rights project with the decline of traditional wars and the rise of diverse forms of political and urban violence which will expose areas where human rights have had no impact. Given the apparent disparity of state approaches to internal security threats and the disparate legal standards for riot control, this warning, when contemplated in light of the ICC Statute's strict legality standard and article 7's inadequacy is rather sobering.

A positivist approach of analysis which recognizes the state centric nature of the law on the use of force in riot control is most suitable to explore to the full extent, the nature of the complexities and contradictions arising from the legal vacuum created by article 7's

definitional inadequacies. Such an approach which acknowledges the role of power, force and politics in shaping law and which traces a link of this power to the necessity of the state, offers an insight into the fundamental omission of article 7's definition of crimes against humanity without clarifying what aspects of state responsibility and law enforcement it does or does not implicate. As already indicated above, a natural law theory is prescriptive and would be best suited to answer the question with considerations of justice and morality. However, it would obscure the questions about article 7's applicability to riot control contexts and its practicality as a basis for a criminal prosecution of state officials' conduct in riot control contexts. Dworkin's third theory of law is too insular and grounded in judicial interpretive considerations, thereby obscuring the problem of tactical considerations by law enforcement officials in riot control contexts. It is also articulated as a rights thesis and is thus of limited import in an ICC context designed to determine and punish criminal conduct rather than distribute rights. The Critical legal theorists' approach dismisses law's potential to embody shared understanding about legitimate or illegitimate conduct which is counter to the premise upon which this study proceeds; that such a level of predictable conduct can be achieved by the law and this is what is lacking for the question of force used in riot control contexts.

The study adopts Hobbes' concept of sovereignty, also referred to herein as the Hobbesian sovereign, as an agent which embodies the complex interconnectedness of law, force, power and politics regarding the question of force used in riot control contexts. It represents the centrality of the fundamental question of the necessity of the state in the study and offers a framework which magnifies the significant nature of article 7's definitional gap when applied to riot control contexts. While positivism does not pretend at an absolute determinacy, the argument is maintained in this chapter that through legitimate processes and consensus building, law can communicate minimum legal standards based on shared understandings of state parties to a given international treaty, of the extent of their liability or otherwise there under.

The main argument is however, that the definition of crimes against humanity under article 7 of the ICC statute is ineffective in riot control contexts as it implicates the powers of the state to use force as part of law enforcement in such contexts and yet offers no guidelines as

to the boundaries of liability for such use of force. Moreover, the interpretive sources that would aid in clarifying these boundaries offer no remedy as they exist in the prescriptive realms of human rights and humanitarian law which have no specific prohibitive standards on which to base a criminal prosecution under article 7. In overall conclusion, the application of article 7 to riot control contexts is premature for an area of law which implicates state responsibility and for which there currently exists no shared understanding under international law on what conduct under state law enforcement processes would amount to criminal liability under article 7. The aim of this thesis is quite modest: to illuminate the nature and extent of this problem. This is demonstrated in the subsequent chapters three and four of the study. The broader question of how to remedy the problem is left to future much more ambitious research.

## **CHAPTER THREE**

### **THE HOBBSIAN SOVEREIGN, AMBIGUITY OF THE ICC STATUTE AND ITS INTERPRETIVE SOURCES OF LAW.**

#### **1. Introduction**

The central argument in this chapter is that the ICC Statute's main sources of law, namely the ICC Statute, the Elements of Crimes, applicable treaties and customary law are ambiguous and as such, inadequate to provide a framework for the application of crimes against humanity to prosecute excessive force used in riot control contexts. I argue that an exercise in judicial interpretation for such contexts is highly susceptible to criticism for violating the principle of legality which limits judicial discretion to the very minimal as opposed to large scale innovations in law. The chapter argues that this would be the result from applying crimes against humanity to riot control contexts, particularly in riot situations bordering on armed conflict. This dilemma is aggravated further by the ICC Statute's legality standard which requires a strict construction of crimes and prohibits criminalization of conduct by analogy. The result of this state of affairs is that on the question of excessive force used in riot control as a crime against humanity, ICC judges lack a clear basis on which to ground their decisions. This legal vacuum is rooted in the concept of the Hobbesian sovereign explained in the preceding chapter, through whom the circularity of the law regulating the use of force in riot control contexts is maintained. I also argue that state parties to the ICC Statute never gave significant consideration to the application of crimes against humanity to law enforcement scenarios. This among others is

reflected for instance, by the hybridization of human rights law and international humanitarian law frameworks without reflection, exacerbating legal uncertainty particularly for ‘in between scenarios’ that are not quite easily identifiable as armed conflicts but are not clear cut law enforcement scenarios either.

The main aim of this chapter is to illustrate this argument through four steps. The first step will be to analyse the principle of legality as a methodology for interpretation under the ICC statute. It will include a brief examination and comparison of the application of legality standards by selected international criminal tribunals. This will be done in part two. Part three will address the second step, which is to examine the application of the ICC statute’s legality standard to the definition of crimes against humanity under the Statute. It will include a brief examination of the antecedents of the relationship between the principle of legality and crimes against humanity. It will also examine the role of the Hobbesian sovereign in the shaping of this relationship at the international level. The third step under part four is to examine the application of the ICC statute’s legality methodology of interpretation to its main and supplementary gap filling sources of law, namely; the ICC Statute itself, the Elements of Crimes and the applicable treaties and the rules and principles of international law, as they relate to the interpretation of force used in riot control contexts as crimes against humanity. This section, like the previous one will examine the role of the Hobbesian sovereign in perpetuating the circularity of these provisions on the central question of establishing boundaries for measuring proportionate and therefore lawful force. Part five will entail the conclusion and will maintain that the interpretive sources offer no adequate framework for a basis of prosecuting use of excessive force in riot control as crimes against humanity.

## **2. The principle of legality and ambiguity under the ICC Statute**

The central question this thesis seeks to answer is largely one about definition and interpretation in law. This section will rely heavily on Grover’s study of the interpretive challenges facing the ICC and in particular, her study of the principle of legality under the

ICC Statute with the caution that her approach is being used purely for illustrative purposes.

It has been pointed out by Grover (2014: 1) that: 'Interpretation is central to the practice of law. Sometimes a legal victory or defeat turns on the meaning a judge attributes to a single word in a legal text'. Thus one of the fundamental difficulties a court is bound to face in the process of interpreting and applying the law is the ambiguity of the words used in legal instruments. These difficulties are particularly amplified for the International Criminal Court (ICC), whose decisions will be critical for measuring culpability for some of the most serious international crimes. This court's findings could also influence transitional justice efforts in situation countries and may encourage or deter states' participation in the court's international criminal law project (Grover 2014: 1-2). Grover identifies some sources of interpretive problems which she anticipates the ICC judges will be faced with including linguistic issues, methodology, inherent indeterminacy and inter-treaty relationships, among others (2014: 9). While previous international criminal tribunals have faced similar challenges with the interpretation of crimes, they have maneuvered them without consistency and clear methodology. Grover analyses these interpretation challenges in light of the objectives and framework of the ICC statute to propose a methodology which the ICC can apply in manoeuvring them, with minimal risks of exceeding its jurisdiction. She identifies the principle of legality as the ICC statute's primary principle of interpretation and reconciles it with its human rights imperative with a view to achieving logical progression and rigorous interpretation (2014: 31-2).

Grover's proposed methodology is of somewhat limited significance for universal application to riot control as an area whose boundaries of legality are largely indeterminate and at whose core lies the Hobbesian sovereign's discretion on violence as a means of law enforcement. Moreover, the ICC statute itself does not outline an interpretation methodology for the Court and as such Grover's methodology remains but a proposal whose adoption by the Court is yet to be seen.

However, even with these limitations in mind, I recognise that Grover's proposal is developed under a comprehensive and contemporary study of the ICC statute's legality framework and to this end provides a fitting lens through which to analyse the Statute's



effectiveness in criminalizing excessive force used during riot control contexts. These arguments are analysed further below.

## **2.1 Antecedents of the principle of legality under international law**

The principle of legality is embodied by two key maxims: *nullum crimen sine lege* and *nulla poena sine lege* which can be translated to mean that no person may be prosecuted and punished for conduct that did not constitute an offence at the time of its commission, and no person shall be punished in a manner not prescribed by the law at the time of committing a given offence (Lamb 2002: 733, Sadat 2002: 180). According to Lamb, these maxims began to emerge on the international scene through their application in post-World War II case law and are now undoubtedly part of customary international law (2002: 733-4). However, their operationalization was met with criticism for arbitrariness and illegality which later paved the way for their more strict articulation under the ICC statute, as illustrated below.

### **2.1.1 The International Military Tribunal of 1945**

Prior to the Nuremberg trials or World War II atrocities, discussions around the meaning and content of the principle of legality were obscure (Bassiouni 1999: 125). After World War II, the Allied powers sought to punish what they called the major criminals of atrocities committed by German military officers and members of the Nazi party and to this end, signed an agreement and Charter establishing an International Military Tribunal (IMT). To the same end, the International Military Tribunal for the Far East (Tokyo tribunal) was established for the prosecution of Japanese officials. The IMT's purpose was to investigate and prosecute crimes against the peace, war crimes and crimes against humanity (IMT Charter art. 6). A major objection to the violation of the principle of legality was argued for the defendants, in relation to the indictment and prosecution for aggressive war. It was argued that as no country had defined or criminalized aggressive war

or provided a penalty for it at the time the defendants allegedly committed it, and that the IMT's prosecution of the accused for the crime of aggression violated the principle of legality. In rejecting this argument the IMT (*France et. al v Goring et. al*: 219) stated:

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 neighbouring 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. 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. On this view of the case alone, it would appear that the maxim has no application to the present facts.

According to Garibian, a reading of post-World War II scholars reveals conflicting views about how the International Military Tribunal (IMT) applied the principle of legality. One school maintains that the IMT proceeded rightly in as far as it was applying law which was already recognized in treaties prohibiting aggressive war. Another school, while acknowledging that there was a violation of legality nonetheless proceeds to justify the IMT's transgression on the basis that the tribunal was operating under natural law principles which are superior to positive law requirements. A divergent view maintains that the IMT proceeded unlawfully and in fact was acting politically and not within the law and yet another group contends that the principle of legality is a national law and not international law principle (Garibian 2007: 94-97). These arguments were not addressed comprehensively within the IMT trials but were eclipsed by a need to avoid the law versus morality debate, hence the adoption of more generalized approach using the principle of justice. This way, disregard for the principle of legality was justified on the basis that it was superseded by a higher principle of justice, namely the need to punish immoral conduct perpetrated by the defendants during the World War (Garibian 2007: 99-100). Bassiouni undertakes an extensive consideration of the merits and demerits of the IMT's application of legality (1999: 123-173) which it is not the aim of this chapter or of this study to rehash. His views however, indicate the controversial nature of the legality question surrounding

the IMT decisions. While on the one hand he points out that the Nuremberg and Tokyo judges relied on their own sense of justice and an unarticulated higher law, which opened up their decisions to criticism for being arbitrary (1999: 146), he subsequently agrees that the conduct described in the IMT and Tokyo Charters was evidently *mala in se* and was already criminal in the major world legal systems. As such, he argues, the principle of legality could not be said to have been violated in respect of offenders who knew or ought to have known that their conduct violated international criminal law had it not been for the fact that their national law had purportedly legalized such conduct (1999: 162-3).

The foregoing controversies raised significant questions for the meaning of the principle of legality under international law and paved the way for subsequent developments which adopted a more specific articulation of the principle. Under international treaty law the principle manifests in various forms under Article 11 of the 1948 Universal Declaration of Human Rights (UDHR), Article 15 of the International Covenant on Civil and Political Rights (ICCPR), Article 29 The Third Geneva Convention of August 12, 1949, among others (Bassiouni 1999:168, Sadat 2002: 180). It is however noteworthy, that as international criminal law was still in its embryonic stages during and after the IMT trials, the application of the principle of legality remained controversial under international criminal tribunals as explored below.

### **2.1.2 The Ad Hoc International Criminal Tribunals (Rwanda and Yugoslavia)**

The International Criminal Tribunal for Yugoslavia (ICTY) has been a site for controversy surrounding the application of the principle of legality. Both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) operated in an era of underdeveloped international criminal law and were left to craft their own methods of interpretation in order to execute their mandates. Neither tribunal's interpretive approaches generated a systematic hermeneutic but rather both tribunals relied on random rules of interpretation including the literal rule, the purposive rule, logic, contextual interpretation, effective interpretation, drafters' intent, progressive interpretation, fairness to the accused and consistency with

customary law (Grover 2014, 63). This lack of methodology is not surprising considering that neither the ICTY nor the ICTR Statute contains a specific legality provision. The closest both statutes come to embedding legality is through a mention of the presumption of innocence as a right of the accused under Article 21(3) for the ICTY Statute and Article 20 (3) for the ICTR. It appears that the approach to legality taken by the ICTY in particular was the same as that adopted by the IMT, namely, the argument that the tribunal was prosecuting conduct which was already recognized as criminal under customary international law and that the accused persons were already aware of the illegality of their conduct at the time of its execution. This approach was made clear upon the establishment of the ICTY in statement by the United Nations Secretary-General at the time, (Report of the Secretary General (1993) S/25704: Para 34) who maintained that:

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.

The foregoing stance manifested in the ICTY's decision in *Prosecutor v Tadic* regarding the question whether individual criminal liability could be imposed under the ICTY statute for violations of common article 3 of the Geneva Conventions when no such liability had been prescribed in the said Conventions. Reminiscent of the IMT's argument against strict legality in post-World War II cases, the Trial Chamber held that as common article 3 provisions were undoubtedly part of customary international law their penalization under the ICTY statute did not violate the principle of legality (1995, ICTY-94-1: Para 72). This stand was upheld on appeal where the Appeals Chamber referenced the IMT tribunal's arguments to maintain that the intention to penalize violations of common article 3 was evident in state practice and a penalization under the ICTY statute was well in line with the *nullum crimen* principle (*Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 1995, ICTY, IT-94-1-AR72: Para 128-137).

A similarly liberal approach was adopted by the ICTR in *Prosecutor v. Akayesu* which conflated the provisions of Additional Protocol II of the Geneva Conventions as part of the 'serious violations' of Common Article 3 of the Geneva Conventions, thereby elevating

them to customary law status and justifying their operation within the principle of legality (1998, ICTR-94-4-T: Paras 616-617).

While the liberal approach to legality by the ad hoc criminal tribunals has been heavily grounded in justifications of already existing customary law, the difficulty remains that it sits uncomfortably with the *nullum crimen* principle which is based on legal certainty. It is no wonder therefore that some scholars have argued that the definition of crimes by the ad hoc tribunals was somewhat emotive and had a *de lege ferenda quality* (Lamb 2002: 745).

It is apparent that with the foregoing controversy over the application of the legality principle by the ad hoc criminal tribunals, the drafters of the ICC Statute for a permanent international criminal court were insistent upon specifying the scope of the principle. However, as has been observed above, while the ICC statute was keen on specificity, the more complex considerations of how the highly restrictive legality principle was to be effectively applied to a still nascent and highly hybridized international criminal law regime were left unarticulated. This omission still fosters controversy over how the principle of legality will operate under the ICC statute.

While several scholars have considered the principle of legality under the ICC statute (Lamb 2002:742-154, Sadat 2002: 180-187, Bassiouni 1999: 174), not many have comprehensively considered its methodological operationalization within the framework of the ICC as a permanent international criminal court. As indicated above, Grover (2014) has undertaken such an enterprise and even proposed a method for the ICC to apply in order to achieve consistency and systematization in interpretation. While this study relies on Grover's methodological proposal for analysing the principle of legality and its application to riot control contexts within the ICC statute, it does not purport to be a comprehensive review of it. As stated above, the reliance here on Grover's method is purely for illustrative purposes wherein it will serve as a tool for illuminating the nature of contradictions and complexities that may arise from the application of the ICC statute legality standard to the Statute's sources of law and their subsequent application to riot control contexts. Grover's proposed method and application to this study are explained further in the ensuing section.

## **2.2 Exploring a methodological approach to the principle of legality under the ICC Statute**

Grover proposes a methodological approach to ICC's legality framework which is grounded in key interests namely: the separation of powers and rule of law interests. While recognizing that absolute legal certainty is an illusion, she proposes some guidelines which are aimed at minimizing criticism for arbitrariness in the ICC's decision making process while avoiding the restrictions of the Statute's rigid legality principle. In so doing, Grover offers some broad parameters within which judicial interpretation ought to occur while protecting legality's interests. These include prohibitions against large scale innovation and avoiding public policy controversies. She however, does not offer further delineations for what these proscriptions mean or in what circumstances of legal interpretation they might occur. This minimizes the usability of her proposed methodology in riot control contexts where the Hobbesian sovereign's discretion dissolves the boundaries of law in the application of force. Without further delineating parameters for her guidelines Grover's proposed methodology remains of limited use in circumventing the ICC's strict legality requirement in riot control contexts.

### **2.2.1 Antecedents of legality under the ICC Statute**

The lack of consistency in the application of the principle of legality under the IMT and ad hoc tribunals' regimes created a backlash against a liberal interpretation of the principle resulting into a highly codified outcome for the ICC statute in order to limit judicial creativity (Grover 2014: 13, 106, Lamb 2002: 742-6). The more general description of the *nullum crimen* principle prevalent at the international level before the era of the ICC statute was less strict than the version applied at the domestic level and as such, custom as a source of international criminal law, albeit unwritten, was still found to be in line with the *nullum crimen* principle as evidenced by the foregoing practice of the IMT, ICTY and ICTR. Grover asserts however that these liberal approaches are not fitting to the ICC statute

framework whose approach to the principle of legality is much closer to the strict stance taken under domestic law than any other international criminal statute (2014: 135). So critical was the definition of this principle to the ICC state parties that it was discussed early in the statute's preparatory process between 1996 and 1998. The principle was cited as a vehicle through which the International Law Commission (ILC) could drive the international criminal law codification process (Lamb 2002: 746). In the initial draft of the ICC statute the ILC articulated the principle of legality in terms as a prohibition against conviction for genocide, war crimes and crimes against humanity if conduct that is the subject of prosecution was not a 'crime under international law' at the time of its commission (UN GAOR, A/49/10 (1994): art 39). However the subsequent Ad Hoc Committee on the Establishment of the ICC immediately pointed out that the principle of legality for purposes of the ICC statute needed to be defined specifically and a mere enumeration of crimes would not suffice (UN GAOR, A/50/22(1995) : paras 52, 57).

According to Lamb, a major concern of the state delegates was that international law did not set out the elements of crimes with sufficient precision. As a result of the foregoing antecedents, the drafters of the ICC Statute desired a statute whose subject matter jurisdiction had been defined exhaustively within its constitutive instrument (2002: 750-1).

I argue here that the concerns of the Hobbesian sovereign in this international criminal law making process played a major role in the approach to legality which was ultimately adopted under the ICC statute framework. Even though civil society groups were part of the discussions in the ICC statute's drafting process and may have influenced the language that was finally adopted, it was also quite apparent that governments were conscious that they were designing a permanent institution which would have the potential to indict their own highest ranking officials. As such, they were keen to ensure that its jurisdictional powers were clearly demarcated (Lamb 2002: 751). To this end, they were guided by the principle of specificity and attempted to define all the cases which might possibly come under the ICC's jurisdiction as *lex scripta*. The state parties' ultimate goal was to exhaustively list all the crimes within the ICC's jurisdiction so that they and their agents might know well in advance what the outer reaches of prohibited conduct were as well as their obligations under the statute (Grover 2014:106, 196).

### **2.2.2 ICC's strict legality and the illusion of legal certainty**

The foregoing concerns yielded the strict legality principle under article 22 of the ICC statute which provides as follows:

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.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Articles 22(1) and (2) will be the main focus of this chapter and indeed for the subsequent chapter of this study as they relate to the interpretation and application of crimes within the framework of the ICC statute including crimes against humanity.

For all the ICC Statute drafters' desire to achieve specificity, Grover has warned that words as mediums of ideas are 'intrinsically imprecise' and that as such, even written laws cannot escape interpretive problems arising out of linguistic ambiguities (2014: 14). She warns against employing the illusion of legal certainty in critiquing judges for judicial law making (2014: 34). Indeed some scholars have taken an especially damning stance to the strict legality version adopted by the ICC drafters, stating that it was ill suited for the particularities of international law which was largely founded in unwritten customary law. Further that the strict version had frozen customary law definitions and that the drafters had shown a deep mistrust of the judges in so enacting. Further criticism argues that in fact, such strict limitation on the ICC's ability to suppress 'future malevolent inventions' is the Statute's biggest weakness (Pellet 2002: 1056-59).



In seeking to circumvent the foregoing paradox of specificity amidst ambiguity, Grover (2014) has crafted an application of the ICC's strict legality principle in a manner which she hopes can ensure the Court's effectiveness in interpreting and applying the statute to complex conduct without falling into previous criticisms of judicial law making as were leveled against the IMT and ad hoc tribunal criminal tribunals. I will argue however, that without sufficient pre-existing legal boundaries for use of force in riot control contexts, and without articulating certain highly evaluative edicts in her proposal, Grover's methodology is of limited import for circumventing the strict legality principle and for application to riot control contexts.

### **2.2.3 Grover's ICC legality methodology**

Grover identifies legality as the primary principle of interpretation under the ICC Statute and recognizes the challenges of observing it while relying on international human rights and humanitarian laws as sources of interpretation. With these challenges in mind, her approach to legality is one that focuses on the essential interests which the principle of legality seeks to protect and the threats which might compromise its primacy (2014: 31). She identifies four interests protected by the principle of legality, to wit: Fair notice, the rule of law, separation of powers and prior law as the basis for punishment (2014: 134-151). This section will address the first three interests with the considered view that the fourth interest on punishment as a basis for prior law is essentially similar to the fair notice interest. Grover uses the lens of the 1969 Vienna Convention on the Law of Treaties, being a principle frame work for judicial interpretation of treaties under international law, to generate what she refers to as 'mandatory guidelines' for interpreting article 6, 7 and 8 of the ICC statute (2014: 216-219). She notes that articles 31-33 of the Vienna Convention are a reminder of the need for an interpretive guideline which balances open-endedness and flexibility on the one hand and strict interpretation on the other in order to avoid rigidity in the face of unforeseen developments in international law (2014: 188).

As stated above, Grover's guidelines still rest on subjective indicators which in the face of law's ambiguity for riot control contexts, do not offer significant direction for effective interpretation. The argument is repeated here that for the particular case of crimes against humanity in riot control contexts, without additional guidelines from the ICC statute's state

parties themselves, an exercise in interpretation will remain largely indefensible against criticism for judicial law making and breach of legality.

The requirement of fair notice under the principle legality means that the law must be knowable to those expected to abide by it. However, Grover observes the futility of a 'knowable law' where such law resides in unwritten customary law or scattered jurisprudence. She concludes that in light of the counter principle that ignorance of the law is no defense, fair warning on its own is unconvincing as a rationale for legality (2014: 137). On this basis she links fair notice to the more significant interests, namely the rule of law and separation of powers. Grover states that the rule of law interest is justified on the basis of the need to prevent arbitrary exercise of judicial discretion and on the need to ensure a court's legitimacy. She however, again cautions against the illusion of absolute legal certainty, noting that adherence to a rule of law is a matter of degree as no legal system can have fixed and clear mechanical rules. She adds that the main goal under the rule of law interest is to minimize arbitrariness and maximize certainty and that the key hereunder is to limit judicial discretion to the 'penumbral zone' or interstitial area' is such a way that the law is certain in majority of the cases (2014: 142, 151). However, she offers no further engagement on the boundaries of this 'penumbral zone' or interstitial area' or indeed what such a zone or area might look like in relation to a specific legal issue, rendering her guidelines limited by subjectivity.

The further foundation Grover highlights is the interest of separation of powers. Grover views this interest as aimed at a restriction against 'large scale innovation' during legal interpretation so as to avoid 'controversial public policy debates'. Further that it is meant to ensure respect for 'considered legislative inaction', which might otherwise give way to criticism for usurping the state parties' intentions (2014: 148, 151). Yet again, Grover offers no further guidelines as to the nature of interpretation which might equate to 'large scale innovation' or what would be 'controversial public policy debate' in a specific legal issue. The same criticism made for the subjectivity of the rule of law interest lies therefore for the separation of powers interest.

Having identified the key legality interests, Grover proceeds to suggest more specific mandatory legality guidelines which it is argued, offer a limited basis to gauge and apply

the ICC Statute's legality standard as they too still operate within a framework of high subjectivity.

#### **2.2.4 Grover's mandatory legality guidelines**

Grover's mandatory guidelines are divided into what she identifies as the three main interpretive devices embedded in Article 22(2) of the ICC Statute, namely: The requirement of strict construction, the prohibition of analogy and interpretation in favour of accused person in case of doubt. This section will only consider the first two devices as they are the ones at the center of the question under study, namely, how to establish the boundaries of interpretation for crimes against humanity in riot control contexts. Interpreted in light of the Vienna Convention as referenced above, Grover argues that the devices form part of the similar imperative under article 31(1) of that Convention which requires the interpretation of treaties in good faith (2014: 400).

Under the strict construction requirement, ten guidelines are stipulated, while under the prohibition of analogous reasoning, four guidelines are listed. In total fourteen of the relevant guidelines are extracted and summarized as follows:

- The requirement of strict construction does not bar court from interpreting and clarifying elements of a particular crime.
- Judges have been granted some law making power but which is limited to the most interstitial and minimal developments, with incremental and moderate interpretations being preferred to expansive interpretations and creation of new crimes.
- The requirement of effective interpretation based on the object and purpose of a treaty as stipulated under the Vienna Convention article 31(1) is applicable only for the mischief of a specific criminal prohibition and not to the whole Rome Statute regime.

- Where an interpretation yields more than one outcome, the most modest as opposed to expansive outcome is favoured.
- The interpretive outcome should be one that a reasonable law abiding citizen could have been expected to have been aware of when reading the relevant provisions of the Rome Statute
- Interpretive outcomes that enhance certainty should be favored over those that do not resolve ambiguity within the law, or exploit it, or multiply the possible circumstances of its application
- Reasoning should be guided by principles and not facts
- Open textured language rebuts the strict construction imperative
- Interpreting open textured provisions should where possible be accompanied by illustrative examples of prohibited or lawful conduct for future reference to enhance legal certainty
- Strict construction requires liberal interpretation for exculpatory grounds
- Analogous interpretation that leads to substantively new crimes is prohibited
- Logical reasoning by analogy to facts of a previous case which is geared towards bringing the facts of a case within the treaty is permitted
- Reliance on previous decisions of the court is not prohibited
- Contextual reasoning based on the Statute, Elements of Crimes, or resort to applicable law for gap filling is permitted.

### **2.2.5 Critiquing Grover's mandatory guidelines**

As stated above, it is not the aim of this study to undertake a comprehensive appraisal of Grover's proposed legality methodology. To this end, only a modest critique of some of

the foregoing guidelines deemed most critical for the study is undertaken, with the view to teasing out the ambiguity issues which still persist within them. As already argued above, Grover's guidelines are based on interests whose parameters are undefined. This limitation is not cured by her mandatory guidelines. To some extent, the guidelines offer straight forward indicators for instance, that the use of open textured language rebuts the strict construction principle. Thus the inclusion of 'other inhumane acts of a similar character' in determining crimes against humanity under article 7 of the ICC statute is an indicator of a relaxed legality requirement. Further direction is given with the requirement that decisions are to be made based on principles and not facts, that the object and purpose interests in interpretation should not be interpreted in light of the entire statute but rather in light of a narrower and specific prohibition, and that illustrative examples should be given in the interpretation of open textured provisions.

However, the other guidelines offer an illusion of objectivity which on closer analysis fades back into the same subjectivity observed in the legality interests listed above. The guidelines for instance, provide no indicators for what would be beyond what Grover calls 'interstitial' or 'minimal' law making power which has been granted to judges or what would be a 'modest' or 'expansive' interpretation venture. In making reference to a 'reasonable law abiding individual', her guidelines retain the presumption that the law is always knowable. This is especially critical for riot control contexts where, as will be argued, the Hobbesian Sovereign's discretion maintains the boundaries of 'lawful violence' in circularity. Regarding analogy, the guidelines do not engage further on when analogy might lead to 'substantively new crimes'. This omission is especially problematic because interpretation by analogy is so close to making new law it often raises legality controversies (Lamb 2002: 753) and as such warranted further explanation. In overall analysis, Grover's guidelines still exist within the framework of the rule of law and separation of powers considerations above, whose content she does not adequately articulate and which, on application to the highly ambiguous framework of riot control, are of limited significance to ensure legality.

While Grover's intentions are that her proposed legality methodology guide judicial interpretation and shield the process from unfounded scrutiny for arbitrariness, she does acknowledge the highly ambiguous framework of crimes in the ICC statute (2014: 32) and even observes that in some cases, state parties retain vagueness and ambiguity within a

treaty provision deliberately in order to justify their actions on the argument that the provision in question supports their preferred interpretation (2014: 148).

Noting the complexity of the ICC ambiguity and legality problem, Grover herself proposes that the ICC 's legislative body, namely the Assembly of State Parties (ASP), adopt a non-binding list of conduct that does or does not meet certain elements of crimes proscribed by the statute (2014: 148). She recognizes that for the hard cases, the determination of boundaries of legality would have to turn back to the state parties themselves. As I argue above, and as will be argued further below, this may be the ultimate solution to the ICC legality dilemma as far as the question of force used during riot control is concerned. As this is an area of law in which the Hobbesian sovereign has retained discretion and monopoly, it would follow that a marking of criminal boundaries for force used in such contexts reverts back to that sovereign.

In the absence of such legality indicators from the Hobbesian sovereign, even with the progressive legality framework Grover proposes, interpretation challenges under article 7 of the ICC statute will persist on the critical question of when force used in riot control contexts amounts to a crime against humanity. As testament to this observation, the ensuing analysis of the ICC statute, Elements of Crimes and other sources of law indicates a pervasive legislative inaction and the ICC's avoidance and conflation of legal boundaries on the question of force used in riot control contexts where the issue has come before it.

### **3. The principle of legality and crimes against humanity under the ICC statute**

A brief review of the historical development of crimes against humanity demonstrates that under international law it is quite evident state actors never extended these crimes to law enforcement contexts. The development of these crimes was always linked to armed conflict contexts and was defined in a framework of victors' justice. This meant that state actors never anticipated their application to their own internal conduct and this has kept matters of state use of force in riot control situations, outside the realm of crimes against humanity. Even where under the ICC Statute it was made clear that crimes against humanity apply in both armed conflict and situations of peace, I argue that the retention in that statute of references to an 'attack against a civilian population' is highly indicative of a

crimes against humanity framework which is yet to fully evolve from being associated with armed conflict scenarios, to a regime that can be effectively applied in law enforcement contexts. I further argue that this association with armed conflict contexts is maintained as a legal crutch in hard cases where riot control borders on armed conflict and is indicative of the undeveloped crimes against humanity framework in riot control contexts. These contexts have over the years been shielded from international scrutiny in the interest of the Hobbesian sovereign who is also a major actor under international law. It is indeed curious to note that while state parties to the ICC Statute were so particular in listing exhaustively conduct which would amount to crimes against humanity under article 7 and under the Elements of Crimes, there was legislative inaction in delineating the complexities of crimes against humanity of murder in relation to killings which are part of law enforcement in riot control contexts. In light of Grover's own suspicions above, one might justifiably speculate that legislative inaction over such a complexity during the ICC statute drafting process was deliberate to perpetuate ambiguity in state parties' interest. In the alternative, one might wonder whether it was genuinely never anticipated that the crimes against humanity regime would extend to law enforcement contexts away from the contexts within which they were developed, or whether there was still some unconscious presumption that crimes against humanity would always occur in situations where they could be associated with armed conflict situations, even though there was no longer a legal requirement for a war nexus.

Whichever speculation one might make, what remains clear is that the failure to delineate crimes against humanity in riot control contexts presents a challenge for complying with the legality requirement under the ICC statute. The inadequacy of the Statute and Elements of Crimes in this respect have led the Court to conflate armed conflict and riot control parameters, which avoids clarity of definition for critical concepts under article 7 such as an 'attack', 'civilian population', 'murder' and 'other inhumane acts' in riot control contexts. This conflation of concepts and boundaries between armed conflict and law enforcement is especially detrimental for legality as it misses the critical difference between the types of protection afforded to civilians in armed conflict versus that accorded to rioters in law enforcement contexts which, conversely, yields a difference between liability for force used against civilians in armed conflict situations and force used against rioters in law enforcement contexts. While the principle of distinction under international humanitarian law (IHL) offers an albeit imperfect legal boundary for establishing liability in armed

conflict for an “attack against a civilian population”, such a boundary does not exist for riot control in law enforcement contexts. This presents a complex challenge for ICC legality as further developed below.

### **3.1 Crimes against humanity: antecedents of armed conflict and theoretical inadequacies**

Bassiouni traces the origin of the term ‘crimes against humanity’ to a 1915 joint declaration that was issued by the then governments of France, Great Britain and Russia as allied forces in World War I, denouncing the Ottoman government’s massacre of the Armenian population in Turkey as tantamount to ‘crimes against civilization and humanity’ (1999: 62). The term was used again in the *1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War* (1919 Commission Report) but was excluded from the Treaty of Versailles (1919) which restricted its jurisdiction to prosecuting war crimes perpetrated by the German military personnel during World War I. The exclusion of the term followed an objection by the United States that unlike war crimes, the juridical content of ‘laws against humanity’ could not be defined and varied with each individual state (1919 Commission Report para 63-4, Bassiouni 1999: 63-5). Despite its exclusion from the legal text, the phrase was used continuously by the 1919 World War I Commission but there was persistent timidity by some governments over its use, which in turn weakened the normative legal development of the crimes (Bassiouni 1999: 63-7). This divergence of attitudes towards crimes against humanity saw its way into the post-World War II legality controversies as has been detailed above. What is apparent in tracing their history is that including the post-world war II Nuremberg and Tokyo tribunals and later to the ad hoc ICTY, ICTR, SCSL, tribunals, the development and prosecution of crimes against humanity under treaty law has occurred in connection with armed conflict contexts as opposed to situations of law enforcement during peacetime. By his observation, Robertson (2012), points out that although Article 6 (c) of the Nuremberg Charter criminalized crimes



against humanity perpetrated before or during the war, it still required that the acts be committed in connection with “any crime within the jurisdiction of the court” and that this suggested albeit ambiguously, that such crimes had to be connected to war crimes and the crime of aggression, which occurred within an armed conflict context. Subsequent developments in the ICTY and ICTR statutes followed similar patterns. The ICTY statute specified jurisdictional authority for crimes against humanity when “committed in armed conflicts whether international or internal” (ICTY Statute, article 5). Bassiouni speculates that maintaining the war nexus under the ICTY framework was aimed at avoiding the post-World War II challenges to legality explored above, which plagued the Nuremberg Tribunal in the prosecution of crimes against humanity (1999: 195). On the other hand, he notes that the ICTR broke the war nexus by merely defining crimes against humanity as a “widespread or systematic attack against the civilian population” (ICTR Statute, article 3, Bassiouni 1999: 195). The same has been said of the ICC Statute’s article 7 definition whose threshold requirements similar to those of the ICTR, make no mention of armed conflict (Ambos and Wirth 2002: 22, Sadat 2002:154).

Bassiouni further speculates that the exclusion of the “armed conflict” nexus under the ICTR Statute was due to the unwillingness of the Security Council to define the conflict in Rwanda as a non-international armed conflict as this fact would have been difficult to establish and would have required an assessment of the extent and nature of involvement of France, a member of the said Security Council, in that conflict (1999:196). It is argued however, as has been argued elsewhere (Ambos and Wirth 2002: 22, Sadat 2002:154), that the reference to civilian population under the ICTR statute betrays a continuing armed conflict nexus even though the relevant treaty provision itself makes no express mention of an armed conflict. The same argument can be made with respect to the ICC statute’s provision as will be developed further below. It is thus submitted that a consideration of the ICTR jurisprudence in *Prosecutor vs Akayesu* (ICTR-96-4-T, 1998: para 582) reveals an understanding that the application of article 3 crimes against humanity were occurring in an armed conflict context as can be seen from the tribunal’s application of an IHL definition of a civilian population in the following terms:

The Chamber considers that an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.

The foregoing description of civilians is further reinforced by that tribunal's conviction of the accused for crimes against humanity of murder, having ordered the killing of individuals who were taking 'no active part in hostilities' (*Akayesu* ICTR-96-4-T, 1998: paras 649 -656 emphasis added). The said hostilities were evidently the armed conflict between the then government forces of Rwanda, The *Forces Armées Rwandaises* (FAR) and the armed opposition forces dubbed the Rwandan Patriotic Front (RPF) as recognized by the ICTR (*Akayesu* ICTR-96-4-T, 1998: paras 621, 627).

The foregoing briefly illustrates the novelty of the application of crimes against humanity independent of armed conflict parameters and more specifically, in contexts exclusively concerned with questions of law enforcement. I argue that this lack of independent discourse outside armed conflict contexts has greatly hindered the development of a normative framework for crimes against humanity in their own right (Ambos 2011: 287,288). I suggest that this inadequacy informs to an extent, the challenges in extending the definition of these crimes to riot control contexts whilst avoiding implications for 'large scale innovation' enunciated under Grover's legality methodology above. This concern moreover, is exacerbated when it is appreciated that the theoretical foundations of crimes against humanity as a concept are equally nebulous as briefly demonstrated below.

### **3.1.2 The theoretical ambiguity of 'crimes against humanity'**

While this study is not an interrogation into the philosophical foundations of crimes against humanity, it is submitted that a brief appreciation of the theoretical problems underpinning the nature of the crime is warranted. Engaging with this question is necessary for an understanding of the nature of the ambiguity challenge plaguing crimes against humanity,

particularly with questions around measuring force and identifying the levels of force necessary to establish culpability under the ICC statute framework without negating the necessities of lawful state coercion by the Hobbesian sovereign.

According to Macleod, there is no final philosophical account on crimes against humanity (Macleod 2010: 282). The problem arises when trying to establish the meaning of 'humanity' and appealing to this 'humanity' (2010: 281). He concludes that no arguments about 'human nature' can provide philosophical meaning for the crime and instead calls for further research to build 'a philosophical account of crimes against humanity' (Macleod 2010: 302). Arguably similar observations partly inform the call for a specialized convention defining crimes against humanity (Bassiouni 1999: 199). Yovel (2006) points out that arguments by some scholars towards an "essential humanness" as the basis for a theory of crimes against humanity were stuck in a metaphysical conundrum (2006: 53-55). The dilemma is also recognized by Luban (2004: 127) who observes that the lack of a single technical coordinated definition and philosophy for crimes against humanity is one of the crimes' major definitional challenges. Vernon (2002: 243 -5) theorizes that crimes against humanity are about the rule of law, authority, the monopoly of force, and the inversion of the power accruing from it. However, he also fails to offer a more specific theory which can distinguish crimes against humanity from any other theory of human rights violations.

I argue that the lack of a single theory of crimes against humanity displayed above means that crimes against humanity depend highly for their clarity on specific statutory definition and the lack of such clarity opens them up for controversies under the principle of legality amplified by a wide range of conflicting definitions. Historically, rebuttals to criticism for the violation of legality have been grounded in politics rather than law as enumerated below.

### 3.1.3 Crimes against humanity as victor's justice

The development of crimes against humanity was historically grounded in the context of victors' justice. While the Nuremberg tribunal was able to offer a response and manoeuvre the legality challenges levelled against it by subsuming the principle of legality under the principle of justice, such justice has variously been critiqued as 'victors' justice'. The criticism goes that the victorious allied powers flouted the rule of law and enunciated crimes against humanity under the philosophy of 'might is right', thereby creating new law based on the power which they derived from their victory of the second world war (Bassiouni 1999: 114, Robinson 1999: 43). Indeed, Garibian argues that the real problem for the allied forces at Nuremberg was not legality *per se*, but the implications that applying crimes against humanity outside armed conflict might have for the principle of sovereignty (2007: 9, 101). He makes the following argument (2007: 101):

Thus the doctrinal analysis that seeks to show that the problem of the legality of the Nuremberg Charter is a false problem also enables us to bring out the most important constraint put on the Tribunal: respect for the "sacrosanct" principle of state sovereignty, which implies non-interference in the internal affairs of other states. While such interference was deemed acceptable in the case of war crimes, it was still, in 1945, a source of embarrassment and uneasiness when the issue was interference for the purpose of repressing crimes committed in peacetime, such as the crimes against humanity perpetrated by the Nazis before 1939. Nuremberg left the question of crimes against humanity in the strict sense "unresolved"; the Tribunal consistently linked such crimes to war crimes. In Elizabeth Zoller's estimation, there is a simple explanation for this: the concept of a crime against humanity and the juridical regime that follows from it 'virtually abolish the international legal order and the sovereignty that founds it.

Basing on Garibian's argument, I argue that in the interest of sovereignty, the allied powers adopted an approach to legality as a principle of justice because it was their justice that was

being applied against the losing powers, over conduct which occurred in an armed conflict that they had won. Applying the same principle of justice to Germany's internal affairs would not have been based on the same moral authority that they derived from winning the war. Without the war nexus they would have implicated their own sovereignty over their internal law enforcement affairs. It is quite apparent in this context, how the need to preserve the Hobbesian sovereign's monopoly over internal affairs influences that sovereign's actions at the international level.

It has been argued that in contrast to the Nuremberg process, article 7 of the ICC statute proscribing crimes against humanity was not imposed by some sovereigns over others, but rather emerged after negotiations between over 160 sovereign states and is on this basis a firm foundation for the future prosecution of crimes against humanity (Robinson 1999: 43, 57). I argue however, that while no allied powers had political control over the development of crimes against humanity in the ICC context, the principle of sovereignty which historically influenced the underdevelopment of crimes against humanity in internal law enforcement contexts is the same principle which delivered them in their current form under the ICC statute, where they are still without an independent grounding theory and are still heavily reliant on the crutch of armed conflict for definition.

The inadequacy of crimes against humanity is brought to the fore in complex law enforcement situations of riot control. The underdevelopment of the crimes has sustained unclear parameters for international criminal responsibility in these contexts and has prevented the effective limitation of the Hobbesian sovereign's discretion under article 7 of the ICC Statute. In these contexts, I argue that the definitions of the crime against humanity of murder and of other inhumane acts under the ICC statute and Elements of Crimes cannot satisfy the Statute's strict legality standards. It is no wonder therefore that for the few situations which have come before the Court where crimes against humanity have been alleged in law enforcement scenarios, the ICC appears to have avoided a comprehensive analysis to distinguish between law enforcement and armed conflict contexts or as indicated above, has conflated the two concepts and collapsed law enforcement analyses under armed conflict analyses. Two such cases, both involving use of force in post-election violence in Kenya and Côte d'Ivoire respectively will be examined in turn in addition to an analysis of the Article 7 and Elements of Crimes framework, and the other sources of law for interpretation under the ICC statute.

#### **4. The ICC Statute and Elements of Crimes as a source for defining crimes against humanity in riot control contexts**

As previously argued, the definition of crimes against humanity within the ICC framework is inept for identifying the unlawful use of force in riot control contexts. This section posits that the definitions of the crime against humanity of ‘murder’ and ‘other inhumane acts’ in as far as they do not make reference to conduct which occurs in riot control contexts, only offer an illusion of legal certainty which unravels when applied to the still undefined scope of lawful killing by the Hobbesian sovereign in riot control contexts. This lack of definitive scope is maintained through the circularity of language used under the ICC Statute and Elements of Crimes. I also argue that the legislative inaction which occasioned this circularity is highly suggestive of the possibility of a deliberate omission by the state parties acting to safeguard monopoly over their internal law enforcement as Hobbesian sovereigns or suggests that a deserving consideration of context specificity was derailed by the inclusion of IHL language, namely ‘civilian population’, which created the illusion of legal certainty offered by the principle of distinction for establishing boundaries of lawful force in armed conflict situations. The latter suggestion plays out in the conflation of IHL and law enforcement language in Kenya and Cote D’Ivoire’s post-election violence situations which both came before the ICC for consideration. The section argues that as the main source of law and ‘proper law’ of the ICC (Pellet 2002: 1077), the Statute’s non-articulation of the scope of crimes against humanity in riot control contexts is a fundamental omission indeed and it exposes the court’s interpretive process to a high risk of judicial innovation and public policy controversy in violation of the principle of legality. It is also indicative of a weak foundation for the other ICC Statute sources of law, namely, treaties and custom in delineating clear legal boundaries for contextualizing force used in riot control as crimes against humanity.

#### **4.1 The ambiguity of ‘murder’, ‘other inhumane acts’ and the policy requirement**

The ICC Statute defines crimes against humanity under article 7 (1) in the following terms:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

...

...

...

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 7 (2) proceeds to give a threshold definition for the foregoing crimes as follows:

For the purpose of paragraph 1:

(a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

As far as defining crimes against humanity in riot control contexts is concerned, the foregoing article 7 (2) threshold requirements of ‘wide spread’ or ‘systematic’ do not present critical definitional problems. This is so because the ‘widespread’ scale of loss during a riot or the existence a plan to apply force to riot control contexts, do not on their

own demonstrate whether the substantive nature of such loss arose from murder within the ICC statute, or from a plan implemented pursuant to a ‘policy to ‘attack’ a ‘civilian population’. The starting point for determination which is also the critical point for establishing culpability, remains whether the manner and level of force used to control the riot were ‘lawful’ and where and how the parameters of such lawfulness are established. For riot control where the legal boundaries are largely ambiguous, the core definitional issues are not the peripheral threshold qualifiers but the fundamental issues concerning the lawfulness of conduct by law enforcement officials.

There is agreement among some writers that the foregoing article 7 (2) threshold definition has the effect of creating a conjunctive but low threshold test, which according to Robinson (1999: 51) requires the proof of multiple acts *and* a policy to commit these acts before proceeding to the higher threshold where the option may be taken to prove whether the acts were either wide spread or systematic. Ambos (2011: 284) refers to it as the ‘widespread-systematic’ test, reiterating that Article 7 obscures the otherwise clear disjunctive ‘wide spread or systematic test by replacing ‘wide spread’ with ‘multiple commission of acts’ and ‘systematic’ with ‘a state or organizational policy’ and interconnects them in so far as the multiple commission of the acts in paragraph 1 must be based on a ‘Policy’. Thus in Robinson’s assessment, (1999:51) should the prosecutor opt to prove the widespread element, the conjunctive requirement of a state or organizational policy will minimize concerns about isolated acts being characterized as crimes against humanity, while if the choice is for the systematic approach, the concerns over the scale of the crimes will be addressed from the requirement of a course of conduct and the multiple commission of the acts in Paragraph 1. Indeed according to Lee (1999:97) during the negotiations on the Rome Statute, the inclusion of the “policy” requirement was essential in order to reach a compromise on crimes against humanity, as it was a means through which unrelated and isolated in humane acts could be collectively described as an *attack* against the civilian population. Triffterer (1999:13) also emphasizes that the requirement of a policy is essential to the ingredients of the crime. From such an analysis, Ambos (2011: 285) concluded that ultimately, the policy requirement is mandatory to prove crimes against humanity under article 7. According to him, the concept of crimes against humanity as a political crime confirms the mandatory requirement of a policy as the only thing that can turn isolated acts of violence into crimes against humanity.



In light of these arguments, I reiterate that one can distil the crimes against humanity definitional concerns down to the nature of the state policy adopted to quell riots, specifically whether such policy aimed at committing ‘murder’ or ‘inhumane acts of a similar nature’ and collectively, whether such a policy then amounts to an ‘attack’ against the ‘civilian population’. These segments; ‘murder’, ‘other inhumane acts’, ‘attack’ and ‘civilian population’, which are each critical for a final basis for alleging culpability under article 7, are the major definitional challenges for riot control contexts as argued above and as will be explored in turn below.

#### **4.1.1 The State policy requirement dilemma**

There is some consensus among scholars on what amounts to a ‘policy’ to commit crimes against humanity. According to Bassiouni (1999: 249) ‘state action’ or ‘policy’ implies the use of public power and resources or of public or legal authorities acting under the law to perpetrate actions which if carried out by another person would be criminal. This definition seems to share common elements with the threshold requirement of a ‘systematic attack’, the exception being that the latter requires a higher degree of organization and substantial public resources (Robinson 1999: 50). Ambos (2011: 286) points out that the policy requirement differs from ‘a systematic attack’, where one typically needs to show some guidance by the accused as to intended victims of the attack, while a widespread attack that is not systematic will require proof of a policy of deliberate inaction or acquiescence on the part of the accused. In other words, almost all state or organizational actions involving the application of public resources such as police or military personnel and weapons would logically require the application of the ‘systematic attack test’ which might very well go to prove the policy requirement.

However, for all the foregoing unanimity, there isn’t a recognized distinction between ‘state policy of attack’ from law enforcement in riot control contexts where the use of public power and state resources are employed pursuant to a plan and on a wide scale. This omission yields what is here referenced as the ‘policy requirement dilemma’. The omission

is a dilemma because of the definitional challenges and political controversy bound to arise in drawing such a distinction. Bassiouni attempts a definition, stating that a state policy of attack can be established from a range of actions whose scale and nature requires the use of government resources acting under ‘arbitrary’ power. He then proceeds to state that such a policy can be perpetuated by an ‘absolutist’ government claiming the legitimacy of positive law and rejecting any discrepancy between law as an instrument of ideology and power (1999: 249-250). To this end he criticizes states which justify their excesses on the claim of necessity for the preservation of public order (1999:250).

However, Bassiouni’s attempted definition is highly subjective and politicized and it cannot be said to have been contemplated within the jurisdiction of the ICC to determine ‘policy of attack’ in this way. Indeed any attempt at a similar assessment in the ICC interpretive process would almost certainly be a violation of the rule against large scale innovation and public policy controversy contrary to the principle of legality and Grover’s guidelines indicated above. As suggested by Bassiouni, the definition would require the ICC to make a pronouncement on whether the state or government in question was an absolutist or democratic government. This would divert from the ICC’s mandate which is restricted to individual as opposed to state responsibility and would certainly drive the court into political terrain.

In order to gain a more legally grounded definition of the state policy in issue, it is pertinent to consider the segments referenced above, namely, ‘murder’, ‘other inhumane acts’, and attack ’and‘ civilian population.

#### **4.1.2 Murder and other inhumane acts**

Article 21(1) (a) of the ICC statute lists as main sources of law from which the ICC may draw for interpretation in the following terms:

The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

The other sources listed include treaties and custom and will be considered under section four of this chapter.

Article 21(3) further provides that:

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.

Pellet (2002:1077) observes that Article 21 stipulates the ICC Statute as the supreme interpretive source for the Court. He observes however, a controversy with Article 21(3) above, which he views as a super legality that might compromise the authority of the other sources of law listed under article 21 by broadening the scope of sources of law into the undefined and murky territory of ‘internationally recognized human rights’. The latter, he observes, have not been defined by the ICC statute and would have to be defined by the Court (2002:1080). Pellet’s concerns clearly raise implications for the principle of legality. Grover has also warned that such a provision might be used as the basis on which to adopt broad interpretations of crimes under articles 6, 7 and 8 of the ICC Statute, using the broad objectives and purposes of human rights. However, she rightly suggests that in fact, article 21(3) was arguably included specifically to safeguard the fair trial rights of the accused against *nullum crimen* violations. Failing in this, she further suggests, a super legality eventuality could be avoided for articles, 7 and 8 interpretation, through a side by side reading of the said article 21(3) and article 22(2) on strict construction. This way, article 22(2) would operate as the *lex specialis* for the interpretation of crimes, while Article 21(3) lies in the background, thereby harmonizing the two provisions (Grover 2010: 562, 2014).

The ICC statute’s interpretive scope for ‘murder’ and ‘other inhumane acts’ will ensue within this framework.

As extracted above, article 7 (1) (a) and (k) lists murder and other inhumane acts causing great suffering, or serious injury to body or to mental or physical health as examples of crimes against humanity. Other acts listed include: extermination, enslavement, deportation, torture, forced pregnancy, persecution, apartheid and forced disappearance. It

is submitted that while these actions may be perpetrated within a riot control context, they are not central to the question under study, which is concerned with the establishing what level of force can be lawfully used in riot control contexts. The most proximate conduct through which this inquiry can be guided is conduct that might amount to murder or the more generic inhumane acts causing injury and mental or physical suffering, which are the focus of this study.

While the ICC statute itself offers no definition for murder and other inhumane acts of its nature, the Elements of Crimes do. Article 7 (1) (a) of the Elements of Crimes lists the elements for the crime of murder as follows:

1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The article contains a footnote explaining that the term ‘killed’ in paragraph 1 above is interchangeable with the term ‘caused death’. As suggested above, this definition is circular as it offers no contextual definition for murder or causing death. It is of limited import in riot control contexts where state policy permits the use of lethal force in riot control contexts moreover within the ambiguous discretion of the Hobbesian sovereign as will be further illustrated in the chapter and indeed the rest of the study.

In his analysis of this subject, Bassiouni (1999:301) states that while the protection of life is a general principle, and all the major criminal justice systems include the offence of murder under their national laws, this does not automatically make murder an international crime. He traces (1999: 304) the formulations of murder as a crime against humanity under the London Charter and the Charters of the ICTY and ICTR and concludes that in his assessment, the definitions failed to fully address some major concepts of murder such as ‘lawful justifications’ in otherwise unlawful killings. In analyzing the ICC statute, he states that this omission remains and as such, the ICC leaves unaddressed, the very questions that were raised under the ICTY and ICRT statutes. Moreover, Politi and Nesi (2001: 82) also seem unsure about the exact scope of the offence of murder envisaged under Article 7 of the Rome Statute. They state that it is uncertain whether mental elements such as the ‘intent

to cause great bodily harm resulting in death’, ‘reckless’ or ‘negligent killing’ are also envisaged by the ICC statute, and point out that there is disagreement among some scholars on the issue.

Concerning ‘other inhumane acts’, the Elements of Crimes are equally non comprehensive and provide a definition in article 7(1) (k) as follows:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population

Like the provision offering a definition for murder, the foregoing definition is without more essentially a repetition of the already inept article 7 provision in the statute. It repeats the term ‘inhumane’ and does not offer it specific content. While this general provision might be assumed to be an indicator of a looser legality requirement as argued by Grover (2014: 216-19, 398-403), it still is a cause for concern for the principle of legality (Bassiouni, 2011b: 411).

#### **4.1.3 Legislative inaction and judicial innovation**

The legislative inaction over so critical an issue is highly indicative of a deliberate omission of certainty in order to perpetuate ambiguity to the benefit of the ICC state parties, in this case the Hobbesian sovereign, over the question of force used in riot control contexts. As stated by Grover, states do use vagueness and ambiguity to their advantage by advancing arguments that treaty provisions favour their version of interpretation of lawful conduct (2014: 148). In light of this argument, it is especially apparent that such an omission is a paradox given the general agreement by ICC Statute state parties to define with clarity and precision the crimes within the jurisdiction of the court and in particular, the intention of

the drafters of the Elements of Crimes to use these Elements to “give teeth to the *nullum crimen*” principle (Stahn and Van den Herik 2012, Grover 2014: 747, Pellet 2002: 1060). If indeed drafters of the statute intended to use a strict legality requirement to limit the court’s jurisdiction over their conduct and to ensure fair warning to themselves by extensively listing the crimes within the ICC’s jurisdiction Grover (2014: 141) then culpability for murder or ‘other inhumane acts’ following force used in riot control by state officials ought to have featured prominently in the definition of crimes against humanity. Instead the states parties made no mention of this complexity, yielding a highly and it is argued, conveniently ambiguous article 7 framework.

Even if the omission was not deliberate on the part of state parties, it is suggested that the absence under international law of a framework clarifying lawful killing in riot control contexts may have negated any consideration of the application of article 7 to such contexts. In any event, the circularity of law on which the Hobbesian sovereign thrives to perpetuate discretion over force used in riot control contexts, also manifests in the circularity of the legal definitions of murder and ‘other inhumane acts’ as indicated above.

Without a contextualized definition for murder and other inhumane acts, I argue that an attempt at interpreting crimes against humanity in riot control frameworks would lead the court into an arena of innovation already referenced in Grover’s legality guidelines, thereby opening the court up to criticism for a breach of the separation of powers doctrine of legality. As indicated earlier one of the tenets of the separation of power interest under Grover’s proposed methodology is that the court respects legislative inaction so as to avoid reproach that it has substituted its own intentions for those of the legislators (Grover 2014: 148). However, as also critiqued above, Grover’s methodology contains no indicators for what kind of interpretive approaches would amount to legislative innovation which renders it impossible to anticipate how the ICC might circumvent the legislative inaction around the definition of murder and inhumane acts, apply it to riot control contexts and fulfil its interpretive mandate well within the principle of legality. This incoherence is indicative of the enduring dilemma of circularity posed by the Hobbesian sovereign’s monopoly over the law on force used in riot control.

The same dilemma arises with respect to defining a ‘state policy of attack against a civilian population’, with the main challenge for legality in this scenario being the demarcation of armed conflict parameters.

#### **4.1.4 ‘Attack’ and ‘civilian population’**

This section argues that the legislative ambiguity and inadequacy of article 7 for riot control contexts is also due in part to the inclusion of references to IHL which derailed a necessary consideration and delineation of parameters for a peace time definition and application of crimes against humanity. In particular, the inclusion of reference to ‘civilian population’, and ‘attack’ creates the illusion of legal certainty offered by the principle of distinction for establishing boundaries of lawful force in armed conflict situations. It is also suggested that this retention of armed conflict terminology is indicative of the fact that the state parties never gave significant consideration to the application of crimes against humanity to law enforcement scenarios. This implies that the ICC would have to venture into new territory to apply this framework to such contexts at the risk of a legality challenge. It is argued that this suggestion explains the ‘avoidance approach’ taken by the ICC thus far through the conflation of IHL and law enforcement issues in the Kenya and Cote D’Ivoire post-election violence situations which have come before it for consideration. This argument is developed further below.

#### **4.1.5 Elements of crimes and the circularity of defining ‘attack against the civilian population’**

As indicated above, the ICC statute contains no definition for ‘a State policy of attack against a civilian population’ yet the existence of such a policy is a foundational basis for establishing crimes against humanity under article 7. As the investigation of definitions for ‘murder’ and ‘other inhumane acts’ have proved unsatisfactory, a consideration of the definitional scope for the other sections; ‘attack and civilian population’ are warranted.

Unfortunately, a review of the Statute and the Elements of Crimes reveals a similarly incomprehensive legal framework. The Statute and Elements' reliance on the war nexus terminology creates confusion and opens up the statute to complex legality challenges. Article 7(3) of the elements of crimes in offering a definition states as follows:

‘Attack directed against a civilian population’ in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population.

Yet again, the definition offered essentially reproduces the description provided under the Statute's article 7(2) (a) and adds nothing except to mention that the acts enunciated under article 7 of the Statute need not be part of a military attack. This addition offers no clarity of application of crimes against humanity to riot control contexts in peace time for it still concludes with the requirement that such an attack be against ‘the civilian population’ without defining the composition of such a population outside the context of an armed conflict.

According to Ambos and Wirth (2002:22), the threshold requirement of ‘civilian’ in an ‘attack against the civilian population’ is most likely a result of confusion based on common article 3 of the Geneva Conventions of 1949 which offers protection to persons taking no active part in hostilities in non-international armed conflicts. The reason for such an assessment stems from the fact that Article 7 dispensed with the war nexus requirement and as such there is no logic to the ‘civilian-combatant’ distinction. In her own consideration of this controversy, Sadat ( 2002:154) points out that if Article 7 evolved to dispense with the required application of the Geneva Conventions, the presumption should be that no one in a ‘conflict’ is a ‘non civilian’ for purposes of Article 7. In further probing the ‘civilian’ requirement, Sadat (2002: 154) alludes to situations of massacres and atrocities in contexts not deteriorating to the level of an armed conflict and which therefore do not trigger the application of war crimes provisions. She rejects the ‘civilian-combatant’



distinction in such scenarios, considering a situation where Government soldiers and their family members might be part of or are victims of such a massacre. Sadat (2002:154) in fact points out that for a provision that was meant to fill the gap left by international humanitarian law (IHL), by the retaining this ‘civilian –combatant’ distinction the Rome Statute is in regression. Ambos observes that recourse to the IHL definition of ‘civilian’ during ‘peace time’ is not possible and recommends that the term should be deleted from the Statute as it cannot be reconciled with the ‘humanitarian character’ of crimes against humanity. He further suggests that maintaining the reference to ‘civilian’ under Article 7 meant that its drafters still regarded crimes against humanity as an extension of war crimes and not a crime in its own right (2011:287,288).

In all the foregoing discussions the main point of convergence appears to be that maintaining the ‘civilian’ element as part of the threshold requirement for crimes against humanity meant that certain members of the state forces might be left unprotected in situations not amounting to armed conflict simply by virtue of their being part of the ‘armed forces’. While Sadat (2002: 154) makes this argument with reference to ‘members of the Government forces and their families’, Ambos (2002:24) makes it with reference to ‘any individual’ and later attempts to make it by reference to the police forces (Ambos 2002:25) although he still does so within the context of an armed conflict

None of the scholars however analyse their arguments within the ICC regime and within the context of law enforcement in riot control contexts. It is no wonder therefore that the definitional challenges thrown up by these issues manifested only recently before the ICC, raising questions which are central to the tension between the ICC’s legality requirement and the Hobbesian sovereign’s discretion to use force to implement the law over its territory. That the ICC has thus far avoided a clear legal articulation of these contradictions is quite telling of the ineptness of article 7 in defining the scope of culpability for crimes against humanity in riot control contexts, as evidenced in the examples of Kenya and Cote d’Ivoire below.

#### **4.1.6 The Decision pursuant to article 15 of the Rome Statute authorizing an investigation into the situation of Kenya (ICC-01/09, 31 March 2010).**

Following disputed presidential election results in 2007, Kenya erupted into violent protests and ethnic attacks which resulted in the death of over 1,000 people and the displacement of about 500,000. In a bid to prosecute the perpetrators of the said violence, the ICC prosecutor commenced criminal investigations for crimes against humanity before the ICC (BBC, 2010). Judge Hans-Peter Kaul's dissenting opinion in the request to authorize an investigation into the Kenyan situation (*Kenya Situation* 2010, ICC-01/09) warned against what he called the 'downscaling of crimes against humanity into ordinary crimes', which would be a possible infringement on state sovereignty (*Kenya Situation* 2010, ICC-01/09: para.10). He took a strict approach to the interpretation of crimes against humanity calling for recognition of their distinction from human rights violations (ICC-01/09: para 53). The judge noted that the report of the Waki Commission which was constituted to investigate the post-election violence indicated that the Kenya Police had used excessive force in some instances to contain the violence, but also that in other instances the police had been overwhelmed and would not act to avert the violence. On this basis the Judge formed the opinion that the multifaceted information regarding police behaviour could not lead him to conclude that there had been an 'attack against the civilian population', let alone one that had been planned pursuant to a State policy or plan (*Kenya situation* ICC-01/09: para. 81-2). In his opinion, the police violence seemed to have been spontaneous, opportunistic and retaliatory in the course of events (*Kenya situation* ICC-01/09: para.119). This, even after observing that the police on their own admission fired live bullets into the crowd and opened fire without warning, as a tactic to push the crowd out of the towns and into the slums, actions which resulted in over 90 percent of the deaths in Nyanza province alone (*Kenya situation* ICC-01/09: para.118). The judge observed further that the Kenya police were operating in a context characterized by chaos, anarchy and collapse of the state, and

almost a total collapse of law enforcement agencies (*Kenya situation* ICC-01/09: paras. 152-3).

However, the majority of the Judges authorized the investigation of the police for crimes against humanity on the basis that their actions indeed amounted to an ‘attack against the civilian population’. I argue that this finding was based on an uncritical interpretation and application of article 7 of the ICC statute which resulted in a conflation of armed conflict and law enforcement scenarios and was a violation of article 22’s strict legality requirements. Going by Grover’s legality guidelines for the application of the said article 22, the decision failed to address the ambiguities surrounding the foregoing concepts of ‘murder’ and ‘attack against the civilian population’ and resulted in a decision which created more confusion than clarity concerning liability for force used during riot control. It was also a decision based on the facts of the violence as opposed to principles of law and as such fell short of Grover’s legality guidelines. Moreover, in so conflating armed conflict and law enforcement scenarios, the decision also adopted an expansive as opposed to incremental approach to crimes against humanity in riot control contexts, also contrary to Grover’s ICC’s legality guidelines. The arguments are developed further below.

#### **4.1.7 ‘Attack against the civilian population’**

To begin with, the judges observed that the police allegedly executed over 500 members of Mungiki, a criminal gang which was perpetrating violence against opposing ethnic groups, and also allegedly killed members of the Sabotage Land Defence Forces (SLDF), another criminal gang against whom the police used violence. The chamber then considered these deaths together with the alleged killings of unarmed women and children and referred to them collectively as an ‘attack against the civilian population’ (*Kenya situation* ICC-01/09: paras. 106-9). In defining the reference to an ‘attack’, the chamber acknowledged that the word itself was not defined in the statute, but that from the elements of crimes, it referred to a campaign or operation carried out against a ‘civilian population’ (*Kenya situation* ICC-01/09para. 80). In defining what a civilian population is, the chamber simply offered that

they were ‘civilians as opposed to members of the armed forces and other legitimate combatants’ (*Kenya situation* ICC-01/09: para.82). It did not explain who legitimate combatants were and the circularity of the definition left unexplored the phenomenon of ‘armed protestors’ in a civil disturbance-bordering on armed conflict. In the case of Kenya this phenomenon was embodied by members of the Mungiki and SLDF, who were armed and perpetrating violence and against whom the Kenyan Police were mandated to protect citizens, as part of law enforcement. It must be noted that the foregoing pronouncements were made despite the fact that the chamber had made no determination that the situation under investigation in Kenya amounted to an armed conflict.

This obscuring of concepts was a missed opportunity for the court to begin exploring some of the definitional difficulties surrounding the ambiguities of article 7 explored above. Moreover, in the confirmation of charges decision in *Prosecutor v. Francis Kirimi Mutahura, Uhuru Kenyatta & Mohamed Hussein Ali* (Case No. ICC-01/09-02/11, 23 January 2012) the court subsequently dismissed charges against the Kenyan Commissioner of Police at the time, on the basis that there was no identifiable course of conduct amounting to crimes against humanity by the Kenyan Police (*Mohamed Hussein Ali* ICC-01/09-02/11: para. 422). There was no assessment whatsoever of the extensive allegations of excessive force by the police, which were the basis for the chamber’s initial authorization of an investigation. As such, there was no chance to measure whether such force amounted to a crime against humanity as had been alleged and questions about legitimate or illegitimate use of force by police in civil disturbances bordering on armed conflict were left unexplored.

However, this question will very likely arise again for the court in the not so far future as already exemplified by the subsequent situation of Côte d’Ivoire which presented with similar events as occurred in Kenya.

#### **4.1.8 The Decision on the confirmation of charges in the case of *Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11, 12<sup>th</sup> June 2014).**

As with the situation in Kenya, the situation in Côte d'Ivoire arose pursuant to disputed presidential election results which occasioned alleged crimes against humanity violations between 2010 and 2011. In the ICC confirmation of charges against the accused and then incumbent president, Mr. Laurent Gbagbo (*Côted'Ivoire Situation* 2014, ICC-02/11-01/11), it was observed that on 16<sup>th</sup> December 2010, anti-Gbagbo demonstrators who were advancing towards Radiodiffusion Television Ivoirienne (RTI) were attacked by Defense and Security Forces (FDS) units with the support of militia and mercenaries, allegedly using gunfire and fragmentation grenades to kill some of the protestors and injure others (*Côted'Ivoire Situation* ICC-02/11-01/11: para.30). It was alleged that there were FDS elements with sniper rifles on roof tops who shot down at fleeing demonstrators and even pursued the demonstrators after dispersal, arresting and attacking them in the process (*Côted'Ivoire Situation* ICC-02/11-01/11: paras. 32, 34).

In Mr. Gbagbo's defense, it was agreed that violent repression was used, and resulted in the death of at least 45 people and injury to at least 54. It was however argued that the repression of these demonstrations did not occur in the context of a 'civilian' demonstration, but rather that it was part of an attempt by the opposition's supporters to take over power by force (*Côted'Ivoire Situation* ICC-02/11-01/11:para.38). It was argued further that indeed on the very day of the alleged violations, there had been exchange of fire between the FDS who were the incumbent's and government troops and the opposition armed groups, which had resulted in the deaths of FDS troops. It was also argued that in that context, these pro opposition forces aimed to use the demonstrators as a pretext to attack the RTI which was a key radio transmission center, and through it, facilitate a takeover of power by force (*Côted'Ivoire Situation* ICC-02/11-01/11: paras. 39).

However, the Chamber concluded that the events involving armed troops occurred in other locations outside the context of the ‘civilian demonstration’. It is here argued that whether the Chamber realized it or not, it did not examine the defense’s argument that the government perceived itself as being under an armed attack and that all opposition protests and actions within that context amounted to active support for an opposition armed group. Such an argument should have solicited an examination of the complexities underlying the question of when, how and by whom should contexts such as these be classified as armed conflicts so as to apply the principle of distinction to identify ‘combatants’ and ‘civilians’. This inquiry would have triggered a discussion of sub-issues regarding whether the demonstrators were ‘civilians’ in a law enforcement context along with a legal explanation for such a characterization, or whether they were civilians in an armed conflict context along with the foregoing interrogation as to who gets to declare the existence or non existence of an armed conflict. This inquiry would also have led to a determination of whether, the rioters by virtue of their alleged effort to oust the government, were part of the combatants and therefore legitimate military targets in an armed conflict scenario. A consideration of these issues was warranted as it was relevant to a determination of the legality or otherwise of the force which the defendant allegedly used against the said demonstrators.

However, the Chamber continued to conflate IHL and law enforcement concepts in the alleged shooting of ‘civilians’ on 17<sup>th</sup> March 2011. Yet again the defense persisted in their argument that given the presence of combatants in Abobo, the alleged violations did not constitute an ‘attack against the civilian population’ (para. 62). The chamber counter argued that the presence of combatants in Abobo did not contradict the ‘civilian nature of the population’ which was targeted by the accused’s armed forces. The Chamber even went further to state that by using an ‘inherently inaccurate’ weapon in a densely populated area the forces orchestrated an ‘attack against the civilian population’. The Chamber’s language strikingly resembles a finding of an IHL violation yet there was no prior attempt to consider at length the questions already highlighted above relating to the existence or otherwise of an armed conflict and the resultant application or otherwise of the IHL principles of distinction and proportionality (*Côte d’Ivoire Situation* ICC-02/11-01/11: para. 63).

By avoiding a rigorous inquiry into the demarcation of IHL and law enforcement contexts in the foregoing scenarios, it is argued that the court did not establish concretely the legal basis for the confirmation of charges of crimes against humanity for the defendant.

At this point it is important to caution that the forgoing situation of Côte d'Ivoire is still before the ICC and the conclusions formulated may be somewhat premature. If these arguments resurface during trial, it will be interesting to observe how far the Court will be willing to engage on them.

The foregoing examples illustrate how much legal uncertainty the ICC has to wade through for these 'in between scenarios' that are not quite easily identifiable as armed conflicts and are not clear cut as law enforcement in riot control scenarios either. Moreover, the trend seems to show that the Court will very likely have to deal with more of such scenarios in the not so far future.

One other similar scenario under preliminary examination by the court is the situation of Ukraine. On 17 April 2014, the Government of Ukraine lodged a declaration under article 12(3) of the Rome Statute accepting the ICC's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. The Government's communication before the ICC accuses the then Ukrainian President and law enforcement agencies of unlawfully using force in excess of their powers and duties. It further alleges that this violation was systematic and led to the killing of over 100 Ukrainians and other nationals. Among the specifics of the complaint was that the state used water cannons against peaceful protestors at an air temperature of 10 degrees Celsius, and that this occurred in the wider contexts of unlawful detentions, disappearances and torture using organised criminal groups. The case is pending the ICC prosecutor's investigation but it will be interesting to observe how it progresses in light of the foregoing unanswered questions.

This analysis of situations demonstrates the undeveloped and inadequate framework of crimes against humanity in law enforcement situations. I argue that as suggested above, the reference in article 7 to IHL terminologies is in fact reflective of deeper structural issues concerning the independent and comprehensive development of crimes against humanity as an international crime in its own right. This inadequacy is revealed above in how the ICC conflates law enforcement and armed conflict terminologies to confirm charges for

crimes against humanity without making an inquiry as to the application of these crimes in law enforcement contexts such as the riot control situations seen above. The result in both the Kenya and Côte d'Ivoire situations has been an unclear and ambiguous broad based articulation of crimes against humanity in riot control situations which are grounded on facts rather than clear principles of law, and which create no certainty for the purposes of legality. As stated by Grover, a legality violation under the ICC statute can occur well before conviction, including during a determination of jurisdiction and during a hearing for confirmation of charges (2014: 190), which was the case for both situations reviewed.

The ambiguity arising from the vacuum within the article 7 framework means that the critical question in riot control contexts of what level of force is unlawful as to amount to 'murder' or 'other inhumane acts' as part of a 'state policy to attack a civilian population' remains elusive. This anomaly is not cured by the other sources of law from which the ICC can draw for interpretation. As already asserted, this perpetual ambiguity is because these sources also maintain circularity regarding boundaries of force the Hobbesian sovereign may or may not use in riot control situations. This is demonstrated in the ensuing section.

#### **4.2 Crimes against humanity and legality: applicable treaties, principles and rules of international law**

This section maintains that the vacuum within the crimes against humanity framework in article 7 of the ICC statute persists within the relevant international human rights treaties. This is due in part, to the open ended nature of such treaties whose objectives, unlike those of international criminal law permit broad interpretations to maximise protections for victims (Robinson 2010: 115,119, Stahn and Van den Herik, 2012: 23- 4). This problem within the ICC Statute is part of a more systemic problem of the uncritical supplanting of the more liberal legal regimes of IHL and IHRL into a more restricted regime under the ICC Statute (Robinson 2010, Stahn and Van den Herik, 2012). For the case of force used in riot control, I further argue that the relevant sources indicate a context specific approach to establishing whether force used was disproportionate and therefore unlawful, a detriment for the principle of legality which favors predictability and prospective application of the



law. The section traces the role of the Hobbesian sovereign in maintaining such ambiguity and deterring a universal application for proportionate force. The situation is especially critical for those riot control contexts bordering on armed conflict where state discretion supersedes legal constrictions and where the boundaries of civil disturbance or riots and armed conflict are unclear. These arguments are developed further below.

#### **4.2.1 Applicable treaties**

Article 21 (1) (b) of the ICC statute provides as an additional source of law, where the Statute and Elements prove inadequate for interpretation, the applicable treaties and principles and rules of international law. It states specifically as follows:

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;

The provision also includes general principles of law derived from national laws of legal systems of the world as a source of law, which will be examined in a separate chapter. For purposes of this section, attention will be given to ‘applicable treaties’ as a source of interpretation for the ICC while the final sub-section will attend to the rules and principles of international law.

According to Pellet (2002: 1078) even though listed as a source of law, treaties are subordinate to the Statute which remains the main law of the ICC. It follows from this that whatever interpretations may be derived from the relevant treaties, they would have to comply with the Statute. Moreover, borrowing Grover’s argument that article 22 is the *lex specialis* concerning interpretation of crimes in articles 6, 7 and 8, it is maintained that the

applicable treaties referenced here cannot be a direct and independent basis for interpreting crimes against humanity in riot control contexts. The treaties as an interpretive source under article 21 play a gap filling role and as such compliment the Statute and Elements of crimes (Grover 2014: 262, Bitti 2009: 294).

As previous discussions have demonstrated, the challenge of establishing a basis for culpability under article 7 in riot control contexts raises pertinent questions for the principle of legality. A survey of treaties reveals IHL and international human rights law (IHRL) as the two major regimes addressing the question of proportionate force in violent contexts. However, as some scholars have pointed out, such legal plurality within the ICC statute yields contradictions which present a challenge for interpretation and for legality (Stahn and Van Den Herik 2012: 23-4, 41, Robinson 2010). According to Watkin (2004:10), IHL and IHRL share the right to life as a common ground and as such share guidelines on the level of force that can be applied to limit this right. He further advances that (2004: 9) since the state is required to maintain law and order, it may be required to use force, although such power must not be 'arbitrary'. He explains that such power may be used for purposes such as self-defense and defense of person and property, effecting an arrest, dispersing a riot, among others (2004:10). He proceeds to point out that IHL has not developed a comprehensive body of law for application in non-international armed conflicts and for that matter, situations may arise which call for a closer interaction between IHL and IHRL. He points to some such scenarios as including emergencies where the military may be called upon to perform internal policing duties (2004: 14), or where law enforcement forces are responding to a scenario bordering on an armed conflict (2004: 25), or where there is presence or potential presence of firearms within a rioting crowd, calling into question the possible application of several methods of riot control (2004: 33). Watkin further advances that the exact nature of the distinction between such scenarios and armed conflict may not always be clear considering that Common article 3 of the Geneva Conventions does not offer a clear guidance on the conditions required before it can be invoked (2004:26). Sassoli and Olson (2008:610) also deal with similar questions in tackling the interaction between IHL and IHRL, pointing out that while IHL does not apply the principle of proportionality in relation to combatants, the IHRL principle of proportionality is applied more generally provided there is no 'arbitrarily killing'. They point out that most IHRL treaties however, do not define what amounts to 'arbitrary' killing.

The foregoing uncertainties yield two critical challenges for legality in riot control contexts: the lack of what for purposes of this study I refer to as an ‘external boundary’ and the lack of an ‘internal boundary’ for establishing criteria for lawful use of force. I use the term ‘external boundary’ here to refer to a reference point to determine the distinction between a situation of law enforcement and an internal armed conflict. The challenge posed by the lack of an external boundary arises from the inadequacy of IHL treaty provisions under Common article 3 and Additional Protocol II of the Geneva Conventions regarding the existence or otherwise of a non-international armed conflict. It emerges strongly in situations bordering on armed conflict, here interchangeably referred to as “threshold or borderline situations”.

I use the term ‘internal boundary’ to refer to a reference point for determining when lethal force may or may not be used in a law enforcement scenario. The lack of an internal boundary arises out of the ambiguity of the IHRL treaty framework concerning the protection of the right to life in riot control contexts. It would arise in both high and low threshold situations of violence. These challenges are considered briefly in turn below.

#### **4.2.2 ‘Other situations of violence’ and the lack of an external boundary**

There is a paucity of comprehensive academic analysis of the challenge presented by the lack of an objective treaty definition for when and how a violent situation might exceed mere internal disturbance or riots and graduate to a non-international armed conflict.

The originating IHL treaty reference to a non-international armed conflict is contained in article 3 common to the Geneva Conventions of 1949 and states in the following terms:

*In the case of armed conflict 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, as a minimum, the following provisions:*

(1) 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, shall in all circumstances be treated

humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

The provision entrenches the principle of distinction in the specified type of armed conflict by protecting the life of ‘persons taking no active part in hostilities’. It however provides no further guidelines as to what ‘an armed conflict not of an international character’ is and how it may be established.

A more specific provision entailed in Article 1(2) of Protocol II additional to the Four Geneva Conventions which was created to further enumerate the scope of IHL in non-international armed conflicts. The provision states as follows:

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

A combined reading of both provisions still offers no clear guidelines as to when objectively an armed conflict may be established. A consideration of jurisprudence on the subject while progressive, is highly subjective and also offers no conclusive parameters on the subject. The leading decision on this is the ICTY’s *Prosecutor v Tadic* (Case No. IT-94-1-T, 1997: para. 561-568), which defines a non-international armed conflict as follows: ‘...protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’

The decision’s criteria for drawing a boundary between ‘unorganized and short lived insurrections’ and armed conflicts are grounded in the intensity of the conflict and the level of organization of parties to the conflict (*Tadic*, Case No. IT-94-1-T, 1997: para 561). More insights are offered by *The Prosecutor v. Fatmir Limaj* in which the intensity of the conflict can be indicated by the state’s use of its military as opposed to police forces (*Fatmir Limaj*

Case No. IT-03-66-T, 2005: para. 84) while the level of organisation of the parties can be established by the existence of a command structure and the ability for the group to execute sustained military operations (*Fatmir Limaj* Case No. IT-03-66-T, 2005: para. 135-170).

A commentary to the third Geneva Conventions by the International Committee of the Red Cross (ICRC) as a body charged with the development and dissemination of IHL (Statutes of the ICRC 2013, Art 4) offers a consolidated list of criteria for non-international armed conflicts as follows (ICRC Commentary, 1960: para.1, p.36):

- (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the de jure Government has recognized the insurgents as belligerents; or  
(b) That it has claimed for itself the rights of a belligerent; or  
(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or  
(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
- (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.  
(b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.  
(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.  
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

The ICRC offers the foregoing as a ‘conducive list’ rather than hard objective criteria and emphasizes that they are not obligatory. The organization recognizes the vagueness surrounding the definition of armed conflicts not of an international character’ and even endorses the rejection of initial attempts at an objective definition (ICRC Commentary 1960: Para 1 A). Moreover, even while offering the foregoing criteria, the ICRC (ICRC Commentary 1958, Para 1 A) discounts the suggestion that there is a clear cut boundary between armed conflicts and riot control contexts in the following statement:

Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? We do not subscribe to this view. We think, on the contrary, that the scope of application of the Article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?

While the foregoing liberal approach discounting the feasibility of an ‘external boundary’ for threshold situations may be beneficial for the broad protection of other fundamental rights such as freedom from torture and liberty, it is not conducive to law enforcement officials in such borderline situations when faced with the problem of measuring what level of force can lawfully be used against violent or armed crowds.

The lack of an external boundary to demarcate armed conflicts from such borderline situations presents significant challenges for determining obligations in complex situations such as those in the Kenya and Cote d’Ivoire above. For the ICC regime which requires a high level of specificity to establish criminal liability, the IHL treaties’ inadequacy presents with minimal options against risk of large scale innovation during legal interpretation.

#### **4.2.3 The Hobbesian sovereign and the ambiguity of armed conflict and riot control boundaries**

The foregoing ambiguity when applied to riot control situations functions to the benefit of the state acting as a Hobbesian sovereign by privileging that sovereign’s discretion over clear cut principles of law which demarcate barriers around what persons are protected from lethal force as civilians and which ones are not. In riot control scenarios bordering on armed conflict, the absence of a clear principle of distinction acting as such a barrier only leaves the IHRL principle of proportionality as the basis for the use of force. However, as

indicated above, this principle is highly subjective and is as well devoid of objective markers here referenced as ‘internal boundaries’, for establishing when force is lawful.

During the process of drafting the Geneva Conventions the delegates were well aware of the problem of the lack of such clear cut boundaries as it was indeed the major basis for an objection against the inclusion of the foregoing common article 3. Some delegates’ main argument was that the provision would encroach on their internal law enforcement powers as in that broad form the meaning of an armed conflict could be applied to any act committed by force, or in the context of anarchy. It was on this basis that a proposal for an exhaustive list of situations where common article 3 would apply was made, but then later rejected as impractical (ICRC Commentary 1960, para 1A). It is here argued that the futility of such a list is exactly due to the highly discretionary and unforecastable nature of the Hobbesian sovereign’s power in matters of law enforcement. The effect of such a sovereign for riot control contexts is that establishing objective and exhaustive parameters of law for use of force is futile.

An attempt has been made by the ICRC to realise legal objectivity for borderline situations which it has labelled under an all-inclusive banner as: ‘other situations of violence’ (OSVs). It defines these as situations such as civil unrest, riots, state repression, violence in the aftermath of elections, gang violence and demonstrations in which the authorities often use extensive police or military force to maintain law and order. The ICRC has observed that while such contexts may not reach the threshold of armed conflict, their humanitarian consequences are serious (ICRC, 2012). However, the organization offers no further specific criteria for these OSVs nor does it develop legal standards of obligations that might follow from such a categorization. There is for instance no further engagement on what ‘extensive police or military force’ is and whether or when it is legitimate.

In an interview by a former head of the ICRC unit which counsels on the law applying in armed conflicts and OSVs, Kathleen Lanard refers to the foregoing suggested criteria for establishing an internal armed conflict as dependent on, among others: the intensity of the violence, the duration and gravity of the armed clashes, the type of government forces involved, the type of weapons used, the number of troops, the extent of damage, the level of organization of the armed group, among others. She however cautions that each of these criteria are determined on a case by case basis weighing the factual indicators (ICRC,

2012). This further confirms the absence of a single objective standard referenced above. More critical however for the foregoing challenges, is the lack of an authority by which an objective pronouncement might be made regarding the existence or other wise of a non-international armed conflict so as to trigger context specific legal standards.

The foregoing vacuum in the law has had practical impact in borderline situations. In a paper inspired after she worked as a regional analyst in the first year of the 2011 Syrian crisis, Lee (2014) observed that the nature and patterns of armed conflict today are different from those which the Geneva Conventions and additional protocols were developed to address. She notes that Africa, Latin America and the Caribbean are experiencing high rates of urban violence exposing more civilians to the effects of armed conflict and civil disturbances, electoral related violence and ‘Arab spring’ styled violence, given the use of explosive weapons in densely populated areas. She notes that the national laws, international human rights law, the principle of ‘humanity’ and the Basic principles on the use of firearms are all that exist to protect the likely victims of these types of violence. However, as already observed above in the theoretical inadequacies of crimes against humanity, the concept of ‘humanity’ without specific statutory definition is wrought with ambiguity.

Lee observes that in 2011, there were 26,000 deaths following seventeen months of civil unrest in Syria before the ICRC decided to qualify the situation as an armed conflict. The apparent reason for the delayed classification was that Free Syrian Army (FSA) the armed opposition group at the time, lacked the minimum level of organisation at that stage of the conflict to graduate the violence from a civil disturbance to an armed conflict. The same position was taken by the UN Human Rights Council following a report of an independent commission of inquiry into the violence in Syria (UN Doc. Session 19/A-HRC-19-69: para 108-109).

Meanwhile, in a Hobbesian sovereign approach, the Syrian government took advantage of the ambiguity of the situation to promise reforms while justifying its attacks on the premise that the armed opposition were part of a foreign conspiracy against the Syrian government and that they as state security operatives, were targeting terrorists (UN Doc. Session 19/A-HRC-19-69: para 14). Similar arguments were maintained by Syrian government officials in an earlier report, stating that elements seeking to destabilize the country were using



protests as a cover for a wider plot to overthrow the government and cause sectarian rifts. The officials sought to bolster their argument by evidence that over 260 members of their security forces had been killed and over 8,000 had been injured in by late June 2011, just four months after the protests erupted in March 2011 (UNHRC report 2011, UN Doc. A-HRC/18/53: para 66). The government's contentions may have further been bolstered by the fact at the time many of its own armed forces had defected to the FSA and there was also an increasing number of 'armed civilians' among the government opposition protestors (UN Doc. Session 19/A-HRC-19-69: para. 14). While no prosecution has yet been commenced to test these arguments, it is here argued that they demonstrate how the ambiguity of an external boundary in borderline situations might be manipulated for a justification by the Hobbesian sovereign to use force in a riot context without objective legal limitations. With the benefit of such ambiguity, the boundaries for the protection of the right to life remain unclear and so does the basis for establishing culpability for their breach.

Lee concludes that the ambiguity of the law in current civil unrest scenarios needs to be investigated further, particularly the nexus between IHL and IHRL in such contexts in order to fill the gap of the protection framework. As Montenegro has observed (2013-2014: 5) the definition of an armed conflict as laid down by the ICTY in *Prosecutor vs Tadic* as the protracted armed violence between an organised armed group and the state and between such groups within a state, does more of amplify rather than clarify what an armed conflict is, because the crucial questions of the intensity of the violence and the organisation of the non-state armed group, remain highly controversial, especially in light of the nature of recent conflicts worldwide.

For practical application of the foregoing challenges to the ICC framework, Robertson (2012) makes the closest albeit minimal connection between crimes against humanity and force used to control crowds. He refers to the 2011 political and security situations in Syria and Egypt before those countries' descent into war and asserts that the state actions of violence characterizing those times were *clear* cases of crimes against humanity (2012: 600, 604 emphasis added). However, at the same time, he ironically acknowledges that in both those countries the point at which lethal force was meant to be used lawfully remains *unclear* (2012: 605 emphasis added).

The paradox in Robertson's argument lies in the fact that even after admitting the inability to identify a clear standard for the unlawful use of lethal force, he proceeds to assert that the response by President Assad to the protestors in Syria was a crime against humanity. He appears to base this on reports that Assad deliberately used tanks, machine guns and snipers against unarmed crowds (Robertson 2012: 605, UNHRC report 2011, UN Doc. A-HRC/18/53: paras 73-76). He is also resolved in this conviction basing on the argument that the rules on the use of force and firearms during civil unrest were settled by the United Nations in 1990, namely, the Basic Principles on the use of Force and Firearms for Law enforcement officers (1990: 606). He argues further that in those rules even in violent demonstrations, lethal force is only to be used when *strictly unavoidable* in order to protect life, and that political instability cannot be invoked to waive these rules (emphasis added).

What Robertson does not investigate however is how it is that even with these apparently 'settled rules', he is still unable to identify at which point lethal force was lawful in both Egypt and Syrian contexts. His assertion is that the Basic Principles on Use of Force and Firearms are adequate to regulate use of force in civil unrest. By this assumption it would be easy to identify when force is disproportionate and consequently in light of the ICC statute, when such force amounts to crimes against humanity. However, this position remains unclear and thus the issue persists: when, in the control of violent protests is force disproportionate and tantamount to crimes against humanity?

This question buttresses both lower threshold violence and borderline situations, and is further explored through an investigation of the application of the principle of proportionality under IHRL in the ensuing section.

#### **4.2.4 The absence of an internal boundary: proportionality of force in the protection of the right to life**

According to Bitti, internationally recognised human rights are likely the most important source of law under Article 21 of the ICC Statute, after the Statute itself and the Rules of Procedure and Evidence (2009: 300). Indeed the ICC has relied heavily on decisions from regional human rights courts such as the European Court of Human Rights and the Inter

American Court of Human Rights (Bitti 2009: 301). However, as observed above, the application of human rights law to the ICC Statute presents contradictions for the application of the principle of legality. The International Covenant on Civil and Political Rights (ICCPR) protects the right to life, providing that no one may be arbitrarily deprived of it (Article 6). However as already observed, the covenant does not define what ‘arbitrarily’ means (Sassoli and Olson, 2008:610). Other human rights treaties which incorporate the right have been equally ambiguous. This section will consider the interpretation of the right to life in riot control contexts with a particular focus on the principle of proportionality as it relates to the use of force. The section builds on the argument that the lack of an internal boundary for establishing lawful force in riot control contexts is rooted in the ambiguous nature of the principle of proportionality. It is further argued that the context specific application of this principle is demonstrative of the earlier articulated impracticality of establishing a comprehensive objective standard of force for prospective application to riot control contexts. This lack of a framework within which the ICC might operate to establish an objective legal basis for culpability for crimes against humanity renders the interpretive process for such contexts highly innovative and in the alternative, highly factual and context specific rather than based on objective principles. These as indicated above are counter to Grover’s mandatory guidelines for the application of ICC legality. The section also maintains the argument that the ambiguous nature of proportionality, just like the ambiguity of internal armed conflict threshold, is a reflection of the Hobbesian sovereign’s discretion which is counter to the concept of an objective legal standard. The demonstration of these arguments is delivered through an analysis of selected jurisprudence from the European Court of Human Rights and the American Convention of Human Rights, being regional courts before which questions of proportionality and protecting the right to life in law enforcement contexts have arisen. While these cases deal with state human rights violations as opposed to individual criminal responsibility, their interpretations on the question of proportionality as it relates to states’ protection of the right to life is relevant for advancing the analysis of the state centric nature of the laws regulating riot control, and the challenge this might pose for an individual criminal prosecution of a state official for using excessive force during riot control. In addition, as already highlighted, the ICC Statute recognises human rights treaties as an interpretive source. The caution of course remains that the distinct legal structures of both

human rights and international criminal law systems be kept in mind (Stahn and Van den Herik 2012: 54)

#### **4.2.5 McCann and others v. UK (Application no.18984/91 27 September 1995)**

This was a decision by the European Court of Human Rights involving a suspected IRA terrorist mission and the UK police. Two police officers of the respondent state shot and killed all three suspects during a suspected terrorist plot. The testimony of the two officers showed that they had shot the victims under an honest belief that they were reaching for buttons on their person in order to set off a car bomb. During trial, the main issue of contention was whether there had been a violation of the right to life under article 2 of the European Convention on Human Rights (European Convention). The Convention recognizes a limitation of the right to life where it is absolutely necessary to use of force; a) in defense of any person against unlawful violence, b) to effect a lawful arrest c) to prevent the escape of a lawfully detained person, and for purposes of preventing a riot or insurrection.

The UK police officers argued that it was necessary for them to shoot to kill the deceased suspects as it was the only way to remove the threat they posed.

In deciding the reasonableness of their belief, the court observed that case law had established reasonableness to be determined according to the facts that the user of the force *honestly believed* to exist at the time. The Court added that this was a subjective test as to what the user believed, but that it was accompanied by an objective test as to whether the user of the force had reasonable grounds for his or her subjective belief (Application no.18984/91: para.134 emphasis added)

The court referred to an old case of in *AG for Northern Ireland's Reference* (1976) to summarize that the reasonableness of the force used depended on a determination whether the mischief could have been prevented by less violent means and on what could reasonably be anticipated from the disproportionate force used against the injury or

mischief which it was intended to prevent (*AG for Northern Ireland's Reference* 1976: para135).

The court also applied article 2 of the European Convention, pointing out that the content of the right to life had to be guided by the objective and purpose of the entire convention which was an instrument for the protection of individual human beings and had to be interpreted so as to make it practical and effective. In further analysis of article 2, the court made three key observations, namely: a) That the convention does not delineate circumstances where it is lawful to kill, but rather circumstances where force which may result in unintended consequences involving the loss of life may be permissible, b) that the use of the phrase “absolutely necessary” imposes a much stricter test of necessity than that applied by states in measuring necessary action in a democratic society and c) that as such, in a democratic society, the state must subject the deprivation of life to close scrutiny and not just considering the actions of the state agencies involved, but also all the surrounding circumstances such as the planning of the operation (*McCann* Application no.18984/91: para.146).

In making a comparison with the domestic law of Gibraltar under which the respondent's police officers had earlier been exonerated, the complainants argued that that law violated the European Convention as it contained a less strict standard for the use of lethal force, allowing force to be used where it was ‘reasonably justifiable’ in contrast to the Convention's higher standard of ‘absolutely necessary’ (*McCann* Application no.18984/91: para.152). The court dealt with this argument dismissively, stating that a difference in wording alone was not sufficient for a finding of an article 2 violation, and that the Convention did not require national laws to have exactly similar wording as it, provided the substance of the right was protected (*McCann* Application no.18984/91: para.158).

I submit however that this argument warranted more scrutiny than the court accorded it, considering that earlier findings of the national inquest had found no wrong doing on the part of the respondents basing on the ‘reasonably necessary’ test. The disparity in findings of liability under both tests is indicative of the lack of universally objective standard on lawful use of force as stated above.

As regards the subjective and context specific nature of measuring force, the Court found that the police officers honestly believed on the basis of the information they had been

given, that it was necessary to kill the suspects in order to prevent them from detonating the bomb (*McCann* Application no.18984/91: para 200). This remained true even though it was eventually found that there was in fact no car bomb to be detonated. The court stated:

The use of force by agents of the state in pursuit of one of the aims delineated in paragraph 2 of the Convention may be justified under article 2 where it is based on an honest belief which is perceived for good reasons to be valid at the time but where it subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the state and its enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

However, the court did find there was a violation of article 2 with regard to the planning of the mission (*McCann* Application no.18984/91: para. 213). The basis for the finding was that the officials should have opted to arrest the deceased persons and not given them the opportunity to enter into Gibraltar where the car bomb was suspected to be, and where the need to use lethal force was heightened.

The dissenting opinion rightly cautioned that the court should not be taken up by the benefit of hindsight. It was here counter argued that the state could have opted to let the deceased into Gibraltar so that there was a stronger basis on which to arrest the accused and press charges as opposed to making an arrest without sufficient evidence linking them to the alleged plot, only to release them and run an even higher risk of retaliation (*McCann* Application no.18984/91: paras. 8, 11).

The *McCann* Judgement reveals some critical points for legality under the ICC Statute which must be noted. In the first instance, the broad interpretation of the right to life adopted by the court takes into consideration the objective of the European Convention as a whole. This is however befitting for a human rights as opposed to an international criminal law statute such as the ICC statute. As observed earlier by Grover (2014), this difference between the IHLR and international criminal law regimes means that while the former will adopt broad based interpretations aimed at enforcing states' human rights obligations, the latter takes a narrow based approach aimed at securing a conviction for individual criminal liability while being constrained by a strict legality requirement aimed at among other things, respecting the accused person's fair trial rights and the presumption of innocence. It must here be recalled Grover's mandatory legality guidelines which emphasize that only

the specific ICC statute provision under consideration and not the objective of the entire ICC framework ought to be applied in the interpretation of crimes under the statute. It follows from this that the European Court's interpretation and application of proportionality to the police planning process in *McCann* is of limited practical significance for measuring liability under article 7 of the ICC statute. Moreover, as observed in the dissenting opinion, such an approach would be highly grounded in the benefit of hindsight and facts as opposed to objective principles upon which riot control planning might be assessed for legality well in advance of execution.

The second point to note is one about context. While the case articulates some standards for the use of force in high security cases, it does not deal with the use of force in situations of large scale sporadic violence such as manifested in Kenya, Cote d'Ivoire, Egypt or Syria as briefly addressed above. It therefore serves a limited function as a framework of analysis for legitimate force in such contexts and it is submitted, should not be taken as a reference point for them either. One of the key contradictions that can be anticipated is the requirement for advance planning to ensure limited violence. The police in this case had information about the deceased persons' suspected plans and movements and arguably had a considerable level of control over the targets and the unfolding of events. This cannot be the same standard applied to the kind of sporadic violence by thousands of armed militia in Kenya or Cote D'Ivoire or Syria where the state forces may have no control over the trajectory of the violence. This point is further demonstrated in chapter four.

The third observation relates to the subjectivity and objectivity tests proffered by the court and the dilemma these present for achieving objective criteria. I argue that the subjective 'honestly believed test' militates against the idea of a universal standard for an honest belief, while the 'objective belief' test which determines whether the user of force had reasonable grounds for his or her subjective belief would arguably be based on the court's benefit of hindsight and in the comfort of the courtroom without the pressure of life and death considerations in violent riot control contexts.

The foregoing arguments point towards the fact of a legal vacuum which was confirmed later in *Nachora and others vs. Bulgaria* where the European Court actually points to the lack of a universal standard on the use of force and notes that article 2 of the Convention calls upon states to delineate an appropriate framework outlining the circumstances in

which their law enforcement officers may use force and firearms in line with international standards (*Nachora* 43577/98 and 43579/98, 2005: para. 95).

The application of the right to life before the Inter-American Court of human rights has not met with any greater specificity as demonstrated below.

#### **4.2.6 Montero Aranguren et al v. Venezuela (July 5 2006) Series C No. 150**

The case of Montero Aranguren et al v. Venezuela (*Montero case*, Series C No. 150) was brought under the American Convention on Human Rights (American Convention) and involved a shooting at a prison following inmates' attempted escape. 63 prisoners were killed, 52 injured and 28 disappeared. The evidence showed that they were shot at indiscriminately by the Venezuelan National Guard and Metropolitan Police using firearms and teargas. In discussing the use of force, the American Court of Human Rights (the Court) stated that force and coercive means could only be used where other methods of control had been exhausted or failed. Further that force was to be used only to the minimum extent possible and not exceeding what was absolutely necessary in relation to the threat to be repelled. In determining that the state officials used excessive force to respond to the escape, the court found a violation of article 4 of the American Convention on the right to life (*Montero case*, Series C No. 150: para. 70-71). The case did not expound on what was absolutely necessary use of force in these circumstances and what was not, leaving unexplored yet another opportunity for filling the foregoing gaps observed in the law.

One case however, does make a modest distinction between the standards of liability for use of force under human rights law and criminal law. The case of *Zambaro Velez et al v. Ecuador* (Judgment of July 4, 2007. Series C No. 166). involves an arrest mission by the Ecuadorian navy, army and air force in a joint operation carried out under an emergency law. It engaged around 1,200 agents who used army trucks, bombs and helicopters. It was targeted at suspected criminals, drug traffickers and terrorists and resulted in the death of



the complainants' relatives. The complainants argued against the state that the planning of the mission contemplated the use of excessive means and left little room for assessments as to proportionality and necessity of the force used on the mission (*Zambaro Case Series C No. 166: para. 74*). The court observed that since there was no evidence of the use of less lethal methods, the mission looked more like an attack and attempt to execute the suspects rather than prevent crime (*Zambaro Case Series C No. 166: para.77*).

Two main points of interest can be observed in this case. The first is a distinction which the court makes between criminal liability and human rights violations. In trying to gain exoneration under the Convention, the state argued that under the Ecuadorian Criminal Code, the state officials would not have been culpable. The court stated that in order for a finding of a violation under the American Convention to be made, it was not necessary for there to be a finding of criminal liability under the said national law. It was sufficient to only demonstrate that state authorities permitted or allowed the actions which led to the violation of rights protected under the convention (*Zambaro Case Series C No. 166: para.124*). This is perhaps the first considerable attention which is given to the distinction between the levels of liability under criminal versus human rights frameworks. Unfortunately, the court does not discuss further the fundamental basis for such a distinction or how both liabilities relate to each other. As such this decision too is of limited significance in establishing boundaries for legality under the ICC framework concerning proportionality of use of force. This argument, much like the one made in McCann above, also demonstrates the disparity of proportionality standards under domestic law and international law which is further explored in chapter four in an analysis of national laws on riot control.

The Court also conflates IHL and IHRL principles in articulating a standard for the use of force, thereby failing to demarcate parameters for measuring force in contexts not amounting to armed conflict. In laying down what appear to be principles for the use of force in law enforcement contexts; necessity, humanity and proportionality, the court states that the principle of necessity justifies only the means of *military violence* that are not forbidden by international law and that are proportionate and relevant for the immediate subjugation of the enemy with the least possible cost of human and economic resources (*Zambaro Case Series C No. 166: para.85*). It offers no further explanation of the anomaly of applying the expression 'military means' to a law enforcement context. On the principle

of humanity, the court states that the principle's role is to compliment and inherently limit the principle of necessity by limiting the use of violent means that are not necessary for the achievement of a '*definite military advantage*'. Yet again there is an unexplained conflation with armed conflict standards and no attempt to explain what the "military advantage" was in this specific context involving the arrest of suspected criminals.

From an overall assessment of the foregoing regional court decisions, and IHLR treaty provisions the legal standards set for establishing proportionate force remain highly ambiguous and very specific to scenarios warranting arrest in controlled contexts, as opposed to the complex situations likely to confront state officials in riot control situations including those bordering on armed conflict, which might require reactive armed responses cutting across a magnitude of objectives. As such, the interpretation at the human rights treaty level remains incomprehensive and not inclusive enough to avail a universal framework upon which the ICC might draw for an interpretation of crimes against humanity in a riot control contexts. This lack of a framework for measuring proportionality in use of force situations is briefly demonstrated below through an analysis of varied context approaches to the applications of the principle.

#### **4.3 The indefiniteness of proportionality and the challenge for prosecution: drawing from IHL discourse**

Clarke (2012) has analysed the challenge presented by the subjectivity of proportionality for a prosecution under the ICC statute albeit in respect of war crimes. However his analysis can be compared to similar challenges in riot control situations given that problems regarding tactical planning and foreseeability occur in both contexts. Moreover, it is the closest analysis yet of proportionality under the legality framework of the ICC Statute. Thus Clarke observes that operational decisions for the application of proportionality as codified under article 51(5) (b) of Protocol I Additional to the Geneva Conventions, vary in each context (2012: 81). He notes that while proportionality is an important element in IHL, considerable doubt still abounds as to the adequacy of *lex lata* defining its parameters due to the fact that rules concerning its interpretation and application are difficult to interpret

and are highly subject to politicization (Clarke 2012:82). In his assessment of scholarship on the subject, there are two main divergent views concerning the adequacy of *lex lata* on proportionality. The less critical view is that proportionality is a broad standard and not a rule. As such, it is incapable of further refinement and application as a strict rule of law. Proponents of this view argue that proportionality *lex lata* ought to be viewed as *lex ferenda* and is to be applied in good faith in order to deal with unforeseen situations. On the other hand, the more critical view argues that proportionality as articulated in IHL treaty provisions is too subjective and difficult to apply. Further that its ambiguity only works in favour of the military as opposed to the civilian. At the same time however, some critical views argue that in fact the ambiguity is detrimental to the military as it offers no guidance to decision makers by failing to set absolute standards for combat operation results. As such, the criticism maintains, the ambiguity of the principle of proportionality fails to provide arbitration by its inability to offer clear guidelines for a defense to a war crimes prosecution or how to avoid one during military planning. To this end, the critics have called for a meeting of military and legal experts to revise the *lex lata* and provide more specific parameters for the principle of proportionality in IHL contexts (Clarke 2012: 83-84). Clarke observes that despite the abundant legal doctrine surrounding it, the substantive content and application of the principle of proportionality remains unresolved. He further observes that the lack of universal standard for the application of the principle is due to the divergent backgrounds and value systems of the various decision makers, which cannot be standardized.

It is here worth noting that these observations regarding divergent backgrounds and context affecting the application of proportionality have been observed to influence law enforcement contexts as well. A 2008 study on how the police in the Netherlands, Germany, Australia, Venezuela and Brazil perceive the use of force, found that while all the participants were aware of legal standards regulating their use of force, the law enforcement officers from different jurisdictional backgrounds applied these standards differently in their unique circumstances (Waddington, Adang et al 2008: 112). Clarke notes that decision making challenges often arise in hard cases and that there is need for a guidance document to aid decision makers on the standards of proportionality (2012:87, 89,122). He highlights without further development some proposals towards such a standard, including numerical equations to assign value to the lives of combatants relative

to those of civilians and a rebuttable presumption of disproportionate force where civilians not taking part in hostilities are killed (2012: 93). Needless to say, both proposals are indicative of the fundamental nature of the legal vacuum underlying the principle of proportionality.

The divergent liberal and critical views on proportionality in IHL contexts have played out in the case of *Beit Sourik Village Council v. The Gov't of Israel* (*The wall fence case* HCJ 2056/04, 2004) and *The Public Committee Against Torture in Israel et al v. The Government of Israel et al* (*The targeted killing case* HCJ 769/02, 2006). These cases are of particular interest because of their divergent approaches to proportionality and the difference of contexts to which the principle is being applied. In *The Wall fence case* the Supreme Court of Israel considered whether Israel's plans to build what it called a security wall cutting off Palestinian citizens from their farm lands was proportionate for the interests of Israel's security. The court found that the route chosen for the wall would have a disproportionate impact on the lives of Palestinian farmers as they would be cut off from their land and from access to the olive trees thereon from which they derived their livelihood. Moreover, the court further observed, no alternative lands had been provided for them. The restricted access to their land which would fall on the other side of the wall would be a violation of their right to property and their freedom of movement. The Court further noted that Israel's interests could still be secured by an alternative route (*Wall fence case* HCJ 2056/04, 2004: para. 60, 61).

In the *Targeted killing case*, the petitioners challenged the Israel Army's policy of targeted killings or assassination against people it suspected to be terrorists. They argued that the policy violated humanitarian law and human rights law. The court found that armed forces may target terrorists when they take a direct part in hostilities, provided the principle of proportionality in such cases was observed. It further held that there was no clear basis on which to assert that targeted killings were permitted or prohibited under customary international law but rather that each determination of legality depended on the unique circumstances of each case. In discussing the balance between human rights protected during armed conflict and military necessity, Justice Barak noted that the balance between the two objectives was not fixed. In some instances, the military necessity may outweigh the needs of the local population and vice versa (*Targeted killing case*, 2006: para 22). He pointed out that in armed conflict contexts a major principle that facilitates the process of

creating this balance is the principle of distinction, which permits the targeting of combatants and persons taking active part in hostilities and protects civilians for as long as they are not taking part in hostilities (*Targeted killing case* H CJ 769/02, 2006: para 23).

Central to the implementation of the principle of distinction however, is the principle of proportionality, which he acknowledges as a general principal of law and a part of customary international law (*Targeted killing case*, H CJ 769/02, 2006: para 41). Justice Barak observes that the balancing of interests under the principle of proportionality is a complex ethical issue (*Targeted killing case*, H CJ 769/02, 2006: paras 45-6). He states in particular (para 58) as follows:

Proportionality is not a precise criterion. Sometimes there are several ways of satisfying its requirements. A margin of proportionality is created. The court is the guardian of its limits. The decision within the limits of the margin of proportionality rests with the executive branch. This is its margin of appreciation.

However, the clear limits of the margin of proportionality are not laid out as the Justice observes, a key limitation of judicial scrutiny to such cases is that it cannot be applied prospectively but rather retrospectively and differently according to each unique case (para. 59). The court concludes (para 60) that:

What emerges is not that a preventative attack is always permitted or that it is always prohibited...we cannot determine that a preventative attack is always legal, just as we cannot determine that it is always illegal. Everything depends upon the question whether the criteria of customary international law relating to international armed conflicts permit a specific preventative attack or not.

From these two cases, I argue that while the court was more proactive with the interpretation of proportionality in the *Wall fence case*, even suggesting an alternative route for the wall, it was more cautious with identifying boundaries of lawful state conduct in the *Targeted killing case*, which deals with issues of a more tactical nature involving the application of the law in the spontaneous and volatile armed conflict contexts. This inability to apply a clear objective legal standard for prospective reference resonates with the foregoing observations and definitional challenges regarding the use of force in riot control contexts. This state of affairs presents potential contradiction between state discretion and

judicial discretion in such contexts considering that the former is applied before judicial review and without clear objective standards of application while the latter occurs after the fact, but without prior clearly defined standards. In the ICC statute legality framework, such tension goes to the core of Grover's mandatory guidelines regarding foreseeability of prohibited conduct and the guideline to avoid public policy controversy.

#### **4.4 Persistent ambiguity under customary law**

The foregoing vacuum within the 'applicable treaties' is indicative of an equivalent absence of objective standard within 'principles and rules of international law' as the other source of law listed under the statute's article 21 (1) (b). There is a consensus among scholars that 'principles and rules' of international law' as stated above in fact refers to customary international law (Pellet 2002: 1070-1072, Grover 2014: 262, 263).

While customary international law's components under Article 38(1) (b) of the Statute of the International Court of Justice (ICJ) comprise general practice accepted as law among states, there is no consensus on how to determine these components. In particular, scholars disagree on what activity qualifies as state practice and with what duration and frequency it must occur before it qualifies as custom. The ICJ never established or maintained a methodology for deriving customary law (Talmon 2015: 417, Petersen 2007:276). Moreover, quantifying and qualifying the practice of over 200 states in the world in order to determine custom is impractical. As such, judicial interpretations based on custom are prone to criticism for arbitrariness (Petersen 2007: 276). Talmon points out that the process of arriving at customary law whether it be by analyzing state practice or *opinio juris* is highly subjective and selective. Indeed he argues that in the majority of its decisions, the ICJ has not examined state practice and *opinio juris* but has merely asserted the existence of certain rules as customary law (2015: 432, 441). Petersen has observed however, that the role of state practice in establishing custom is fast diminishing in favour of *opinio juris* and has been extended to 'paper conduct' which includes the conduct and pronouncements of international organisations (2007: 278, 280). Anaya observes that the activities of international institutions including statements and resolutions concerning human rights play

a role in shaping state conduct or may provide evidence of what states believe their obligations to be under customary international law (1998: 43).

Regarding use of force in riot control contexts, I argue that uniform state practice and an agreed upon standard is nonexistent in light of the foregoing analysis. An analysis of national laws on the riot control in the ensuing chapter confirms the lack of a uniform standard to constitute the existence of customary law on use of force in riot control contexts. Furthermore, the existing UN pronouncements on riot control embodied in the Basic Principles on the Use of Force and Firearms for Law Enforcement Officers (UN Basic Principles), are not universally recognized by all states. While the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has lauded them as widely acknowledged among states and human rights institutions (UN Doc. A/HRC/26/36 2014: Para. 44, Amnesty International 2015: 11), He only cites Australia and Brazil as countries which have relied on them to guide domestic legislation. In the same document he does acknowledge that the principles are still unknown to important constituencies (UN Doc. A/HRC/26/36 2014: Para. 44- 45). Where they have been applied, the principles' own lack of a clear operational framework and their ambiguity has facilitated fundamental alternation to suit different national contexts. The principles do not circumvent the foregoing challenge to provide external or internal boundaries within which proportionate and as such lawful force in riot control contexts including threshold scenarios can be determined (Amnesty 2015: 11). These arguments will be enumerated further in Chapter Four as part of an assessment of the effectiveness of general principles from national law as interpretive sources under article 21 (1)( c ) of the ICC statute.

## **5. Conclusion**

The main sources of law for the interpretation of crimes against humanity in riot control contexts, namely the ICC Statute, the Elements of Crimes, the Applicable treaties and customary law are inadequate to provide a frame work for an effective criminalization of excessive force used in riot control contexts. This is fundamentally due to the ambiguity of law on the use of force in riot control contexts through which the discretion of the Hobbesian sovereign is perpetuated. The existence of such discretion is so pervasive that it permeates into legal provisions in diverse treaty regimes which seek to establish boundaries

of legality to regulate it, ensuring their perpetual circularity. The result in the highly restrictive context of ICC legality is the lack of a framework from the ICC's interpretive sources, on which to base a prosecution for crimes against humanity in riot control contexts without a high risk of legislative innovation or public policy controversy. While an attempt at a more lax legality standard is offered, it is still inherently wrought with subjectivity and in such a state cannot offer effective tools for circumventing the circularity of law surrounding the use of force in riot control contexts. The challenge to effective criminalization of such force under the crimes against humanity regime is also due in part to the under development of crimes against humanity as international crimes in their own right. The historical evolution of these crimes in armed conflict contexts has fostered their conflation with IHL parameters for establishing liability which has contributed to their inhibited articulation in riot control contexts.

Specifically, state parties to the ICC Statute never reflected sufficiently on the application of crimes against humanity to law enforcement contexts and this shows through the legal uncertainty surrounding the question in actual riot control situations which have come before the ICC. While the Hobbesian sovereign's role is also apparent in this underdevelopment, the judges of the ICC have also missed or avoided opportunities to foster the development of crimes against humanity in law enforcement contexts which manifested in the situations of Kenya and Côte d'Ivoire. These situations were also missed opportunities for the court to demonstrate how it can circumvent its strict legality restrictions in hard cases whilst effectively fulfilling its interpretive role and avoiding criticism for legislative innovation.

In final analysis, absolute legal certainty is impractical and the highly subjective nature of and circularity of laws concerning riot control render an interpretation exercise seem illusory. In the context of the ICC where decisions may be highly politicized the objectivity and legality of such an interpretation process is even more challenging. The nature of cases involving state use of force in riot contexts as seen in the foregoing examples could arise in the wake of post-election violence, ethnic or other political violence. In such scenarios the Hobbesian sovereign is wont to draw on its monopoly on the use of force to justify its actions. The lack of an objective international framework upon which to measure these actions is a hindrance to effective criminalization of excessive force that may be used by state officials in riot control contexts. This state of legal uncertainty affirms the earlier



assertion that state parties to the ICC Statute have not engaged in consensus building and as such have not developed a shared understanding of the boundaries of liability under the Statute's article 7, for force used in riot control contexts.

Ultimately, there may be a need for State parties to engage in further negotiations and research with a view to setting out at the very least, a minimum set of universal parameters which might serve as shared understandings among them of what otherwise lawful conduct by state officials may be described as a crime against humanity under the ICC Statute. Without such a parameter, the highly state centric and discretionary law on riot control poses a significant challenge for a precarious balance of article 7 between judicial interpretation and legislative innovation. This approach would not be made with the claim of absolute certainty for all prospective riot control situations, but would at the very least be a foundation in which the ICC might ground a determination of culpability for crimes against humanity in riot control contexts. The alternative would be for the ICC to take a liberal approach to the interpretation of the statute's legality restrictions but at the risk of undermining its own legitimacy.

As is further demonstrated in the next chapter, the highly state centric nature of law enforcement forms the basis for disparate standards of use of force in national law contexts which then undermines the option of extracting general principles of law from these contexts for transposition on to the international level under the ICC statute. The restriction against judicial innovation to cure the interpretation gap under article 7 is magnified by an analysis of the disparate standards on riot control under national law where the Hobbesian sovereign enjoys even greater prominence.

## **CHAPTER FOUR**

### **GENERAL PRINCIPLES FROM NATIONAL LAWS AND THE UN BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS.**

#### **1. Introduction**

The ICC Statute lists general principles of law obtained by the Court from legal systems of the world as one of the sources of law that can be turned to if the Statute itself, its Elements of Crimes and the applicable treaties, rules and principles of international law do not fill a gap in the ICC's interpretation and decision making process. As a source of law general principles are plagued by a series of methodological and substantive criticisms which are further exacerbated under the strict legality requirements of the ICC Statute. In this Chapter I argue that the pervasiveness of the Hobbesian sovereign's discretion on the question of use of force in riot control presents a particularly complex situation wherein the extraction of substantive general principles on the use of force in riot control, from inherently open ended national law provisions on the same, poses a challenge for filling the gap in the law without violating the principle of legality. I argue that while such a task might be achieved for lower thresholds of violence, it would be an illusory undertaking for the more borderline cases of violence such as those reviewed in chapter three above. The ensuing analysis of selected legal provisions illustrates fundamental differences between states' standards on key pillars of necessity, precaution and means and methods of applying force in riot control contexts, which indicates the paradox in purporting to abstract general principles from them. Moreover, the residual discretion inherent in the riot control laws renders the very idea of an objective standard illusory. I argue that the intricate connection

between national standards on law enforcement and the discretion of the Hobbesian sovereign yields a situation where those standards depend ultimately on subjective determinations which are wont to be driven more by political and security considerations of the Hobbesian sovereign. This merger of law and sovereign is the basis for the enduring dissolution of law in the face of state violence and the resultant circularity in the language of law at national level. This assessment renders illusory the very concept of abstracting general principles from inherently abstract standards with a view to applying them at the international level under the ICC Statute framework.

This chapter aims to illustrate this argument by analysing the substantive and methodological issues at play in the process of extracting and transposing general principles on the use of force onto the ICC statute to define crimes against humanity.

The main objectives of the chapter are therefore to conceptualise general principles of law as provided under article 21 of the ICC statute and to analyse how the concept relates to the statute's principle of legality under article 22. The next objective is to assess the methodological and substantive challenges of using general principles of law as a source of law under the ICC statute. Under this objective, the chapter analyses and classifies certain national laws' provisions on use of force in riot control with a view to identifying the challenges of abstracting general principles of law from them and assessing the effectiveness of such exercise under the ICC's legality standard. The chapter will also analyse effectiveness of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officers as possible an alternative source of law under the ICC Statute for use of force standards.

The Chapter is divided into seven sections. The first section is the introduction, the second section explores the background of general principles of law, the methodological and substantive issues underlying them as well as their application. The third section discusses the application of general principles by the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ) and ad hoc tribunals such as the international criminal Tribunal for Yugoslavia. The fourth section analyses the methodological and substantive criticisms of general principles of national law under the framework of the ICC Statute. The fifth section analyses the extracted provisions of national laws on the use of force and firearms, and assesses their application as general principles under the ICC

Statute. The sixth section analyses the UN Basic principles on the use of force and firearms and their application under the ICC Statute. The seventh and final section contains the overall analysis and conclusion.

## **2. General Principles of law as sources of law under international law**

In order to gain a clear concept of general principles of law as a source of law under Article 21 of the ICC Statute, it is important to also understand their antecedents. The earliest references to general principles can be traced to international arbitral decisions well before the adoption of the Statute of the Permanent Court of International Justice (PCIJ) and they arguably influenced the foundations of international law (Giorgio 2014: para. 1, Pellet 2006, 764). The principles later gained prominence under Article 38 paragraph c of the PCIJ Statute as ‘general principles of law recognized by civilized nations’. This wording is maintained under article 38 (1) (c) of the Statute of the International Court of Justice (ICJ) as a near duplication of article 38 (c) of the PCIJ Statute which it replaced (Giorgio 2014: para 1-4). Even at their earliest conception, there was no consensus as to the meaning of general principles of law (Crawford 2012:34, Pellet 2006: 764). Within the committee of Jurists who prepared the PCIJ Statute was a Belgian delegate who contemplated that general principles were equivalent to natural law principles, and had in his draft, referenced these sources as ‘the rules of international law recognized by the legal conscience of civilized peoples’. Another delegate from the United States perceived the phrase as granting the court powers to rely on subjective concepts of justice. Ultimately, a compromise position was arrived at which still left the court with enough powers to develop and refine the said principles of justice, while they retained a character of objectivity, hence the final phrase ‘general principles of law recognized by civilized nations’ (Crawford 2012: 34). More specifically, it has been clarified that the intention of the drafters was for the application of those laws that existed in domestic law (Pellet 2006:768, Neha 2014: 19)

It should be noted that under the Statute of the Permanent International Court of Justice (SPICJ), the main basis for providing general principles of law recognized by civilized

nations as a source of law was to ensure that after treaties and customs, the court might still be able to refer to a source of law to fill a lacuna in the law. The problem the drafters sought to cure is called *non liquet* (Shaw 2008: 98, Wallace and Martin –Ortega 2009: 23, Grover 2014: 179). This situation may arise during a decision making process where the court realizes that there is no law regulating a particular point under consideration under a statute or previous court decisions. In such a situation, the court may find itself having to rely on rules existing as general principles which may be derived from national legal systems, in order to reach a final decision. Raimondo (2008: 7) observes that international courts and tribunals may turn to general principles of law to fill legal gaps, interpret legal rules and to reinforce legal reasoning. A *non liquet* scenario is particularly likely to manifest under international law, given the considerable underdevelopment of rules to regulate all the scenarios with which it might be faced (Shaw 2008:98). This has been said to be especially the case for the less developed branches of international law such as international criminal law (Raimondo 2008: 8). Shaw expresses confidence in the inclusion of this source under article 38 (1) (c) of the ICJ Statute as a cure for *non liquet*, observing that every international law problem can be settled as a matter of law even when there may not be obvious rules applicable to the situation under consideration (2008:99). He does note however, the failure of the court to make a non-equivocal pronouncement on a rule of international law on the use of nuclear weapons by a state in self-defense against an attack where its very survival was at stake (2008:99). A critical point to observe is that within the PCIJ and ICJ statutory framework, general principles do not compete with treaty and custom as interpretative aids and are only to be referred to where a given treaty or custom does not expressly resolve the matter in issue (Grover 2014:360, Cassese 2005: 183). However, with that being said there is no formal hierarchy established between the sources of law under these frameworks and all three sources can be applied simultaneously, with the main function of general principles being to fill any gaps for the avoidance of *non liquet*. Through the interpretation process however, the general principles remain autonomous as a material and formal source of law (Raimondo 2008:36-9). This view remains prominent among scholars even with respect to application under the ICJ Statute (Raimondo 2008:20, 43).

## **2.1 Problems with methodology and substance**

Even though they are an autonomous source of law, general principles are plagued by methodological and substantive inconsistencies. It has been observed that tribunals, in using general principles as a source of law, do not have a mechanical system they follow for applying national law principles from which they abstract these principles. The argument has been made that tribunals only adapt and edit modes of general legal reasoning and comparative law analogies from national legal systems in order to then arrive at a comprehensive body of rules which they can apply during the international law making process. As such the content they extract for application, while largely influenced by national law, is ultimately the court's creation (Crawford 2012: 35). This observation correlates with a general of disagreement among scholars as to the correct definition and methodology for identifying general principles of law (Pellet 2006: 766, Ford 1994-5:47, Ellis 2011:959, Neha 2014: 19). A general reading of the literature reveals a disagreement over two key issues, namely: the methodological approach to general principles of law and the process of abstracting content and transposition of general principles to international law. These are discussed briefly in turn below.

### **2.1.1 Methodological disparities**

According to Ford (1994-5: 47) some scholars take a comparativist approach to the process of abstracting general principles of law while others take the 'categoricist' approach. The comparativists are insistent upon an extensive comparative survey of national laws for the extraction of general principles while the 'categoricists' disregard the need for a 'universal domestic consensus' as they believe that by their very nature as general principles the relevant rules are grounded in reason and are 'part of the modern law of nature'. By this method, general principles of law would be discernible from even a single legal system

(Ford 1994-5: 50). Pellet seems to take the categoricist approach, observing that the comparative approach is unrealistic and unessential considering the all relevant material cannot be available to the parties for judicial consideration. Further that, in his opinion, the majority of modern national laws can be categorized into legal systems which are coherent (2006: 770). On his part, Ford believes that both approaches are extreme as they undermine the judicial discretion which is central to the process of decision making. Comparativism would reduce the judge to jurisprudential poll taking, while the categorist approach encourages judges to take the path of least resistance and undermines the rigor that is required in decision making. He recommends a synthesis between these two extremes with judges applying comparative methods whilst centering their discretion to determine common principles (Ford 1994-5: 51).

In opposition to Pellet's categoricist approach, Ellis and Neha point out that the distinction of national laws into legal systems is not coherent. Neha observes that the existing classifications into common law and civil law among other legal families exist in private law and would hardly be suitable for categories such as administrative, constitutional and criminal law. Moreover, she argues, the categorizations operate on macro and opposed to micro comparisons on specific legal issues and as such, laws belonging to the same legal system may have different solutions to specific legal problems and the categoricists would overlook this detail (2014: 63). This danger of conflating legal issues under the categorist approach is also recognized by Ellis (2011: 957). Ellis recognizes another danger with the categorist approach which touches the very legitimacy of general principles of law as a source of law particularly if applied under international criminal law. Her concerns are based on the realities of the heterogeneity of laws and imbalances in economic and political power under international law which may eventually affect the legitimacy of law making processes and institutions (2011:955-6). Ellis' concerns are based in a voluntarist approach which places emphasis on the consent of states to be bound by rules and as such, much like the comparativist approach emphasizes the need for methodology that aims at a wide comparative study in order to achieve universal representation (2011: 955).

Ellis concludes on a generally pessimistic tone, noting that while many scholars observe that the dearth of comparative law application in judicial decisions thus far is problematic,

there is a minority who still believe that extensive comparative approaches are not necessary. In her final analysis, the prevailing international law methodology in unsatisfactory owing to fundamental flaws in the categorization of legal systems (2011: 957).

### **2.1.2 Content and transposition of general principles of law**

According to Pellet (2006: 766) although international lawyers have never agreed on the definition of the ICJ Statute's article 38 general principles, they are in agreement that the principles are unwritten legal norms, recognized in states' municipal laws, and that they must be transposable to the international level. He notes that there have been reservations about the possibility of extracting general principles from a diverse range of national laws, but dismisses the concern, pointing out that the principles thus extracted need not be detailed rules but rather, general principles which give 'general guidelines' to the court to reach its decisions (2006: 769). This view is backed by Kolb who explains in more descriptive terms, that general principles are not rules whose legal content tends to be narrow. He explains that general principles are not defined so precisely the way rules are but concomitantly, they are not worded as broad political statements. To this end, they provide a middle ground between *lex lata* and *lex ferenda*, combining abstraction and concreteness. Their generality and flexibility renders them suitable for dynamic application in future cases, while their anchorage in law grants them that core certainty that guards against criticism of arbitrariness (2006: 9). He proceeds to offer an example of the principle of proportionality around which he claims three legal ideas have coagulated in the nineteenth and twentieth centuries, namely, the idea that a measure taken should be able to fulfill an aim searched for otherwise it would be disproportionate, secondly, the least onerous means of achieving the said aim should be selected and finally that the gravity of the means taken to achieve the aim should correlate with the facts giving rise to the means used (Kolb 2006: 8).



This conceptualization of general principles is critical for the process of transposing general principles from national to international law systems. It is generally agreed among scholars that the process of transposing general principles from national law does not involve a whole sale application of those laws to the international level, 'lock stock and barrel', but rather involves a process, after abstracting the principles, of ensuring that they are applicable at the international level, considering that the conditions and institutions vary at both levels and that following this, rules which might be justified at the national level may be unjustifiable at the international level and vice versa (Pellet 2006:772-3, Ford 1994-5:49, Ellis 2011: 959). By way of example, Pellet considers courts' jurisdiction in national law which is not dependent on state consent, while at the international level subjecting a state to court jurisdiction cannot happen without that state's consent.

However, the foregoing optimistic view is counteracted by a more critical approach by Ellis (2011), who argues that attempts to distill rules to essential core principles is a mechanical and 'unidimensional process' which would yield incomplete results, considering that the existence of a rule in several legal systems is not indicative of its content. In her view, rules depend largely on the context within which they operate and as such, similar rules could take on different meanings in different contexts of application. She argues therefore that rules should be seen as part of a larger and very complex narrative and not as parts of a machine to be transplanted mechanically from national law to international law (2011: 971). Neha makes the same argument, stating that any consensus achieved by considering legal principles in isolation of their domestic contexts only yields an illusory conclusion (2014: 81). In her analysis of the methodological and substantive criticisms surrounding general principles of law, Ellis proposes an abandonment of the quest to find a universal standard of rules or concepts and recommends a more honest approach where national rules are considered simply as part of arguments that can be made before an international tribunal in order to secure a decision, rather than claim them as representations of some objective standard (2011: 960-971).

Ellis and Neha's arguments against transposition and categorist approaches to general principles of law are clearly rooted largely in concerns about state consent in international law making process. Olufemi and Chin (1997) downplay these 'consent based' concerns,

pointing out that consensual issues exist even with other sources of law including customary international law and as such, that they may arise with the application of general principles of law should not be an accepted justification of a threat to the stability of international law.

I argue that this variance of approaches and attitudes in conceptualizing general principles of law as a source of law has been at the center of the trends of application of the said principles as sources of law in international tribunals, with the permanent tribunals adopting a more cautious approach to the general principles, while the ad hoc tribunals have been more experimental and liberal in their application. At a more general level, the unsystematic application of the general principles as a source of law even within the ad hoc tribunals is reflective of the disharmony that has surrounded them since their incorporation into the PCIJ Statute and has followed them into the ICC Statute framework. This state of affairs is explored further below.

### **3. General principles of law under international courts and tribunals**

A number of scholars have analysed how general principles of law have been applied by courts and tribunals and the consensus seems to be that the PCIJ and ICJ have been hesitant in their application of general principles of law from domestic law, while the International Criminal Tribunal for Yugoslavia (ICTY) has been the more creative of the other ad hoc tribunals. It has however not surmounted the foregoing methodological and substantive criticisms which appear to be inherent in general principles as a concept of law. The ICC on the other hand, has had only a limited opportunity to apply general principles as a source of law, even though the available decisions indicate a rather rigid and avoidance tactic similar to one adopted by the ICJ. This scenario is discussed briefly below.

### 3.1 The ICJ and PCIJ

It has generally been observed of the ICJ and the PCIJ that they never made it clear how they were applying general principles of law recognized by civilized nations as a source of law in the making of their decisions (Raimondo 2008: 21, Ellis 2011: 956). Some scholars have gone on to dismiss their methodology as unscientific and merely based on the judges' hunches' (Schlesinger 1957, 734-5). Other scholars have been more specific and pointed out that most of the time when those courts referenced general principles of law, they in fact were using natural law precepts or general international law norms or customary law to arrive at decisions (Ellis 2011: 955, Giorgio 2014: para 32, Raimondo 2008: 22).

Giorgio and Raimondo highlight some decisions by the PCIJ and ICJ and conclude that general principles of law have played a minimal role in the decisions of these courts and they have not based any of their rulings exclusively on the said principles (Raimondo 2008: 22). Raimondo highlights the *Corfu Channel* Case and the *Jaworzina* Case as examples of how the ICJ and PCIJ arbitrarily referenced general principles of law but never demonstrated how they were extracted. In the *Corfu Channel* case the ICJ accepted the principle of admissibility of circumstantial evidence in a dispute between Albania and the United Kingdom over damage to the UK's royal navy ships and loss of life owing to mines in Albania's territorial waters, for which the latter denied responsibility. In examining whether Albania knew of the mines, the ICJ noted the difficulties of gathering such evidence and thereby permitted circumstantial evidence as it was acceptable in 'all systems of law' (*Corfu Channel*, 18). Raimondo observes that the ICJ did not clarify how it came to conclude that circumstantial evidence was admissible under "all systems of law" and only speculates that perhaps the court considered national and international arbitral procedures in making the determination (2008:29). In Giorgio's view, the reference to "all systems of law" was used in this case to confirm an already established principle in international law (2014: para. 10). A similar general reference was made by the PCIJ in the *Jaworzina Advisory Opinion* regarding a territorial dispute between Poland and Czechoslovakia which the Allied Powers had referred to a Conference of Ambassadors for

settlement. The PCIJ relied on the principle of textual interpretation to conclude that the language of that conference's decision could not be outweighed by the letter Poland sought to rely on to undermine the conference's decision. Raimondo observes that the PCIJ did not enunciate how it arrived at the principle of textual interpretation, but he speculated that this was probably because international tribunals had severally previously applied the principle (Raimondo 2008: 24). The other observation has been made that where the courts referenced general principles of law alongside other rules, they were simply used to validate the decision based on those other rules (Raimondo 2008: 27). In this case, the General Principles are used to reinforce legal reasoning that led to the decision. This was the case for the *Factory at Chorzow* Case, in which the PCIJ referenced the principle that no advantage may be gained from one's wrong alongside the Geneva Convention concerning Upper Silesia to conclude that it had jurisdiction over the case. The PCIJ relied on decisions both of national courts and international tribunals without yet again belabouring the methodology of abstracting general principles of from national law.

The foregoing discussion provides an indication of the haphazard manner in which the PCIJ and ICJ have approached general principles, availing limited systematic guidance for the subsequent courts and ad hoc tribunals. It has been suggested that the reason why the courts avoided a rigorous engagement with general principles as a source of law was to avoid the difficulty of engaging in comparative analysis and the issues of state consent and voluntarism that might arise from such exercise (Giorgio 2014: para. 16, Ellis 2011: 956). This observation warrants a discussion of how the ad hoc tribunals, specifically the international criminal tribunals have approached general principles of law.

### **3.2 International Criminal Tribunals**

While ad hoc international tribunals have been more rigorous than the ICJ and PCIJ in showing how they apply general principles of law derived from domestic legal systems, they have mainly faced criticism over how they have abstracted the principles and how they have transposed them for application on the international scene and the implications this has had for the principle of legality.

Raimondo (2008) has done a comprehensive study into the application of general principals of law by international criminal courts and tribunals. This chapter relies heavily on his work because his arguments and approach to general principles as a source of law are aligned with this study's arguments and approach to analysis of general principles under the ICC framework. Raimondo's approach provides a framework through which this study illustrates the adequacy or otherwise of general principles as a source of law under Article 21 of the ICC Statute. He notes that with the emergence of the more rudimentary international criminal law, international criminal tribunals relied more on general principals to fill the gaps where definitions of *actus reus* and *mens rea* were indeterminate (Raimondo 2008: 73, Cassese 2005: 193). In his assessment when these tribunals apply general principles of law, they do so using two methods: the vertical move and the horizontal move (2008: 45, 175, 177). The former is aimed at extracting legal principles from national laws, while the latter tests whether the extracted principles are recognized by the nations (2008: 45). Through his analysis of selected decisions of the International Military Tribunal at Nuremberg (IMT), the International Criminal Tribunal of Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR) Raimondo identifies the enduring misapplication of general principles as well as their methodological and substantive inadequacies. This is expounded further below.

### **3.2.1 The vertical move: challenges with the substance of general principals of law under international criminal law**

In extracting a general principle of law from national laws, some of the misapplications Raimondo observes include the challenge of compliance with legality, alteration of the substance of the general principle and in some cases the fabrication of the general principle. One example given is the criminalization of the crime of aggressive war under the Agreement for the Establishment of an International Military Tribunal of 1945 (The IMT Charter). In the IMT trial of German major war criminals, counsel for the defense argued that prosecution for the crime of aggressive war was in violation of the principle of *nullum crimen nulla poena sine lege* (nullum principle) in as far as it would amount to an *ex post facto* application of the law contrary to the law of civilized nations, considering that

national legal systems had neither criminalized nor provided penalties for aggressive war before the IMT Charter. The Counsel emphasized that *nullum crimen* was a fundamental principle recognized in international and national law. The IMT rejected this argument and contended that the principle of *nullum crimen nulla poena sine lege* was a principle of justice rather than a principle limiting sovereignty and that as such, it would be unjust to leave unpunished those who waged aggressive war. Further that the IMT Charter was binding and decisive and it was therefore unnecessary to consider whether aggressive war had been a crime before its execution (2008:78).

However, there have been scholars who agreed with the defense counsel and even state that the IMT violated the *nullum crimen* principle in deciding this way (Werle 2005, Sadat 2002: 185). Raimondo himself notes that the tribunal did not explain what it meant by saying that the *nullum principle* was one of justice rather than ‘a limitation to sovereignty’ (2008:78). It is submitted that the dismissal of the *nullum crimen* principle was a missed opportunity to analyse how a criminal tribunal might resolve tensions between general principles abstracted from domestic law which contradict a treaty provision.

The other observation is of a decision by the ICTY in *Prosecutor v. Furundzija*, where the tribunal, after reviewing a selection of national laws and failing to extract a principle to define rape as including forced oral penetration, reverted to international criminal law and international law to solve this dilemma. From there, it extracted the principle of human dignity, which it relied on to then classify forced oral penetration as rape on the ground that it was a humiliating and degrading attack on human dignity (Raimondo 2008: 112-3). Raimondo observes that the ICTY formulation of the *actus reus* of oral penetration as a crime of rape was patently broader than what the national law provisions provided (2008: 113). In his view, it was a contradiction for the court, upon finding no such definition of rape in national laws, to then revert to international law in order to cure the anomaly. In his view the court by so doing violated the principle of strict construction of criminal statutes and further that in light of the doubts from assessing the general principals of law, then the issue ought to have been resolved in favour of the accused in line with the principle of *in dubio proreo* (2008:114). This criticism against the ICTY has been severally highlighted by Ellis (2011: 968-9) who suggests that the court reverted to human rights principles of dignity in order to avoid having to seek for a common denominator for the definition of rape from national laws. Neha (2014: 38) has also critiqued the methodology used by the

court, pointing out how it reverted to international law for a solution when it had initially found the same international law to be unhelpful. She finally concluded that the tribunal introduced new sources of international criminal law to make the decision.

These contradictions in the application of general principles are not so surprising given the apparent lack of clarity and uniformity that has in some instances been displayed among judges on the ways in which they determine what general principles are. This state of affairs also played out in the ICTY case of *Prosecutor v. Erdemovic* where the judges in a majority vote of three to two decided that duress could not provide a complete defense to crimes against humanity and war crimes. The decision was arrived at using policy considerations of international humanitarian law and the objectives of international criminal law after the judges failing to come up with consistent principles on the defense of duress from national laws (*Erdemovic*, Case No. IT-96-22-A, Opinion of Judge McDonald and Judge Vohrah, para. 72). The judges considered the overall goal of international criminal law to protect the lives of innocent people and the importance of placing limits on commanders and combined it with liberal interpretations of the principle in common law jurisdictions to eventually deny the accused the defense of duress (*Erdemovic* Case No. IT-96-22-A, Opinion of Judge McDonald and Judge Vohrah, para. 75-89).

In his dissenting opinion Justice Cassese contested the policy approach stating that it violated the principle of legality, and further that the decision relied excessively on common law approaches to the defense of duress (*Erdemovic* Case No. IT-96-22-A, Dissenting Opinion of Judge Cassese, para 11).

### ***Substance and transposing of general principles***

A major challenge with the vertical move that is discernible from the foregoing discussion revolves around the substantive nature of the general principle to be extracted and the process of transposing it to apply at the international level. These issues were at the center of the *Furundiza* and *Erdemovic* decisions.

Regarding the substantive nature of rules to be abstracted, in *Erdemovic*, one judge felt that the extracts should be a concrete and consistent rules, while some others felt that they need

not be concrete, but rather a general principle that embodies the reasons for the creation of a norm was sufficient (*Erdemovic* Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah para. 72, *Separate and Dissenting* Opinion of Judge Stephen para. 63). Raimondo (2008) maintains that the latter view is the correct one, explaining that general principals of law are but abstractions of legal rules deprived of their particular elements, and that it is crucial in extracting them, to determine their legal justification and the fundamental principles common to given institutions within the different national legal systems. In the final assessment of a comparative study, he asserts, what must be extracted ought to be a general principle of law rather than a concrete and detailed legal rule (2008:103) and that small differences in the content of legal rules from the various national legal systems should not impede the extraction of a general principle. Furthermore, he propounds that the exercise should not involve a technical looking for coincidences among the legal rules but rather should be aimed at observing a common denominator in the relevant laws (2008: 49).

However, referring to other scholars like Akehurst, Kolb and Weil, Raimondo notes that in some cases, the general principles that are obtained themselves often exist at a high degree of abstraction where they are excessively abstract, making them too vague to be applicable by international courts and tribunals (2008: 49). He notes Weil's observation that if the rules from which the general principles are being abstracted are themselves too abstract, then so will the general principles and they will be of no use at the international level, particularly for international criminal law, which is wrought with challenges of indeterminacy co-existing in tension alongside criminal law requirements of specific interpretation (2008: 49). This theme is especially important for the exercise of abstracting general principles of law from the inherently discretionary nature of the Hobbesian sovereign's use of force standards, which as already illustrated in the foregoing chapter, is at the core of perpetuating the circularity of international law on the question of measuring illegitimate force in law enforcement contexts.

Regarding the problem of transposing general principles, Raimondo observes that international tribunals apply general principles of law by analogy and that criminal tribunals tend to take for granted the analogy between foundations for criminal responsibility at the national and international levels. This is likely based on the perception that international criminal law obtains its legitimacy as criminal law based on the main



objectives of deterrence and retribution, which are basically a transposition from national criminal (2008:184). To this end, international criminal tribunals have applied analogies with respect to substantive criminal law without adjustment, on issues relating to the foundations of criminal responsibility, defences, penalties and the definition of crimes (2008:185). This issue was at the center of Cassese's critique against the 'practical policy considerations' in *Erdemovic* which in his view is a doctrine that applies in municipal law, particularly in common law contexts. In his critique Cassese warned that the automatic analogy approach from national to international law would be mechanical and might lead to unforeseen consequences given the differences between the two systems of law (*Erdemovic*, Case No. IT-96-22-A, Dissenting Opinion of Judge Cassese, paras 2- 5).

As has been observed by Pellet (2006: 772-3) the process of transposition must be one that recognizes that rules which conditions at the national level vindicate may not be capable of vindication at the international level and vice versa. This is owing to the differences in conditions between the two systems. This issue is highlighted in Judge Cassese's specific observations in *Erdemovic* (Case No. IT-96-22-A: para. 5) as follows:

International trials exhibit a number of features that differentiate them from national criminal proceedings. All these features are linked to the fact that international criminal justice is dispensed in a general setting markedly different from that of national courts: international criminal courts are not part of a State apparatus functioning on a particular territory and exercising an authority of which courts partake. International criminal courts operate at the inter-State level. They discharge their functions in a community consisting of sovereign States. The individuals over whom these courts exercise their jurisdiction are under the sway and control of sovereign States...To lose sight of this fundamental condition, and thus simply transplant into international law notions originating in national legal systems, might be a source of great confusion and misapprehension. The philosophy behind all national criminal proceedings, whether they take a common-law or a civil law approach, is unique to those proceedings and stems from the fact that national courts operate in a context where the three fundamental functions (law-making, adjudication and law enforcement) are discharged by central organs partaking of the State's direct authority over individuals. That logic cannot be simply transposed onto the international level: there, a different logic imposed by the different position and role of courts must perforce inspire and govern international criminal proceedings.

The foregoing observation is endorsed by Raimondo, particularly as far as the absence of an international legislature is concerned, warning that general principals of law based on the idea of legislation cannot automatically be applied at the international level (2008, 189).

This observation is particularly critical for consensualists such as Ellis (2011) whose emphasis on the context specific nature of rules in domestic contexts resound with warnings against mechanical transposition, which practise she warns can lead to a rejection of the very legitimacy of general principles of law.

The foregoing criticisms surrounding the application of general principles by international criminal tribunals have also been extended to how the tribunals have approached the horizontal process of abstraction as briefly discussed below.

### **3.2.2 The horizontal move: challenges with methodology and representativeness**

The first observation made about the decisions Raimondo reviews is that the international criminal tribunals have not yet come up with a clear legal methodology for how they select countries from whose laws they then proceed to extract the general principles (2008:179). He notes that for a majority of the decisions, the tribunals applied the laws of North America and Europe and ignored laws from Asia, Africa and South America. He further notes that while the courts do not still apply the PCIJ statute's standard of applying laws from so called 'civilized nations', the tribunals have not clearly indicated when they use the alternative terms, what they mean by 'all nations', 'community of nations', 'nations of the world', among others. Moreover, he further observes that, the tribunals' dominant use of North America and European laws still essentially represents the laws of what were regarded as the 'civilized nations' in the initial drafting of the PCIJ statute and which domination he equates to legal imperialism (183). In his view, what the courts apply in selecting the laws or legal systems from which to extract those laws is basically a mimicking of comparative legal study and not the actual application of it (183).

To this end, Raimondo proposes that rather than maintain this hierarchy, a selection based on geographical representation would facilitate a more universal application of the law. Much like Ellis (2011) and Neha (2014) above, he argues that the division of countries into legal systems as common law or civil law traditions was for didactic reasons and is not significant in and of itself to a legal determination of culpability. He points out that in modern law, most of the legal families have merged and may not fall into obvious

categories, particularly for criminal law which has resulted in mixed criminal procedures where the distinction between the Romano-Germanic and Common law families following the inquisitorial and adversarial procedures respectively, is not clear. For practical purposes, he proposes that the geographical selection should include laws that are more developed on the issue under review (2008:56).

While Raimondo does not analyse what this selectivity portends for the legality principle and the principle of strict construction of criminal statutes, it is submitted that the issue of representativeness and methodology in selecting the laws for abstracting general principles is critical for a determination of culpability under international criminal law, as it affects the argument of notice and foreseeability particularly for acts that are not *mala in se* and that are context specific as is the case for decisions on the use of force in riot control contexts. This argument is developed further below.

Another observation on methodology which Raimondo observes is that whilst tribunals are expected to select the latest laws that were valid at the time of the alleged crime (2008: 43), in his analysis of their decisions, criminal tribunals rarely indicated that they were applying the laws that were valid at the time of the alleged crime. He notes that most of the time, the laws relied upon were those easily accessible to the judges via the internet, which is also problematic for legality considering that laws change constantly (2008:175).

This observation foregrounds the challenge to foreseeability given the abstract and policy oriented nature of use of force standards in domestic contexts, which are highly susceptible to change. It will be argued that this problem which is part of the inherent nature of use of force legislation, poses significant methodological challenges for an objective construction of general principles regarding this area of the law.

Raimondo offers these methodological and substantive challenges as continuing ones for international criminal tribunals of which the International Criminal Court is no exception. He however, does not extensively address them in light of the wider complexities they might present for a determination of legality in a highly indeterminate area of the law such as the use of force during riot control. An assessment of the substantive and methodological issues addressed by Raimondo would be warranted under the highly restrictive regime of the International Criminal Court in an indeterminate legal context such as the one under study. The ensuing sections map out the legality regime of the ICC and the dilemma all the

foregoing criticisms portend for the court in seeking to prosecute use of force in riot control contexts as a crime against humanity.

#### **4. The International Criminal Court: General principles of law, the use of force in riot control and the ICC legality dilemma**

Cassese (2005) has observed that states are often weary of general principles as these tend to restrict their freedom to act. To this end, he postures that states rarely invoke general principles of law except where they think it might be to their advantage to invoke them against a certain state in limitation of that state's sovereignty (2005:188-9). It is no wonder therefore that arriving at a consensus on general principles as a means of defining criminal conduct under the ICC statute was problematic. One of the challenges in crafting a permanent international criminal court statute was the disparity among legal systems on solutions to given problems and the lack of an extensive jurisprudence and experience on which to base a universal criminal code (Sadat 2002: 173). By way of example, while in principle, the drafters of the ICC Statute agreed on the importance of *nullum crimen*, there were disagreements on its details. As discussed under chapter three, the most critical point of departure in the ICC Statute drafting process was the fact that the principle of legality was more liberal under international law compared to its more specific nature under national law systems (Sadat 2002: 181 & 186). Many state representatives were uncomfortable with the ICC applying law that was uncodified, especially given that judges of the court were likely to hold varying methodologies. Furthermore, as has been noted, some delegates wished to know with specificity and beforehand, what the elements of crime within the court's jurisdiction were as they were aware that the ICC would potentially be trying high ranking state officials. To this end, it has been noted that the strict legality principle adopted in the ICC Statute was to provide certainty to states regarding the extent of their obligations under it (Sadat 2002: 182), and to safe guard their sovereignty interests (Grover 2014: 196). It was in this same spirit that the statute adopted neutral language not belonging to any particular legal tradition, but which probably also meant that

the ICC would have to engage in rigorous interpretation to clarify ambiguities created by the neutrality (Sadat 2002: 173).

The ICC's departure from the more liberal *nullum crimen* standards of international tribunals has been observed by Grover (2014: 198) and Lamb (2002), who state that the lack of state practice to guide earlier *ad hoc* international criminal tribunals led to the definition of crimes by those tribunals that has an emotive, *de legeferenda* quality where they are guided by the degree of offensiveness of certain acts rather than by law. Lamb has argued that going by this method, the tribunals were and will continue to be guided by the concept that the more heinous the act, the more it violates a moral principle of humanity. She concludes that this approach co-exists uncomfortably with the *nullum crimen* principle (2002:746).

This approach would certainly pose a contradiction to the strict requirements of *nullum crimen* under the ICC Statute. Given the foregoing lack of specificity surrounding the nature of general principles as a source of law and their relationship to *nullum crimen* under international criminal law as applied by the *ad hoc* tribunals, a separate analysis of the nature of these principles under the ICC Statute is apt. As Lamb has noted, the ICC *nullum crimen* principle was structured in such a way as to forestall previous criticism against the IMT for violations of legality (2002:746).

#### **4.1 Strict construction, effectiveness and legality**

Grover (2014) who has done an extensive study into the interpretation of crimes under the ICC statute observes some imperatives that are critical for upholding legality under the Statute among which are; the imperative of strict construction, the prohibition of analogy, and the principle of effective interpretation (2014:186-217). When analysed in light of the enduring circularity of standards on the use of force in riot control contexts and the foregoing criticisms against general principles of law, this trio magnify the legality dilemma facing the ICC for requiring so high a standard of specificity in a field where the

law largely dissolves into discretion on the use of force under the Hobbesian sovereign conceptualized in chapter two.

#### **4.1.1 Strict construction and general principles as a source of law under the ICC Statute**

The ICC statute recognizes general principles of law as an interpretive source under Article 21 (1) (c) as follows:

(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.

The general principles of law as referenced above are clearly no exception to the prohibition against retroactivity and legality even as they abide by their purpose to remedy cases of *non liquet* (Grover 2014: 184). The Statute is itself clear in the hierarchy it lays out under article 21, wherein the general principles are only to be applied where the Statute itself, the elements of crimes, and the applicable treaties and principles as explored above, remain silent on the issue under investigation. Raimondo suggests that this relegation of general principles under the Statute means the drafters perceived a narrow conception for the role of general principles in the ICC decision making process (2008: 150). On this basis, and in light of the stringent legality requirements under the ICC Statute, it has been stated that arguments that general principles give a defendant notice of novel interpretations of international criminal law must be strongly rejected (Grover 2014: 179). While general principles may come so close to judicial law making (Grover 2014: 179), under the ICC Statute judges are prohibited to expand the court's jurisdiction using treaties, customary law or general principles to find conduct criminal when it is not set out as such under the Rome Statute. This spirit of strict construction under the ICC Statute is in line with the idea that it is the proper role of the legislature and not the judiciary to resolve complex policy issues which may arise from laws (Grover 2014: 190,193).

However, even with so strict a requirement under the ICC statute, Grover (2014) observes that article 22 does not ignore the need to balance between the imperative for strict construction with the principle of effective interpretation, which requires that a treaty be interpreted in good faith, while considering its objects and purpose (2014: 198). The critical issue with ensuring this balance for purposes of this study remains whether such a balance can be achieved under general principals of law to secure a definitive standard for excessive force used during riot control as a crime against humanity under Article 7.

#### **4.1.2 Effective interpretation, analogy and strict construction**

Grover (2014) notes that it was not the intention of the drafters of the ICC Statute to take positivism to the extreme (2014: 189) and that the ICC Statute indeed does leave a vast reservoir for judges through the principle of effective interpretation, although such reservoir is considerably reduced compared to other legal regimes. She warns that while this principle may be applicable, it should not be used so liberally and through teleological reasoning as to swallow the principle of legality whole (2014:184, 198). This warning is reminiscent of Judge Cassese's rejection of automatic transposing of domestic based policy considerations to the international scene in the *Erdemovic* decision above. The principle of effective interpretation as Grover observes, might not always be consistent with the subjective intentions held by parties to a treaty as these often seek to limit their obligations and as such, tend to use language in a treaty so as not to concede to that treaty the full reserve to realize all of its inherent potential and purposes (Grover 2014:198). To this end, effectiveness is a matter of degree and under the Rome Statute, the reservoir left for judges is considerably reduced and is limited to only the most interstitial and minimal developments of the law under the Statute (Grover 2014: 198-9). It is argued that this limited reservoir would have to be diligently exercised even in the filling of open ended phrases such as 'other inhumane acts' under Article 7 in defining crimes against humanity. The foregoing presents a complex challenge in light of the requirement of general principles to have a 'reasonable degree of legal certainty' when interpreting open textured statements such as 'other inhumane acts' (Grover 2014: 204). In this context the balancing

act it seems must happen with a view to achieving some legal certainty but at the same time not violating the principle of legality. The complexity is highlighted by Grover (2014) who notes that an interpretive outcome from such a balancing act ought not to foster the open-endedness of a criminal prohibition but at the same time should offer some more predictable parameters for future application by for instance, providing some criteria or inclusive examples of the conduct that is prohibited under the relevant statute provision. To arrive at such a decision, reasoning should not be largely fact driven but rather should be based on principles (2014: 204). Grover warns that interpretations that fail to resolve the relationship between the requirements of strict construction and effective interpretation would lead judges to engage in ‘fact specific case by case criminalization’ which would send a potent message that there are no fixed limits of official coercion and that the ‘suggestion box for such limits remained always open’ (2014: 200).

The foregoing discussion is reflective of the controversy noted earlier surrounding the nature of principles to be abstracted, that is, whether they ought to be specific rules or more flexible principles. As observed, the consensus is that the general principles abstracted from domestic law need not be so rigid but rather a balance between *lex lata* and *lex ferenda*, having just that degree of ‘abstraction and concreteness’ all at once so as to be ‘dynamic yet also have specific meaning’ (Kolb 2006: 9). This balancing act has thus far not been employed by the ICC. In fact, the evidence available so far indicates a rather restrictive and avoidance approach, similar to the one taken by PCIJ and ICJ to general principles. In the *Situation of the Democratic Republic of Congo, Judgment on Application for Extraordinary review of the Pre-Trial Chamber I*, the Court rejected the Prosecutor’s argument that a general principle could be abstracted from national legal systems, which allowed the review by higher courts, of lower courts’ decisions denying appeals to a higher court. In rejecting the prosecutor’s argument, the court noted that no such alleged general principle existed as for all the legal systems analysed, the modalities for the right or otherwise of review varied from one national system to another (*Situation of the Democratic Republic of the Congo*, Appeal Case No.: ICC -01/04, paras 27-29 and para 31).

Although the Court went on to state that the ICC Statute exhaustively defines the right of appeal and as such there was no lacunae to fill, the decision is indicative of a nascent rigid approach to the content of general principles. Raimondo has argued that the court’s finding was wrong as it was based on a lack of uniformity of rules yet general principles only



require the extraction of principles (2008: 155). This tension between specificity and flexibility of general principles in the context of the ICC Statute thus far indicates favor towards specificity.

The complexity of the balancing act expected from the foregoing discussion is accentuated when applied to the use of force standards during riot control, considering the apparent lack of specific indicators for illegitimate force. The dissolution of law under Hobbesian sovereign state violence is apparent even under national law as argued in chapter two conceptualizing this sovereign and as the ensuing analysis will show. The ability of courts to extract legal principles that would offer a degree of certainty which meets with the requirements of effective interpretation without going beyond their jurisdictional powers is particularly tested on the subject of riot control. Courts in undertaking such a venture would have to ensure that their interpretive outcome does not expand the scope of crimes against humanity to include new classes of conduct and new contextual circumstances, or less rigorous mental elements than are required for the offence. Or indeed to ensure that it does not create an offence where none is expressly provided for in domestic law.

The ICC Statute augments these prohibitions by proscribing the use of analogy in the interpretation of crimes. It must be noted that using analogous reasoning to define a crime is clearly accommodated under the ICC statute's proscription of 'other inhumane acts of a similar character' under Article 7 (1) (K), with a list of crimes to which such acts can be compared for this assessment. The criticism remains however, that the Statute does not avail the legal standards to apply in identifying these 'inhumane acts' (Grover 2014: 213). The Statute's silence on how to approach this open textured provision in one of its 'criminalizing articles only serves to further complicate the challenge of differentiating between interpreting law and making new law in hard cases (Grover 2014: 215). Moreover, for the ICC Judges Grover (2014) warns that if they are to observe strict construction, they must consider, firstly, that they are not usurping the authority of the Assembly of State parties and as such must construct conduct bearing in mind the legislative choices of state parties and avoiding unfair surprise for 'an ordinary law abiding person in the actor's situation'.

Grover argues that in measuring the ordinary law abiding person's standard of notice of criminal liability, ICC judges should consider whether that person ought to have obtained

legal advice prior to them acting (2014: 203). It is submitted that this consideration offers no remedy for the ICC's legality dilemma because even with this consideration, the circularity of laws concerning force in law enforcement in other states is so pervasive and avails limited if any objective guidance for specificity even to a legal advisor of another state. Moreover, for riot control contexts, use of force actions are part of law enforcement and are not *mala in se* particularly in "threshold situations". Determinations of legality in such contexts are wont to dissolve into tactical considerations limiting the significance and practicality of notice of culpable conduct.

#### **4.1.3 Methodological criticisms**

Considering the high level of competition between Hobbesian sovereigns and the high level of resistance against external control particularly on matters of internal security, the foregoing dilemma feeds into ICC's article 21 (1) ( c ) methodological inadequacies on the particular question of use of force standards. As earlier observed the provision indicates that the court should consider 'national laws derived from legal systems of the world' and further makes reference to 'laws of states that would normally exercise jurisdiction over the crime'. Pellet (2002) suggests that the provision only requires the court to consider the 'principal' legal systems of the world which he reduces to a small category of countries from civil law, common law and Islamic law (2002:1073). As discussed above, this categoricist approach has been criticized by consensualists who have pointed to the negative implications of a non-representative selection of laws in light of the imbalance of political and economic power between the states under international law (Ellis 2011).

For the ICC context, Raimondo (2008: 151) has observed that the test the Court will apply in selecting national laws for comparison remains an open question, suggesting that this is yet another approach to Article 21 that can only be revealed as and when the Court considers more cases requiring it to apply general principles of law. In the interim however, I argue that for the context of riot control legislation, Pellet's interpretation is inadequate. While the ICC cannot be expected to apply all the laws of all the countries in

the world, limiting itself to the laws of a few countries from the three legal systems Pellet suggests would be an inadequate means to examine laws of countries whose context specific provisions on the use of force are significantly disparate as is demonstrated below. Moreover, considering the foregoing substantive criticisms against general principles, a ‘categoricist’ approach to methodology would only further undermine the process of abstracting general principles on a micro analytical rather than macro analytical basis which opens them up to closer comparison.

As was earlier noted in Raimondo’s observation, basing on legal systems to extract general principles of laws is of limited significance in light of the hybridity that has emerged overtime between these systems. A geographical consideration with specific attention to laws with more developed provisions on the subject under study would be more apt (Raimondo 2008: 3, 56). It is argued, that this approach particularly bodes well for the question of use of force standards, considering how closely linked it is to the very foundation of the Hobbesian sovereign and the attendant level of protectiveness over these standards that can be expected from states, thereby requiring a more diverse approach of comparison.

These arguments relating to the substantive and methodological challenges above are further developed through an analysis of selected national laws categorized in three tables below.

## **5. National laws on the use of force in riot control**

The ensuing analysis of national legal provisions is based on three tables: A, B and C. Table A is a collection of relevant provisions extracted from selected laws on riot control. The provisions are grouped according to their degree of specificity basing on the three pillars critical to the determination of legitimate force, namely: the justification for force, the precautions taken before implementing the force and the means and methods allowed for applying the force. Table B is a coded representation of the disparity of standards within these pillars and Table C is a main point summary of the indicators of disparity on these three pillars of measuring force. The analysis of the provisions reveals a continuity of the methodological and substantive challenges of general principles under the ICC Statute

discussed above. This section will consider the methodological challenges faced in the process of analysis, the contradictions of abstracting general principals from the disparate provisions and the implications these have for the transposition of standards onto article 7 of the ICC Statute.

## **5.1 Methodological challenges**

As indicated by Raimondo (2008: 151), the test for selecting national laws for comparison under Article 21 (1) (c) of the ICC Statute remains an open question. However, in line with the foregoing argument for a more representative approach, the provisions used for comparison were selected with considerations of substantive relevance. A total of forty nine laws were reviewed based on considerations of relevance owing to how developed their provisions on the use of force are. The provisions extracted are emblematic for the various standards on the justification, precaution and means and methods of force. Laws that were silent on how state police or military forces should use force but merely stated the fact that they had powers to use force were not considered. The laws were taken from the following countries: Nigeria, Uganda, Kenya, Egypt, Rwanda, Zimbabwe, Fiji, South Africa, Mexico, Argentina, Nicaragua, Canada, Australia, Finland, Iceland, Germany, India, Pakistan, Malaysia, Taiwan, Indonesia, Singapore, Sri Lanka, Afghanistan, China, Philippines, Bhutan, Albania, Armenia, Bulgaria, Czech Republic, Russia, Timor Leste, Brunei, Azerbaijan, Croatia, Bhutan, Georgia, Lithuania, Bosnia and Herzegovina, St. Lucia, Malta and Latvia.

A key methodological challenge to be highlighted relates to accessibility of all relevant laws on the standard of force and the susceptibility of the laws to amendment. The laws referenced were extracted from the online database compiled by the UN Special Rapporteur on Extra Judicial, Summary and Arbitrary Executions (Special Rapporteur). As is stated on that platform, the database is only a collection of the laws that are within the Special Rapporteur's possession and the site is open to receiving updated information on their amendment. This reflects the key methodological criticism mentioned above by Raimondo

characteristic of general principles from national laws as sources of law and the susceptibility to constant amendment (2008: 175).

Following from this limitation, I caution that the data used in the tables ought not to be taken as a final indication of what the latest legal provisions from the respective national laws are. With that being admitted, it is pertinent to point out here that this methodological challenge offers some insight into the paradox of expecting state actors to have notice of a universal standard on the use of force based on general principles from national laws, when such national laws are not always readily available to the public and are wont to change according to each a state's sovereign objectives. This inaccessibility of documents on use of force standards has been observed by the Special Rapporteur himself (2014: paras 35-40) and by Amnesty International (2015: 13) particularly in respect of the more institutional documents such as operational procedures, internal regulations and training manuals, with some countries reportedly classifying such documents as protected documents which are not accessible to the public (Amnesty 2015: 13). I argue therefore that from the outset, given the inaccessibility of standards on the use of force and the susceptibility of these standards to change, presumptions of notice and foreseeability for the principle of *nullum crimen* cannot be taken for granted as the conduct in question is not *mala in se*. This limitation reinforces the challenge for strict construction on the question of use of force standards as crimes against humanity.

## **5.2 Method of categorizations: TABLES A, B and C**

As explained earlier, the relevant provisions of the selected laws fall in three major categories which correlate with significant pillars regulating the use of force, namely; the justification of the use of force, the precaution for the use of force and the means and methods of force. Under those categories, the provisions are grouped according to whether they are highly structured, fairly structured or unstructured. The highly structured provisions are those that provide clear references to specified laws for specified actions and steps to be taken at each stage of using force, and make reference to the relevant authorities

from whom permission for the said action is to be obtained. They also include provisions that list the weapons that are restricted or prohibited. Ultimately these laws provide limited discretion for use of force in law enforcement contexts. Under the coded representation in table B (Annex), these laws are colour coded as green.

The fairly structured provisions are those that make vague references to some laws or procedures for steps to be taken and use the language of reasonableness as the main guiding principle for actions to be taken. Thus they may mention the need for precaution or weapons that may be used, but ground these provisions in conditionalities of reasonableness. These avail moderate discretion for use of force and are colour coded as orange on table B.

The unstructured category are those provisions which do not prescribe parameters for action, highly refer to the use of discretion and use open ended declarations about human life, necessity among such other open indicators. They also make no mention of what weapons may be used or how to use them. These provisions avail a high discretion for the use of force. They are colour coded as red on table B.

It is argued that ultimately, these distinctions in the levels of discretion allowed by the law in the selected provisions yield fundamental disparities on the question of determining culpability for the use of force, which translates into a real challenge for the process of extracting general principles for universal application. The ensuing section will present an analysis of all the tables A, B and C which will be referenced here for purposes of the discussion but are availed in the Annexures for practical considerations of space.

### **5.3 Analysis of tabulated laws**

The nature of the legal provisions as analyzed from the tables in the Annexures indicates the endurance of the Hobbesian sovereign's control over the question of how force can be used in the maintenance of law and order, and this portends significant challenges for extracting general principles of law to attain an effective definition for an "attack against

the civilian population” which does not violate the requirements of strict construction under the ICC Statute. This state of affairs is discussed further below under sections assessing the extraction of principles through vertical move and establishing a commonality between standards through the horizontal move, and finally assessing the process of transposition in light of the ICC’s requirements of strict construction.

### **5.3.1 Fundamental disparities of standards**

Whereas Kolb (2006: 8) highlights some core content for the principle of proportionality in the use of force which can be summed up as; ends must be achievable using the least onerous means and to a degree commensurate with the reason for those ends, it is submitted that this content for the issue under investigation is meaningless unless applied in specific contexts. Testament to this argument is evidenced by the apparent disparity of standards between the national laws reviewed in Table A and as graphically represented on Table B. The coded representation indicates blocks of standards that can be divided into highly structured, moderately structured and unstructured standards on the use of force. These are color coded as green, orange and red respectively. The translation in practical terms is that law enforcement officers in red states enjoy by law, high degrees of discretion when determining why, when and how to use force, with the implication of very a limited basis for culpability, While the orange states enjoy moderate discretion and a higher possibility of culpability and the green states have highly restricted discretion with higher possibilities for culpability. Observed in this light, these disparities are fundamental as they represent disparate implications for legality in each context. On this basis, it is argued that the fundamental nature of these disparities is not one that can readily be ignored and collapsed under an abstraction of general principles. Moreover, as already argued above, while it may be too early to be of real significance, the ICC’s insistence in the *Situation of the Democratic Republic of Congo* on uniformity of rules at the national level before a claim can be made for general principles amplifies the significance of such fundamental disparities in use of force laws in affirming this position.

In particular, a reading of Table C summarizing the nature of disparity reveals specific disparities and generalities which further complicate attempts at consolidating the various rules and abstracting general principles from them. Some of these are identified as follows:

- Some laws draw a distinction between using force and using firearms, others conflate these issues or do not mention the difference at all
- Some laws regulate use of force only in situations of arrest, while others make a distinction between arrest and crowd control situations, and yet others simply generalize on the use of force for all cases
- Many laws do not limit the use of firearms to defense of self and others but extend it to property
- Many laws are unspecific as to the justifications for the use of force.
- Some prohibit the use of explosives in crowds, others do not
- Some are more specific on how the shooting should happen, i.e. into the crowd, at the most violent section of the crowd, when one can identify the armed people in the crowd, for dispersing the crowd or not, while others simply make blanket statements allowing the use of firearms
- Some require a judicial pronouncement on the unlawfulness of an assembly, others leave this to the police officer's discretion
- All agree that a warning may be discarded where it is deemed impractical. However, there is no specific consensus on when the warning may be impractical. While some state when it may be unnecessary, others do not specify and leave it largely in the discretion of the officer. Some provisions differ on the nature and aim of the warning and the contents of it. What should the warning say? Should it mention exit routes? The type of force about to be used and how and the effects it might have on the crowd?

Ignoring these highly context specific disparities to proceed and abstract general principles not only portends a high risk of violating legality, but would eventually be an exercise in circularity. This is due to the circular nature of standards that is inherent in all the three



categories of extracted provisions. In fact, if any common denominator can be extracted from the laws analysed, it is that in each category of laws, there is a residual discretion for the law enforcement officer to control the use of force, even in the highly structured green states. It is submitted that this denominator is a reflection of the inherently discretionary power of the Hobbesian sovereign as discussed above which perpetuates the circularity of law where it meets the sovereign's violence. As argued under chapter two, national laws are the fundamental basis through which the Hobbesian sovereign discretion is preserved. It is therefore not surprising that attempting to extract a common standard from different national contexts by which Hobbesian sovereigns are expected to comply would present with challenges related to legality. The latter statement itself may seem paradoxical considering the abstract nature of the national laws on the use of force, but recalling the merging of law, power and violence under the Hobbesian sovereign, it becomes apparent that the principle of legality in this context is intrinsically linked to the Hobbesian sovereign's power to use violence. This argument focuses the ensuing discussion on the challenges that the residual discretion would portend for the process of abstracting general principles and eventually of transposing them to the ICC Statute.

### **5.3.2 The vertical and horizontal moves: extracting general principles and the requirement of effective interpretation**

From the analysis of the extracted provisions, the challenge of achieving a balance between concreteness and effective interpretation without 'swallowing the principle of legality whole' as cautioned by Grover (2014) is at the center of the process of distilling general principles of law for universal application to riot control contexts.

As observed above by Raimondo (2008) general principles need not be extracted in the form of detailed rules and minor differences between laws should not hinder the extraction of a basic principle. In his view, the basis for generating these principles would be in establishing the fundamental principles common to relevant institutions and to define their legal justification.

However, in light of the foregoing arguments on fundamental disparity and circularity of the standards, it is submitted that this exercise when applied to use of force standards is one deeply plagued by legal paradoxes and tensions which render it especially impractical. Two competing principles, concreteness and the residual sovereign's discretion present major challenges for the process of abstraction as analysed further below.

It must be recalled the warning made by Grover and Weil as observed by Raimondo (2008:49), that even in extracting the general principles, the outcome must be applicable as a determinate principle and not something that will simply offer further abstraction and ambiguity. It is argued that such would be the case for riot control standards. Whereas some general principles might be extracted as common denominators among the various laws selected, they would still be very abstract statements around how force used must be reasonable and proportionate and how officers must take precautionary measures to ensure minimal loss of life, thereby still falling short of providing the degree of certainty that would provide the level of predictability required for a prosecution for crimes against humanity under the ICC Statute.

In order to overcome the foregoing challenge and achieve useful concreteness, the principles would run into a challenge of *nullum crimen*. They would have to be a bit more specific and reflect some standards on how and when force can be used, how graduated force should be used, how and where to shoot, when to shoot, the basic principles around issuing of warnings, principles around dispersal, what weapons are inherently disproportionate and indiscriminate. On close observation, of Table C such "principles" would arguably resemble the indicators in the highly or moderately structured category and would portend as new law for the unstructured category. On this consideration, as already indicated above, they might attract criticism for violating *nullum crimen* principle.

It is apparent from the foregoing challenges, that a major dilemma for regulating conduct on the use of force is that it encompasses a wide variety of context specific actions and decisions but for which specific rules for each specific context cannot be laid down in anticipation. It is an open ended scenario for which concreteness cannot truly be achieved and as such that desired balance between the concreteness and open endedness that is expected of general principles cannot be attained. This suggests rather strongly that it may very well be one of those situations that Raimondo (2008) mentioned cannot be regulated

by general principles. The problem it seems is that the abstraction within the laws themselves is too high for further abstraction. As Raimondo himself observes (2008: 49), the general principles will be abstract and of no use under international law, if they are abstracted from rules that are already abstract.

It is submitted that from the laws reviewed, even the legal provisions categorized as specific still retain a high level of abstraction where ultimately, the decision whether or not to use force remains in the discretion of the concerned officer of the law, to decide according to the specific circumstances of the situation at hand. This phenomenon is here dubbed the residual discretion. From an analysis of the highly structured indicators under table C, it is evident that statements of residual discretion exist even where specific standards are purportedly set. By way of example, one provision on the use of weapons provides as follows:

The following are prohibited or restricted during crowd management operations: (a) the use of 37 mm stoppers (prohibited); (b) the use of firearms and sharp ammunition including birdshot and buckshot (prohibited); and (c) the use of rubber bullets (shotgun batons) (may only be used to disperse a crowd in extreme circumstances, if less forceful methods prove to be ineffective.

This provision while apparently concrete is not absolute as the law enforcement officer may flout it once in his or her determination, it would be ineffective for law enforcement in that context.

Another provision from the restricted column provides:

In order that the decision to open fire may be acted upon without loss of control or confusion, the responsible officer shall, as soon as it appears likely that the use of fire arms will be necessary, tell off a detachment of armed police to be held in readiness. When fire is to be opened, the responsible officer shall decide the minimum volume necessary to be effective in the circumstances, and shall give precise orders accordingly, as to the particular men or files who are to fire and the number of rounds to be fired and whether volleys of independent aimed shots are to be fired. And shall ensure that his orders are not exceeded. Whatever volume of fire is ordered, it shall be applied with maximum effect. The aim shall be kept low and directed at the most threatening parts of the crowd.

Other such similar provisions are discernible from the highly structured categories under Table C and the more detailed table A.

I argue that what this demonstrates is that ultimately, the law offers an illusion of standards particularly for ‘threshold scenarios’ where, it is meaningless when left to the discretion of whoever is given power to use force depending on the practicalities of the situation. It is argued that this dilemma is indeed an indication of the inherently discretionary nature of the Hobbesian sovereign that is the very foundation of that sovereign’s monopoly on force as pointed out in chapter two. This phenomenon perpetuates the dissolution of law once it comes into contact with that sovereign’s violence which explains the circularity of language on standards of force under international law as seen under chapter three and four.

As the same sovereign operating at international law acts under national law, such circularity is wont to endure there as well. What this implies in the overall assessment is that, regarding the question of regulating use of force for riot control contexts, the quest for concreteness under the prevailing legal framework is a contradiction as by their very nature, the rules are designed to be abstract and adjustable to deal with context specific situations. Two examples of how this phenomenon has played out in contemporary post-riot contexts are briefly examined below. It is argued that the scenarios demonstrate the illusion of law as an objective standard for use of force in riot control contexts.

### **5.3.3 The enduring circularity of law on the use of force in national application**

#### ***a) Report of the Marikana Commission 2012***

The Marikana Commission (The Commission) was appointed in 2012 by the South African President under Constitutional mandate following a miners’ uprising at Lonmin mine in Marikana Province. Police intervention in the uprising of over 3000 rioters armed with machetes, sticks, bows and arrows, resulted in the death of 44 people, injuries were sustained by more than 70 people, and approximately 250 people were arrested (Marikana Report 2012: 1, 343). In considering whether the police used proportionate force, the

commission, in spite of the already quite detailed provisions on proportionate force, interestingly found that no unit in South Africa was in a position to deal effectively with a crowd situation such as was encountered at Marikana which was armed with sharp weapons and firearms. It proceeded to recommend (Marikana Report 2012:547) that a panel of experts be appointed, including senior officers of the legal department of the South African Police Services (SAPS) and police officers with extensive experience in public order policing at both the local and international levels ‘who have experience dealing with crowds armed with sharp weapons and firearms’ to:

- a) Revise and amend the country’s standing order 262 and other prescripts relevant to public order policing
- b) Investigate where public order policing methods were inadequate and study other countries’ best practices and measures available without relying on weapons capable of automatic fire.

It must here be recalled that under the table of laws reviewed, South Africa presented highly structured provisions for the justification, the precaution and the means and methods of force. Yet for all its detailed provisions including specific instructions on the adequate weapons and the stages of intervention, the Commission failed to define the lawful approach and standard to be successfully applied in the specific context of the Marikana uprising. Instead the Commission noted that there was need for a specific law to regulate specific riot control contexts where a crowd is armed. This despite the fact that order 262 was arguably enacted to deal comprehensively with matters relating to crowd gatherings and assemblies (Marikana 2012: 353). In this specific regard, the Commission (para. 1034) stated:

... [t]he failure of the standing order to 262 to make any provision at all for the use of sharp ammunition invites a response from the SAPS that standing order 262 is therefore not applicable in operations with crowds that are armed and potentially or actually violent . This in turn leaves space open for argument as to what prescripts, if any, apply in such situations with regard to preparation of written plans, briefing, debriefing and generally the issue of ‘spontaneous events’.

Interestingly, despite this observation, the commission proceeded to find that there was excessive force used during the riots and recommended the implicated police officers for further investigation and prosecution by the Director of Public Prosecutions. It will be interesting to see, if that trial proceeds, whether and how the court will deal with the ambiguity or the lack of a clear standard for situations such as the one in Marikana and the standard that will be applied as a basis for the prosecution.

It is argued that this search for specificity of law even where it apparently already exists is an exercise in futility precisely because of the nature of the Hobbesian Sovereign for whom decisions to use violence ultimately depend on tactical discretion which cannot be objectively regulated by the law. This phenomenon further manifested after the 2011 riots in London and similar conclusions were made, despite the detailed provisions on proportionality in UK police training manuals. Two reports are considered briefly to illustrate this point.

***b) 2012 Metropolitan Police Service (MPS) Report of the Strategic Review into the Disorder of the August 2011 London riots***

The riots in August 2011 in London occurred after a peaceful protest against a police shooting of a young man turned violent. Two people lost their lives, 3, 931 offences including arson and robbery were recorded, and 4, 019 arrests were made (MPS Report 2012: 14). The riots saw police come under attack with police cars being set on fire in some areas and missiles being thrown directly at the police in others. According to one chief inspector, the police faced unprecedented levels of spontaneous life-threatening violence. Reports also indicated that in some cases crowds attacked police using petrol bombs and knives (MPS Report 2012: 42-3). The report notes that while the officers who intervened during the riots applied the techniques they were trained to do, there was a need for those techniques to be adapted to the situation that the officers found themselves faced with in order to deal with the unique challenges in those circumstances (MPS Report 2012: 118).

This is yet another indication of the context specific nature of the decisions on actions to be applied in riot control contexts, particularly those that are spontaneous and may not be easily managed with a step by step specificity. True to the pattern followed by the Marikana Commission, the MPS report reveals that after the riots, a committee was established to review the UK's public order tactics, including the use of firearms, to make them more adaptable to fast changing pace of violence during protests such as were witnessed in August 2011 (MPS report 2012: 118). It is argued here as well, that this exercise is a quest for an elusive objective standard on the use of force.

***c) Her Majesty's Inspectorate of Constabulary (HMIC) Report into the London Riots of 2011.***

The same foregoing observations were maintained in the report made by Her Majesty's Inspectorate of Constabulary (HMIC 2011 Report), in which it was observed that even though the Association of Chief Police Officers' (ACPO) Manual of guidance; *Keeping the Peace*, extensively sets out Police tactics on the use of force during riot control, including guidelines on various policing methods and the weapons to be used, the manual still does not address the real challenges of spontaneous flash rioting (HMIC 2011: 61). In observing the unrealistic nature of the guidelines based on for training (HMIC 2011:61), one observation in respect to some officers who were interviewed for the report is quite significant:

All six forces reported that even where training was provided, frequently it was not sufficiently realistic. Some officers did not, for example, train in full kit, which meant that training did not prepare them for the rigours they experienced for real. Some commanders and officers interviewed also expressed the view that training has become sterile; it focuses largely on practicing the delivery of rehearsed tactics in pre-determined scenarios, e.g. taking a junction where rioters disperse when challenged. They pressed HMIC to recommend opportunities which would allow them to use their judgement, dynamically, to problem solve, and combine tactics. The accent, they said, should be on encouraging officers to be flexible and reactive to emerging threats.

The foregoing augments previous arguments which maintain the context specific and highly discretionary nature of riot control contexts. Indeed the HMIC noted that the ACPO

manual was developed as a 'living document' to be developed according to new policing needs (61). It also warrants specific observation here that indeed, because of the fundamentally discretionary nature of use of force in riot control contexts it is no surprise that some standards on the use of force such as in the case of the UK are contained in a training manuals as opposed to statutory provisions. This would facilitate changing them to suit specific circumstances as the need arises.

Another key observation to note from the HMIC report is that it had previously dealt with similar recommendations three times, twice in 2009 and then in February 2011, each time noting that the existing police rules were not sufficient and required further reform for clarity (HMIC 2011:76). This observation suggests very strongly a vicious cycle of searching for an elusive legal certainty through legal reform whenever new challenges present in violent protests yet Police officers are simply required to use their discretion to contain the violence, particularly in those cases not specifically covered within precise legal boundaries.

The foregoing analysis illustrates the challenge of aiming to generate substantive general principles based on national laws on the use of force, for which the very foundation is the Hobbesian sovereign's discretion to maintain monopoly on force. This is particularly the case for threshold contexts where law enforcement officials may have little to no control over the intensity and momentum of violence from a rioting crowd. It is apparent from the foregoing examples that while the illusion of specificity of standards may hold for lower thresholds of violence, it is wont to disappear with higher thresholds of violence where the sovereign's monopoly on force is threatened. As argued under chapter three, these threshold situations are the ones most likely to come before the ICC considering the scale and intensity of violence they present and their closeness to armed conflict. With the disappearance of specific standards and the centring of the sovereign's discretion in these contexts, the search for a legal basis on which to found a prosecution becomes highly complex and susceptible to criticisms relating to judicial law making. It indeed arguably becomes an illusory quest.



This interconnectedness between national law on the use of force and the Hobbesian sovereign means that arguments regarding ‘state necessity’, ‘Maintaining public order’ ‘protecting life and property’ take on highly subjective meanings that are interpreted from the point of view of the Hobbesian sovereign. This relationship between law, sovereign and violence portends a specific challenge for the process of transposing use of force standards onto the international scene as crimes against humanity under the ICC Statute. This argument is developed further below.

#### **5.4 Transposing use of force standards: analogy and strict construction: Attack, murder and inhumane acts**

The combined effect of the elusive nature of law on the use of force and the fundamental disparities in the core elements for measuring force as analysed above, signify a major challenge for the process of transposing the already abstract standards on the use of force into the definition of crimes against humanity envisaged under Article 7. More importantly, this challenge is grounded in the Hobbesian sovereign’s monopoly on force under national law, which is perpetuated through its residual discretion in use of force contexts as argued above.

It follows that in the absence of a clear standard, the question of what amount of force qualifies as murder under national law so as to amount to an ‘attack against the civilian population’ remains dependent on highly subjective indicators that are determined by the Hobbesian sovereign. This observation it is argued, is supported by the apparent duality of legal systems relating to murder and manslaughter.

#### **5.4.1 The duality of law enforcement laws and criminal laws**

An observation can be made from a survey of the Special Rapporteur's data base that of the provisions analyzed, most are not regulated under criminal laws. Majority are extracted from Police Acts, Public Assembly Acts, Riot Control Acts, Public Order Management Acts, and Use of Force Standing Orders among others. The police actions on the use of force are evidently being regulated as part of law enforcement activity and not as criminal activities.

By way of example, from Table A, of all the laws previewed, only two legal provisions; the Criminal Code of St. Lucia (2004: S. 43, 46) and the Criminal Code of Canada, (2013: S. 32) regulate the use of force in riot control contexts within criminal codes and even then, they do so as provisions empowering officers to prevent riots criminalised in the statutes. They do not even define what levels of force used in stopping such riots would amount to murder or manslaughter under the very criminal codes criminalising murder and manslaughter.

Other provisions on the use of force expressly exclude criminal liability for force used in riot control contexts. Examples of these are extracted as follows:

*-Uganda Police Act, Section 35:* the police officer, may do all things necessary for dispersing the persons so continuing assembled, or for apprehending them or any of them, and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming that resistance, and shall not be liable in any criminal or civil proceedings for having by the use of that force caused harm or death to any person

*-Fiji Public Order Act as Amended by Public Order Decree: Section 9 (3 )...may use such force as he or she considers necessary, including the use of arms, to disperse the procession, meeting or assembly and to apprehend any person present thereat, and no police officer nor any person acting in aid of such police officer using such force shall be liable in criminal or civil proceedings for any harm or loss caused by the use of such force.*

*-Public Order Security Act Zimbabwe: Section 29*

If a person is killed as a result of the use of reasonably justifiable force in terms of subsection (1), where the force is directed at overcoming that person's resistance to a lawful measure taken in terms of that subsection, the killing shall be lawful.

Where criminal liability for excessive force is referenced as in the case of Sri Lanka, there is still no express indications of what would amount to excessive force, as the determination what force to use is highly discretionary. The relevant provision merely provides that:

A police officer is entitled to fire upon a mob to protect life or property (*Sri Lanka Police Ordinance: department Order No. A/ 19, s. 4*).

The provision contains no accompanying parameters for how the fire ought to be used, except to state that the officer should consider whether immediate action is necessary or whether mere armed presence of an armed party will be sufficient to cause the crowd to desist from violence. Such circularity offers no apparent objective indicators for criminal liability for murder or manslaughter in such contexts.

#### **5.4.2 Implications of duality for transposing standards on the use of force**

Basing on the foregoing observations of duality, the earlier cautions by Cassese, Ellis and even Pellet on the significance of observing the fundamental difference between domestic and international contexts before transposing domestic law principles to the international level are hereby recalled. In particular, as Pellet (2006:773) observed:

...conditions at the international level are very different from what they are at the domestic, and ...rules which the latter's conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level.

On the basis of this caution I argue that the foregoing duality of legal regimes for murder as a crime under national law and killing as part of a law enforcement process is highly indicative of the fact that there are two separate standards for assessing violence which results in killing by the state on the one hand and killing by non-state actors on the other. While the former is subject to rules hinged on tactical and highly subjective context specific considerations, the other is determined based on moral and law and order standards. This distinction of standards reinforces the state centered nature of use of force for riot control contexts as intrinsically linked to the Hobbesian sovereign's functions of law enforcement. Thus the content of these standards is clearly highly under the control of context specific processes that are functional for purposes of law enforcement. Such considerations do not exist under international law. This duality combined with the foregoing argument on residual discretion and the illusion of legal certainty for riot control standards present a strong challenge to transposing these standards as indicators for murder or 'other inhumane acts' as crimes against humanity under article 7 of the ICC statute.

In light of these arguments, attempts at such transposition would have no basis in specific domestic law standards and are bound to yield decisions based either on analogy, which is prohibited under the article 22 requirements of strict construction under the ICC Statute. Such a scenario is especially aggravated by the fact that by the very nature of the conduct under review, the Hobbesian sovereign's monopoly over force and power would be under judgement. Thus a highly contentious situation would arise of a clash of discretions between state discretion in matters of law enforcement over its territory and the judge's discretion in applying the law. As earlier pointed out by Ellis (2011), such criticisms concerning power are critical to the very legitimacy of general principles as a source of law and indeed to the adjudication project under international law (2011:956).

In overall observation, the highly abstract realm of use of force in riot control contexts is a symptom of the Hobbesian sovereign which manifests through the illusion of law by purportedly regulating force within legal provisions but which ultimately operate on the basis of the law officer's discretion. This fact is often exposed in cases of higher thresholds of violence when the sovereign's monopoly on violence is threatened. This state of affairs renders it impractical to extract substantive general principles of law from national laws on the use of force in riot control contexts in order to apply them to a definition of crimes against humanity under the ICC Statute. As has already been observed, the specificity requirements under the Statute are higher than those of ad hoc international criminal tribunals, and the role general principles as a source of law under it is highly subsidiary. That the process of extracting them for criminalizing riot control contexts is a highly complex balancing act susceptible to criticisms for want of legality and encroachments on sovereignty further diminishes their effectiveness as a tool of decision making by the ICC.

I submit that the use of force in riot control scenarios is highly indicative of one example of areas of sovereignty that state parties to the ICC Statute wanted to ensure were inaccessible to the court via liberal powers of interpretation. As observed by Grover (2014: 187) some of the main reasons for so restricting the principle of legality for the ICC was the fundamental implications that the court's jurisdiction had for states, considering that most crimes under its purview had a close nexus to state activity. Controlling riots is a core state activity which as earlier explained is an intricate part of the very functioning of sovereign states under their law enforcement and security mandate.

There are some scholars who believe that the ICC might have to make decisions in a way that ensures it is not beholden to so restrictive a standard of legality which state parties imposed on it (Pellet 2002: 1053). It remains to be seen how this will manifest and what implications it will have for the relationship between the Assembly of State Parties and the ICC. Until then however, jurisdiction over riot control contexts remains ambiguous and ridden with several and fundamental contradictions as observed above. This remains the case even with the existence of principles which have been developed under the auspices of the United Nations to guide law enforcement officials on the issues discussed above. The significance of these principles as soft laws warrant an assessment of their applicability to

the foregoing dilemma including an examination of their place under Article 21 as an interpretive source for the ICC.

## **6. UN Basic Principles on the Use of Force and Firearms as a source of law for the ICC**

The foregoing discussion on general principles warrants a consideration of the UN Basic Principles on the Use of Force and Firearms (UN Basic Principles) and their relationship to the national laws discussed above.

The UN Special Rapporteur on Extra Judicial Summary and Arbitrary Executions has noted that the UN Basic Principles are considered to be authoritative sources of law for some states such as Australia and Brazil (UN Doc. A/HRC/26/36, 2014, para. 44) and are indeed listed by some states as reference point for standards on the use of force. The UN Basis Principles remain categorised as soft law as noted in the report of the Special Rapporteur (UN Doc. A/HRC/26/36, 2014: para. 43).

According to Detter, soft laws are rules that emanate from multiple sources including unilateral acts and bilateral agreements (1994:212). Boyle and Chinkin (2007:211-2) refer to them as simply a variety of legally non-binding instruments used in international relations and they most notably manifest in the declarations or resolutions adopted by states at international conferences or at United Nations General Assembly. They are merely supplemental to international hard law, namely treaties and customary law, and are not in themselves binding.

However, it has been argued that even when non-binding, soft laws may entail legal consequences for states (Detter 1994: 212-3). Detter observes that in some cases they merely reflect obligations already existing in hard law, but in other cases, they may result into legal obligations (1994:213). It has been observed (Boyle and Chinkin 2007: 212) that the interplay between soft law on the one hand, and treaties, custom and general principles of law on the other is significant to the law making work of international organizations, of which the ICC is one. Soft laws may be derived as general principles not taken from

national law, but intended for application by courts or states in the interpretation of the law. They cannot override treaties or custom, but their importance is derived from the influence they can exert on the interpretation and application of other law (Boyle and Chinkin 2007: 223).

The strict prescription of sources of law under Article 21 of the ICC Statute undermines the role of soft law in the ICC's decision making process. In fact, the Statute does not mention soft law specifically as a source and the ambiguous reference to 'principles and rules of international law' under sub article 1 (b) has been suggested to mean either decisions of ad hoc criminal tribunals or as customary international law (Grover 2014: 262, Pellet 2002: 1070-72, Neha 2014: 51-2). Moreover, the highly definitive hierarchy of sources where the Statute and Elements are the main source followed by treaties and customary law and lastly by general principles of law strongly indicates a closed list which does not envisage the relevance of soft law sources.

Nonetheless, considering the recognition by Grover of a judicial reservoir left to ICC judges even under the strict construction limitations (2014: 198) and also considering the prediction by Pellet that ICC judges might have to work towards freeing themselves from such strict prescriptions (2002: 1059), the importance of soft law on the issue of use of force in law enforcement and 'borderline' contexts warrants consideration. It is on this basis that this section proceeds to examine the UN Basic Principles and assess whether they provide a remedy for the circularity that has persisted through the analysis of the ICC statute, the Elements of Crimes, the applicable treaties and international principles to the general principles of law derived from national laws on the question of specificity in the use of force. Given their nature as soft law, the UN Basic Principles' provisions are open ended and offer no solution to the dilemmas of circularity in the foregoing analyses. This is discussed briefly below.

## **6.1 The enduring circularity of use of force standards under the UN Basic Principles**

The UN Basic Principles were adopted by the 8<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders which was held on 27<sup>th</sup> August –September 7<sup>th</sup> 1990. From

the very onset, the principals themselves betray a lack of bindingness and circularity by urging states in clause 1 to adopt and implement their own rules on the use of force and firearms but to keep these standards ‘constantly under review’. This is reflective of the illusion of specificity of law explored in the cases of the post Marikana and Post London riots inquiries discussed above. Moreover, as already analysed, the national laws on the subject themselves remain ultimately based on the state’s discretion. The principles themselves are not without some other criticisms on circularity particularly for borderline cases of violence. For instance, clause 4 directs states to use nonviolent means first before they resort to using force and firearms. There are no subsequent specific directives on what stage the situation warrants a resort to force or to firearms. The presumption is that such an assessment is to be left to the discretion of the state forces themselves. This only serves to confirm previous criticisms on residual discretion and the challenges of circularity flowing from it.

The other provisions of the Basic Principles raise the same pattern of tensions and circularity. Clause 5 directs states that where lawful use of force and firearms is inevitable, law enforcement officials should exercise restraint and use force in proportion to the legitimate objective to be achieved. The issue immediately arises that in riot control contexts, it is states that determine what these objectives are and also determine at what point the said objectives would have been achieved. With these considerations, it can be expected that political and security considerations would be conflated to serve the Hobbesian Sovereign’s interests. A judicial engagement with such open ended state centric questions in a prosecution for crimes against humanity would be open to criticisms for objectivity and occasion the clash of discretions referenced above. It would lead the court directly into the arena of political considerations, which would have grave implications for its legitimacy.

Clause 8 which provides that internal challenges such as political instability or any other public emergency may not be invoked to justify any departure from the Basic Principles is already being circumvented by states which had otherwise opted to refer to the Basic Principles as guidelines for their use of force standards. According to the UN Special Rapporteur on Extra Judicial Killings, the threat of terrorism is being invoked by states as a basis for lower thresholds for use of force during riots (UN Doc. A/HRC/26/36, 2014: para. 32). This has also been observed in Amnesty International’s guidelines to the interpretation



of the UN Basic principles, which notes that states' legal reforms are being done in such a way as to blur the lines between military and law enforcement operations and the applicable legal standards on the use of force (Amnesty International 2015: 11). It is submitted that this observation reflects precisely the inherent nature of the Hobbesian sovereign's discretion on the issue of internal security and is at the core of the foregoing challenges to legal specificity on the question of use of force in riot control contexts. It also demonstrates the Basic Principles' limitation as non binding standards.

Clause 9 limits the use of force to cases of: self-defense, defense of others against imminent threat of death or serious injury, to prevent the commission of 'a particularly serious crime' involving grave threat to life, to arrest a person presenting such danger or resisting authority, but all must depend on whether less extreme measures are insufficient to achieve the objectives. Further, it provides that the intentional lethal use of firearms is to be made only when 'strictly unavoidable' to protect life. These considerations are inherently discretionary and are bound to lead back to questions around interpretation and context specific decisions already explored above.

Under article 13, the principles provide for the dispersal of unlawful but nonviolent assemblies, by avoiding the use of force, but that where this is not practicable, may use force 'to the minimum extent necessary'. Regarding violent assemblies, state officials may use firearms only when 'less dangerous means' are impracticable and only to the 'minimum extent necessary'. As already observed, the terminology used offers little in the way of substantive standards.

There has been an attempt by Amnesty International to offer interpretative guidelines for the principles but these too perpetuate circularity and are not without unresolved questions and false presumptions about the different states' national standards. A consideration of what they offer is warranted in this light.

## **6.2 Amnesty International's guiding principles to the interpretation of the Basic Principles on the use of Force and Firearms**

The guidelines start by acknowledging that law enforcement officials operate in highly sensitive circumstances which require instant decisions and difficult judgments to be made in very dangerous, highly stressful circumstances (Amnesty International 2015: 9). They however proceed to augment the argument made earlier about a lack of universality by admitting that law enforcement practices differ from country to country depending on the country's security situation, political, legal and administrative set up, the size of the country's economic, logistical, and cultural issues. Further that as such, each country should develop its own necessary legislative and operational framework on the use of force and firearms, provided these are established in a manner that they are compliant with international human rights law and standards in general and Basic Principles in particular (Amnesty International 2015: 12). As already established under chapter three, these human rights standards are themselves ambiguous and can only be given content in the specific contexts in which force has to be applied as part of riot control. This purported guidance through the human rights standards and the UN Basic Principles therefore is but another exercise in circularity in the quest for a uniform standard for purposes of legality under the ICC.

Moreover, on Amnesty International's own admission, the guidelines themselves could not be made on a geographically representative level as some countries qualified their documents as protected and thereby inaccessible to the public, including material such as internal police regulations and training manuals (Amnesty International 2015: 13). This re-echoes the tensions that have already been referred to about the Hobbesian sovereign's discretion.

Regarding legality, the guidelines state that the use of force ought to serve a legitimate objective as established by law and that the force ought to be used for a lawful law

enforcement purpose (17). This guideline meets with the same challenge of the circularity of law as analysed above. The objectives for which force may be used are prescribed in open ended terms, including: self defense, defense of life and property law, dispersing crowds, ensuring public safety, preventing crime, among others. These objectives, while provided for in the law, are ultimately determined in scope and urgency by the law enforcement officers and by the state.

On the question of necessity, the guidelines note that states should only use firearms if other means are ineffective or if there is no promise of achieving an intended result (Amnesty 2015: 18). The explanation offered for this guideline is that states should make the assessment at two stages; the qualitative and quantitative stage. Under the qualitative assessment, states should consider whether force is necessary at all or whether it is possible to achieve their legitimate objective without resorting to force, while the quantitative assessment is to be made on the basis of how much force is needed to achieve a given objective, in which case the force ought to be minimum but effective and temporary in that it ought to stop once the objective has been achieved or is no longer achievable. Furthermore, on the question of proportionality, the guidelines advise that clause 5 of the guidelines which cautions against excessive force means that state officials may have to accept at some point that their legitimate objective is unachievable.

The decisions anticipated in borderline scenarios involve considerable political and tactical judgments which may be rather specific and in conflict with the generalised approaches such as those proposed in the guidelines. An example may be given of the direction to stop using force when an objective is no longer achievable. If applied in contexts where governments are threatened by unconstitutional overthrow from power, the practical question arises on would be the arbiter as to when such states ought to give up defending their post. Ultimately, this would have to be a decision that only the sovereign can make and without external intervention, it is not feasible to prescribe an objective set of standards by which states must comply to determine when their objective becomes unattainable. Such decisions like several others related to the use of force in law enforcement, remain largely contextual.

The guidelines proceed to expound on proportionality stating that the principle also means that law enforcement officers may only have to put a life at risk if it endangers another life

(Amnesty International 2015: 18). As already pointed out, questions of self-defense and the grounds permitting the use of force differ in various countries and in some of the provisions, are much broader than the grounds envisaged here, extending into defense of property, state security, defense of the peace, among others.

Regarding the dispersal of violent assemblies, the guidelines provide that state intervention should be guided by the principle of facilitating the assembly and should not anticipate violence right from the start of the assembly. The guidelines proceed to state that security personnel should aim at specific violent individuals but should not use the violent actions of a few individuals to respond to the entire assembly with violence (Amnesty International 2015: 147). Again, as already highlighted, this approach presupposes a relatively organised and controllable assembly but does not address largely violent and armed crowds engaging in sporadic violence. The methods required to deal with these kinds of scenarios may not always be straight forward as presumed by the guidelines.

On the question of the means and methods of force, the guidelines offer some considerable specificity as to what weapons qualify as legitimate for use in law enforcement processes and how they ought to be used. However, these guidelines are limited to kinetic impact projectiles, tear gas and water cannons as the weapons. They provide that kinetic projectiles should not be fired randomly at the crowd but are to be aimed exclusively at the people engaged in the violence and should only be used when other means to stop the violence have failed. More specifically, the guidelines state that they should be fired at the lower part of the body to minimize injury, they should never be used in skip fire, by bouncing off the ground. Further, the guidelines state that teargas may only be used when there is more generalized violence to disperse the crowd and only when all other means have not been successful. They further state that firearms should never be used as tactical weapons in the management of public assemblies (Amnesty International 2015: 148).

While the foregoing guidelines on firearms are quite specific, by Amnesty International's own observation, there is a large scale misuse of these weapons and there are no specific standards on their legitimate use of by law enforcement agents (Amnesty 2003: 58). While this finding was made before the writing of these guidelines, it is quite apparent going by the analysis of the laws tabulated in the annexure that the absence of a universal standard

on the acceptable weapons as well as their use still persists. What this portends is that with respect to the means and methods of force used in riot control, the guidelines may be of some significance in aiding interpretation, but for want of universality, they would very likely invite a legality challenge as *lex ferenda*, based on the strict construction rule of the ICC Statute. As Detter (1994: 250) points out, soft law may serve as support for a future binding treaty, but for the sake of preserving the principle of security of the law, soft law provisions must not in themselves be interpreted as evoking obligations *per se*.

In the overall analysis, the UN Basic Principles and the guidelines for their implementation do not circumvent the circularity of the law on the question of a universal standard for the use of force in riot control contexts. While in some aspects concerning the weapons and methods of using those weapons the guidelines offer a considerably high degree of specificity, the absence of their application universally limits their significance in the interpretive process under the strict legality conditions of the ICC Statute. The other aspects of both guidelines remain wrought with the same challenges of ‘open-endedness’ which effectively defers decision making and judgements on the necessity, precaution and means and methods of force, back to the law enforcement officials engaged in the actual law enforcement process.

## **7. Conclusion**

While general principles of law from legal systems of the world are meant to be a final resort for gap filling in hard cases, the controversy surrounding their methodological and substantive application renders them susceptible to criticisms ranging from want of certainty, objectivity and representativeness. It has been suggested that the PCIJ and ICJ avoided them for precisely these reasons. While the ad hoc criminal tribunals have been more active in the application of general principles, they have done so in a manner that has maintained rather than cured the inadequacies and contradictions which continue to plague general principles as a source of law.

Under the highly restrictive standards of the ICC Statute, these criticisms are further magnified. The highly abstract nature of standards on the use of force in law enforcement

contexts such as riot control, render the process of distilling general principles from such standards a very complex undertaking in which several contradictions would have to be reconciled. An analysis of selected legal provisions illustrates the practical methodological inadequacies of applying general principles for a universal use of force standard. The fundamental differences between states' standards on key pillars of necessity, precaution and means and methods of force indicate the paradox in abstracting general principles from these standards, while the residual discretion inherent in the laws render the very idea of an objective standard illusory. As argued above, the intricate connection between national standards on law enforcement and the discretion of the Hobbesian sovereign yields a situation where those standards depend ultimately on subjective determinations which are wont to be driven more by political and security considerations of the Hobbesian sovereign. This intricate interconnectedness is what explains the apparent dual legal system for killings under law enforcement processes and for killings by non-state actors. This merger of law and sovereign is the basis for the enduring dissolution of law in the face of state violence and the resultant circularity in the language of law at national level.

In final analysis, this assessment renders illusory the very concept of abstracting general principles from inherently abstract national standards on riot control and transposing them onto international law under the strict legality framework of the ICC Statute. A purported application of them in light of all these considerations is highly susceptible to criticisms of making new law, and applying law by analogy which are contrary to the strict ICC legality requirements. Moreover, they would also open the process up to criticism for applying political considerations.

While the UN Basic Principles offer some degree of certainty for prohibited means and methods on the use of force, these too like the highly structured national law provisions are only useful for lower level thresholds of violence and are wont to dissolve into considerations of sovereignty in cases of 'borderline' violence when the Hobbesian sovereign's monopoly on force is threatened as discussed above. Moreover, they are soft law sources whose application under the ICC Statute's strict sources provisions is still uncertain.

In conclusion, the foregoing analysis of laws on use of force riot contexts demonstrates an area of sovereignty over which the states retain a high level of control and for which clear

boundaries of force continue to be an illusion. A prosecution under the ICC Statute based on general principles from these standards is wont to be highly politicized and criticized for want of legality. This is ultimately due to the fact that State parties to the ICC Statute as argued earlier, have not arrived at a shared understanding on what aspects of their otherwise lawful conduct in law enforcement would open their officials up for such a prosecution. As the concept of the Hobbesian sovereign demonstrates, states are prone to jealously protect their prerogative to use force including over a matter of internal jurisdiction such as riot control. The process of ‘internationalizing’ this fundamentally internal exercise by way of international criminal law has not been yet occurred and an application of Article 7’s ICC statute would be premature.

## **CHAPTER FIVE**

### **CONCLUSION**

This study set out to answer the main question whether article 7 of the ICC Statute effectively criminalises the use of force in riot control contexts as crimes against humanity. It also set out to investigate how the Hobbesian sovereign as an agent of analysis can help to explain the legal inadequacies and contradictions arising from the application of article 7 to riot control contexts.

The study did not consider specific riot control situations as case studies but rather adopted a general approach using various examples of laws and judicial decisions to explore the question of how states' response to violent protests is justified by law and whether criminal liability for such force can be established effectively as a crime against humanity under the ICC Statute. The study undertook this task through doctrinal analysis and positivist theory. It juxtaposed these sources of law against the strict legality requirement of the ICC Statute to explore the extent and nature of contradictions arising from the definition of crimes against humanity under Article 7.

In order to demonstrate the extent of these complexities and contradictions the study used the Hobbesian view of the sovereign to illuminate the state centric nature of the law on the use of force in riot control. This view of sovereignty was used to lay emphasis on the role of power and politics in shaping law and to link this power to the necessity of the state. It offered an insight into the fundamental omission in the definition of crimes against humanity under article 7 in as far as the article fails to clarify what aspects of force used by



state officials in riot control it criminalizes. The Hobbesian view of sovereignty demonstrated that the internationalization of internal riot situations is premature given that international law is dependent on the community of sovereign states which jealously protect their prerogatives to use force, whether against international enemies or internally against opponents. The study has done so by depicting the circularity of language in laws regulating states' use of force in riot control contexts.

The main finding of this study is that article 7 of the ICC Statute does not effectively criminalise the use of force in riot control contexts as crimes against humanity. It is based on the fact that the definition of crimes against humanity under article 7 implicates state force used in riot control contexts but offers no guidelines as to what force would be legitimate as part of law enforcement processes and what force is criminalized. This in turn defeats the application of the ICC Statute's strict legality standards to the abstract and circular standards on the use of force in riot control contexts as perpetuated under the Hobbesian sovereign state structure. Moreover, the interpretive sources that would aid in clarifying these boundaries offer no remedy as they exist in the prescriptive realms of human rights and humanitarian law which have no specific prohibitive standards on which to base a criminal prosecution under article 7.

In particular, chapter three of the study found that the main sources of law for the interpretation of crimes against humanity in riot control contexts, namely the ICC Statute, the Elements of Crimes, the applicable treaties and customary law are inadequate to provide a frame work for an effective criminalization of excessive force in riot control contexts. This is fundamentally due to the ambiguity of law on the use of force in riot control contexts through which the discretion of the Hobbesian sovereign is perpetuated. The existence of such discretion is so pervasive that it permeates into legal provisions in diverse treaty regimes which seek to establish boundaries of legality to regulate it, thereby ensuring perpetual circularity on the standard of liability for force used in riot control contexts. The result in the highly restrictive context of ICC legality is the lack of a framework from the ICC's interpretive sources, on which to base a prosecution for crimes against humanity in riot control contexts without a high risk of criticism for legislative innovation or public policy controversy and without breach of the strict standard of legality stipulated under

article 22 of the ICC Statute. While the study notes an attempt by Grover (2014) at a more lax legality standard, her proposal is still inherently wrought with subjectivity and does not in its proposed state offer effective tools for circumventing the circularity of law surrounding the use of force in riot control contexts. The study applied it for illustrative purposes with acknowledgement of this limitation.

The study also found that, the challenge to effective criminalization of state mandated force as crimes against humanity under the ICC Statute is due in part to the under development of crimes against humanity as international crimes in their own right. The historical evolution of these crimes in armed conflict contexts has fostered their conflation with IHL parameters for establishing liability which has contributed to their inhibited development in riot control contexts. The ICC has also missed or avoided opportunities to foster their development in law enforcement contexts as was manifested in the situations of Kenya and Côte d'Ivoire which have been brought before it. These situations were also missed opportunities for the court to demonstrate how it can circumvent its strict legality restrictions in hard cases such as riot control contexts bordering on armed conflict, whilst effectively fulfilling its interpretive role and avoiding criticism for legislative innovation. It remains to be seen how the Court will manoeuvre this question in the future.

Chapter three of the study maintains that absolute legal certainty is unachievable and the highly subjective nature of and circularity of laws concerning riot control render their interpretation under the ICC's strict legality requirement a paradox and a particularly challenging, almost illusory undertaking. In the context of the ICC where decisions may be highly politicized the objectivity and legality of such an interpretation process is even more complex. The nature of cases involving state use of force in riot contexts as seen in the foregoing examples could arise in the wake of post-election violence, ethnic or other political violence. In such scenarios the Hobbesian sovereign's monopoly on the use of force is entrenched within legal frameworks which offer no clear limitations on its actions. The chapter argues however for a bare minimum of parameters agreed upon as universal standards and a foundation against which to measure state actors' conduct in riot control contexts. This would be an initial step towards a clearer legal basis for the criminalization of riot control conduct under the ICC Statute framework.

Chapter four of the study found that while general principles of law from legal systems of the world may be an avenue for gap filling in hard cases, their methodological and substantive inconsistency renders them susceptible to criticisms for want of certainty, objectivity and representativeness. Under the highly restrictive standards of the ICC Statute, these criticisms are further magnified. The highly abstract nature of standards on the use of force in law enforcement contexts such as riot control, render the process of distilling general principles from such standards a very complex undertaking in which several contradictions would have to be reconciled. An analysis of selected laws on use of force in riot control contexts has illustrated the methodological inadequacies of applying general principles for a universal use of force standard. The fundamental differences between states' standards on key pillars of necessity, precaution and means and methods of force indicate the paradox in abstracting general principles from these standards, while the residual discretion inherent in the laws render the very idea of an absolute and objective standard illusory. The intricate connection between national standards on law enforcement and the discretion of the Hobbesian sovereign yields to a situation where those standards depend ultimately on subjective determinations which are wont to be driven more by political and security considerations of that sovereign. This merger of law and sovereign is the basis for the enduring dissolution of law in the face of state violence and the resultant circularity in the language of law at the national level, which is then replicated at the regional and international levels. This assessment renders illusory the very concept of abstracting general principles from inherently abstract standards, as argued in chapter four. A purported application of general principles in light of all these considerations is highly susceptible to criticisms of making new law, and applying law by analogy which are contrary to the strict ICC legality requirements.

While the UN Basic Principles offer some degree of certainty for prohibited means and methods on the use of force, these too like the highly structured national law provisions are only useful for lower level thresholds of violence and are wont to dissolve into considerations of sovereignty in cases of 'borderline' violence as discussed above. Moreover, they are soft law sources whose application under the ICC Statute's strict sources provisions is still uncertain.

The study's analysis of laws demonstrates an area of law over which states retain a high level of control and for which clear boundaries of legality continue to be an illusion. The

study argues that given the historical development of crimes against humanity and states' significant monopoly over the use of force laws analysed above, state parties to the ICC Statute never intended the application of crimes against humanity under the Statute to riot control contexts. As such, the application of article 7 to riot control contexts is premature for an area of law which implicates state responsibility and for which there currently exists no shared understanding under international law as to what conduct under state law enforcement processes would amount to criminal liability under it.

A way forward as indicated earlier may require extensive negotiations and consultations with state parties and experts towards a minimum set of standards as a basis for criminal liability under the Statute. Such a standard, without claiming to aspire towards absolute certainty could set out what weapons are agreed upon as inherently indiscriminate and as such, prohibited, and what methods of riot control might be inherently considered an 'attack'. The political challenges and legal complexities of these suggestions as well as the modalities of how they would be implemented are beyond the scope of the study. However, they are significant enough to warrant further independent research.

In conclusion, the legal frameworks regulating use of force in riot control contexts, and those regulating crimes against humanity still operate in silos. It will be interesting to see whether the ICC will continue to avoid applying them concurrently where the question arises before it in the future, or where it does not avoid doing so, how it will manoeuvre the strict standard of legality it is bound by under the ICC Statute without undermining its own legitimacy as the first permanent international criminal court.

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### **ANNEXURES:**

#### **TABLE B: CODED REPRESENTATION OF DISPARITY IN STANDARDS OF SELECTED LAWS ON LAWFUL STATE RESPONSE TO RIOT CONTROL CONTEXTS**

##### **Key to colour code:**

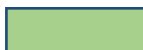
*Unstructured*



*Fairly structured*



Highly structured



	<b>Justification</b>	<b>Precaution – warnings specified? Protected people specified?</b>	<b>Means and Methods - list of weapons specified or not? Means of use specified?</b>
1. Nigeria			
2. Uganda			
3. Kenya			
4. Egypt			
5. Rwanda			
6. Zimbabwe			
7. South Africa			
8. Mexico			
9. Argentina			
10. Nicaragua			
11. Canada			As much force as necessary in good faith

12. Australia			'take steps reasonably believed necessary'
13. Fiji			
14. Finland			'necessary forms of force considered justifiable'
15. Iceland			
16. Germany			
17. India			
18. Malaysia			'may do all things necessary' 'use such force necessary'
19. Taiwan			
20. Indonesia			
21. Pakistan			
22. Sri Lanka			'A police officer may fire upon the crowd to protect life and property' and may consider whether or not immediate action is necessary – no regulation for how force is to be used
23. Afghanistan			

24. China			'necessary measures'
25. Philippines			
26. Bhutan			
27. Albania			
28. Armenia			
29. Bulgaria			
30. Czech Republic			
31. Russia			
32. Serbia			
33. Timor Leste			PTNL can use weapons of any model and caliber, use of firearms to be regulated by specific order
34. Brunei			Force may include the 'use of lethal weapons'
35. Azerbaijan			
36. Croatia			

37. Georgia			
38. Lithuania			
39. Bosnia and Herzegovina			
40. St. Lucia			
41. Malta	revolt/opposition		
42. Latvia			Special means permitted and their use to be determined by the Minister of the Interior

**TABLE C: SUMMARISED CATEGORIZATION OF THE WAYS IN WHICH SELECTED LAWS DIFFER ON THE THREE PILLARS OF MEASURING FORCE.**

TABLE OF FORCE INDICATORS	
<b>JUSTIFICATION/NECESSITY-</b> <i>why use force?</i>	<p><b>Unstructured:</b> <i>wide discretion, no indicators for specificity of thresholds</i></p> <p>maintaining and securing of public safety and public order, lawful objective', Self defense or defense of person from violence and defense of property, dispersal of assemblies or quelling riots, sufficient grounds to assume that persons are preparing to put up an armed resistance, preventing mass riots, address a risk of crime, to execute their duties, breach of the peace,</p>



	<p><b>Moderately structured:</b><i>language in law but liberal indicators for thresholds</i></p> <p>Security Director to apply to a court of first instance for an authentication of the ‘non peacefulness of the gathering’ before dispersal, prevention of crimes committed or pending preparation, detention of a person who committed administrative wrong or crime, dealing with violation of legislation combined with use of violence, repulse of group assaults upon residential buildings, offices,</p> <p><b>Highly structured:</b><i>step by step and detailed language in law as instruction for thresholds</i></p> <p>Following refusal of specific directives to disperse or reroute for stipulated reasons and after officer has taken specific steps namely: notifying the convener of perceived inability to adequately protect the crowd, to ensure pedestrian safety, to ensure protection from rival gangs, among others,</p> <p>A police officer may use firearms to prevent the committing of a criminal act for which a prison sentence lasting five years or more can be pronounced; 3. prevent the escape of a person caught committing a criminal act for which a prison sentence of more than ten years can be pronounced, or of a person for whom search on the grounds of having committed such a criminal act has been announced</p>
<p><b>PRECAUTION-</b></p> <p><i>When to start force to minimize casualties</i></p>	<p><b>Unstructured:</b><i>wide discretion, no indicators for specificity of thresholds</i></p> <p>upon the expiration of a reasonable time after an order to disperse, after giving due warning, after giving such due warning as he may consider necessary, sufficient time for the warning to be observed,</p> <p><b>Moderately structured:</b><i>language in law but liberal indicators for thresholds</i></p> <p>-Upon the expiration of one hour after an order to disperse,</p> <p>-firing shall not be resorted to for the dispersal of the assembly except under specific direction from the Assistant Superintendent or Deputy Superintendent of Police.</p> <p>-use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result</p>

	<p>-Warning to be in a language understood by assembled persons, clearly indicating that there would be use of firearms,</p> <p>-allow participants to leave after warning</p> <p>-The police must announce its decision of applying weapons or explosives against persons. In this case the announcement will be complete by warning them with a loud voice (3 verbal warnings) and firing three warning gunshots.</p>
	<p><b>Highly structured:</b> <i>step by step and detailed language in law as instruction for thresholds</i></p> <p>Milder forms of force to be used first: namely martial arts, if ineffective, to be followed by the use of a truncheon, a service dog to be used when conditions escalate to beyond truncheon,</p> <p>-actions in phases starting from the use of verbal persuasion, and non lethal weapons, to lethal weapons as circumstances may demand as follows: phase 1) preventive arrest, phase 2 declare assembly unlawful, warn through microphone or order the crowd to disperse or resort to show of force if the crowd still refuses to disperse. Phase 3: non lethal weapons: if after phase two the crowd is still resolute and is preparing to start engaging in violent disorder, the most senior police officer is to seek out the relevant Dzongdag or Dungpa to be physically on the spot to authorize the use of the following non lethal weapons to contain their actions: water cannons, Tear smoke, Riot Batons, Rubber Pellets. Phase 4: when the less extreme means are insufficient and the police are in danger of being overrun by the violent mob elements, the riot control force shall resort to the use of firearms. Prior to this however, the officer concerned shall secure the relevant Dzongdag or Dungpa to be physically present at the scene and authorize in writing the use of lethal means</p> <p>-verbal warnings at an audible level, indicating the departure routes, 2. escalate to: water cannons, gas canister, batons in successive order (refusal to disperse) 3. escalate to: warning shots, sound or gas bombs, rubber cartouche bullets, non rubber cartouche bullets. In successive order (violence and destruction of property, assault on individuals and officers, 4. ‘tools proportionate to response to threat to life, property and money’. (resort to firearms)</p> <p>Planning stage: dialogue and preparation, initial and peaceful stage: supervision, Brach of peace/confrontational stage: If</p>

	<p>violence reaches a stage where rocks are thrown at the CDM or other persons or at property causing damage to it, the ground commander shall warn the participants that if the violence continues, the assembly will be dispersed.</p> <p>If the violence continues, another audible warning will issue and after allowing sufficient time, an order for dispersal will follow, following which, the demonstrators shall be disbanded, contained and isolated. Water cannons and riot sticks may be used to aid the process</p> <p>-During any operation ongoing negotiations must take place between officers and conveners or other leadership elements. (2) If negotiations fail and life or property is in danger, the following procedure must be followed: Step Action 1 Put defensive measures in place as a priority. 2 Warn participants according to the Act, of the action that will be taken against them, should defensive measures fail. 3 Bring forward the reserve or reaction section or platoon that will be responsible for offensive measures, as a deterrent to further violence, should the above-mentioned measures not achieve the desired result. 4 Give a second warning before the commencement of the offensive measures, giving innocent bystanders the opportunity to leave the area. 5 Plan all offensive actions well and execute them under strict command after approval by the CJOC.</p> <p>-In a loud voice order them in at least two of the official languages and, if possible, in a language understood by the majority of the persons present, to disperse and to depart from the place of the gathering or demonstration within a time specified by him, which shall be reasonable. (b) If within the time so specified the persons gathered have not so dispersed or have made no preparations to disperse, such a member of the Police may order the members of the Police under his command to disperse the persons concerned and may for that purpose order the use of force, excluding the use of weapons likely to cause serious bodily injury or death. (c) The degree of force which may be so used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained.</p> <p>-precaution should be taken that a force armed with firearms is not brought close to a dangerous crowd as to risk it either being overwhelmed by numbers or being forced to inflict heavy casualties. If the use of firearms cannot be avoided, firing should be carried out from a distance sufficient to obviate the risk of the force being rushed and to enable strict fire control to be</p>
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	maintained.
<p><b>PROPORTIONALITY/ MEANS AND METHODS</b></p> <p><i>What can you use or not use and how to use it to minimize casualties</i></p>	<p><b>Unstructured:</b> <i>wide discretion, no indicators for specificity of thresholds</i></p> <p>may do all things necessary for dispersing the persons, may use such force as is reasonably justifiable in the circumstances, including lethal force, use of as much force as the peace officer believes, in good faith and on reasonable grounds, to be sufficient firearms and other weapons likely to cause death or serious bodily injury shall, if used, be used with all due caution and deliberation, and without recklessness or negligence</p> <p>-a list of firearms and types of ammunition in the armament of the police shall be approved by the approved by the Government of Armenia. It shall be prohibited to accept those arms and ammunition into the armament of police which cause especially grave injuries or are a source of unjustifiable risk</p> <p>The types of special means permitted to the police pursuant to this Law, and the procedures for storing, carrying and use of such shall be determined by the Minister for the Interior of the Republic of Latvia, after co-ordination with the Ministry of Health of the Republic of Latvia.</p> <p>-The PNTL cannot impose restrictions or use coercive means other than those that are strictly necessary. 4. The PNTL can use weapons of any model and calibre</p> <p><b>Moderately structured:</b> <i>language in law but liberal indicators for thresholds</i></p> <p>-force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used , Force to be used when strictly necessary</p> <p>-use of firearms is considered to be an extreme measure and is not to be used except when a suspect or offender offers armed resistance uses deadly force or otherwise poses risk to the lives of others,</p> <p>Firearms may only be used against a crowd of people when acts of violence are committed by or from [somebody] within the crowd or such acts are imminent and coercive measures against</p>

	<p>individuals do not succeed or are without any promise of success,</p> <p>-not to use private force, special means and firearms against women, juveniles or persons who accompany minors, have obvious signs of disability, are privately and mental handicapped, as well as in crowded places with high probabilities of harm to by passers, except for the cases of assault by means of firearms and armed resistance</p> <p>Authorized officials, shall be entitled, in accordance with the law, to use the following coercive measures: physical force, night-sticks, hand-cuffs, chemicals, physical means for restraining persons, barriers for vehicles, police dogs, water cannons, and other reasonable means under the circumstances.</p> <p>Before using firearms, the Police shall whenever possible use the following equipment: water spray, batons, tear gas canisters, rubber bullets, or any other ‘relevant devises’ used in controlling riots.</p> <p>If the group fails to disperse, only the following instruments of restraint may be used: 1) physical force; 2) police baton; 3) special motor vehicles; 5) service dogs; 6) service horses; 7) water cannons; 8) chemical agents; Instruments of restraint referred to in Paragraph 2 of this Article may be used only on order of head of regional police directorate, i.e. police officer empowered by the head.</p> <p><b>Highly structured:</b> <i>step by step and detailed language in law as instruction for thresholds</i></p> <p>The riot control police shall use firearms only under the following circumstances: I) when their performance and security is threatened by sporadic isolated gunfire from mob elements, returning fire should be ordered when targets can be identified, and when it is impossible to effectively defend oneself from the assailant other than by the use of a weapon: the firing is intended to hit the assailant alone and in doing so, the law enforcement officials must respect and preserve life and minimize injury and damage</p> <p><b>PROHIBITED:</b>-4) The following are <b>prohibited</b> or restricted during crowd management operations: (a) the use of 37 mm stoppers (prohibited); (b) the use of firearms and sharp ammunition including birdshot and buckshot (prohibited); and (c) the use of rubber bullets (shotgun batons) (may only be used to</p>
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	<p>disperse a crowd in extreme circumstances, if less forceful methods prove to be ineffective - restricted).</p> <p>-In order that the decision to open fire may be acted upon without loss of control or confusion, the responsible officer shall, as soon as it appears likely that the use of fire arms will be necessary, tell off a detachment of armed police to be held in readiness. When fire is to be opened, the responsible officer shall decide the minimum volume necessary to be effective in the circumstances, and shall give precise orders accordingly, as to the particular men or files who are to fire and the number of rounds to be fired and whether volleys of independent aimed shots are to be fired. And shall ensure that his orders are not exceeded. Whatever volume of fire is ordered, it shall be applied with maximum effect. The aim shall be kept low and directed at the most threatening parts of the crowd. In no circumstances shall firing over the heads of, or at the fringes of the crowd be allowed. Since buckshot is not safe from any range at which it is shot, government has directed that the use of buckshot ammunition against crowds is prohibited.</p> <p>-Special weapons and explosive devices may not be used for the purpose of preventing a person from escape. Explosive devices may not be used against persons gathered in a crowd</p> <p>- Chemical agents means short-term effect teargas, without lasting effects on psychophysical and general health, as well as chemical substances with effect lenient than teargas. Special protective measures shall be taken when using chemical agents in vicinity of children's institutions and nursing homes, primary schools, busy traffic routes or inflammable substances. Chemical means shall not be used against persons near inflammable substances, at great heights, or in similar locations where human life could be endangered.</p> <p>-Rubber Bullets only be used for defensive purposes in case of danger to physical integrity of any member of the security institutions of demonstrators or third person. In no case you may use this type of ammunition as a means disperse a demonstration.</p>
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**TABLE A: A GROUPING OF SELECTED LAWS ON LAWFUL STATE  
RESPONSE TO RIOT CONTROL CONTEXTS**

NECESSITY/JUSTIFICATION OF FORCE
<p><b>Unlimited discretion: Unspecified/abstract/un-prescribed/highly within the realm of discretion:</b> unclear language, no lists or clear references to specific law, high references to discretion, no clarity on steps, or directives, but on rhetorical declarations about human life, necessity etc.</p>
<p><b>Nigeria:</b> 10. Public safety and public order (1) The President may give to the Inspector-General such directions with respect to the maintaining and securing of public safety and public order as he may consider necessary, and the Inspector-General shall comply with those directions or cause them to be complied with. (2) Subject to the provisions of subsection (1) of this section, the Commissioner of a State shall comply with the directions of the Governor of the State with respect to the maintaining and securing of public safety and public order within the State, or cause them to be complied with: Provided that before carrying out any such direction the Commissioner may request that the matter should be referred to the President for his directions. (<i>The Nigeria Police Act, section 10, chapter P19</i>)</p>
<p><b>Rwanda:</b> Police officer may use force in pursuance of a ‘lawful objective’ that cannot otherwise be achieved. Self defense or defense of person from violence and defense of property, dispersal of assemblies or quelling riots  (<i>Section 40 of Law No. 9 of 2000 on the establishment and Jurisdiction of the National Police</i>)</p>
<p><b>Kenya:</b> -Unlawful public meeting, ‘breach of the peace’ or ‘public order’ (<i>section 5 of Public Order Act, 2009, Cap. 56</i>)</p>
<p><b>Uganda:</b> 36. Dispersal of assembly after it has been ordered to be terminated. If upon the expiration of a reasonable time after a senior police officer has ordered an assembly to disperse under section 35(4) the assembly has continued in being, any police officer, or any other person acting in aid of the police officer, may do all things necessary for dispersing the persons so continuing assembled, or for apprehending them or any of them, and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming that resistance, and shall not be liable in any criminal or civil proceedings for having by the use of that force caused harm or death to any person. (<b>Police Act, 1994. Cap 303</b>) (<i>combines precaution and means and methods</i>)</p>
<p><b>Fiji:</b> section 9(3) of the <b>Public Order Act as amended by the Public Order Amendment Decree</b> which provides as follows; Any police officer, if in his or her opinion such action is necessary for the public safety, after giving due warning, may use such force as he or she considers necessary, including the use of arms, to disperse the procession, meeting or assembly and to apprehend any person present thereat, and no police officer nor any person acting in aid of such police officer using such force shall be liable in criminal or civil proceedings for any harm or loss caused by the use of such force. (<i>combines precaution and means and methods</i>)</p>

**Zimbabwe:** 29 Dispersal of unlawful public gatherings (1) A police officer and any person assisting him may do all things reasonably necessary for— (a) dispersing the persons present at a public gathering the holding or continuance of which is unlawful by virtue of any direction or order under section twenty-five, twenty-six or twenty-seven; and (b) apprehending any such persons; and, if any such person makes resistance, the police officer or the person assisting him may use such force as is reasonably justifiable in the circumstances of the case for overcoming any such resistance. (2) If a person is killed as a result of the use of reasonably justifiable force in terms of subsection (1), where the force is directed at overcoming that person's resistance to a lawful measure taken in terms of that subsection, the killing shall be lawful. (Public Order and Security Act, 2007) (*combines precaution and means and methods*)

**India: The Armed Forces Special Powers Act 1958:** Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,- (a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances; (*combines precaution and means and methods*)

**Albania:** A police officer may use force to 'achieve a legal purpose' and only when it is necessary. (Law on State Police 2007, Art.118)

**Armenia:** The choice to exercise physical force, special means or use firearms shall be in the discretion of the Police employee, issuing from the situation, the seriousness of the offense and the personality of the offender. **Art 29 (Law on Police 2004)**

**But see towards the specific: Art. 31:** A right to exercise special means to repel and attack against a police officer or members of the public, overcome resistance to a police officer or persons ensuring the maintenance of public order, where there are sufficient grounds to assume that persons are preparing to put up an armed resistance, while preventing mass riots and illegitimate group acts threatening the works of transport, communication and other organization.

Art 32 supra: Police employees are entitled to use firearms while defending citizens from attacks harmful to their life and health, while in self-defense and when there's an attempt at forceful disarming. While repulsing group or armed attack against citizens' apartments, areas occupied by state bodies, and organizations,

**Bulgaria:** The police shall not abuse the rights given to it by the law to use physical power, auxiliary devices and weapons. The police shall use physical power, auxiliary devices or weapons only in cases, provided by the law, in case of unavoidable necessity, proportionate to the risk, and to a degree, which is necessary in order to achieve a lawful goal. 85. The police on a crime scene is in the position to make an assessment whether to use physical power, auxiliary devices or weapons, and to what extent **Code on Police Ethics, 2004.**

**Criminal Code of St. Lucia (2004) Force to preserve order 43.** Any person who is authorised as a police officer or in any judicial or official capacity (a) to keep the peace or preserve order at any place;



(b) to remove or exclude a person from any place;(c) to use force for any similar purpose; may use such force reasonable in the circumstances as is necessary for the execution of such authority.

**Force within statutory authority justifiable 45.** Any person who is authorised under any enactment to use force may use such reasonable force as is necessary according to the terms and conditions of his or her authority.

**Force against riotous or unlawful assembly 46.** For the suppression or dispersion of a riotous or unlawful assembly, reasonable force may be used subject to the provisions of this Code with respect to riotous or unlawful assembly.

#### **Dispersing rioters after order made**

**343.—** (1) If, upon the expiration of one hour after such order has been made or after the making of such order has been prevented by force, persons continue riotously to assemble together, the police officer or any other person acting in aid of such officer, may do all that is necessary for the purpose of dispersing the persons so continuing to assemble or arresting them or any of them. (2) Where any person resists, the police or the person acting in the aid of such officer, may use such force as is reasonably necessary for overcoming such resistance, and is not liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to the person resisting. (3) Nothing in this section affects or limits the power to use such force as mentioned in this section at any time before the expiration of one hour from the making of the order, or after the making of the order has been prevented, if in the circumstances it is reasonably necessary to use such force for the suppression, or prevention of the continuance of any riot

**Czech Republic, Police Act 1991 section 38:** A police officer is entitled to use coercive means in the interest of the protection of security of persons and his/her own, protection of property and public order, against a person endangering those.

**Brunei Public Order Act 1998: Power to use force. Section 21.** (1) Notwithstanding anything to the contrary contained in any other written law, any police officer may in any special area use such force as, in the circumstances of the case, may be reasonably necessary, which force may extend to the use of lethal weapons, in order — (a) (i) to effect the arrest of any person who fails to comply with any order under section 11 or 15 or whom he has reasonable grounds for suspecting to have committed an offence against section 28, 29 or 30; or (ii) to effect the arrest of any person who fails to comply with a direction or signal to stop at or before reaching any barrier erected or placed under section 14; or (iii) to effect the arrest of any person whom he has reasonable grounds for suspecting to have committed an offence against any provision of any written law which is for the time being specified in the Schedule; (b) to overcome forcible resistance offered by any person to such arrest; or (c) to prevent the escape from arrest or the rescue of any person arrested as aforesaid; or (d) to disperse any unlawful group. *(combines precaution and means and methods)*

**China's law on processions and demonstrations 1989:** Article 27 The people's police shall stop an assembly, a procession or a demonstration that is being held, if it involves one of the following circumstances: (1) .. (2) ... or (3) the emergence, in the course of the activity, of a situation which endangers public security or seriously undermines public order. If any of the circumstances specified in the preceding paragraph occurs and the instruction to stop the activity is ignored, the chief officer of the people's police present at the scene shall have the authority to order a dismissal; for those who refuse to dismiss, the chief police officer present at the scene shall have the authority to decide, in accordance with relevant state, provisions, on the adoption of necessary measures to force a

dismissal and to take away from the scene by force those who refuse to obey or detain them at once. *(combines precaution and means and methods)*

**Malaysia Police Act 1967** Use of force in dispersing or arresting persons pursuant to section 27 or 27A 27B. If persons are ordered to disperse pursuant to subsection 27(3) or 27A(1) and do not disperse, any police officer or any other person acting in aid of a police officer may do all things necessary for dispersing them and for arresting them or any of them pursuant to subsection 27(6) or 27A(5), and, if any person makes resistance, may use such force as is reasonably necessary for overcoming resistance (Power to stop certain activities which take place other than in a public place)

**Malaysia Public Order Preservation Act, 1958** Section 5 (2) Any police officer may, if it is necessary for the public security, use such force as may be necessary to disperse any procession, meeting, assembly ordered to be dispersed or prohibited under the provisions of this section, which force may extend to the use of lethal weapons. *(combines precaution and means and methods)*

**Australia: Public Order (protection of persons and property) Act 1971, section 8(4)** For the purpose of: (a) dispersing an assembly in respect of which a direction has been given under this section; or (b) dispersing or suppressing an assembly to which paragraph (1)(b) applies (whether or not a direction has been given under this section in respect of the assembly); it is lawful for a person to use such force as he or she believes, on reasonable grounds, to be necessary for that purpose and is reasonably proportioned to the danger which he or she believes, on reasonable grounds, is to be apprehended from the continuance of the assembly. (Provisions applying to common wealth premises and territories). Also see **section 17(4) (b)** for diplomatic and consular premises.

**Australia Police Powers and Responsibilities Act 2000:** section 51 Prevention of riot (1) It is lawful for a police officer to take steps the police officer reasonably believes are necessary to suppress a riot. (2) It is lawful for a police officer, acting under reasonable orders given by a justice for suppressing a riot, to suppress a riot *(combines precaution and means and methods)*

**Criminal Code of Canada 2013, s.32.** (1) Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds, (a) is necessary to suppress a riot; and (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

*(combines precaution and means and methods)*

**Finland Police Act, Section 19** Dispersing a crowd (1) Police officers have the right to order a crowd to disperse or move if the gathering threatens public order and security or obstructs traffic. If an order to disperse or move is not obeyed, police officers have the right to use force to disperse the crowd and to apprehend noncompliant persons.

Section 27 Use of force (1) When carrying out official duties, police officers have the right to use necessary forms of force that can be considered justifiable to overcome resistance, remove a person from the scene, carry out an apprehension, prevent the escape of a person who has lost his or her liberty, eliminate an obstacle or address an immediate risk of a crime or other dangerous act of being committed, or some other dangerous situation developing. (2) When judging the justifiability of force, the importance and urgency of the assignment, the danger posed, the resources available and other factors influencing an overall assessment of the situation shall be taken into consideration

27(4) The police have the right, with the assistance of the Defence Forces, to use military force to prevent or intervene in the commission of a terrorist offence as laid down in the Act on Executive Assistance to the Police by the Defence Forces (781/1980). (523/2005) (5) Provisions on the excessive use of force are laid down in Chapter 4, sections 6(3) and 7 of the Criminal Code. (517/2003) (*combines precaution and means and methods*)

**Timor Leste, Organic Law National Police (2004)** Article 5 Legitimate use of force 1. In the case of disturbance of public order and peace, the use of force is authorized, and where this is insufficient, other means can be used to overcome illegitimate resistance against members of the PNTL, in the performance of their duties. 2. The coercive means will only be able to be used in the following cases: (a) to repel an immediate and unlawful aggression in self defense or in defense of other people; (b) after the use of all means to overcome resistance to the performance of their functions and after having given an explicit warning.

**The Police Act of Iceland, 1996:** Article 14 The use of force. Those who exercise police authority may use force in the course of executing their duties. At no time, however, may they use force to a greater extent than is necessary on each given occasion. (*combines precaution and means and methods*)

The powers of enforcement officials mentioned by the law specify that they only may use force "as of necessity":

Art 184. -. The police officials or security forces have the following powers: (...) 11) Use of public force as of necessity.

**Argentina Minimum criteria for the development of protocols and the Police Forces Federal Security Forces in public demonstrations (Resolution no. 210/2011 of Ministry of Security )**

The main objective of the police and security forces acting on concentrations or public demonstrations is the respect and protection of the rights of participants and reduce the damages that the concentration or manifestation cause or could cause the rights of people who do not participate in it and the public goods. In fulfilling these objectives will grant security forces prominence to the protection of life and physical integrity of all involved.

[...]

**Argentina: Regulation No. 8 of Guns and Shooting (ODI No. 25 of February 6, 2012)**

**The rules of Guns and Shooting Range of the Federal Police Argentina regulates it pertains to the use of weapons**

**fire by members of that force.** [...] CHAPTER X 43 Use of firearms can be justified: for the preservation of life and for public security, In extreme circumstances when decisions must be made under uncertain and changing circumstances. The use of weapons here always requires sufficient cause and demonstrable reason for confrontation with armed people, but with minimum possible risk to the physical integrity of third parties. It is justified to stop flight where the aggressor continues gunning down police personnel and to prevent circumstances involving imminent danger of death to police or to third parties.

**Argentina: Plan of Operations No. 01/10 of the National Gendarmerie Director for Personnel Operation Sentinel (containing the "General Rules on the Use of Weapons**

**Fire)** Gendarmerie staff FIREARMS USED AGAINST PEOPLE ONLY: 1) In self-defense or others, 2) In case of serious and imminent danger of: - Death or; - Serious injury. 3) To prevent a

particularly serious crime involving a serious threat to life.

4) In order to arrest a person presenting such a danger and resisting armed to their authority and only when less extreme means are insufficient measures to achieve those objectives.

#### **Pakistan Police Rules 1934**

1 a) The main principle to be observed is that the degree of force used shall be regulated by the circumstances of each case. The object of the use of force is to quell a disturbance of the peace, or to disperse an assembly which threatens such disturbance and has either refused to disperse, or shows a determination not to disperse.

**Fairly limited discretion: Fairly specified/Moderate/moderately prescriptive within the law:**  
vague references to some laws or procedures

**Egypt:** -If the participants in the public meeting, procession, or demonstration take any action that constitutes as a crime punishable by law or violate the peaceful nature of expressing opinions.

-Security Director may apply to a court of first instance for an authentication of the ‘non peacefulness of the gathering’.

(article 11, *Protest Law 107, (2013)*) see *Amnesty International Criticism*

[:https://www.amnesty.org/en/latest/news/2013/11/egypt-new-protest-law-gives-security-forces-free-rein/](https://www.amnesty.org/en/latest/news/2013/11/egypt-new-protest-law-gives-security-forces-free-rein/)

**Azerbaijan:** I. Police officer shall be entitled to use private force in respect of any person failing to implement his legal demands only in the following cases: 1) prevention of crimes committed or pending preparation; 2) detention of a person who committed administrative wrong or crime; 3) dealing with violation of legislation combined with use of violence. 4) repulse of group assaults upon residential buildings, offices, enterprises etc. **(Police Act. Section 26)**

Police officer shall be entitled to use special means in respect of any person failing to implement his legal demands only in the following cases: 1) assault or any other violent action posing real danger to human life and health; 2) riots and mass public disturbances;

IV. Police officer shall be entitled to use firearms in order provided by the legislation of the Republic in the following cases: 1) prevention of crimes committed or pending preparation; 2) detention of a person who committed administrative wrong or crime; 3) dealing with violation of legislation combined with use of violence. 4) repulse of group assaults upon residential buildings, offices, enterprises in cases mentioned in paragraph 7 of Subsection II of the present Section; 3) encroachments upon human lives and failure in using forced preventive means; 4) armed resistance in the course of detention; 5) prevention of criminal offences posing an imminent danger to human life; 6) prevention of attempt to procure possession of firearms by other person; **(Police Act Section 26)**

**No liability for action:** According to the requirements of the present ACT, use of private force,

special means and firearms in cases of extreme necessity shall be adequate to the imminence of danger. Deprivation of life as a result of the use of private force, special means and firearms in cases of extreme necessity shall not be considered as a violation of the right to live(**Police Act supra, Section 26 VI**)

**Croatia law on Police (2000), Article 54:** The means of coercion may be used to protect human lives, to surmount resistance, to prevent escape or to reject an attack if the measures of warning and ordering do not guarantee success.

**Bhutan Police Act 2009: Section 65:** The use of firearms is considered to be an extreme measure and is not to be used except when a suspect or offender offers armed resistance uses deadly force or otherwise poses risk to the lives of others.

Section 79: the use of force: the use of force by police shall be regulated entirely by provisions of the law. The object of the use of force is to quell a disturbance of the peace, or to disperse an unlawful assembly, which either refused to disperse or showed a determination not to disperse, the degree of force employed shall be regulated according to the circumstances of each case. (*see structured precaution*)

**German Act on the use of Direct Force by Federal Police Officers exercising Public Authority (1961)**

**§ 10 firearms against persons (1) Firearms may only be used against individuals,** 1. to prevent the imminent execution or the continuation of an unlawful act, which under the circumstances a) is a crime or b) committed an offense, using or keeping firearms or explosives 2. a person who is escaping arrest

(2) Firearms may only be used against a crowd of people when acts of violence are committed by or from [somebody] within the crowd or such acts are imminent and coercive measures against individuals do not succeed or are without any promise of success.

**Taiwan Act Governing the use of Police Weapons (2002) Article 4** While performing duties, the police may use knives or firearms under the following circumstances: 1. When an extreme mishap is imminent and it is urgent to maintain the public order. 2. When the uproar is reaching the point of causing social disorder. 3. When the person to be arrested or detained by law resists arrest or escapes, or anyone helps him/her resist the arrest or escape. 4. When either the land, building, tools and supplies, vehicles, boats, aircrafts under police's protection or people's lives, bodies, freedom, or properties is endangered or under threat. 5. When the police's lives, bodies, freedom or equipments are endangered or threatened, or there is enough evidence to believe that the foresaid parts will be endangered. 6. When a person carrying a weapon is believed to cause trouble, and he/ she refuses to be at the police's command after being ordered to drop the weapon. 7. If there is no alternative to the use of deadly force to stop the situations prescribed in subparagraph 1 and 2 of the preceding article. Other approved weapons may also be used in the circumstances, prescribed in the preceding paragraph, if necessary. (*combines precaution and means and methods*)

**Armed Forces Act of Singapore, 1975:** Restriction on «use «of «force likely to cause death or



grievous hurt 201F. —(1) A serviceman in exercising any power under section 201B(3) or (4) or 201C(9) shall not, in using force against any person — (a) do anything likely to cause the death of, or grievous hurt to, the person unless the serviceman believes on reasonable grounds that doing that thing is necessary to — (I) protect the life of, or to prevent serious injury to, another person (including himself); or (ii) protect infrastructure specified in an order made under section 201C(1) against damage or disruption to its operation; or (b) subject the person to greater indignity than is reasonable and necessary in the circumstances. [25/2007 wef 01/08/2007] (2) If a person attempts to escape being detained, a serviceman shall not do anything that is likely to cause the death of, or grievous hurt to, the person unless the person has, if practicable, been called on to surrender and the serviceman believes on reasonable grounds that the person cannot be apprehended in any other manner.

**Law of Georgia on Police, 2013: Article 31:** Right to apply coercive measures 1. In order to ensure the implementation of the police tasks, a police officer is authorized to apply suitable coercive measures proportionally (*strictosensu*), only in cases of necessity and with such intensity that ensures the achievement of a legitimate goal.

**Article 33:** In order to protect **public security and legal order**, a police officer uses active and passive special means.

**Article 34:** A police officer is authorized to use firearms as a means of last resort: a) in order to protect a person and himself/herself, when life and/or health is endangered; b) in order to free persons illegally deprived of their liberty; c) in order to prevent an escape of a person detained for violent act or omission, or especially grave crime, with a prior knowledge of a police officer; d) in order to suppress a violent crime, if a person shows resistance to a police officer; e) in repelling an attack on a protected object, state organ and/or public organization;

**Latvia Law on Police 1992 Section 13. Rights of Police Officers to Use Physical Force and Special Means**

Police officers have the right to use physical force, special fighting techniques, handcuffs, means of tying, batons, tear eliciting substances, special paints, psychological impact lights and sound devices, devices for opening premises occupied by persons violating the law, means to demolish barriers and forcibly stop transport, water cannons, armoured vehicles, helicopters and other special means of transport, as well as service dogs and horses, if such are necessary in order to:

- 1) repel an attack on persons, police officers, other workers of institutions of the Ministry of the Interior, and persons who are performing their duties of service in guaranteeing public safety and in the fight against crime; 2) repel an attack on buildings, premises, structures and means of transport regardless of their ownership, or free facilities occupied by armed persons; 3) free hostages; 4) prevent mass disorder and group violations of public order; 5) arrest and convey persons violating the law to a police institution or other service premises, as well as restrain arrested, detained and convicted persons during conveyance and incarceration if such persons do not submit to or resist police officers, or if there is reason to believe that such persons may escape or do harm to other persons nearby or themselves; and
- 6) stop intentionally wrongful resistance to lawful requests made by police officers or other persons performing service duties in guaranteeing public order or in the fight against crime.

**See also: Section 14. The Right of Police Officers to Use Firearms**

Shooting on purpose shall be deemed to be use of a firearm.

A police officer has the right on a continuing basis to keep and carry a firearm issued to him or her for use in the line of duty. The regulations and procedures with respect to keeping and carrying a firearm issued to a police officer shall be determined by the Minister for the Interior of the Republic of Latvia.

A police officer is entitled to use a firearm in an absolute emergency in order to:

- 1) defend other persons and himself or herself from attack that actually endangers life or may do harm to health, or to avert an attempt to obtain a firearm by force;
- 2) free hostages;
- 3) repel a group or armed attack on police officers or other persons who are performing the duties of the service in guaranteeing public safety and fighting crime;
- 4) repel a group or armed attack on facilities, premises, structures, institutions, undertakings and organisations that are to be guarded;
- 5) arrest a person who is showing armed resistance or who is surprised in the act of committing a serious or an especially serious crime or has escaped from detention, or arrest an armed person who refuses to comply with a lawful request to hand over a weapon or explosives;
- 6) stop a means of transport, damaging it, if its driver through his or her actions is creating actual danger to the life or health of persons and does not submit to the request of a police officer to stop the means of transport and if there is no other way to arrest the driver; or
- 7) render harmless an animal that endangers the life or health of a person.

A police officer also has the right to use a firearm to give a warning signal or to summon help.

**Lithuania, law on Police:** Article 42. Conditions for the Utilization of Firearms A police officer shall have the right to use firearms against persons, animals, motor vehicles, and other forms of transportation. A police officer shall have the right to use firearms against a person in the following cases: 1. when his or her health or life is in danger, or to prevent his or her firearm from being seized; 2. to defend other persons from an attack which threatens their health or life, as well as to free persons who have been kidnapped or taken hostage; 3. to repel an armed attack; 4. while in pursuit of a criminal suspect, if the suspect uses or attempts to use a firearm, weapon, or other life threatening object, implement, or method in an attempt to evade arrest; 5. to apprehend a person caught in the act of committing a serious offence, provided that the person cannot be apprehended in any other way; 6. while attempting to apprehend an arrested or convicted person, if the person has escaped, or is trying to escape, from the place of imprisonment, or from the place of detention before trial or while being transported; 7. in the event of a mass prison escape or riot; and 8. in the event that a police guard or specially guarded facility is attacked; the list of such facilities shall be determined by the Government of the Republic of Lithuania. The use of firearms against a person and the consequences thereof shall be reported to the prosecutor immediately. The use of firearms shall be prohibited: in public gathering places, if it endangers innocent people; against citizens who have young children with them; against

women, minors, and persons who are visibly disabled, except in cases when said persons attack or resist with firearms themselves

**Bosnia and Herzegovina:** (1) Authorized officials may only use firearms when it is necessary to protect human life. Art 30(1). But see: (2) Before using a firearm, an authorized official must identify himself and give a clear warning of his intent to use a firearm, except in cases where doing so would unduly place himself or others at risk of death or serious harm. (3) Authorized officials who perform responsibilities and duties within a unit or group, may use firearms only if ordered by the unit or group commander. The order to use firearms may be given only when expressly provided by law.

(4) Coercive means may be used by authorized officials in order to: 1. repulse an attack on themselves, other persons or persons they have secured detained, kept in custody or arrested; 2. subdue one or more persons who violate the peace and public order; 3. prevent the escape of a person who is being escorted, detained, kept in custody or arrested; and 4. make a lawful arrest when the subject is resisting arrest. (*Art 29(4), law on Police of the Brcko District*)

#### **Nicaragua Police Act (1996)**

5) Rational use of force and use of firearms:

Members of the police shall: 5 1. Use only the force necessary to avoid serious and irreparable damage immediately; doing so governed by the principles of congruence, opportunity and proportionality in using the means at its disposal, if other means remain ineffective.

5.2. Use firearms only when there is a serious threat for his life, physical integrity or those of third parties; or in order to avoid the perpetration of a particularly serious crime involving grave threat to life, or to arrest a person presenting such a danger, which oppose resistance to authority, or to prevent his escape, and only if that result less extreme insufficient to achieve these objectives; or those circumstances that may pose a serious risk to public order and accordance with the principles which the preceding paragraph refers to. (*combines precaution and means and methods*)

**Afghanistan Police Law (2005),** In normal cases the police may use weapons after given notice to the person in front in the following cases: to prevent a felony or misdemeanor, provided that the application of other means of force stipulated in this law are not possible or effective; public order and security are at stake; 5. if the police intense is a legitimate defense. (3) In normal cases the police may use explosives after giving notice to the person in the following cases: 7. a person or persons use fire arms or explosives against the police; 8. the use of fire arms against a person or persons in order to repulse their attack proved to be ineffective; 9. the intention of the police is to launch an effective action to destroy things that could pose a threat to public security.

**Use of Weapon against a Group of People Article 24:** The police can apply weapon or explosives against a group of people only if it resorted to offensive acts of disturbing the security by means of arms, and if the use of other means of force applied against them individually has proved ineffective.

In this case it is imperative to first announce the use of weapon or explosives by giving at least three verbal warnings followed by three gunshot warnings and that this action should happen within the provisions of the law and be based on a sound decision.



**Germany-Act on the Use of Direct Force by Federal Police Officers exercising Public Authority 1961**

**Section 10:** firearms against persons (1) ,Firearms may only be used against individuals, 1. to prevent the imminent execution or the continuation of an unlawful act, which under the circumstances ) is a crime or b) committed an offense, using or keeping firearms or explosives 2. a person who is escaping arrest (2) Firearms may only be used against a crowd of people when acts of violence are committed by or from [somebody] within the crowd or such acts are imminent and coercive measures against individuals do not succeed or are without any promise of success.

**Pakistan Criminal Procedure Code: Chapter IX**

Section 128: If an assembly has been directed to disperse with no result, an officer may enlist the assistance of a male person who need not be a police officer, to disperse the crowd by force. This may be for the purpose of confining or arresting offending individuals, provided that firing shall not be resorted to for the dispersal of the assembly except under specific direction from the Assistant Superintendent or Deputy Superintendent of Police.

129: If the assembly cannot otherwise be dispersed and if it is necessary for the public security that it should be dispersed, the Police Officer of the Highest rank not below Assistant Superintendent of Police or deputy Superintendent who is present may cause it to be dispersed by the armed forces.

130(2). Every such army officer so required for the dispersal shall obey the requisition in the manner he or she thinks fit, but in so doing shall use as little force and do as little injury to person and property as may be consistent with dispersing the assembly and arresting and detaining such persons.

**Highly limited discretion: Specified/Highly Specified/Strict/highly prescriptive within the law:** clear cues and references to the law, actions and relevant authorities, names restricted or prohibited weapons,

**South Africa:** Failed negotiation and a threat to life and property (*Section 14, National Instruction on Public Order Police 2012*).

Following refusal of specific directives to disperse or reroute for stipulated reasons and after officer has taken specific steps namely: notifying the convener of perceived inability to adequately protect the crowd, to ensure pedestrian safety, to ensure protection from rival gangs, among others. (*Section 9, The regulation of gatherings Act, 1993*).

**Sri Lanka –Section 78 police ordinance:** No fire may be opened in any circumstances unless the crowds are committing any of the offences listed in the firing orders, namely, murder or grievous injury, arson, breaking into houses or places of worship by night, destroying houses, shops, stores or

places of worship in such a way that may cause death or grievous harm and if there is no person in authority from whom the police can get orders and if there is no other way to stop the mob. (Referenced under department Order No. A/ 19. But see precaution and means and methods: A police officer is entitled to fire upon a mob to protect life or property. The provision contains no accompanying parameters for how the fire ought to be used. The officer should consider whether immediate action is necessary or whether mere armed presence of an armed party will be sufficient to cause the crowd to desist from violence.)

*(combines precaution and means and methods)*

## **PRECAUTION -LEVELS OF FORCE/STAGES FOR INTERVENTION**

**Open/mild: Unspecified/abstract/un-prescribed/highly within the realm of discretion:** unclear language, no lists or clear references to specific law, high references to discretion, no clarity on steps, or directives, but on rhetorical declarations about human life, necessity etc

### **Kenya:-**

-A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.

*(National Police Service Act, 6<sup>th</sup> schedule).*

‘reasonably necessary’ force whenever the circumstances so permit without gravely jeopardizing the safety of persons and without grave risk of uncontrollable disorder,

-firearms shall not be used unless weapons less likely to cause death have previously been used without achieving the purpose aforesaid; and firearms and other weapons likely to cause death or serious bodily injury shall, if used, be used with all due caution and deliberation, and without recklessness or negligence.*(Section 14. Public Order Act, 2009)*

- The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.*(National Police Service Act, 6<sup>th</sup> schedule).*

An officer intending to use firearms shall identify themselves and give clear warning of their intention to use firearms, with sufficient time for the warning to be observed, except— (a) where doing so would place the officer or other person at risk of death or serious harm; or (b) if it would be clearly inappropriate or pointless in the circumstances. *(National Police Service Act, 6<sup>th</sup> schedule).*

**Rwanda:** The use of force shall be preceded by warning, unless the warning defeats the objectives of Police. *(sec.40. law No. 9/2000).*

Warning to be in a language understood by assembled persons, clearly indicating that there would be use of firearms. The most senior officers are to authorize the use of firearms. However, where the crowd’s intent is murder, pillage and destruction of public buildings, the authorization may be waived. *(Section 41, law No. 9/2000).*

**Malta Public Meetings Ordinance 1931.** 15. (1) The order to disperse shall be given by distinct formal intimations given by such means as the senior member of the Police force present may deem adequate. For the purpose of giving such intimation any member of the Police Force may use any public address system which may be in use at the meeting. (2) Should the said intimations fail to have effect the meeting may be dispersed by the use of force. 4 CAP. 68.] PUBLIC MEETINGS (3) It shall also be lawful to use force if no intimation can be made owing to revolt or opposition.

**Criminal Code of St. Lucia (2004)**

**Dispersing rioters after order made**

**343.—** (1) If, upon the expiration of one hour after such order has been made or after the making of such order has been prevented by force, persons continue riotously to assemble together, the police officer or any other person acting in aid of such officer, may do all that is necessary for the purpose of dispersing the persons so continuing to assemble or arresting them or any of them. (2) Where any person resists, the police or the person acting in the aid of such officer, may use such force as is reasonably necessary for overcoming such resistance, and is not liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to the person resisting. (3) Nothing in this section affects or limits the power to use such force as mentioned in this section at any time before the expiration of one hour from the making of the order, or after the making of the order has been prevented, if in the circumstances it is reasonably necessary to use such force for the suppression, or prevention of the continuance of any riot

**Albania Law on State Police 2007:** The Police officer uses the minimum amount of force necessary in accordance with the principle of proportionality. When using force, the officer is to choose from a continuum of force options which includes: verbal persuasion, physical restraint, impact weapons, aerosol weapons (devices with chemical paralysing substances), electrical impulse devices, police dogs, and firearms.

The Police officer must warn that he will use force prior to its execution. The warning may be abandoned if the circumstances do not permit it, in particular if the immediate execution of means of force is necessary to prevent immediate threat.

(6) A group of persons has to be warned of the intention to use force or of the change of form of force as early as possible, allowing participants to leave. Art. 118

**Taiwan Act Governing the use of Police weapons:**

**Article 6:** The police shall properly use police weapons in case of emergency and shall not exceed the necessary degree of force. **Article 7** Once the reason for the use of police weapons doesn't exist, the police shall cease their use immediately. **Article 8** When using police weapons, the police shall pay attention not to hurt innocent third parties. **Article 9** The police should avoid using lethal force unless

the situation is so imminent that the lives of officers or bystanders are being threatened.

**Malta Police Act 1961:** The Use Of Force, Proportionality. Added by: XIII. 2002.4.

**96.** Police officers may use such moderate and proportionate force as may be necessary to ensure the observance of the laws. Remedy of last resort. Added by: XIII. 2002.4. **97.** The use of force is a remedy of last resort and shall only be used for the duration that is strictly necessary when it is evident that all other remedies would be of no avail. Relevant time. Added by: XIII. 2002.4. **98.** If in any Court or tribunal any question arises as to the reasonableness of the use of force the circumstances prevailing at the time when force was used shall be the criterion for examining such reasonableness. Arms. Added by: XIII. 2002.4. **99.** (1) In exceptional circumstances the Force may, in the execution of its duties, use fire-arms and other offensive weapons or materials. (2) When assessing the existence or otherwise of the exceptional circumstances mentioned in sub article (1), consideration shall be taken of the conditions prevailing at the time when the use of fire-arms, or weapons or other materials becomes inevitable to preserve the life of a police officer or of others, or to avert an imminent danger of widespread violence. POLICE [CAP. 164. 23 Responsibility. Added by: XIII. 2002.4. **100.** Saving any criminal or civil liability under any other law, it shall be considered as an offence against discipline if a police officer uses force for considerations extraneous to those permitted by law and the circumstances of the case.

**Moderately specified: negotiation (mode of communication. Effective communication?) see art 22 of Romania Law on Police**

**Fairly specified/Moderate/moderately prescriptive within the law:** vague references to some laws or procedures

**Egypt:** 1. verbal warnings at an audible level, indicating the departure routes,  
2. escalate to: water cannons, gas canister, batons in successive order (refusal to disperse)  
3. escalate to: warning shots, sound or gas bombs, rubber cartouche bullets, non rubber cartouche bullets. In successive order (violence and destruction of property, assault on individuals and officers  
4. 'tools proportionate to response to threat to life, property and money'. (resort to firearms)  
(Article 12 of Protest law 107).

**Afghanistan law on police, 2005:**

Announcing the Application of Force **Article Twenty-two** (1) The police must announce its decision of applying weapons or explosives against persons. In this case the announcement will be complete by warning them with a loud voice and firing three warning gunshots. (2) The weapons and explosives shall not be used if uninvolved persons could suffer from it.

Use of Weapon against a Group of People **Article Twenty-four** The police can apply weapon or

explosives against a group of people only if it resorted to offensive acts of disturbing the security by means of arms, and if the use of other means of force applied against them individually has proved ineffective. In this case it is imperative to first announce the use of weapon or explosives by giving at least three verbal warnings followed by three gunshot warnings and that this action should happen within the provisions of the law and be based on a sound decision.

#### **Azerbaijan:**

I. In the course of implementation of his/her duties in respect of the use of private force, special means and firearms, police officer shall be bound as follows: 1) to use private force, special means and firearms only as a means of last resort and for purposes of necessary defense, should all other means of influence fail to procure desired outcome, as well as to the degree proportionate to the gravity of the offence and personality of the offender; 2) not to use private force, special means and firearms against women, juveniles or persons who accompany minors, have obvious signs of disability, are privately and mental handicapped, as well as in crowded places with high probabilities of harm to by passers, except for the cases of assault by means of firearms and armed resistance; 3) to use firearms exclusively for prevention of an imminent danger; 4) to make an oral warning or precautionary shot prior to using firearms (in case of sudden, i.e. totally unexpected attack, as well as in cases if the attacker uses firearms, motor transportation vehicle, dangerous predatory, wild or other animal, police officers shall be entitled to use firearms without warning); (Police Act Section 29)

#### **Law of Georgia on Police:**

**Article 34:** The active use of firearms against a person shall be preceded by a following verbal warning on its use: “Police! Freeze or I will shoot!” followed by the warning shot. In case of necessity, a warning shot may not be conducted. 7. Firearms may be used without warning: a) upon armed attack, as well as upon unexpected attack with the use of military equipment, any vehicle or mechanic means; b) upon escape, by using a vehicle, of an arrestee or detainee who has committed especially grave crime, with the prior knowledge of a police officer; c) upon showing armed resistance by a person; d) upon giving the signal of distress or calling for additional support;

**Article 35.** Restriction on the use of coercive measures 1. It is prohibited to use physical force, special means and firearms against persons with evident signs of pregnancy, minor age, disability or old age, except for the cases when they conduct an armed or group attack, show an armed resistance to a police officer endangering life and health of another person or a police officer, unless it is impossible to repel such an attack and resistance by applying other techniques and means. 2. The exception to paragraph 1 of this Article is the case when non use of physical force and special means makes impossible to implement police functions.

#### **Indonesia Police Regulations 2009:**

**Article 43 (1)** In seeking to overcome civil disorders, every INP personnel shall apply a series of actions, beginning from the least forceful or persuasive, before undertaking repressive actions or enforcement, in accordance with the principles of legality, necessity and proportionality. (2) In addressing civil disorder, no INP officer shall commit excessive action which may bring damage to the location of incident or the environment without legitimate grounds. (3) Any INP officer addressing a civil disorder shall at all times keep casualties and damage to minimum. 33 **Article 44**

(1) No INP officer shall use force under the pretext of public interest or restoring public order.

Use of Force and Firearms **Article 45** Every INP officer in taking measures involving the use of force must take into consideration the following: a. non-violent actions and methods should be attempted first; b. use of force should only be practiced if strictly necessary; c. force may only be used for legitimate law enforcement; d. no exception nor grounds shall exist to permit the unlawful use of force; e. use and application of force must be proportional and only to achieve objectives permitted by law; f. use of power, firearms or equipment in applying force must be in proportion to the threat being faced; g. clear boundaries must be established for the use of firearms/equipment or the use of force; h. damage and injury resulting from the use of force must be kept to the minimum. **Article 46** (1) All officers must be trained in the use of power, equipment and firearms that can be used in applying force. (2) All officers must be trained in non-violent techniques and methods. **Article 47** (1) The use of firearms shall be allowed only if strictly necessary to preserve human life. (2) Firearms may only be used by officers: a. when facing extraordinary circumstances; b. for self-defense against threat of death and/or serious injury; c. for the defense of others against threat of death and/or serious injury; 34 d. to prevent a serious crime that threatens the life of others; e. to restrain, prevent or stop a person who is committing will be committing an action that can endanger lives; and f. respond to a situation that endanger lives, where more persuasive measures are inadequate. **Article 48** Every INP officer in carrying out police action using firearms must abide by the procedure on the use of firearms as follows: a. The officer must understand the law enforcement principles of legality, necessity and proportionality. B. Prior to the use of firearms, the officer must issue clear warning by: 1. Identifying one's self as an officer or personnel of the INP on duty; 2. Provide verbal warning in a clear and firm voice to the subject to desist, raise his/her hands, or lay down his/her weapon; and 3. Provide sufficient time for the order to be carried out. C. In extremely pressing circumstances where a delay could result in the loss of life or gross injury of the officer or another person within the vicinity, the warning as described in sub-paragraph b is not necessary.

## **Philippines:**

### **National Police Operational Procedures, Rule 24 on Civil Disturbance Management Operations (2013)**

Rule 24 on civil disturbance operational procedures: General guidelines: Section 1) In cases of civil disturbance, The civil disturbance management (CDM) shall be located at least 100 meters from the crowd. In lightning rallies or demonstrations, the ground commander shall exhaust all efforts through dialogue with the leaders for a peaceful dispersal. In case of failure, orderly dispersal shall be resorted to by arresting the leaders.

Section 2) The CDM shall not carry any kind of fire arms, but may be equipped with batons, riot sticks. Tear gas, smoke grenades, water cannons or any similar anti-riot devise shall not be used unless public assembly is attended by actual violence or serious threats of violence or deliberate destruction of property.

Section 4 a) The role of the CDM contingent must be viewed as a last resort. Their role should never be greater than what is necessary in the circumstances. Doubts concerning the number of troops should normally be resolved in favour of deployment of a large number as this may prevent the



development of situations in which the use of excessive force may be necessary.

4 b) The ground commander must adhere to the ‘minimum necessary force principle’ in selecting an operational approach to a civil disturbance. Force shall be used only when “strictly necessary”. Force applied shall be proportional to the law enforcement objectives

### **Philippines:**

#### **National Police Operational Procedures, Rule 25 Rallies and Demonstrations (2013)**

Rule 25: The Philippine National Police adheres to the UN Code of Conduct for Law enforcement Officers which requires officers to limit the use of force to what is strictly necessary for the performance of their duties

25.7: Police responses during Public Assembly: The following are the Police Responses During the Planning stage, initial and peaceful stage, confrontational stage, and violent stage and post operational stage.

Planning stage: dialogue and preparation, initial and peaceful stage: supervision, Brach of peace/confrontational stage: If violence reaches a stage where rocks are thrown at the CDM or other persons or at property causing damage to it, the ground commander shall warn the participants that if the violence continues, the assembly will be dispersed.

If the violence continues, another audible warning will issue and after allowing sufficient time, an order for dispersal will follow, following which, the demonstrators shall be disbanded, contained and isolated. Water cannons and riot sticks may be used to aid the process.

During the violent stage, non-lethal weapons shall be used, to wit:

During the confrontational stage, the truncheon or baton may be used to push back and not to strike individuals. However, when they do become violent, it may be used for dispersal, but with caution.

Water cannons maybe used when crowds become unruly forcing the troops to fall back to secondary positions. Tear gas may be used to break up formations or groupings who refuse to disperse and who continue to be aggressive.

### **Argentina:**

#### **Minimum criteria for the development of protocols and the Police Forces Federal Security Forces in public demonstrations (Resolution no. 210/2011 of Ministry of Security )**

Restrictions and control measures

6. All resources will be exhausted to ensure conflict resolution that does not involve damage to the physical integrity of the people involved and not involved in the demonstration. To this end, measures will be established ensure against conflict situations, the intervention of the police and security forces is progressive, necessarily beginning with the dialogue with organizers of the demonstration.

[...]

**Argentina: Regulation No. 8 of Guns and Shooting (ODI No. 25 of February 6, 2012) The rules of Guns and Shooting Range of the Federal Police Argentina regulates it pertains to the use of**

**weapons fire by members of that force. [...]**

43 Officers must issue a warning or notice before making use of weapons, when: d.1) This possible. D.2) It does not increase the danger of aggression to himself or others (eg where the officer is surprised or at a numerical or tactical disadvantage).

**Argentina: Plan of Operations No. 01/10 of the National Gendarmerie Director for Personnel Operation Sentinel (containing the “General Rules on the Use of Weapons**

**Fire)** 58 and. General provisions for the use of weapons: The use of firearms is limited to extreme cases and as a last resort before concrete situations of unlawful violence with firearms that endanger the life of the acting official and / or third parties. There must be a standard order from lowest to highest. For example: before a direct confrontation attempt using natural physical force; then apply defensive judo among others. Aggressive chemical non-lethal rubber bullets must be used before wielding the gun with intimidatory purposes. This if circumstances permit and do not endanger the life of the victim, third or the staff member gendarmerie; Very serious and urgent circumstances may warrant a different reaction.

**Latvia Law on Police 1992 Section 13. Rights of Police Officers to Use Physical Force and Special Means**

The type of special means and the intensity of use of physical force or special means shall be determined by taking into account the specific situation, the nature of the violation and individual characteristics of the violator, restricting as much as possible the harm done by such means. It is prohibited to use special fighting techniques, handcuffs, batons, tear-eliciting substances and service dogs against women, against persons with obvious signs of disability and minors, except in cases when they make a group attack, endanger the lives or health of other persons and police officers, or show armed resistance.

The types of special means permitted to the police pursuant to this Law, and the procedures for storing, carrying and use of such shall be determined by the Minister for the Interior of the Republic of Latvia, after co-ordination with the Ministry of Health of the Republic of Latvia.

See also section 14: Before using a firearm a warning of intent to do so must be given. If necessary, a warning shot may also be fired. A firearm may be used without warning if: an attack is sudden or weapons, military equipment, or any type of mechanical means of transport is used in the attack; such is necessary to free hostages; It is prohibited to use and make use of firearms at locations where as a result of such use other persons may be injured; also, it is prohibited to use firearms against women and minors except in cases when they are executing an armed attack, show armed resistance, or by means of a group attack endanger the lives of other persons or police officers. A police officer has the right to take out a firearm and prepare it for shooting if the officer believes that in the specific situation its use or utilisation is not ruled out. If the arrested person on purpose makes sudden movements or other dangerous actions which the police officer may interpret as attempted violence, attempts to approach the police officer closer than the distance indicated by the officer, the police officer has the right to use a firearm in conformity with this Law.

**Pakistan Police order 2002 Chapter XVII**



S. 156 h) Every precaution should be taken that a force armed with firearms is not brought close to a dangerous crowd as to risk it either being overwhelmed by numbers or being forced to inflict heavy casualties. If the use of firearms cannot be avoided, firing should be carried out from a distance sufficient to obviate the risk of the force being rushed and to enable strict fire control to be maintained.

**Highly/Strictly specified: Specified/Highly Specified/Strict/highly prescriptive within the law:** clear cues and references to the law, actions and relevant authorities, names restricted or prohibited weapons,

**South Africa:** Execution (1) The use of force must be avoided at all costs and members deployed for the operation must display the highest degree of tolerance. The use of force and dispersal of crowds must comply with the requirements of section 9(1) and (2) of the Act. During any operation ongoing negotiations must take place between officers and conveners or other leadership elements. (2) If negotiations fail and life or property is in danger, the following procedure must be followed: Step Action 1 Put defensive measures in place as a priority. 2 Warn participants according to the Act, of the action that will be taken against them, should defensive measures fail. 3 Bring forward the reserve or reaction section or platoon that will be responsible for offensive measures, as a deterrent to further violence, should the above-mentioned measures not achieve the desired result. 4 Give a second warning before the commencement of the offensive measures, giving innocent bystanders the opportunity to leave the area. 5 Plan all offensive actions well and execute them under strict command after approval by the CJOC.

- (a) the purpose of offensive actions are to de-escalate conflict with the minimum force to accomplish the goal and therefor the success of the actions will be measured by the results of the operation in terms of cost, damage to property, injuries to people and loss of life; (b) the degree of force must be proportional to the seriousness of the situation and the threat posed in terms of situational appropriateness; (c) it must be reasonable in the circumstances; (d) the minimum force must be used to accomplish the goal; and (e) the use of force must be discontinued once the objective has been achieved. (4) The following are prohibited or restricted during crowd management operations: (a) the use of 37 mm stoppers (prohibited); (b) the use of firearms and sharp ammunition including birdshot and buckshot (prohibited); and (c) the use of rubber bullets (shotgun batons) (may only be used to disperse a crowd in extreme circumstances, if less forceful methods prove to be ineffective – restricted). (5) Force may only be used on the command or instruction of the CJOC or operational commander (if appointed). Members may never act individually without receiving a command from their commander. (6) All members involved in the actions must form part of a unified command structure, consisting of sections, platoons or companies. Members not working in sections may not be deployed. All visible policing members deployed for such purposes must be trained in the management of crowds. (7) Common law principles of self-defense or private defense are not affected by this Order. 12. Reporting and record keeping (1) Members involved in an

operation must

*(South African Police Service Standing Order, 262 of 2004, Section 11 & The National Municipal Policing Standard, 2008, Section 12)*

(2) (a) In the circumstances contemplated in section 6(6) or if a member of the Police of or above the rank of warrant officer has reasonable grounds to believe that danger to persons and property, as a result of the gathering or demonstration, cannot be averted by the steps referred to in subsection (1) if the gathering or demonstration proceeds, the Police or such member, as the case may be, may and only then, take the following steps: (I) Call upon the persons participating in the gathering or demonstration to disperse, and for that purpose he shall endeavor to obtain the attention of those persons by such lawful means as he deems most suitable, and then, (ii) In a loud voice order them in at least two of the official languages and, if possible, in a language understood by the majority of the persons present, to disperse and to depart from the place of the gathering or demonstration within a time specified by him, which shall be reasonable. (b) If within the time so specified the persons gathered have not so dispersed or have made no preparations to disperse, such a member of the Police may order the members of the Police under his command to disperse the persons concerned and may for that purpose order the use of force, excluding the use of weapons likely to cause serious bodily injury or death. (c) The degree of force which may be so used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained. (d) If any person who participates in a gathering or demonstration or any person who hinders, obstructs or interferes with persons who participate in a gathering or demonstration- (I) Kills or seriously injures, or attempts to kill or seriously injure, or shows a manifest intention of killing or seriously injuring, any person; or (ii) Destroys or does serious damage to, or attempts to destroy or to do serious damage to, or shows a manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable, such a member of the Police of or above the rank of warrant officer may order the members of the Police under his command to take the necessary steps to prevent the action contemplated in subparagraphs (I) and (ii) and may for that purpose, if he finds other methods to be ineffective or inappropriate, order the use of force, including the use of firearms and other weapons.

*(Section 9 (2) of the Regulation of Gatherings Act.)*

**Police Act of Bhutan 2009: section 80:** all attempts to disperse a crowd by extortion or warnings shall be made before it is declared and unlawful assembly. Once an order to disperse has been defied or when the attitude of the crowd is obviously defiant, force shall be used. The degree and duration of the use of force shall be limited as much as possible and the least deadly weapon, which the circumstances permit shall be used.

**Section 80:** To save lives and property, the police shall adopt actions in phases starting from the use of verbal persuasion, and non lethal weapons, to lethal weapons as circumstances may demand as follows: phase I) preventive arrest, phase 2 declare assembly unlawful, warn through microphone or order the crowd to disperse or resort to show of force if the crowd still refuses to disperse. Phase 3:

non lethal weapons: if after phase two the crowd is still resolute and is preparing to start engaging in violent disorder, the most senior police officer is to seek out the relevant Dzongdag or Dungpa to be physically on the spot to authorize the use of the following non lethal weapons to contain their actions: water cannons, Tear smoke, Riot Batons, Rubber Pellets. Phase 4: when the less extreme means are insufficient and the police are in danger of being overrun by the violent mob elements, the riot control force shall resort to the use of firearms. Prior to this however, the officer concerned shall secure the relevant Dzongdag or Dungpa to be physically present at the scene and authorize in writing the use of lethal means. The riot control police shall use firearms only under the following circumstances: i) when their performance and security is threatened by sporadic isolated gunfire from mob elements, returning fire should be ordered when targets can be identified, and when it is impossible to effectively defend oneself from the assailant other than by the use of a weapon: ii) In self defense or in defense of others against the imminent threat of death or serious injury from fire bombers, saboteurs with explosives, arsonists, and looters, the firing is intended to hit the assailant alone and in doing so, the law enforcement officials must respect and preserve life and minimize injury and damage. Firearms may be used against the people as a last resort after appropriate warnings are given including firing in the air.

## PROPORTIONALITY/MEANS AND METHODS OF FORCE

**Unspecified/unrestricted: Unspecified/abstract/un-prescribed/highly within the realm of discretion:** unclear language, no lists or clear references to specific law, high references to discretion, no clarity on steps, or directives, but on rhetorical declarations about human life, necessity etc

**Kenya:** ‘reasonably necessary’ force. Whenever the circumstances so permit without gravely jeopardizing the safety of persons and without grave risk of uncontrollable disorder, firearms shall not be used unless weapons less likely to cause death have previously been used without achieving the purpose aforesaid; and firearms and other weapons likely to cause death or serious bodily injury shall, if used, be used with all due caution and deliberation, and without recklessness or negligence. (Section 5. P.O. A, 2009)

Firearms may only be used when less extreme means are inadequate and for the following purposes— (a) saving or protecting the life of the officer or other person; and (b) in self-defense or in defense of other person against imminent threat of life or serious injury. (*National Police Service Act, 6<sup>th</sup> schedule Section B. para 1*).

**Armenia Law on Police 2004 supra: Art. 32:** a list of firearms and types of ammunition in the armament of the police shall be approved by the approved by the Government of Armenia. It shall be prohibited to accept those arms and ammunition into the armament of police which cause especially grave injuries or are a source of unjustifiable risk.?

**Latvia Law on Police 1992: Section 13 (6)** The types of special means permitted to the police pursuant to this Law, and the procedures for storing, carrying and use of such shall be determined by the Minister for the Interior of the Republic of Latvia, after co-ordination with the Ministry of Health of the Republic of Latvia.

**Russia Federal Law on Federal Security Service, 1995 Article 14.** Use of arms, special means and

physical force (as per Federal Law No. 153-FZ of 27.07.2006) The staff of federal security service organs shall be permitted to possess and carry standard issue weapons and special means. They shall be entitled to use military equipment, arms, special means and physical force, including military combat tactics, in accordance with the legal and regulatory acts of the Russian Federation.

**Timor Leste Organic Law of National Police 2004** Article 5 (3). The PNTL cannot impose restrictions or use coercive means other than those that are strictly necessary. 4. The PNTL can use weapons of any model and 238 caliber. 5. The use of firearms shall be regulated by specific order.

**Mexico:**

***The manual on the use of force, common to the three armed forces.***

*(Based on Article 19 of the Organic Law of the Federal Public Administration and in compliance with the provisions of Article 13 of the Directive governing the legitimate use of force by staff of the Army and Air Force of Mexico, pursuant to the exercise its functions in support of civil authorities and pursuant to the Federal Law on Firearms and Explosives, and the second article 27 ter of the secretarial agreement by which the directive amending and supplementing 003/09 of September 30, 2009 , whereby the legitimate use of force by naval personnel, in performance of their duties in maintaining the rule of law is regulated) .*

3. Principles on the Use of Force. A. The use of force levels by members of the armed forces, it is only appropriate when strictly unavoidable or indispensable to the fulfilment of the mission that has been assigned in support of civil authorities.

B. The use of force will be made in strict adherence to human rights, regardless of the type of aggression, according to the principles of opportunity, proportionality, rationality and legality. To. Opportunity: when used in the time required, should avoid any unnecessary action if there is evidence of danger or risk the lives of people outside the facts. This means that care must be taken at the time and place in which strictly limit the damage and disruption both to life and to the integrity of the people involved and their property and in general, the impact on the rights of the inhabitants. B. Proportionality: when used in the magnitude, intensity and duration necessary to achieve control of the situation, considering the level of resistance or aggression that front; It refers to the relationship between the threat to legally protected personnel or external to the facts civilian population, and the level of force used to neutralize it. The severity of a threat is determined by the magnitude of the aggression, the dangerousness of the offender, whether individual or collective, the characteristics of its already known behavior, possession or not weapons or instruments for aggression and resistance or opposition arise. C. Rationality: when use is the result of a decision in which the objective pursued, the circumstances of aggression, personal characteristics and capabilities of both subject to control as the member of the armed forces valued; which implies that the application of the use of force not to resort to alternative means, given the existence of the act or hostile intent, is necessary. D. Legality: when its use is developed with adherence to current regulations and with respect for human rights 4. Levels of resistance.

7. It should not be forgotten that situations requiring the use of force are dynamic, they can move from one type of aggression to another and therefore personnel is within the same must make the right

decisions applying the principles of opportunity, proportionality, rationality and legality.

. The following actions listed, are prohibited constitute a misuse of force. To. Control a person with the application of self-defense techniques that restrict breathing or blood supply to the brain. B. Place a person in handcuffs in a position to restrict his breathing. C. Shoot or from moving vehicles, except in those cases where failure to do so, it is clear and obvious that the personnel of the armed forces or others will be seriously affected and there is no alternative to avoid it. D. Shoot through windows, doors, walls and other obstacles, towards a goal that is not fully identified. And. Shoot when there is an imminent risk to third parties. F. Shoot to control people who are only causing damage to material objects. G. Shoot to neutralize people whose actions can only lead to injury or damage to themselves. 15. General. A. In all operations carried out armed to be aware of the existence of a situation that potentially could reach forces use force must be carried out the following: a. Previous actions. 1. Identify those sites within the area of operations that present the greatest problems arising from high crime rates and the presence of organized crime groups. However, the level of force used should always respond to the threat it faces, and not the place or territory where they carried out the operation.

**Bulgaria:** The police uses physical power, auxiliary devices and weapons only as a last chance and stops using them immediately after the necessity to use them has ceased to exist. **(Code on Police Ethics, 2004)**

**Indonesia Police Regulations 2009,** Use of Force and Firearms Article 45 Every INP officer in taking measures involving the use of force must take into consideration the following: a. non-violent actions and methods should be attempted first; b. use of force should only be practiced if strictly necessary; c. force may only be used for legitimate law enforcement; d. no exception nor grounds shall exist to permit the unlawful use of force; e. use and application of force must be proportional and only to achieve objectives permitted by law; f. use of power, firearms or equipment in applying force must be in proportion to the threat being faced; g. clear boundaries must be established for the use of firearms/equipment or the use of force; h. damage and injury resulting from the use of force must be kept to the minimum.

**Moderately specified : Fairly specified/Moderate/moderately prescriptive within the law:** vague references to some laws or procedures

**Egypt:** Water cannons, gas canister, tear gas, batons, gas bombs, rubber cartouche and non-rubber cartouche bullets, live bullets.

**Rwanda:** Before using firearms, the Police shall whenever possible use the following equipment: water spray, batons, tear gas canisters, rubber bullets, or any other 'relevant devises' used in controlling riots. *(Section 42 of Law No. 9 of 2000 on the establishment and Jurisdiction of the National Police)*

**Armenia Law on Police 2004, Art 31,** the police employees shall have a right to use special means as follows: rubber bullets for mass riots, preventing an attack against a civilian or police officer, to maintain public order, teargas and water cannons for all the foregoing scenarios and for suspicion of a



planned armed resistance, electric shocking devices for all the foregoing except for mass riots, and guard dogs for all scenarios except for mass riots.

**Bosnia and Herzegovina (Law on the internal Affairs of the Sarajevo Canton):** Authorized officials are entitled to use appropriate means of force such as: physical force and rubber baton, tying devices, chemicals, equipment for forcible stopping and obstructing vehicles and persons, trained dogs, cavalry and water cannon when necessary to protect themselves or another person or personalities under protection from being attacked, or to restrain the resistance of one or more persons disturbing public peace and order or endangering the safety of traffic or of the persons who are to be brought, detained or deprived of liberty, in order to settle the disturbance of public peace and order, as well as to prevent the escape of persons being escorted or who are to be brought, detained or deprived of liberty, if there is a suspicion that he will attempt to escape (**Art, 40**).

**Bosnia and Herzegovina :**(2) The Chief Of Police, Deputy Chiefs of Police and authorized officials are entitled to use coercive measures only when strictly necessary and when all other means of control prove to be ineffective. In all circumstances the lowest stage of coercion necessary for control or enforcement shall be applied. The amount of force must be commensurate to the seriousness of the offense and the legitimate objective to be achieved. Lethal force shall be applied only as an uttermost solution necessary to protect lives, as specified in Article 32 of this Law. (3) Authorized officials, shall be entitled, in accordance with the law, to use the following coercive measures: physical force, night-sticks, hand-cuffs, chemicals, physical means for restraining persons, barriers for vehicles, police dogs, water cannons, and other reasonable means under the circumstances. (**Art 29, Law on Police of the Brcko District.**)

**Bosnia and Herzegovina (law on the internal Affairs of Tuzla, Sarajevo,)** Authorized official persons use firearms from the article 43. only if by using physical force, baton or other means of force, they cannot carry out a task or a duty. If the situation permits, the official authorized person is obliged to warn a person before using the firearms against him/her (Art. 45, 42, )

Authorized officials shall use fire arms from Article 39, in cases when they are not able to perform their jobs and tasks using physical force, night-sticks or other coercive means. Authorized officials, if given circumstances allow, shall be obliged to warn a person they will shoot at before using fire arms. (**Internal Affairs of Posavina, Art. 40**)

#### **Czech Republic, Act Regulating the police 1991:**

##### **PART FIVE:**

The use of coercive means and weapons by a police officer **Section 38 Coercive means** (1) Coercive means include: (a) self-defense holds, grabs, hits and kicks; (b) tear gas; (c) baton; (d) handcuffs; (e) service dog; (f) use of horses for crowd control; (g) vehicle immobilizer; (h) road spike or other means of forcible stopping of a vehicle; (I) water gun; (j) shock weapon; k) hit with a firearm; l) threat with a firearm; m) warning shot. (2) A police officer is entitled to use coercive means in the interest of the protection of security of persons and his/her own, protection of property and public order, against a person endangering those. (3) Before using coercive means, a police officer must warn the person against whom he/she is taking action to stop the unlawful conduct or else coercive means will be

used. This shall not apply in the case of the provision of paragraph (1)(g). He/she may refrain from using the police warning only in the case his/her life or health is in danger or the life or health of another person, and action must be taken immediately. In force of legislation from January 1, 2007 (4) The police officer shall choose the coercive means he/she will use with respect to the situation, in order to achieve the purpose of the police action, and use such a coercive means that is indispensable for breaking the resistance of the person violating the law. (5) A police officer must take care that the use of coercive means does not inflict harm on the person of a degree obviously disproportionate to the nature and dangerousness of his/her unlawful conduct.

**Czech Republic -Use of a weapon:** Section 39 The use of a weapon (1) A police officer is entitled to use a weapon (a) in self-defense or assisting self-defense in order to obstruct an immediately threatening or continuing attack against his/her person or the attack against the life or health of another; (b) if a dangerous offender against whom action is being taken ignores the officer's demand to surrender or is reluctant to leave his/her shelter; (c) if there is no other possibility to break the resistance aimed at frustrating the officer's serious action; (d) in order to prevent the escape of a dangerous offender who cannot be stopped in another way; (e) in order to obstruct a dangerous attack posing threat to guarded or protected premises or point, after an ignored warning to refrain from such an attack; (f) if there is no other possibility to stop a vehicle the driver of which is by his/her reckless driving seriously endangering the life and health of persons and fails to stop upon a repeated warning or signal given to him/her pursuant to a special regulation 9); (g) in order to stop a vehicle the driver of which, in the immediate area of a state border, fails to stop upon a repeated warning or signal given to him/her pursuant to a special regulation 9); (h) if a person against whom the coercive means of a threat with a firearm or the coercive means of a warning shot has been used fails to obey the officer's commands aimed at protecting his/her own security or the security of another person; (I) if there is a need to paralyze an animal endangering the life or health of persons. (2) "Weapon" under paragraph (1) means a firearm, a stabbing or cutting weapon, unless it is a special weapon under this Act. (3) The use of a weapon by a police officer in cases referred to in paragraph In force of legislation from January 1, 2007 (1) (a) through (g) is admissible only if the use of coercive means would obviously be ineffective. (4) Before using a weapon in the cases referred to in paragraph (1) (a) through (e), a police officer must warn the person against whom he/she is taking action to refrain from the unlawful conduct or else a weapon will be used. He/she need not use the warning only if his/her life or health or the life or health of another person are endangered and he/she must immediately respond. (5) When using a weapon, a police officer must take the necessary care, in particular, not to endanger other persons' life and to spare as much as possible the life of the person against whom the action is being taken. Section 39a (1) Police officers assigned to the intervention squads of the Public Order Police Service and the Rapid Response Unit, to the Protection Service as well as to the Foreign and Border Police Service at airports are entitled to use special coercive means and special weapons when taking actions to save the life and health of persons or to protect property, except when provided otherwise by this Act. (2) Special coercive means are: (a) temporarily paralyzing means; (b) special ejection devices, unless having the character of a weapon or a special weapon under this Act; (c) special means of forced entry. (3) Special weapons are: (a) sniper rifle (b) shotgun; (c) gun with a silencer; (d) gun with laser sight; (e) mechanical firearm; (f) specially adapted firearm; (g) explosive, special explosive device and special ammunition. (4) Special coercive means under paragraph (2)(a) and special weapons under paragraph (3)(a) and (b) may also be used by police officers not referred to in paragraph (1) if they have a special training for their manipulation. In force of legislation from

January 1, 2007 (5) The use of special coercive means and special weapons shall be regulated by the provisions of section 38 (2) through (5), section 39 and sections 40 thorough 42 of this Act.

**Lithuania law on police:**

**Article 43:** Special Police Equipment and the Conditions of Use Thereof Police shall be permitted to possess and use the following special equipment and methods: rubber truncheons, handcuffs and restraining devices, methods of combat wrestling, gas, water cannons, police dogs, methods of stopping transport by force, and other means: 1. rubber truncheons may be used in the circumstances specified in paragraphs 1 8 of Part 2 of Article 42 of this Law, as well as during the apprehension of persons who are violating public order, if such persons resist the police officer or refuse to obey his or her demands; 2. handcuffs and restraining devices may be used: - in the apprehension and transportation to police head quarters of persons guilty of committing socially dangerous acts, if there are reasonable grounds to believe that such persons will resist the police officer or attempt to escape detention - while transporting persons who have been detained or arrested; and - when citizens, as a result of their dangerous actions, may potentially inflict harm on themselves or on others; 3. methods of combat wrestling may be used: - in the apprehension and transportation to police headquarters of persons guilty of committing socially dangerous acts, if such persons resist or attempt to escape detention by other actions; and - when persons intentionally refuse to carry out the lawful demands of a police officer or resist a police officer's lawful actions; 4. gas may be used for personal protection in cases provided for in paragraph 1 of Article 43 of this Law; - special purpose gas may be used: - in the event of mass riots or group actions which grossly violate public order; and - when apprehending and forcing persons guilty of committing socially dangerous acts to abandon certain premises, motor vehicles, or other forms of transport; 5. water cannons may be used in the event of mass riots or group actions which grossly violate public order; 6. police dogs may be used: - in the pursuit of criminal suspects who have fled from the scene of the crime; - when apprehending persons who have escaped from places of confinement, from places of detention before trial, while being transported under guard, or during interrogation; - when apprehending persons guilty of committing a crime or of grossly violating public order; - during mass riots or group actions which grossly violate public order; and - when police officers are defending themselves, citizens, or guarded objects from assault. 7. means of stopping transport by force may be used when the driver refuses to stop upon a police officer's demand, or in regard to a special road sign. It shall be prohibited to use special police equipment against children, pregnant women, women with children, and persons who are visibly disabled, except in cases when said persons are themselves the attackers.

**Act on the use of Direct Force by Federal Police Officers exercising Public Authority (1961)  
German § 12 Special rules for the use of firearms**

(1) Firearms may only be used when other measures of direct force are applied unsuccessfully or without any promise of success. Their [firearms] use against people is only permitted if the purpose is not achieved by the use of weapons against property.(2) The purpose of the use of firearms is only to [put the person in the position not to be able to attack or flee] . It is forbidden to shoot when, through the use of firearms, it is recognizable [perceivable] for law enforcement officers that bystanders are



highly likely to be jeopardized [at high risk of danger or hazard], unless it [the use of firearms] cannot be avoided during action against a crowd (§ 10 Para. 2).

**§ 13 Threat of force** (1) The use of firearms must be threatened [as in: must be announced or warned]. The firing of a warning shot can be considered as threat/warning of force.

In case of a crowd, the threat/warning of force must be repeated.

(2) The use of water cannons and vehicles [police cars, tanks] against a crowd must be announced].

## **Pakistan Police order 2002**

### **Chapter XVII**

**Section 156 f):** In order that the decision to open fire may be acted upon without loss of control or confusion, the responsible officer shall, as soon as it appears likely that the use of fire arms will be necessary, tell off a detachment of armed police to be held in readiness. When fire is to be opened, the responsible officer shall decide the minimum volume necessary to be effective in the circumstances, and shall give precise orders accordingly, as to the particular men or files who are to fire and the number of rounds to be fired and whether volleys of independent aimed shots are to be fired. And shall ensure that his orders are not exceeded. Whatever volume of fire is ordered, it shall be applied with maximum effect. The aim shall be kept low and directed at the most threatening parts of the crowd. In no circumstances shall firing over the heads of, or at the fringes of the crowd be allowed. Since buckshot is not safe from any range at which it is shot, government has directed that the use of buckshot ammunition against crowds is prohibited.

S. 156 h) Every precaution should be taken that a force armed with firearms is not brought close to a dangerous crowd as to risk it either being overwhelmed by numbers or being forced to inflict heavy casualties. If the use of firearms cannot be avoided, firing should be carried out from a distance sufficient to obviate the risk of the force being rushed and to enable strict fire control to be maintained.

## **Pakistan Police Rules 1934**

Rule No. 14.56: Instructions regarding the use of force by the Police against crowds are as follows:

1 The use of force by the police against crowds is regulated entirely by the law, particularly, chapters V and IX of the criminal procedure code.

1 a) The main principle to be observed is that the degree of force used shall be regulated by the circumstances of each case. The object of the use of force is to quell a disturbance of the peace, or to disperse an assembly which threatens such disturbance and has either refused to disperse, or shows a determination not to disperse.

1 d) The effectiveness of force depends upon the determination with which it is applied. It's direction against the most defiant section of the crowd to be dispersed and its absolute control. Failure to act on this principle results inevitably in more force being applied than would otherwise have been necessary. It is not possible to lay down any more definite rule as to when different methods of different weapons shall be used. The officer responsible is required to decide this in each case on

consideration of the strength and attitude of the crowd to be dispersed and the strength of the force available for its dispersal.

**Highly structured: prohibited weapon/s are listed, steps and procedures highly prescriptive within the law:** clear references to the law, actions and relevant authorities, names restricted or prohibited weapons,

**South Africa: See above-** The following are prohibited or restricted during crowd management operations: (a) the use of 37 mm stoppers (prohibited); (b) the use of firearms and sharp ammunition including birdshot and buckshot (prohibited); and (c) the use of rubber bullets (shotgun batons) (may only be used to disperse a crowd in extreme circumstances, if less forceful methods prove to be ineffective - restricted). (5) Force may only be used on the command or instruction of the CJOC or operational commander (if appointed).

**Note:** But as per the National Municipal Policing Standard, Section 12, Pepper Spray as well as firearms and sharp ammunition are prohibited unless a specific commander permits their use,

**Croatia: (Law on Police, Article 21)** The application of a police power must be proportional with the need for the reason of which it is undertaken. The application of a police power must not cause consequences more harmful than the ones that would have been caused if the police power had not been applied. Applied shall be the police power, by the means of which the lawful aim may be achieved with the least harmful consequences and within the shortest possible time.

**Croatia, law on police: Article 54A** police officer shall always use the mildest means of coercion that guarantees success. The person, against whom the conditions are fulfilled for the use of the means of coercion, shall not be warned if the warning would jeopardise the performing of the official task.

**USE OF BODILY FORCE Article 55** For the purposes of this Law, the use of bodily force implies the use of various martial arts holds and similar actions on another person's body, the aim of which is to reject an attack or to surmount a person's resistance, with the least possible harmful consequences.

**USE OF TRUNCHEON Article 56** The use of truncheon is allowed if the milder forms of use of bodily force are ineffective or do not guarantee success.

**USE OF SERVICE DOGS Article 59** A service dog may be used as a means of coercion in the following cases: 1. when conditions for the use of bodily force or truncheon are fulfilled; 2. when conditions for the use of firearms are fulfilled; 3. when breached law and order is being restored. In cases referred to in Paragraph 1, Point 2 of this Article, a service dog may be used without muzzle, whereas in the cases referred to in Points 1 and 3, it must be used only with muzzle.

**USE OF CHEMICAL AGENTS Article 60** Apart from the cases described in Article 67, Paragraph 1 of this Law, chemical agents may be used for forcing a person out of a closed area or for solving hostage situations. **USE OF SERVICE HORSES Article 61** Service horses may be used as a means of coercion only to restore the breached law and order. **USE OF FIREARMS AGAINST PERSONS Article 62** A police officer may use firearms if other means of coercion used already were inefficient or if they do not guarantee success. A police officer may use firearms when there is no other way to:

1. protect his/her own life as well as the lives of other people; 2. prevent the committing of a criminal act for which a prison sentence lasting five years or more can be pronounced; 3. prevent the escape of a person caught committing a criminal act for which a prison sentence of more than ten years can be pronounced, or of a person for whom search on the grounds of having committed such a criminal act has been announced; 4. prevent the escape of a person, who has been arrested for the commission of criminal acts referred to in Point 3 or of a person for whom search on the grounds of having escaped from prison has been announced. Before the use of firearms, a police officer shall verbally warn the person by uttering “Stop, it’s the police”, followed by the second warning “Stop or I’ll shoot!” The warning referred to in Paragraph 3 of this Article shall not be given if this would jeopardise the performing of a police task. Article 63 The use of firearms is not allowed when it would jeopardise other persons’ lives, unless the use of firearms is the only means of defense from a direct assault or danger. The use of firearms is not allowed against a minor, unless the use of firearms is the only way of defense from an assault or danger.

**Croatia: Article 65** Special types of weapons and explosive devices may be used when conditions referred to in Article 62, Paragraph 2 of this Law are fulfilled, in case the use of other types of weapons is inefficient or does not guarantee success. Special weapons and explosive devices may not be used for the purpose of preventing a person from escape. Explosive devices may not be used against persons gathered in a crowd. The Minister or a person authorised by him/her renders the decision on the use of special types of weapons and explosive devices.

**Croatia law on Police (2000) Article 64:** A police officer is empowered to order a group of persons to disperse if the group has gathered and is acting in an unlawful manner, so that it might provoke violence. If the group does not disperse, the use of the following means of coercion is allowed: 1. special motor vehicles; 2. bodily force; 3. truncheon; 4. chemical agents; 5. water jets; 6. service dog; 7. service horse. The measures referred to in Paragraph 1 of this Article may be used only upon the order given by the head of a police administration or a police officer authorised by him/her.

**Police law on Serbia Article 85:** Use of instruments of restraint against a group of people Article 85 Authorized officer shall be entitled to issue an order to a group of people to disperse provided that the group was unlawfully gathered, unlawfully behaves or may instigate violence. If the group fails to disperse, only the following instruments of restraint may be used: 1) physical force; 2) police baton; 3) special motor vehicles; 5) service dogs; 6) service horses; 7) water cannons; 8) chemical agents; Instruments of restraint referred to in Paragraph 2 of this Article may be used only on order of head of regional police directorate, i.e. police officer empowered by the head.

3.2.8. Water cannons **Article 97** Water cannons may be used only under condition and in a manner laid down by this Law for use of instruments of restraint against a gathered group behaving in a manner that may instigate violence. 3.2.9. Chemical agents Article 98 Chemical means may be used in order to fend off assault or to subdue resistance if this cannot be achieved by physical force or police baton, in order to restore public order, to expel people from closed areas, in resolving hostage situations and in when conditions have been met for use of special weapons or explosive devices, or for use of firearms laid down by this Law. Chemical agents means short-term effect teargas, without lasting effects on psychophysical and general health, as well as chemical substances with effect lenient than teargas. Special protective measures shall be taken when using chemical agents in vicinity of children's institutions and nursing homes, primary schools, busy traffic routes or inflammable substances. Chemical means shall not be used against persons near inflammable substances, at great

heights, or in similar locations where human life could be endangered. . 3.2.10 Special weapons and explosive devices Article 99 Special types of weapons and explosive devices may be used only if the conditions laid down by this Law for using firearms are met, and if other types of weapons prove unsuccessful or do not guarantee success. Special weapons and explosive devices are forbidden in preventing a person to escape. Explosive devices may not be used against crowds Decision to use special weapons and explosive devices shall be made by Director General of Police, with consent by Minister. 3.2.11 Firearms Article 100 In the course of duty, authorized officer may use firearms only if other restraint measures would fail and it is absolutely necessary to: 37 1) protect human life; 2) prevent a person who has been caught while committing a criminal offence for which the law prescribes a sentence of ten years or over ten years of imprisonment from escaping, if there is a direct threat to life; 3) prevent escape of a person lawfully deprived of freedom, or a person against whom an arrest warrant has been issued for a criminal offence referred to in point 2) of this Article if there is a direct threat to life; 4) fend off a life-threatening attack against the officers; 5) fend off an attack directed against a facility or person under officer protection, if there is a direct threat to life; Protection of human life Article 101 Use of firearms with respect to Article 100, point 1) of this Law, shall mean the use of firearms for protection of life of one or several persons, attacked by one or more other persons, provided that there is immediate danger to life or the attacked or attacker.

Special limitations on use of firearms Article 107 Use of firearms is prohibited when it would endanger the lives of others, except when use of firearms is the only instrument of performing duties as referred to in Article 100 hereof. Use of firearms is prohibited against minors, except in case when this is the only way to avert direct attack or danger. (*Combines necessity, precaution, means and methods*)

**Argentina Minimum criteria for the development of protocols and the Police Forces Federal Security Forces in public demonstrations (Resolution no. 210/2011 of Ministry of Security )**

10. The ban on carrying firearms for all staff must be clearly defined police and security forces for their role in the operation could enter direct contact with the demonstrators. Lethal munitions must not be available to the staff of the police force or security who intervene in operational control of public demonstrations. The use of guns is prohibited. It is considered as a serious disciplinary offense the use of arms or ammunition not provided by the institution.

Rubber Bullets only be used for defensive purposes in case of danger to physical integrity of any member of the security institutions of demonstrators or third person. In no case you may use this type of ammunition as a means disperse a demonstration.

Aggressive chemicals may be used only as a last resort and always after a previous order of the head of the operation, who will be responsible for the misuse of the same. In such cases, the use of force will be restricted solely to officers specially trained and equipped for this purpose.

