Reserving the objectionable: reprisals against enemy civilians, the United Kingdom and 1977 Additional Protocol I

Lindsay Moir[*]
Professor of International Law, University of Hull, UK

Keywords
International humanitarian law; belligerent reprisals; civilian protection; United Kingdom; Additional Protocol I; treaty reservations; object and purpose of a treaty; effect of impermissible reservation

Abstract
Belligerent reprisals are a largely discredited method for the enforcement of international humanitarian law, which have been progressively limited and prohibited. Additional Protocol I of 1977 prohibits reprisals against enemy civilians but the United Kingdom lodged a reservation upon its ratification of the Protocol reserving the right to engage in reprisal activity against enemy civilians in certain circumstances. This article assesses the permissibility of the United Kingdom's reservation according to the regulatory framework set out in the 1969 Vienna Convention on the Law of Treaties, which provides that a reservation is not permissible if it is incompatible with the object and purpose of the treaty. It then considers the possible legal effects of the reservation should it be determined to be impermissible.

1. Introduction

Any law student is likely to point out that effective enforcement is a significant deficiency of international law. Given the horizontal nature of the international legal system, with no centralised authority providing a recognised and comprehensive framework of enforcement and sanctions, this is not surprising. Such difficulties are perhaps even more apparent in the context of the law of armed conflict (or international humanitarian law (IHL)). Indeed, students may be equally familiar with Lauterpacht's famous statement that, 'If international law is, in some ways, at the vanishing point of the law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law'.[1]

[*] Thanks are due to the two anonymous reviewers for their helpful comments. The author can be contacted at L.Moir@hull.ac.uk.
[1] H Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 BYIL 360, 382.

Nonetheless, the late twentieth century saw various attempts to more effectively enforce the law of armed conflict, particularly through a more consistent imposition of individual criminal responsibility. Thus, in 1993 an international criminal tribunal was created by the UN Security Council to prosecute individuals responsible for serious violations of IHL committed during the armed conflict in the Former Yugoslavia, with a similar tribunal created in 1994 to prosecute those violations committed in Rwanda. These ad hoc responses were followed by the adoption of a Statute for a permanent International Criminal Court in 1998, and the establishment of various Special Courts and Tribunals (e.g. for Sierra Leone, Cambodia, etc.). As Darcy intimates, 'Not since the aftermath of the Second World War has there been such a commitment to trying persons suspected of committing violations of the laws of armed conflict.'[2]

Even if such judicial mechanisms were to prove entirely successful in terms of prosecuting violations at the end of hostilities, however, they often provide little immediate assistance on the battlefield and during the course of hostilities. In such situations, States are probably less interested in possible future remedies for harm suffered and losses endured, or in the eventual trial and punishment of the individuals responsible. Instead, they are likely to be more concerned in ensuring that violations of IHL by the enemy cease as quickly as is possible and are not repeated.[3] On occasion, then, States have felt compelled to resort to much more direct (some might say primitive) enforcement of the law in the form of belligerent reprisals. Such reprisals are notoriously controversial, and Best wisely cautions the student mentioned at the outset to 'be on his guard when he hears the word. Deeper hypocrisy and duplicity attach to it than any other term of the art.'[4]

This article considers the development of IHL's approach to belligerent reprisals, with particular focus on the issue of reprisals against enemy civilian populations. It then questions attempts by the United Kingdom to retain the right to undertake such attacks in the face of what appears to be a growing lack of acceptance by the vast majority of States. In this context, the article examines the permissibility and effect of the UK's reservation to the prohibition of reprisals against enemy civilians contained in Article 51(6) of Additional Protocol I of 1977 (API). It argues that the reservation is impermissible, in that it is incompatible with the object and purpose of API and so fails to comply with Article 19(c) of the Vienna Convention on the Law of Treaties 1969 (VCLT), and that — whilst the legal effect of an impermissible reservation remains a contested issue in

---

[2] S Darcy, 'What Future for the Doctrine of Belligerent Reprisals?' (2002) 5 YIHL 107, 124.
[3] Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3 ed, Cambridge University Press, 2016) 289; MCC Bristol III, 'The Laws of War and Belligerent Reprisals Against Enemy Civilian Populations' (1979) 21 AFLR 397, 425; P Sutter, 'The Continuing Role for Belligerent Reprisals' (2008) 13 JCSL 93, 93.
[4] G Best, *War and Law Since 1945* (Oxford University Press, 1994) 203.

international law — this has potentially far-reaching consequences for the UK and its legal obligations under the Protocol, ranging from the possibility that it remains bound by Article 51(6) regardless to the possibility that it cannot be considered a Party to API at all.

2. Belligerent reprisals in international law

Reprisals have a 'long and disreputable history'.[5] There can often be a degree of confusion regarding the concept, however, and it is important to note at the outset that — despite a tendency on the part of States (in particular) to be somewhat imprecise regarding terminology — belligerent reprisals do not refer simply to acts of vengeance or retaliation. Nor, despite an evident connection between reprisals and the principle of reciprocity, does the concept serve to indicate that the rules of IHL operate on a purely reciprocal basis.[6]

In general terms, a reprisal in international law is an act which would ordinarily be unlawful, but which is justified — and therefore accepted — as a response to (and against a State responsible for) a prior violation of the law, and aimed specifically at ending that violation or else preventing further violations.[7] They are, then, a self-help enforcement tool, more commonly referred to in contemporary discourse as countermeasures, and not involving forcible action. The distinct concept of *belligerent* reprisals refers to acts which take place in the specific context of armed conflict and *prima facie* constitute a violation of IHL, but which are accepted as a lawful response to prior violations of IHL committed by another State.[8] As described by the UK *Manual on the Law of Armed Conflict*, they are 'extreme measures to enforce compliance with the law of armed conflict by the adverse party [that] can involve acts which would normally be illegal, resorted to

---

[5] GD Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2 ed, Cambridge University Press, 2016) 694.

[6] UK Ministry of Defence, *Manual of the Law of Armed Conflict* (Oxford University Press, 2004) 420; FJ Hampson, 'Belligerent Reprisals and the 1977 Additional Protocols to the Geneva Conventions of 1949' (1988) 37 ICLQ 818, 819-820 and 829-832; Best (n 4) 203-204; J de Hemptinne, 'Prohibition of Reprisals' in A Clapham, P Gaeta & M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015) 575, 578-580; S Oeter, 'Methods and Means of Combat' in D Fleck (ed), *The Handbook of International Humanitarian Law* (3 ed, Oxford University Press, 2013) 115, 228.

[7] C Greenwood, 'The Twilight of the Law of Belligerent Reprisals' (1989) 20 NYIL 35, 37.

[8] See, e.g., International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its 53rd Session, YILC (2001) Vol II, Part 2, 128; Greenwood (ibid) 38; Dinstein (n 3) 290; S Darcy, 'The Evolution of the Law of Belligerent Reprisals' (2003) 175 Mil LR 184, 185-187; F Kalshoven, *Belligerent Reprisals* (Martinus Nijhoff, 1971) 33-44.

after the adverse party has itself carried out illegal acts and refused to desist when called upon to do so'.[9]

Examples from previous armed conflicts are not particularly difficult to identify. Numerous reprisals and counter-reprisals occurred during World War II, with both Germany and the UK justifying the escalation of indiscriminate bombing raids in those terms.[10] Reprisals were also apparent in the 'tit-for-tat' mistreatment of individuals in the power of belligerent parties, including the execution of prisoners of war and hostages.[11] There has been a marked decrease in reprisals since, although more recent examples can be found in the context of the 1980-1988 Iran/Iraq War[12] — and possibly even in the context of current hostilities arising from Russia's invasion of Ukraine.[13] Despite this reduction in their use, it would be inaccurate to suggest that the notion of reprisal is a 'relic from the past'.[14] As will be seen, whilst many reprisals are now prohibited, vestiges of the concept — albeit tightly constrained and regulated — remain.

---

[9] UK *Manual* (n 6).

[10] Indeed, the 'V' of Germany's notorious V-bombs stood for *Vergeltung* (i.e. reprisal). See Best (n 4) 312.

[11] AM de Zayas, *The Wehrmacht War Crimes Bureau, 1939-1945* (University of Nebraska Press, 1989) 108, reproduced in M Sassòli & AA Bouvier (eds), *How Does Law Protect in War?* (ICRC, 1999) 651; M Walzer, *Just and Unjust Wars* (4 ed, Basic Books, 2006) 208-209.

[12] F Kalshoven, *Reflections on the Law of War* (Martinus Nijhoff, 2007), 767-768. See Iraq, *Letter dated 2 May 1983 to the UN Secretary-General*, UN Doc S/15743 (4 May 1983); Islamic Republic of Iran, *Letter dated 2 February 1987 to the UN Secretary-General*, UN Doc S/18648 (2 February 1987); Iraq, *Letter dated 18 February 1987 to the UN Secretary-General*, UN Doc S/18704 (18 February 1987); Islamic Republic of Iran, *Letter dated 24 February 1987 to the UN Secretary-General*, UN Doc S/18721 (25 February 1987); Islamic Republic of Iran, Minister of Foreign Affairs, *Letter dated 27 February 1987 to the UN Secretary-General*, UN Doc S/18728 (27 February 1987); Islamic Republic of Iran, *Letter dated 24 June 1987 to the UN Secretary-General*, UN Doc S/18945 (24 June 1987).

[13] See P Beaumont, C Higgins & A Mazhulin, 'Putin warns of further retaliation as Ukraine hit by massive wave of strikes', *The Guardian* (10 October 2022), <www.theguardian.com/world/2022/oct /10/explosions-kyiv-ukraine-war-russia-crimea-putin-bridge>; L Chao-Fong, H Taylor & S Lock, 'Putin says he will keep on launching attacks on Ukraine's electricity infrastructure', *The Guardian* (8 December 2022), <www.theguardian.com/world/live/2022/dec/08/russia-ukraine-war-live-news-us-denounces-putins-loose-talk-on-nuclear-weapons-zelenskiy-reports-fierce-fighting-in-bakhmut? page=with:block-6391ef418f08222b5ee8738a#block-6391ef418f08222b5ee8738a>; M Milanovic & MN Schmitt, 'The Kerch Strait Bridge Attack, Retaliation, and International Law', Lieber Institute West Point (12 October 2022), <https://lieber.westpoint.edu/kerch-strait-bridge-attack-retaliation-international-law/>; MN Schmitt, 'Reprisals in International Humanitarian Law', Lieber Institute West Point (6 March 2023), <https://lieber.westpoint.edu/reprisals-international-humanitarian-law/>.

[14] APV Rogers, *Law on the Battlefield* (3 ed, Manchester University Press, 2012) 351.

The legal regulation of reprisals is not a recent development,[15] and contemporary customary IHL imposes a number of requirements in order for a military response to qualify as a lawful belligerent reprisal. Whilst the precise expression of these requirements may vary slightly from commentator to commentator, there is broad consensus as to the core elements, and the UK *Manual* sets out the prerequisites in the following terms:[16]

(a) It must be in response to serious and manifestly unlawful acts, committed by an adverse government, its military commanders, or combatants for whom the adversary is responsible.
(b) It must be for the purpose of compelling the adversary to observe the law of armed conflict. Reprisals serve as an ultimate legal sanction or law enforcement mechanism. Thus, if one party to an armed conflict breaches the law but then expresses regret, declares that it will not be repeated, and takes measures to punish those immediately responsible, then any action taken by another party in response to the original unlawful act cannot be justified as a reprisal.
(c) Reasonable notice must be given that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of the case.
(d) The victim of a violation must first exhaust other reasonable means of securing compliance before reprisals can be justified.
(e) A reprisal must be directed against the personnel or property of an adversary.
(f) A reprisal must be in direct proportion to the original violation. Whilst a reprisal need not conform in kind to the act complained of, it may not significantly exceed the adverse party's violation either in degree or in effect. Effective but disproportionate acts cannot be justified as reprisals on the basis that only an excessive response will forestall further violations.
(g) It must be publicized. Since reprisals are undertaken to induce an adversary's compliance with the laws of armed conflict, any action taken as a reprisal must be announced as such and publicized so that the

[15] R Bierzanek, 'Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law' in A Cassese (ed), *The New Humanitarian Law of Armed Conflict* (Oxford University Press, 1979) 232, 236-237.
[16] UK *Manual* (n 6) 421-422. Whilst much similarity exists between these requirements and those set out in the ICRC Customary International Humanitarian Law Database, Rule 145, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule145>, the ICRC is perhaps slightly less unequivocal in relation to requirements (c) and (g). See also, e.g., Greenwood (n 7) 39-49; Dinstein (n 3) 290; Kalshoven (n 8) 339-344; de Hemptinne (n 6) 582-586; Darcy (n 8) 187-196.

adversary is aware of the reason for the otherwise unlawful act and of its own obligation to abide by the law.

(h) As reprisals entail state responsibility, they must only be authorized at the highest level of government.

(i) Reprisal action may not be taken or continued after the enemy has ceased to commit the conduct complained of.

These are not necessarily easy criteria to satisfy. First, they presuppose 'information, self-restraint, goodwill, and (while facts are being established and relations with the enemy kept open) time which are rarely available in real-war conditions'.[17] Second, even were States to abide scrupulously by these requirements, the resort to reprisals would still not be free from difficulty. Disagreement exists, for example, as to whether proportionality should be assessed in relation to the initial illegality or the end to be achieved — i.e. the prevention of future violations.[18] That both aspects are relevant is probably settled, but the objective measurement of proportionality on anything other than the crudest scale remains tricky — and more difficult still where the reprisal takes a form other than retaliation in kind.[19] As such, proportionality inevitably means 'the absence of obvious disproportionality, […leaving …] belligerents … with a certain freedom of appreciation'.[20] Likewise, the first requirement, i.e. the existence of a prior violation of IHL, is often less than straightforward. Absent independent fact-finding machinery, disputes as to the violation of IHL are inevitable. In most cases, where State A alleges a violation by State B and responds by means of reprisal, State B will deny that the alleged violation took place. State B may then consider State A's reprisal to be a violation of IHL, responding with its own reprisal — and so it continues. The effectiveness of belligerent reprisals as an enforcement tool is therefore open to question.

On the one hand, it is not unusual to read that (at least) the threat of reprisal can be an effective deterrent to unlawful action. Draper, for example, suggested that the success of reprisals in ensuring respect for IHL had been 'more attributable to

---

[17] Best (n 4) 311.

[18] Greenwood (n 7) 44; Sutter (n 3) 100-102; Hampson (n 6) 823-824; AD Mitchell, 'Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law' (2001) 170 Mil LR 155, 160-161. Dinstein (n 3) 291, explains that reprisals 'tend to be somewhat harsher than the original breach'.

[19] Bierzanek (n 15) 244. Contrast obvious disproportionality, e.g., *Kappler* 15 AD (1948) 471 (discussed in Greenwood (ibid) 45 and Dinstein (ibid)) and *Einsatzgruppen* 15 AD (1948) 565 (discussed in R Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) 185) with, e.g., a State responding to the killing of prisoners of war by employing prohibited means/methods of warfare against enemy troops.

[20] Kalshoven (n 8) 341-342.

the fear of reprisal action than … the actual use of the device',[21] and various commentators adopt a similar position.[22] It is, of course, difficult to demonstrate the veracity of the proposition that violations have, in fact, been prevented by the possibility of reprisals.[23] On the other hand, there is widespread agreement that — even if we accept the possible utility of threatened reprisal action — reprisals themselves carry no such benefits and, far from promoting compliance with IHL, are much more likely to result in an escalation of violence and a cycle of breaches.[24] As Newton explains, reprisals 'have the duality of being a historically well-established mechanism for deterring violations of the law of armed conflict even as they provide an ostensible rationale for otherwise unthinkable atrocity', any efficacy 'undermined by the potential for grievous retaliatory abuses'.[25] Susceptible to such cynical manipulation, we all too readily arrive at the point whereby, 'tangled up with counter-reprisal, … unlawful acts of violence spiral out of any meaningful legal control'.[26] Against this background, it is no surprise that reprisals have been variously described as an 'inherently … barbarous means of seeking compliance with international law',[27] a 'primitive instrument through which violence escalates into barbarity',[28] and 'a convenient cloak for disregarding the laws of war'.[29]

Nor are the victims of belligerent reprisals necessarily (or even usually) those responsible for the initial violation. Indeed, the UK *Manual* accepts that reprisals are 'an extreme measure of coercion, [precisely] because in most cases they inflict suffering upon innocent individuals'.[30] This is perhaps especially true of reprisals against civilians, in which context the International Criminal Tribunal for the Former Yugoslavia (ICTY) outlined that:

---

[21] MA Meyer & H McCoubrey (eds), *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the late Professor Colonel GIAD Draper, OBE* (Kluwer, 1998) 95.
[22] See, e.g., Dinstein (n 3) 290; Hampson (n 6) 841-842; Kalshoven (n 12) 772; Bristol (n 3) 422; GH Aldrich, 'Compliance with the Law: Problems and Prospects' in H Fox & MA Meyer (eds), *Armed Conflict and the New Law, Vol II: Effecting Compliance* (BIICL, 1993) 3, 8.
[23] Mitchell (n 18) 171-172; Darcy (n 2) 126.
[24] See, e.g., Darcy (ibid) 124; Aldrich (n 22) 8; Bristol (n 3) 425; Kalshoven (n 12) 775; Oeter (n 6) 228; N Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) 303; de Hemptinne (n 6) 576; Meyer & McCoubrey (n 21) 95; Best (n 4) 312; SE Nahlik, 'From Reprisals to Individual Penal Responsibility' in AJM Delissen & GJ Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff, 1991) 165, 173; Bierzanek (n 15) 237-238.
[25] MA Newton, 'Reconsidering Reprisals' (2010) 20 Duke JICL 361, 372.
[26] A Clapham, *War* (2021) 508.
[27] ICTY, *Prosecutor v Kupreskic et al* (Judgment of 14 January 2000) para 528.
[28] A Cassese, *International Law in a Divided World* (Oxford University Press, 1986) 274.
[29] UNWCC, *History of the UN War Crimes Commission and the Development of the Laws of War* (HMSO, 1948) 29.
[30] UK *Manual* (n 6).

> The most blatant reason for the universal revulsion that usually accompanies reprisals is that they … are … not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers.[31]

Granted, this view has not always enjoyed universal acceptance. Hampson, for example, suggested that reprisals can be seen as measures taken not against innocent individuals *per se*, but against the offending State itself and that, in this context, targeted individuals possess a 'dual character':

> They are not only … victims of the conflict who need, in their individual capacity to be protected from ill-treatment. They also share in the responsibility of a community for the acts of that community… [and] may be the targets of reprisal action without violating the principle that the innocent should not be made victims. In their individual capacity they are innocent but they are also part of the State. The objection that the victims of reprisals are innocent therefore appears to be an oversimplification.[32]

The inevitable conclusion of this approach is that, 'if reprisals do have a useful part to play in humanitarian law, logically this must mean reprisals against *any* targets'.[33] Not only would this seem to require the permissibility of reprisals against the wounded, sick and shipwrecked, prisoners of war, etc. — not accepted by States, and therefore prohibited by international law — it also seems somewhat fixated with the idea of reprisals in kind. Hampson, for example, suggests that breaches in relation to a State's nationals in the hands of the enemy might justify reprisals against enemy nationals in the State's own power,[34] whilst Bristol questions the very basis on which enemy civilians merit treatment similar to those specifically protected from reprisals elsewhere in IHL. Accepting that prisoners of war and civilians in occupied territory should be protected, in that they have 'ceased to be useful as instruments for the projection of power',[35] he views enemy

---

[31] *Prosecutor v Kupreskic* (n 27) para 528.
[32] Hampson (n 6) 840-841. See also F Kalshoven & L Zegveld, *Constraints on the Waging of War* (4 ed, Cambridge University Press, 2011) 156-157; Bristol (n 3) 410-411.
[33] Hampson (ibid) 839.
[34] Ibid. She also points to mistreatment of, and reprisals in relation to, prisoners of war.
[35] Bristol (n 3) 420.

civilians as 'providing political, economic, and moral support to the armed forces'.[36] As such, whilst enemy civilians are (and should be) protected from direct attack, there is no justification for their protection from 'reprisals-in-kind'.[37]

These are difficult positions to sustain. First, as indicated above, reprisals are not limited to responses in kind. Second, it is precisely because civilians and civilian objects make no contribution to the *military* activities of the State that they are legally protected from attack. As Walzer explains, 'the helplessness of the victims rules them out as objects of military attack, and their noninvolvement in criminal activity rules them out as objects of retributive violence'.[38] To assert that reprisals (in kind or otherwise) against enemy civilians are possible because they share responsibility for the actions of their State and offer some utility in terms of its military power/capacity would be to accept that collective responsibility is tolerated by international law — and that first strikes against enemy civilians, attacks against children, etc. are (or should be) equally lawful.[39] The civilian population would thus become a legitimate means to an end, indivisible from the State itself, undermining the fundamental principle of distinction and reflecting an approach to responsibility directly opposed to recent developments in international law and human rights.[40] On the contrary, enemy civilians possess human rights *qua* individuals. These are not lost as a result of the actions of their State — even were it possible to discern their political or moral support for the State's activities. As the ICTY indicated:

> … the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can … be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts.[41]

3. The development of legal limitations on belligerent reprisals

There are powerful policy and moral reasons against the resort to reprisals and States, through developments in IHL, had already sought progressively to limit

---

[36] Ibid.
[37] Ibid.
[38] Walzer (n 11) 213-214.
[39] Ibid 213-215.
[40] See, e.g., Darcy (n 2) 112-116; Dinstein (n 3) 294; T Meron, *The Humanization of International Law* (Martinus Nijhoff, 2006) 14; Bierzanek (n 15) 244; Mitchell (n 18) 175-176.
[41] *Prosecutor v Kupreskic* (n 27) para 529.

their use.[42] The first prohibition was set out in Article 2 of the 1929 Geneva Convention on Prisoners of War,[43] providing that reprisals against prisoners of war were forbidden. Compliance during World War II may have been less than perfect, but when four new Geneva Conventions were adopted in 1949, the prohibition of reprisals was extended yet further: Article 13 of Convention III reaffirmed the prohibition with respect to prisoners of war;[44] Article 46 of Convention I prohibited reprisals against the wounded and sick, medical and religious personnel, and medical buildings and equipment on land;[45] and Article 47 of Convention II prohibited reprisals against similar categories at sea.[46] Finally, Article 33 of Convention IV prohibited reprisals against the civilian population of occupied territory — although, importantly for present purposes, not against civilians in enemy territory and in the general course of hostilities.[47] Article 4 of the 1954 Hague Convention for the Protection of Cultural Property during Armed Conflict also prohibited reprisals against the property protected by the Convention.[48] Together, these provisions represented a significant limitation of the scope for lawful belligerent reprisals. In fact, the restrictions were so severe that the only possible targets remaining for reprisals were (active) members of enemy armed forces, legitimate military objectives and, importantly, enemy civilian populations and civilian objects in unoccupied territory — i.e. in their own States.[49]

Recognising continuing weaknesses in regulation, fresh attempts were made in the 1970s to revise and enhance IHL and, in particular, to increase the level of protection for civilians. In 1971, Draper had suggested with some prescience that States were 'not eager to preserve reprisals' and that 'reprisals, in combat action, directed against innocent civilians … may be the subject of an express prohibition in any new Convention or amending Protocol in either the Hague or Geneva streams of law'.[50] Indeed, many delegations at the 1974-1977 Diplomatic

---

[42] See, e.g., Darcy (n 8) 196-209; Bierzanek (n 15) 241-243; de Hemptinne (n 6) 577.
[43] Geneva Convention Relative to the Treatment of Prisoners of War, 1929, 118 LNTS 303.
[44] Geneva Convention Relative to the Treatment of Prisoners of War, 1949, 75 UNTS 135.
[45] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 UNTS 31.
[46] Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 UNTS 85.
[47] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287.
[48] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, 249 UNTS 240.
[49] C Greenwood, 'Reprisals and Reciprocity in the New Law of Armed Conflict' in MA Meyer (ed), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (BIICL, 1989) 227, 233; Hampson (n 6) 826.
[50] Meyer & McCoubrey (n 21) 96.

Conference leading to the Additional Protocols considered reprisals a 'dirty word',[51] and API ultimately included a series of new prohibitions outlawing reprisals against the wounded, sick and shipwrecked, medical and religious personnel and equipment (Article 20), civilian objects (Article 52(1)), historic monuments, works of art or places of worship which constitute part of the cultural or spiritual heritage of peoples (Article 53(c)), objects indispensable to the survival of the civilian population (Article 54(4)), the natural environment (Article 55(2)), and works and installations containing dangerous forces (Article 56(4)).[52] The focus of this article, however, is Article 51(6), which states explicitly that 'Attacks against the civilian population or civilians by way of reprisals are prohibited.'[53]

Taken together, these provisions are sweeping in nature. They may not prohibit reprisals per se,[54] but they come close — and there is broad agreement that the only permissible reprisals remaining (at least as far as treaty rules are concerned) would seem to be those taken against enemy armed forces and/or other persons actively participating in hostilities, or else against legitimate military objectives. Given that such attacks are lawful in any case, there is little scope for reprisals beyond either the use of lawful weapons in an unlawful manner, or the use of weapons prima facie prohibited by IHL (unless the prohibition extends to the use of a particular weapon 'under any circumstances', as is the case, for example, with chemical weapons).[55] The *Commentary on the Additional Protocols* accordingly indicates that 'the Conventions and the Protocol incontestably prohibit any reprisals against any person who is not a combatant ... and against any object which is not a military objective.'[56]

---

[51] Bristol (n 3) 399, referring to the Report of the US delegation. Kalshoven (n 12) 612 agrees that delegations had been 'allergic to the very word'.

[52] Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, 1125 UNTS 3. See Greenwood (n 8) 51-53. For more background on Conference proceedings, see Nahlik (n 24) 165; Bierzanek (n 15) 233.

[53] For a brief outline of its adoption, see Kalshoven (n 12) 611-612.

[54] See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), Diss Op Judge Koroma 574, who goes too far in suggesting that they do.

[55] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993, UN Doc CD/CW/WP.400/Rev.1, Article I. See UK *Manual* (n 6) 107, n 24, taking the same view in relation to booby-traps (105, n 9), incendiary weapons (110, n 41) and anti-vehicle landmines (113). See also, e.g., Greenwood (n 7) 53; Hampson (n 6) 828-829; Dinstein (n 3) 293-294; Darcy (n 8) 209; Rogers (n 14) 351; de Hemptinne (n 6) 581-582; Y Sandoz, C Swinsarski & B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, 1987) 627.

[56] Sandoz, Swinarski & Zimmerman (ibid) 987.

4. The UK reservation to the prohibition of reprisals against enemy civilians

The UK ratified API on 28 January 1998. Upon ratification, it lodged a robust reservation, the text of which requires quotation in full for present purposes:

> The obligations of Articles 51 to 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased.[57]

As will be evident from the discussion above, this is 'an accurate formulation of the requirements international law traditionally sets for recourse to belligerent reprisals'.[58]

---

[57] UK *Manual* (n 6) 422-423. Egypt, Germany and Italy also made statements indicating the wish to retain the right to react 'against any violation by any party … with all means admissible under international law'. See Egypt, Declaration made upon ratification of Additional Protocols I and II (9 October 1992) para 3; Germany, Declarations made upon ratification of Additional Protocol I (14 February 1991) para 6; Italy, Declarations made upon ratification of Additional Protocol I (27 February 1986) para 10. France made a broadly similar statement. See France, Reservations and declarations made upon ratification of Additional Protocol I (11 April 2001), para 11. Reservations to API are available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties?activeTab=default>. Given that API makes reprisals against civilians *inadmissible* under international law, these equivocal statements simply beg the question and, as such, are not discussed here. It may be possible to view them as reservations (see Kalshoven (n 12) 612-613; J Gaudreau, 'The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims' (2003) 849 IRRC 143, available in English at <https://www.icrc.org/en/doc/assets/files/other/irrc_849_gaudreau-eng.pdf> 16-17; Darcy (n 8) 225-227), but they lack the unambiguous nature of the UK position.

[58] Kalshoven & Zegveld (n 32) 158.

In terms of the precise scope of the reservation, it should be recalled that the UK accepts the prohibition of reprisals against civilians in occupied territory. The UK *Manual* also indicates that reprisals may only be directed against 'the personnel or property of an enemy'.[59] Depending upon how 'personnel' is understood, the reservation could accordingly be seen as reserving only the right to take reprisal action against the military personnel of the enemy (rendering it meaningless), or against the military and civilian personnel of the enemy (i.e. against civil servants but not the civilian population more generally). It seems reasonable to suggest, however, that the reservation as applied to reprisals against civilians and civilian objects should be considered to have the same scope. In this context, it is difficult to point to equivalence between civil servants and a similarly restricted category of civilian objects — especially in light of the prohibition of reprisals against objects not clearly or easily linked to a specific government (e.g. cultural property and/or the natural environment). Instead, the reservation should be read in the broadest possible sense as referring to *all* enemy civilians. This interpretation seems much more reflective of the UK's intentions. Article 51, after all, refers throughout to the civilian population and civilians, and the UK reservation explicitly relates to these provisions (referring itself to the civilian population and civilians, rather than civilian personnel). It is also supported by the UK's refusal to accept that reprisal attacks against civilians can never be justified and are prohibited by customary IHL.[60] Indeed, the UK has more recently referred to its own reservation to API as evidence that a prohibition of reprisals against '*all* civilians and civilian property' is not supported by State practice.[61] Clearly, then, albeit within carefully restricted confines,[62] the UK is seeking to avoid at least some of the prohibitions on reprisals contained within API — most importantly, Article 51(6).

This particular provision is the focus of the present article not only because the principle of distinction and immunity of the civilian population from attack is one of the most fundamental principles, if not *the* most fundamental principle, of IHL,[63] but also because the other reprisals provisions set out in API Articles 52-56 can be seen as 'ancillary to Article 51(6)'.[64] Two particular questions will be considered: first, whether the UK's reservation is permissible (and, consequently,

[59] UK *Manual* (n 6) 421.

[60] Ibid 423, n 62.

[61] ILC, Protection of the Environment in relation to Armed Conflicts, Comments and Observations Received from Governments, International Organizations and Others, UN Doc A/CN.4/749 (17 January 2022) 93 (emphasis added).

[62] Clapham (n 26) 510.

[63] ICRC (n 16) Rule 1.

[64] Greenwood (n 7) 62. Oeter (n 6) 230, suggests that Article 51(6) represented the most important safeguard in that reprisals against enemy civilians had not only been permitted by customary law previously, but had also constituted the bulk of such measures.

whether it is valid or invalid);[65] and second, what the consequences and legal effect of the reservation are if it is deemed impermissible.

5. Is the UK's reservation permissible?

The rules of international law governing reservations to treaties are found in VCLT Articles 19-23.[66] Departing from the previously accepted position whereby reservations required unanimous acceptance by the other States Parties — an approach with obvious merits in terms of both simplicity and the preservation of a treaty's integrity through a guaranteed control mechanism,[67] VCLT is more flexible. Modelled on the ICJ's *Advisory Opinion on Reservations to the Genocide Convention*,[68] and reflecting the consensual nature of treaties, VCLT Article 19's starting position is that the formulation of a reservation is generally permissible unless: '(a) the reservation is prohibited by the treaty; [or] (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made'.

API does not prohibit reservations in general terms. Nor does it prohibit reservations to specific Articles, or any particular type or category of reservation. In this particular context, VCLT Article 19(a) and (b) are therefore moot. Kalshoven suggests that the negotiating history of API 'leaves no doubt that a strong majority in the Conference was not prepared to accept the idea of reservations with respect to the prohibitions on reprisals',[69] but no such limitation found its way into the text of the treaty. In an attempt to balance developing trends in international law with the difficulty in achieving an outright prohibition on reservations (a position which 'might have seemed the only solution for a multilateral instrument with a humanitarian aim'[70]), the draft Protocol had initially contained an Article enumerating those specific provisions to which reservations were not permitted — including what eventually became Article 51.[71] This draft Article was deleted

---

[65] This has been queried in passing by some scholars, but without detailed consideration. See S Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Fleck (n 6) 647, 660, fn 80; Darcy (n 8) 228; Gaudreau (n 57) 18; K Dörmann, 'Article 8' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2 ed, Beck/Hart, 2008) 324.

[66] 1155 UNTS 331.

[67] A Pellet, 'Article 19' in O Corten & P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary, Vol I* (Oxford University Press, 2011) 410; C Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1993) 64 BYIL 245, 246.

[68] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion (28 May 1951), ICJ Rep 1951, 15.

[69] Kalshoven (n 12) 612.

[70] Sandoz, Swinarski & Zimmerman (n 55) 1064.

[71] Ibid 1063-1064.

following a vote in Committee I,[72] however, and a new proposal presented to the plenary Conference. Seeking to prohibit reservations 'incompatible with the humanitarian aim and purpose of this Protocol', and again specifying a (reduced) number of specific Articles — although this time not including Article 51, this proposal also failed to be adopted.[73] Even in voting against the proposal, however, several States (including the UK) explained that they did so because the proposed list of Articles to which reservations would not have been possible was incomplete, and that they had no intention of making reservations to those provisions or to the Protocol more generally in any case.[74] Faced with no likelihood of consensus, and with the support of the ICRC,[75] the issue of reservations to API was therefore left to be regulated by general international law as expressed in the other relevant provisions of VCLT.[76]

Express and/or specific prohibitions as per Article 19(a) and (b) are not the only grounds on which reservations are liable to falter. Based squarely on the *Genocide Convention AO*, VCLT Article 19(c) provides that a formulated reservation will also be impermissible where, 'in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.' Functioning as a 'normative safeguard',[77] the object and purpose test is designed to act as the 'equilibrium point',[78] enabling the widest possible level of State participation within a treaty regime whilst also maintaining its integrity by preventing reserving States from effectively undermining the very *raison d'être* of the treaty itself.[79]

---

[72] Ibid 1064. See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977* (Federal Political Department, Bern 1978) Vol IX, 479, CDDH/I/SR.76, para 39.

[73] Sandoz, Swinarski & Zimmerman (n 55) 1064; *Official Records* (ibid) Vol III, 358, CDDH/421; *Official Records* (ibid) Vol VI, 355-359, CDDH/SR.46, paras 82-101.

[74] See, e.g., Mr. Freeland (UK), voting against the draft 'not because his Government had formed an intention to make reservations to any of the articles specified … [but because] many articles in the Protocol of an undoubtedly humanitarian character … were not included' (CDDH/SR.46, para 84); Mr. Aldrich (US), agreeing that 'reservations should so far as possible be prohibited … [but that] many other articles were of an essentially humanitarian character … [and that the US] had not the least intention of making any reservations' (CDDH/SR.46, para 85); and Mr. Di Bernardo (Italy), opposing the draft Article on the basis that it 'would give the impression that each State would be authorized to regard the unmentioned provisions of the Protocol as being open to reservations [which would be] absolutely unacceptable' (CDDH/SR.46, para 87).

[75] *Official Records* (n 72) Vol IX, 360, CDDH/I/SR.67, para 32.

[76] Sandoz, Swinarski & Zimmerman (n 55) 1060.

[77] M Girshovich, 'Classifications of Objections Based on the Legal Assessment of a Reservation by Objecting States' (2014) 16 Int Community LR 333, 338.

[78] Pellet (n 67) 445.

[79] *Genocide Convention AO* (n 68) 21.

As indicated by the VCLT *Commentary*, however, 'this equilibrium is contested by the advocates of parochial approaches of "specialized" fields of international law and, singularly, by "human rightsists", who invoke the specificity of human rights treaties to contest the applicability of the Vienna regime to reservations formulated in their respect.'[80] Their claim is that reservations are inappropriate per se in relation to such treaties because they are not reciprocal or bilateral in nature, instead imposing obligations upon States Parties in a more unilateral sense.[81] IHL is often described in similar terms. Greenwood, for example, explains that 'humanitarian law is primarily intended to protect individuals, rather than states',[82] resulting in an absence of reciprocity. IHL treaties can therefore be characterised as 'a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties'.[83] VCLT itself underlines the non-reciprocal nature of 'treaties of a humanitarian character' in Article 60(5), which rules out the ability of States to terminate or suspend the operation of such treaties in response to material breach by another Party — importantly, 'in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.[84]

Further support for this proposition can be found in the fact that the 1949 Geneva Conventions (in common Article 1) and API (in Article 1(1)) require not only that States Parties comply with their *own* obligations under the treaties, but also that they ensure that other Parties abide at all times by *their* obligations during armed conflict — an interest that clearly goes beyond mere reciprocity. In this

---

[80] Pellet (n 67) 420.

[81] See *Genocide Convention AO* (n 68) 23, explaining that, in humanitarian conventions 'contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.' Diss Op Judge Alvarez, 54, accordingly argued that humanitarian conventions should 'establish plainly that reservations are inadmissible'. See also, e.g., K Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights' (2002) 13 EJIL 437, 439-442. This is not to suggest that the Parties do not also receive some benefits: see L Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, 1995) 111.

[82] C Greenwood, 'Historical Development and Legal Basis' in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) 1, 8.

[83] Ibid 9-10, quoting JS Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Vol IV* (ICRC, 1958) 15.

[84] The UK reservation may also be problematic on this basis. See Hampson (n 6) 833; Kalshoven (n 12) 612-613. B Simma & CJ Tams, 'Article 60' in Corten & Klein (n 67) 1351, argue that responses under Article 60 must be distinguished from reprisals (which remain unaffected) and, at 1368, that 'The main field of application of [Art 60(5)] lies in the field of those humanitarian treaties which do not require the parallel adoption of common standards by the parties but involve the performance of obligations in bilateral constellations — i.e. mainly treaties of humanitarian law.'

context, the ICJ has accordingly reaffirmed that 'every State party … whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with',[85] and the ICTY that:

> As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather … they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a "legal interest" in their observance and consequently a legal entitlement to demand respect for such obligations.[86]

The International Committee of the Red Cross (ICRC) accordingly asserts that customary IHL contains a rule whereby 'The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity'.[87]

Granted, the ICRC also seems to accept that this rule is to be distinguished from the concept of reprisals.[88] Furthermore, and in response to claims that the VCLT reservations regime is inappropriate for treaties of a humanitarian character, it must be recalled that the VCLT regime has its genesis in the *Genocide Convention AO* — which dealt with precisely such a treaty. In addition, the International Law Commission (ILC), as creators of the VCLT regime, envisaged that it would apply to any/all multilateral treaties.[89] After all, achieving the widest possible participation is perhaps especially important for standard-setting, humanitarian treaties and, as such, it could be argued that the possibility of reservations remains vital. Nor is it necessarily easy (or possible) to discount entirely a degree of

---

[85] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), para 158.

[86] *Prosecutor v Kupreskic* (n 27) para 519. For discussion of IHL as obligations *erga omnes (partes)*, see M Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations *Erga Omnes* and *Erga Omnes Partes*' (2018) 23 JCSL 383; R Provost, 'Reciprocity in Human Rights and Humanitarian Law' (1994) 65 BYIL 383; B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Rec des Cours 233.

[87] ICRC (n 16) Rule 140.

[88] Ibid.

[89] Unless the opposite intention was clear, or the treaty established an international organisation. See Pellet (n 67) 420-421. See also KL McCall-Smith, 'Mind the Gaps: The ILC Guide to Practice on Reservations to Human Rights Treaties' (2014) 16 Int Community LR 263, 266: 'The Vienna Convention is indifferent to subdivisions of international law and therefore these rules apply to treaties relating to the law of the sea and nuclear disarmament as well as human rights treaties'.

reciprocal/bilateral operation in the context of armed conflict between particular States Parties — the UK reservation is, in and of itself, designed to (re)introduce an element of reciprocity in this context. It is, then, perhaps more appropriate to see IHL treaties as instituting a set of 'objective obligations' which are additional to, but do not entirely replace, 'mutual, bilateral undertakings'.[90]

In any case, and as indicated above, the drafters of API intended VCLT to regulate reservations to the Protocol. As such, a focus on the compatibility of the UK's reservation with the object and purpose of the treaty under VCLT Article 19(c) rather than on the desirability of reservations to the Protocol per se is necessary.

5.1 Determination of the object and purpose of Additional Protocol I

Two questions immediately arise in the context of determining the object and purpose of a treaty: (i) who is responsible for making the determination; and (ii) how the determination is to be made. VCLT is silent on both issues. Article 20(4) sets out the options for other States Parties in terms of reacting to a reservation, providing that they can either: (a) accept the reservation; (b) object to the reservation but elect to maintain treaty relations with the reserving State; or (c) object and refuse to enter into treaty relations with the reserving State. Article 20(5) further provides that a reservation is deemed to have been accepted by another State Party if it fails to object within twelve months of either receiving notification of the reservation or else of its own expression of consent to be bound, whichever is later. No mention is made — in Article 20 or elsewhere — of the basis on which objections to a reservation can or should be made, or precisely how the object and purpose of a treaty is to be ascertained.

5.1.1 Who is to determine compatibility with a treaty's object and purpose?

Prima facie, the compatibility of a reservation with a treaty's object and purpose seems to be a matter for the other States Parties. In its *Genocide Convention AO*, the ICJ indicated that 'each State … party … is entitled to appraise the validity of the

[90] As expressed by the European Court of Human Rights in the context of ECHR. See ECtHR, *Loizidou v Turkey* (Preliminary Objections), Judgment (23 March 1995) para 70. Hampson suggests distinguishing between the 'Geneva' and 'Hague' limbs of IHL, whereby rules protecting victims of armed conflicts may be objective in nature, whilst rules regulating the conduct of hostilities (including Section 1 of API Part IV) are not. See FJ Hampson, 'Law of War/Law of Armed Conflict/International Humanitarian Law' in MJ Bowman & D Ktritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press, 2011) 538. At least part of her reasoning, however (i.e. that common Article 1 imposes an obligation to ensure respect by other Parties and that reprisals are 'expressly precluded against protected persons' in the context of the Geneva Conventions (see 554)), seems equally applicable to API.

reservation … individually and from its own standpoint.'[91] This decentralised, subjective approach runs the risk that Parties might take different views on the matter, leading to the logically incoherent position whereby a reservation is valid and applicable between the reserving State and some States Parties, but invalid and inapplicable between the reserving State and others — even where the basis for their objecting to a reservation was its invalidity. In other words, leaving the determination of compatibility up to the other Parties means that a reservation could be both compatible and incompatible at the same time — a situation described (somewhat euphemistically) as 'inelegant'.[92]

The ICJ's assumption had been that States would be keen to preserve 'at least what is essential to the object of the Convention', and that this difficulty would therefore be 'mitigated by [their] common duty … to be guided in their judgment by the compatibility or incompatibility of the reservation with [its] object and purpose'.[93] This was not necessarily an approach supported by the entirety of the ICJ bench, however (four Judges warned that the test is 'so difficult to apply that … we have difficulty in seeing how the new rule can work'[94]), or more broadly.[95] Nonetheless, and despite 'durable' resistance from the ILC,[96] the ICJ's flexible approach eventually came to be adopted and 'has not been questioned since'.[97]

In setting out possible reactions to a reservation, then, VCLT effectively places responsibility for determining a reservation's compatibility with the treaty's object and purpose upon the shoulders of the other Parties: 'every State determines individually whether a reservation formulated by another State is or is not compatible with the object and purpose of the treaty'.[98] Indicated by either acceptance of or objection to the reservation (presumably on the stated basis of its

---

[91] *Genocide Convention AO* (n 68) 26.

[92] DW Bowett, 'Reservations to Non-restricted Multilateral Treaties' (1976-77) BYIL 67, 81.

[93] *Genocide Convention AO* (n 68) 26-27.

[94] Joint Diss Op Judges Guerrero, McNair, Read & Hsu Mo (ibid) 43-44. They cautioned that the result (i.e. that a reserving State may or may not be considered Party to the Convention depending upon the subjective views of other States) could lead only to confusion and that, as such, it was inappropriate to regard the 'admissibility of a reservation as a private affair to be settled between pairs of States' (at 45).

[95] See, e.g., Pellet (n 67) 412-415; V Crnic-Grotic, 'Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties' (1997) 7 Asian YBIL 141, 145-146; J Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations' in I Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff, 2004) 149, 163-164.

[96] Pellet (ibid) 413.

[97] ibid, 415.

[98] Sandoz, Swinarski & Zimmerman (n 55) 1062. See also Gaudreau (n 57) 3; Pellet (n 67) 446; Crnic-Grotic (n 95) 174; J Klabbers, 'Accepting the Unacceptable: A New Nordic Approach to Reservations to Multilateral Treaties' (2000) 69 Nordic JIL 179, 184.

incompatibility), not only can this be 'a considerable challenge for States',[99] it also maintains the unresolved difficulty inherent in States taking inconsistent positions and raises the question of whether the object and purpose of a treaty is truly an appropriate matter for subjective assessment.[100]

It might have been expected (or at least hoped) that a formulated reservation inconsistent with the overall thrust of a treaty would be seen by other States Parties as problematic, prompting widespread objection and pressuring the reserving State into withdrawing its reservation, thereby maintaining the integrity of the treaty.[101] The ILC accordingly suggests that States which consider a particular reservation to be invalid 'should formulate a reasoned objection as soon as possible', and that such objections can be important (even if not decisive) in assessing the validity of a reservation.[102] The ICJ might have assumed in 1951 that States Parties would engage faithfully in such scrutiny. Subsequent practice, however, demonstrates that they have singularly failed to do so. Instead, even (or perhaps especially) in relation to human rights treaties, States have sought to lodge 'a plethora of reservations — often of a nature that gives serious concern as to compatibility with the object and purpose of the treaty concerned',[103] and the assumption contained within the *Genocide Convention AO* has been largely 'unrealized'.[104]

Even so, the ICJ refuses to discount entirely the relevance of an absence of objections. Thus, in the 2002 *Armed Activities* Case (and whilst making its own objective determination as to the validity of Rwanda's reservation to Article IX of the Genocide Convention), it sought to buttress its conclusion that the reservation in question was not incompatible with the object and purpose of the treaty by reference to the fact that, 'when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it'.[105] In this particular context, it is impossible to avoid the fact that no State has objected to the UK's reservation to API. As Judge Koroma explained, however, 'States are often remiss in fulfilling their duties of objecting to reservations', even where they

---

[99] I Buffard & K Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 Austrian Rev Int & European Law 311, 343.
[100] Lijnzaad (n 81) 40.
[101] A Seibert-Fohr, 'The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties' in Ziemele (n 95) 183, 194.
[102] *Report of the International Law Commission: Guide to Practice on Reservations to Treaties*, UN Doc A/66/10/Add.1 (2011) 520-524. VCLT does not, however, seem to leave it open to States Parties to declare objectionable reservations null and void. See Klabbers (n 98) 184.
[103] ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (*DRC v Rwanda*), Jurisdiction and Admissibility (Judgment of 3 February 2006), Joint Sep Op Judges Higgins, Kooijmans, Elaraby, Owada & Simma, para 10.
[104] Ibid para 11.
[105] *Armed Activities on the Territory of the Congo* (n 103) para 68.

consider the reservation to be invalid.[106] Indeed, there are several possible reasons for the absence of objections to any reservation formulated.

First, an absence of objections may be more indicative of practicalities than of substantive acceptance. It should be recalled that the twelve-month time period for tacit acceptance set out in VCLT Article 20(5) represented a compromise between a longer period for reflection — resulting in 'a protracted period of uncertainty as to the legal relations between the reserving state and the confronted parties',[107] and a shorter period — offering insufficient time for other States Parties to engage in detailed assessment and evaluation of a reservation and its potential consequences. It may be that States routinely fail to object to impermissible reservations because the twelve-month time period is, in practice, too short.[108] As Sinclair suggested:

> Governments tend to be sluggish in their reaction to reservations, if only for the reason that many administrations are simply not equipped to keep under constant review reservations to multilateral conventions formulated by other States, whether upon signature or ratification. This may be regrettable, but it is a fact of international life.[109]

Equally, the mechanics of lodging an objection to another State's reservation may involve considerable administrative costs, and/or other (potentially complex) internal procedures — not to mention the political risk that objecting may serve to destabilise the relationship between the objecting and reserving States.[110] In common with many other aspects of international law, responses are likely to be driven as much by pragmatism and self-interest as by acute concern for the integrity

---

[106] ibid, Diss Op Judge Koroma, para 14. Whether such a duty exists in international law is questionable. See ILC *Guide to Practice* (n 102) 520-524, stressing at 524 that, whilst States are encouraged to object where justified, this is 'purely optional'.

[107] D Müller, 'Article 20', in Corten & Klein (n 67) 503.

[108] Pellet (n 67) 473; ILC *Guide to Practice* (n 102) 398; B Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) AJIL 281, 312-314. The 12-month period may not be set in stone as far as incompatible reservations are concerned (see ILC *Guide to Practice* 524). Nor does the UK consider VCLT Article 20(5) to represent customary international law (see (1997) 68 BYIL 489). It would, however, be 'undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving state under a treaty of universal concern.' See Müller (n 107) 500, quoting ILC Special Rapporteur Waldock.

[109] I Sinclair, *The Vienna Convention on the Law of Treaties* (2 ed, Manchester University Press, 1984) 63, suggesting also that placing the onus to object upon the 'innocent party' may be difficult psychologically in relation to powerful neighbours.

[110] Girshovich (n 77) 344-345.

of a particular treaty: 'A state may find another state's reservations objectionable, or even violative of the basic understanding of the treaty, but unless the former's own domestic interests are directly implicated, monitoring, scrutinizing, and reacting to other states' reservations are simply not priorities.'[111] This tends to be an argument advanced in the context of human rights treaties which, as indicated above, are closer to unilateral obligations owed to individuals than reciprocal obligations owed to other States Parties. It is equally possible to see how it could operate in the context of API. Unless another Party envisages armed conflict with the UK as at least a reasonable possibility, the utility of objecting in terms of any possible impact upon its own interests would be minimal. It might be argued that UK engagement in military activities against other States is not a wholly unusual occurrence, but it seems unlikely that other Parties would consider and respond to its reservation based upon that particular eventuality — and, even if this were to be the case, the UK would have no need to rely upon its reservation so long as the objecting State complied with its own obligations under Articles 51 and 52.[112] To object might even be seen to signal the opposite intention.

Further recalling previous discussion of the *erga omnes partes* nature of IHL treaties, however, objection is unlikely to serve any practical purpose in any case. Given the significant (even if perhaps not total) absence of reciprocity, not only would the argument be that accepted reservations do not release other Parties from their corresponding treaty obligations in relation to the reserving State as per VCLT Article 21(1),[113] nor would objection to a reservation trigger the result provided for in Article 21(3) whereby the provision in question becomes ineffective as between the reserving and the objecting States.[114] Nor does the extreme option of refusing to accept any IHL treaty relations with the reserving State seem particularly attractive.[115]

Finally, and perhaps perversely, it may be that another State Party makes no objection to a reservation *precisely because* 'it considers that the reservation fails to meet the object and purpose test under Article 19(c) … and, therefore, no objection is necessary.'[116] The 1979 Convention on the Elimination of All Forms of

---

[111] R Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent' (2002) 96 AJIL 531, 537.

[112] Hampson (n 6) 834. See also Müller (n 107) 500.

[113] See 'Second Report on Reservations to Treaties, by Mr Alain Pellet, Special Rapporteur', UN Doc A/CN.4/477 and Add.1 (10 May and 13 June 1996) para 149; M Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 EJIL 489, 508.

[114] ILC *Guide to Practice* (n 102) Guideline 4.2.5 and accompanying *Commentary* at para 4; Girshovich (n 77) 345; WA Schabas, 'Reservations to Human Rights Treaties' (1994) 32 Canadian YIL 39, 65; McCall-Smith (n 89) 294.

[115] Girshovich (ibid).

[116] Korkelia (n 81) 451.

Discrimination Against Women serves as an example. Whilst some States have certainly objected to particular reservations,[117] State practice also provides compelling evidence of a failure to object even where the incompatibility of a reservation with the object and purpose of the treaty seems clear and obvious.[118] This perceived lack of a need to object may reflect a degree of inadequacy as far as VCLT rules are concerned in the context of human rights/humanitarian treaties.[119] It certainly contributes to the conclusion that States apparently feel little incentive, or are less than rigorous, in objecting to reservations — and that silence ought not be taken to imply approval. It also leads to the more general question of whether there is any role at all for objections to a reservation which is impermissible, and what — if anything — can or should be drawn from a failure to object.

In assessing objections to reservations to the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee (HRC) indicated in 1994 that 'The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant … [and, as such] … it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable'.[120] In the context of Pakistan's reservation to ICCPR Article 40, for example, and although it did trigger a number of objections, it has been argued that, 'Even without the objections … it would be difficult to argue that a reservation to … Article 40 is consistent with the object and purpose of the treaty.'[121] Objections by other Parties might serve to *highlight* incompatibility, but certain reservations are incompatible with the object and purpose of a treaty regardless.

In his Dissenting Opinion in *Armed Activities*, Judge Koroma was equally sceptical regarding the majority's approach, insisting that:

> [T]he fact that a State does not object to such a reservation at the time it is made is not … of dispositive significance … [T]he failure of a State to object should not be regarded as determinative in the context of human rights treaties like the Genocide Convention that are not based on reciprocity

[117] See Buffard & Zemanek (n 99) 311.
[118] Crnic-Grotic (n 95) 148-149. See also, e.g., L Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89 AJIL 341, 343-4, discussing US reservations to the UN Convention Against Torture and Convention on the Elimination of All Forms of Racial Discrimination.
[119] See, e.g., *Armed Activities* (n 103), Diss Op Judge Koroma, para 15; Klabbers (n 98) 192; Korkelia (n 81) 441-442; McCall-Smith (n 89) 266, 275.
[120] HRC, General Comment No 24, UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994) para 17.
[121] McCall-Smith (n 89) 279.

> between States but instead serve to protect individuals and the international community at large.[122]

As already discussed, API, as a humanitarian treaty, is also just such a Convention. Even if the other Parties have opted not to draw attention to the UK reservation — regrettable as this may be, in that they accordingly fail to provide clear evidence of their views as to its admissibility and whether they consider it compatible with the object and purpose of the treaty — this cannot be determinative of the issue and be taken to mean that it is.[123] This conclusion flows directly and logically from the VCLT framework. As per VCLT, a reservation's admissibility under Article 19 is *not* determined by the presence or absence of objections by other Parties.[124] VCLT makes no link between Article 19(c) and Articles 20 and/or 21, and the objection regime attaches *only* to those reservations which are, in principle, *permissible*.[125] There is absolutely no indication that an *impermissible* reservation is open to acceptance under Article 20(4), or of what its legal effects are under Article 21.[126] To suggest, however, that an incompatible (and therefore impermissible) reservation — i.e. one that the reserving State is not legally entitled to make — might nonetheless be accepted by other States Parties is 'a contradiction'.[127]

Uncertainty surrounding this particular question has led to a long-running and 'passionate' dispute.[128] Central to the disagreement is whether the validity of a reservation can indeed be determined only according to the subjective assessment of other States Parties (the 'opposability' approach),[129] or whether the permissibility of a reservation is instead a (the) preliminary question, determined on an objective basis rather than by the reaction of other States (the 'permissibility' approach). According to the latter view, the opposability of a reservation to other Parties is a

---

[122] *Armed Activities* (n 103), Diss Op Judge Koroma, para 14. See also ILC *Guide to Practice* (n 102) 412.

[123] Gaudreau (n 57) 3.

[124] See, e.g., ECtHR, *Belilos* v. *Switzerland*, App No 10328/83 (Judgment of 29 April 1988) para 47; HRC General Comment No 24 (n 120).

[125] See Müller (n 107) 492-3; A Pellet & D Muller, 'Reservations to Treaties: An Objection to a Reservation is Definitely not an Acceptance' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 37, 54; Redgwell (n 67) 257. The UK itself accepts that it is 'questionable' whether VCLT rules were intended to apply to impermissible reservations. See Observations on HRC General Comment No. 24, UN Doc A/50/40 (3 October 1995) 138.

[126] Pellet (n 67) 425, 474; Müller (n 107) 512; McCall-Smith (n 89) 291; Redgwell (n 67).

[127] Lijnzaad (n 81) 52.

[128] See, e.g., Müller (n 107) 512; Klabbers (n 95) 171; Korkelia (n 81) 452-453.

[129] See discussion in Pellet (n 67) 425-426, and Müller (ibid).

secondary question, dependent upon their reaction to a reservation which is permissible *per se*.[130]

The 'permissibility' approach is more logically coherent, better reflects the substance of VCLT, and must be preferable. As outlined in the *Commentaries*,[131] VCLT makes it clear that States may not formulate a reservation in a way that is inconsistent with *any* element of Article 19. Just as reservations which fall foul of Article 19(a) and (b) are void, so must it be the case for reservations which do not comply with Article 19(c) — after all, the different paragraphs of Article 19 all seek to prevent the formulation of reservations that States are not permitted to make. Article 20(4) and (5) are not, then, the sole restrictions upon acceptance of a reservation by other Parties. Rather, Articles 19 and 20 operate in different contexts and timeframes: Article 19 regulates the formulation of a reservation, whilst Article 20 regulates reactions to a reservation once it has been established. Article 21 then specifies the legal effect of those reservations 'established … in accordance with articles 19, 20 and 23'.

To suggest, as the opposability approach does, that a State Party can accept a reservation (either explicitly, as per Article 20(4), or implicitly, as per Article 20(5)) which does not comply with Article 19(c), and which is accordingly prohibited, would be to strip Article 19(c) (and indeed Article 21) of any legal effect — the impermissible reservation would have precisely the same effect as a permissible reservation.[132] As Simma and Hernàndez explain, it would be:

> … unacceptable, both in policy and logic, that the [regime] of a codification convention could first declare certain reservations impermissible and then simply continue to regulate the ways in which such impermissible reservations (also) can be made and become effective, without distinguishing them in any way from permissible ones.[133]

This cannot be the case, and a reservation falling foul of Article 19(c) must be prohibited — and void ab initio — irrespective of its apparent 'acceptance' by other States Parties, which is not legally possible. The twelve-month rule in Article 20(5)

---

[130] Bowett (n 92) 88.

[131] Pellet (n 67) 476-482; Müller (n 107) 512-515 and 544-545.

[132] See, e.g., Lijnzaad (n 81) 41; Redgwell (n 67) 260-261; KL McCall-Smith, 'Severing Reservations' (2014) 63 ICLQ 599, 609-611. The UK seems to agree. See Observations on HRC General Comment No. 24 (n 125) 138: 'it seems highly improbabl[e] that a reservation expressly prohibited by the treaty [as per VCLT Article 19(a)] is open to acceptance by another Contracting State. And if so, there is no clear reason why the same should not apply to the other cases enumerated in article 19, including incompatibility with the object and purpose under 19(c)'.

[133] B Simma & GI Hernàndez, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?' in Cannizzaro (n 125) 60, 62.

does not serve to circumvent this.[134] Objections may highlight the fact that other Parties consider a reservation incompatible with the object and purpose of a treaty, but they are not necessary in order to establish incompatibility, and the absence of objections does not mean that a reservation is therefore compatible (and/or accepted). Article 19 must instead 'be interpreted as stating the criteria of "intrinsic" validity of reservations' on an *objective* basis.[135]

Of course, whilst this means that the absence of objections has no impact on the permissibility or otherwise of a reservation, for some, 'the drawback [is] that the system … does not work, for how else can it be determined that reservations are impermissible except by means of objections?'[136] For some treaty regimes — and certainly for those with supervisory/enforcement machinery attached — it may be that an independent, objective assessment of compatibility can be made (at least on occasion). This is certainly the approach that has gained traction in the sphere of human rights with, for example, HRC and the Strasbourg machinery of the European Convention on Human Rights (ECHR) demonstrating a particular willingness to engage in the activity. Thus, HRC asserted that it 'necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the [ICCPR]',[137] whilst the European Commission and Court of Human Rights have consistently determined for themselves whether reservations to ECHR are consistent with its object and purpose, and hence permissible.[138]

Pointing to such practice, several Judges in the 2002 *Armed Activities* Case rejected the suggestion that the *Genocide Convention AO* had resulted in a 'regime of inter-State *laissez-faire* in the matter of reservations, in the sense that while the object and purpose of a convention should be borne in mind both by those making reservations and those objecting to them, everything in the final analysis is left to

---

[134] Bowett (n 92) 80; Müller (n 107) 506-507; Pellet & Müller (n 125) 54. See also ILC *Guide to Practice* (n 102) 409-410 and 509-522, in particular Guidelines 3.4.1: 'The express acceptance of an impermissible reservation is itself impermissible'; 4.5.1: 'A reservation that does not meet the conditions of formal validity and permissibility … is null and void'; and 4.5.2 (1): 'The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State'. Support for this position is not necessarily universal: see France and Germany, *Reservations to Treaties: Comments and observations received from Governments*, UN Doc A/CN.4/639 and Add.1 (15 February and 29 March 2011) 68-69.

[135] Pellet (n 67) 482.

[136] Klabbers (n 95) 178; McCall-Smith (n 89) 294-295. Lijnzaad (n 81) 42, sees the approach as 'impractical [in that] it is impossible to find out whether states believed a reservation to be incompatible and thus unacceptable in a system in which tacit consent is the major form of acceptance.'

[137] HRC, General Comment No. 24 (n 120) para 18.

[138] See, e.g., *Belilos v Switzerland* (n 124) para 47: 'the silence of … the Contracting Parties does not deprive the Convention organs of the power to make their own assessment'.

the States themselves'.[139] Highlighting the dangers of divergent views as to validity and the fact that any problems envisaged in this context in 1951 had proved 'vastly greater than … foreseen',[140] they asserted that the determination of permissibility is not limited to the individual assessment of other States Parties, and that courts and tribunals are equally competent to 'pronounce on compatibility with object and purpose, when the need arises'.[141]

Dedicated, independent oversight is not, however, a feature that API (in common with most treaties) enjoys. Absent a relevant adjudicative authority,[142] it may well be that, at least in terms of formal or authoritative structures and mechanisms, the issue is necessarily left open and that 'states can only dispute inconclusively whether a particular provision of a treaty is indeed part of its object and purpose.'[143] It is perhaps little wonder that the UK has itself taken a relatively equivocal approach to the question:

> The test of incompatibility is and should be an objective one, in which the views of competent third parties would carry weight. Ultimately however it is a matter for the treaty parties themselves and, while the presence or absence of individual State 'objections' should not be decisive in relation to an objective standard, it would be surprising to find a reservation validly stigmatized as incompatible with the object and purpose of [a treaty] if none of the Parties had taken objection to it on that ground.[144]

As already explained, however, it is misguided to require or expect objections on the part of other Parties, and an absence (or inconsistency) of objections cannot and

---

[139] *Armed Activities* (n 103), Joint Sep Op Judges Higgins, Kooijmans, Elaraby, Owada & Simma, para 4; Diss Op Judge Koroma, para 15: 'the fact that the DRC did not object to Rwanda's reservation at the time it was made has no bearing on the Court's ability to consider it'.

[140] Joint Sep Op (ibid) paras 9-10.

[141] Ibid paras 15-20.

[142] Whilst it might perhaps be suggested that the ICRC could play this role in the context of the Geneva Conventions and their Protocols, it is important to recall that (unlike HRC, ECtHR, etc.) the ICRC is not an enforcement body as such — and unlikely to be willing to engage in such activity in any case.

[143] DS Jonas & TN Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 Vanderbilt JTL 565, 597. As the ILC *Guide to Practice* (n 102) 519-520 indicates, however, whilst the validity of a reservation may remain unresolved, 'the substance of the applicable law … must not be confused with the settlement of disputes that results from its application. A reservation is or is not valid, irrespective of the individual positions taken by States … and, accordingly, its nullity is not a subjective or relative matter, but should, as far as possible, be determined objectively'.

[144] Observations on HRC General Comment No. 24 (n 125) 139.

should not mean that a reservation's compatibility and permissibility is beyond external, objective scrutiny. Of course, where a specific supervisory body or consideration in an alternative judicial context is absent, this naturally raises questions as to the appropriate forum or mechanism for such an assessment. In this context, it should be recalled that international law is a system where authoritative determination of contested issues is rare, and where the positions of States tend to be driven by political rather than (or at least as much as) legal considerations. External scrutiny and 'unofficial' judgments therefore become an important function of the international legal academy,[145] and this article endeavours to engage in this process.

5.1.2 How is a reservation's compatibility with a treaty's object and purpose to be determined?

Article 19(c) is not the only reference to the object and purpose of a treaty in VCLT. Seven other articles refer to the concept,[146] linking several key aspects of the law of treaties to the test whilst offering no guidance as to how it is to be discerned.[147] It accordingly remains a tantalisingly unclear notion, variously characterised as 'mercurial',[148] 'flexible',[149] and an 'enigma';[150] the method of its determination 'chronically rehashed without a definitive answer'.[151] With no assistance from the *travaux préparatoires* forthcoming, 'All that can be deduced … is that one should … place oneself at a sufficiently large level of generality: it is not a case of "analysing" the treaty, of examining its provisions one after the other, but rather of discovering the "essence", the global "project".'[152] Such vagueness may have been appealing to

[145] O Schachter, 'In Defense of International Rules on the Use of Force' (1986) 53 University of Chicago LR 113, 122.
[146] Article 18 on protecting object and purpose prior to entry into force, Article 20(2) (also in the context of reservations), Article 31(1) on interpretation, Article 33(4) on resolving textual differences between alternative authentic texts, Article 41(1)(b)(ii) on restricting inter-party modification, Article 58(1)(b)(ii) on restricting inter-party suspension, and Article 60(3)(b) on material breach.
[147] Crnic-Grotic (n 95) 142, describes the absence of a definition as 'remarkable'.
[148] D Kritsiotis, 'The Object and Purpose of a Treaty's Object and Purpose' in MJ Bowman & D Kritsiotis (n 90) 237, 238.
[149] J Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 Finnish YBIL 138, 140.
[150] Buffard & Zemanek (n 99) 342.
[151] McCall-Smith (n 89) 269.
[152] Pellet (n 67) 447.

States throughout the drafting process,[153] but offers little certainty, serving only to 'erode the law's capacity to guide state behavior'.[154]

Recalling that the VCLT approach reflects that of the *Genocide Convention AO*, it might have been assumed that 'there are few treaties with an object and purpose as obvious as the Genocide Convention'.[155] Even here, however, there was disagreement as to precisely what this is: 'To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention?'[156] This was a question to which the ICJ returned when DRC claimed that Rwanda's reservation to Article IX was incompatible, in that 'its effect is to exclude Rwanda from any mechanism for the monitoring and prosecution of genocide, whereas the object and purpose of the Convention are precisely the elimination of impunity' for the crime of genocide.[157] The Court held to the contrary, that the reservation related to its jurisdiction as dispute settlement mechanism for the Convention rather than to the substantive obligations of the Convention itself, and that it was therefore compatible with the treaty's object and purpose.[158] Again, however, there was strong dissent. Judge Koroma, for example, insisted that, whilst reservations regarding dispute settlement need not be incompatible per se, this is not the case 'if the provision to which the reservation relates constitutes the *raison d'être* of the treaty':[159]

> The object and purpose of the Genocide Convention is the prevention and punishment of the crime of genocide, [which] encompasses holding a State responsible whenever it is found to be in breach of its obligations under the Convention. …
> … Article IX is thus crucial to fulfilling the object and purpose of the Convention since it is the *only* avenue for adjudicating the responsibility of States.[160]

So much for the suggestion that identifying the object and purpose of even a 'single-purpose treaty' is straightforward,[161] and little wonder that applying the rule

---

[153] McCall-Smith (n 89) 269: 'negotiating states appear to have embraced the complete vagueness of the concept and applied it [wherever] agreement on a more refined standard could not be reached.'
[154] Jonas & Saunders (n 143) 569.
[155] Lijnzaad (n 81) 40.
[156] *Genocide Convention AO* (n 68), Joint Diss Op Judges Guerrero, McNair, Read & Hsu Mo, 44.
[157] *Armed Activities* (n 103) para 57.
[158] Ibid para 67.
[159] Ibid, Diss Op Judge Koroma, para 11.
[160] Ibid paras 12-13. See also Joint Sep Op Judges Higgins, Kooijmans, Elaraby, Owada & Simma.

to complex multilateral treaties such as API, which are much 'more elaborate, more diversified and more detailed … has the disadvantage of being extremely simplistic.'[162] It may be the case, for example, that a treaty has 'no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes [such that …] a search for the common intentions of the parties can be likened to a search for the pot of gold at the end of a rainbow.'[163] Nor is it undisputed that 'object and purpose' is itself a unitary concept.[164] At any rate, it seems clear that the exercise inevitably involves the separation of treaty provisions into core elements, essential to the achievement of the treaty's goals, and other obligations that are less central to the integrity of the agreement.[165]

How is this to be achieved in practice? Relying on 'intuition and common sense'[166] is unlikely to provide consistent answers and avoid disagreement. Equally, the 'inherently abstract' nature of object and purpose means that it cannot simply be reduced to the identification and consideration of a number of specific, key articles.[167] As such, and whilst the text of the treaty is clearly vital, a broader, contextual consideration is key. Although not the only place the object and purpose of a treaty has been sought or discerned,[168] the Preamble accordingly assumes major significance. It is, after all, 'the normal place in which to embody, and the natural place in which to look for, an express or explicit general statement of the treaty's objects and purposes.'[169] Yet even this may not prove straightforward — preambles can be 'a collection of high-sounding platitudes which furnish only a blurred indication of the object and purpose, or none at all. One should … not expect miracles'.[170] It necessarily becomes, then, a question of treaty interpretation — a rather unhappy tautology given the instruction in VCLT Article 31 that a treaty be interpreted in light of its object and purpose.

---

[161] Lijnzaad (n 81) 81.
[162] Ibid.
[163] Sinclair (n 109) 130.
[164] See Klabbers (n 149) 144-148; Kritsiotis (n 148) 240; Jonas & Saunders (n 143) 578-580; Crnic-Grotic (n 95) 168; Buffard & Zemanek (n 99) 318 and 331-332.
[165] Buffard & Zemanek (ibid) 343; Lijnzaad (n 81) 83; *Genocide Convention AO* (n 68), Diss Op Judge Guerrero et al, 42: 'This attempt to classify reservations into "compatible" and "incompatible" would involve a corresponding classification of the provisions of the Convention into two categories — of minor and major importance'.
[166] Klabbers (n 149) 155.
[167] Jonas & Saunders (n 143) 597.
[168] See Crnic-Grotic (n 95) 168-169.
[169] G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYIL 203, 228. See also Sinclair (n 109) 118.
[170] Buffard & Zemanek (n 99) 334.

The VCLT *Commentary* states that ICJ practice has seen the object and purpose of treaties determined not only from the preamble, but also from the title, from articles 'placed at the head of the treaty [and] which "must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied"', from articles indicating '"the major concern of each Contracting Party" at the time of conclusion of the treaty', from the *travaux préparatoires*, and from the treaty's 'general architecture'.[171] The ILC *Guide to Practice* similarly suggests that deducing the object and purpose of a treaty requires its interpretation:

> … as a whole, in good faith, in its entirety, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, including the preamble, taking into account the preparatory work of the treaty and the "circumstances of its conclusion" and, where appropriate, the subsequent practice of the parties.[172]

Given the suggestion that these 'disparate elements are taken into consideration, sometimes separately, sometimes together … [in order to form a] "general impression"',[173] it is easy to see why this is criticised as barely constituting a 'method' for deducing the object and purpose of a treaty at all.[174] Indeed, the closest that scholars have come to proposing an actual methodology, having recourse first to the title, preamble and 'programmatic articles' of the treaty, before testing any prima facie conclusion in light of the treaty's text,[175] failed to determine a clear object and purpose in most of the cases that it was applied to.[176]

Thus, and as the ILC accepted following the *Genocide Convention AO*, 'Even if the distinction between provisions which do and … do not form part of the object and purpose of a convention … is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively.'[177] Subjectivity is, of course, not unknown in international law.[178] Indeed, Pellet

---

[171] Pellet (n 67) 448. ICJ practice is also discussed in Crnic-Grotic (n 95) 16 and Buffard & Zemanak (ibid) 317. ILC *Guide to Practice* (n 102) 356 cautions, however, that the ICJ has tended to simply affirm its position rather than engage in empirical analysis.
[172] ILC *Guide to Practice* (ibid) 361.
[173] Pellet (n 67) 449.
[174] Ibid.
[175] Buffard & Zemanek (n 99) 333, described by Pellet (ibid) as 'the most convincing attempt' at a generally applicable method.
[176] Buffard & Zemanek (ibid) 334-342. The only exception was the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (possibly extending to 'other conventions with a similarly definite object').
[177] UN Doc A/1858, YILC (1951) Vol II, 128, para 24.
[178] Ibid.

suggests that concerns regarding the subjectivity of the interpreter should not be over-stated,[179] and the ILC ultimately advocated 'a fairly general approach' to the issue whereby a reservation can be considered contrary to the object and purpose of a treaty 'if it affects an essential element of the treaty that is necessary to its general tenour [*sic*], in such a way that [it] impairs the *raison d'être* of the treaty'.[180] This assessment is to be made in good faith, taking account of 'the terms of the treaty in their context, in particular the title and preamble', as well as 'the preparatory work of the treaty and the circumstances of its conclusion'.[181] The intended result is what might be described as an 'objective framework for this subjectivity'.[182]

In applying these criteria to API, it is perhaps instructive to note that its Title refers to the 'Protection of Victims of International Armed Conflicts', whilst the Preamble recalls the necessity to 'reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application'. Neither of these are necessarily dispositive of questions as to the compatibility of the UK reservation. It might be argued, for example, that maintaining the availability (or at least the threat) of reprisals in kind in the event of a breach is one way — conceivably an effective way — of ensuring and reinforcing the protection afforded to civilians as victims of conflict. As Kalshoven explains, even if it accepts the 'wisdom of the primary rules for the protection of the civilian population', a State may nonetheless be 'unshakeable in its belief that to better realize this particular basic objective it must retain the power, for the event of its own civilian population being exposed to attacks in gross violation of the rules of the Protocol, to subject the enemy to the same treatment'.[183] The UK's reservation could therefore represent an attempt to *achieve* the object and purpose of API, rather than to defeat it.[184] Indeed, Bristol asserts that:

> The rationale underlying the absolute prohibition of reprisals contained in the four Geneva Conventions of 1949 simply does not apply to enemy civilian populations in enemy territory. To artificially clothe them with immunity from reciprocation-in-kind is to offend the principle of military necessity and ignore the lessons of history. Viewed in this light, a reservation to Article 51 is compatible with the protocol's purposes of enhancing the legal protections due noncombatants and accelerating the development of the humanitarian law of armed conflict.[185]

---

[179] Pellet (n 67) 469.
[180] ILC *Guide to Practice* (n 102) 351-352.
[181] Ibid 359.
[182] Crnic-Grotic (n 95) 174.
[183] Kalshoven (n 12) 777.
[184] Greenwood (n 7) 64; Darcy (n 8) 228.
[185] Bristol (n 3) 426-427.

The dubious accuracy of this claim as far as the targets and efficacy of reprisals are concerned has already been addressed. Reprisals against enemy prisoners of war, for example, are not a legitimate mechanism through which to prevent the mistreatment of a State's own captured troops. There is no reason why the balance between humanity and the availability of reprisals as a tool for enhancing respect for IHL should be any different with respect to civilians. Nor can the resort to measures almost inevitably leading to an escalation of hostilities and a cycle of worsening attacks against enemy civilians justified as reprisals and counter-reprisals possibly serve to strengthen the principle of distinction and the effective protection of civilians by IHL.[186] If civilians are accepted as *victims* of international armed conflict — of which there is surely no doubt — there can be no place for violence directed against them, even as a reprisal, in a treaty which explicitly seeks to reaffirm, develop and reinforce their protection. Even if it is accepted, however, that the Title and Preamble of API might leave at least a degree of ambiguity as to compatibility,[187] the *travaux préparatoires* would seem to point to the better view being that reprisals against civilians are not compatible with its object and purpose — or with one of the most fundamental tenets of IHL.

It is (hopefully) uncontroversial to state that the protection of civilians from the effects of hostilities is 'the bedrock of modern humanitarian law'.[188] The ICRC considered the *raison d'être* of the Additional Protocols (in general terms) to be the improvement of safeguards for human beings, and suggested that its concerns and wishes in this regard had been largely satisfied.[189] Within this broad objective, it drew particular attention to the protection of the civilian population from the dangers of hostilities, intimating that, 'The reaffirmation and development of norms in this field, … neglected since 1907, was the *primary reason* for the Diplomatic Conference, and [it] would have been considered a failure if the legislative work had not been successful on this point'.[190] It has therefore been suggested that 'The

---

[186] After all, reservations to the reprisals prohibitions would 'necessarily result in refusing such protection [i.e. of the civilian population] when reprisals are resorted to'. See Bierzanek (n 15) 255.

[187] Indeed, 'on the advice of experts, the ICRC … drafted extremely short Preambles stating [only] a few general ideas' (*Official Records* (n 72) Vol IX, CDDH/I/SR.67, 362), eliciting minimal discussion.

[188] *Prosecutor v Kupreskic* (n 27) para 521.

[189] Sandoz, Swinarski & Zimmerman (n 55) xxxiv. The ICRC President indicated that there had been 'inadequate protection of civilian populations against the effects of war [and that] the preparation of Additional Protocols … was designed to remedy that shortcoming', reflecting 'the unswerving principle of absolute and unconditional respect for the enemy *hors de combat* — the wounded, the prisoner or the civilian': *Official Records* (n 72) Vol V, CDDH/SR.1, 11.

[190] Sandoz, Swinarski & Zimmerman (ibid) (emphasis added).

Protocol's added value lies essentially in the general protection afforded civilians and civilian objects'.[191]

It is undeniable that a number of different concerns and aims on the part of particular delegations can be discerned from discussions in the opening sessions at the Conference, including: an overarching goal to render conflict more humane and reflect the link between human rights and IHL; the importance of recognising and regulating wars of national liberation and their participants; and the regulation of means and methods of warfare that result in unnecessary suffering or are indiscriminate in their effect (the latter clearly also reflecting a concern for civilians and civilian objects). Equally evident, however, is the volume of contributions highlighting an explicit desire to achieve an enhanced level of protection for civilians.[192] Crucially, these included a number of indications that this particular matter was of central importance to the Conference and the instruments adopted. Greece, for example, 'attached particular importance to the protection of the civilian population';[193] the Holy See gave 'absolute priority to the preparation of international legal instruments for the protection of the civilian population';[194] the Republic of Korea insisted that 'Special attention should be given to the protection of the civilian population';[195] the Federal Republic of Germany believed that the protection of the civilian population should receive '[s]pecial emphasis';[196] and Sweden indicated that 'Protection of the civilian population was paramount'.[197]

In the more specific context of discussions around the draft text of (what became) API Article 51, it is again notable that various States placed particular value and importance on its provisions. Poland, for example, stated that Article 51 'contained the most important provisions of the Protocol, such as … the prohibition of attacks by way of reprisals', welcoming especially 'the clear and categorical prohibition of reprisals in paragraph 6'.[198] The German Democratic Republic (GDR) agreed that 'the elaboration of clear and comprehensive provisions concerning the protection of the civilian population … was one of the most important tasks of the

---

[191] Gaudreau (n 57) 17.

[192] See, e.g., statements by Morocco, Greece, Romania, Yugoslavia, US, USSR, Hungary, Iraq, Holy See, Denmark, Venezuela, Republic of Korea, Federal Republic of Germany, UK, German Democratic Republic, Madagascar, Switzerland, Sweden, Austria, Argentina, Finland, Bangladesh, Japan, Iran, Mongolia, and Vietnam, *Official Records* (n 72) Vol V, CDDH/SR.10-CDDH/SR.14 and CDDH/SR.17-CDDH/SR.19.

[193] *Official Records* (n 72) Vol V, CDDH/SR.11, 102.

[194] Ibid, CDDH/SR.12, 123.

[195] Ibid, CDDH/SR.13, 130.

[196] Ibid 131.

[197] Ibid, CDDH/SR.14, 143. See similar statements by, e.g., Romania (CDDH/SR.11, 103), Yugoslavia (CDDH/SR.11, 105), Iraq (CDDH/SR.12, 123), Denmark (CDDH/SR.12, 125), Iran (CDDH/SR.18, 188), and Mongolia (CDDH/SR.18, 192).

[198] *Official Records* (n 72) Vol VI, CDDH/SR.41, 166.

conference', adding that it 'therefore gave particular support' to the prohibition of reprisals against civilians which 'had the same importance, and … absolute nature, as the prohibition of reprisals against prisoners of war [and] the wounded and sick, which were already contained in the Geneva Conventions'.[199] The Byelorussian SSR considered Article 51 to be 'one of the most important articles of Protocol I',[200] Mexico saw it as 'essential' to the development of IHL,[201] and Romania recalled the 'special importance' that it attached to rules for the protection of the civilian population — 'one of the fundamental aims of this Diplomatic Conference'.[202] Sweden reaffirmed the 'fundamental value [of Article 51] for the whole Protocol', and that the 'clear prohibition of reprisals is … of very great importance',[203] whilst the Ukrainian SSR indicated that the Article — specifically including the prohibition of reprisals, which it saw as a 'major improvement' on Article 33 of Geneva Convention IV — 'corresponds to the stated objectives of Protocol I'.[204] Indeed, the GDR also expressed the view that the prohibition of reprisals was so important that it 'would therefore regard any reservation [to] the prohibition as *incompatible with the humanitarian object and purpose* of the Protocol',[205] whilst Mexico similarly considered that Article 51 'cannot be the subject of any reservations whatsoever since these would be *inconsistent with the aim and purpose of Protocol I* and undermine its basis'.[206]

Of course, as already indicated, there was not necessarily a clear uniformity of approach across all delegations, some of which took a different view and had different priorities.[207] In light of the above, however, it seems 'obvious' that the protection of the civilian population represents the object and purpose of at least

---

[199] Ibid 167.
[200] Ibid.
[201] Ibid 193.
[202] Ibid 196.
[203] Ibid 198-199.
[204] Ibid 201-202.
[205] Ibid 167 (emphasis added).
[206] Ibid 193 (emphasis added). See also Darcy (n 8) 227-228; GB Roberts, 'The New Rules for Waging War: The Case Against Ratification of Additional Protocol I' (1985) 26 VaJIL 109, 145; SE Nahlik, 'Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law: Geneva 1974-1977' (1978) 42 Law & Contemp Prac 36.
[207] See, e.g., GH Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions' (1991) 85 AJIL 1, 17, asserting that, whilst it seemed 'unlikely' that there would be serious/systematic attacks against US civilians, or US reprisals in response, a US reservation similar to that of the UK would be 'defensible as not incompatible' with API's object and purpose. Although writing subsequent to discussions at the Conference (and not entirely consistent with the view expressed in n 72), Aldrich had been Head of the US delegation and, as Rapporteur for the Third Committee, largely responsible for negotiation and drafting this section of API.

those rules contained in Part IV of API, and (whilst there were probably others) one of the primary aims and objectives of API as a whole. The prohibition of reprisals against civilians was inserted to promote and better achieve this particular goal.[208] Even if there were doubts as to the illegality of such reprisals in 1977 (so that Article 51(6) might not necessarily have represented a 'reaffirmation' of IHL), it is difficult to maintain that reprisals against civilians could be consistent with a treaty that also explicitly seeks to 'develop' the protection afforded by IHL to those who are not involved in hostilities.[209] To claim otherwise would be to accept that violations of IHL in relation to those individuals that the rules are specifically designed to protect can be justified as a means to achieve compliance with those rules — something that 'becomes harder every day'.[210]

According to Kritsiotis, a treaty's object and purpose is 'a thing to be interpreted [which] exists in the eye of the beholder, and [which …], like any proposition of law, … is there to be interpreted, argued, contested and adjudicated'.[211] Argument may be generally absent in this particular instance. Adjudication certainly is. In the eye of this particular beholder, however, the UK reservation to the prohibition of reprisals set out in API Article 51(6) cannot be considered compatible with the treaty's object and purpose. It must, therefore, be impermissible as per VCLT Article 19(c) — and the silence of the other Parties cannot remedy this, leading to its acceptance via Article 20(5). The reservation is invalid and, as such, it is not possible to accept it at all.

6. What is the legal effect of the UK's reservation?

On the basis that the UK reservation is impermissible, the question of its legal effect becomes key. This is not straightforward, first, because a prohibition on reprisals against civilians may have developed in customary IHL, potentially rendering the UK reservation moot. Whilst the existence of a customary norm in parallel with API Article 51(6) would not make the reservation invalid per se, customary rules and treaty rules are binding independently. Reservations only concern the relevant treaty provision, leaving a State's customary obligations intact.[212] The UN General Assembly, ICTY, ICC and ICJ all assert the general illegality of reprisals against

[208] Kalshoven (n 12) 777.
[209] Gaudreau (n 57) 27.
[210] Ibid 18. The fundamental importance of civilian protection (and prohibition of reprisals) is also largely, although not quite universally, supported by the subsequent practice of States Parties — an additional interpretative tool in identifying a treaty's object and purpose. See ICRC (n 16) Rule 146 Practice <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule146>.
[211] Kritsiotis (n 148) 286.
[212] Pellet (n 67) 460-461.

civilians,[213] and the ILC has recently (although cautiously) done the same.[214] The ICRC takes a more equivocal position.[215] In any case, the UK might be able reasonably to assert that it is a persistent objector to any such customary rule,[216] and that any possible obligations would therefore arise only from API.

This highlights the second difficulty — how to reconcile 'a patent contradiction in the expression of will by the State',[217] having declared both an intention to become a Party to API and, at the same time, the desire to avoid an obligation of central importance to the treaty. A considerable lack of clarity still exists in this particular context, reflecting 'the major gap of the reservations regime',[218] and leading to a situation whereby States have been able to maintain invalid reservations to a range of treaties.

As indicated above, VCLT Articles 20 and 21 deal only with reservations which are *permissible*. They offer no indication as to the effect of an impermissible reservation. Debate accordingly centres on the issue of whether such a reservation serves to negate the reserving State's acceptance of the treaty per se or, alternatively, whether only the impermissible reservation is a nullity. In the *Genocide Convention AO*, Judges Guerrero, McNair, Read and Hsu Mo took the former approach, insisting that, should a putative reservation be incompatible with a treaty's object and purpose, 'the reserving State would not be considered a party to the Convention'.[219] A view shared by Bowett,[220] this is certainly optimal in terms of preserving the integrity of the treaty. It is much less effective, however, in achieving the widest possible participation — in contrast to the alternative approach, regularly

---

[213] UNGA Res 2675 (XXV) (9 December 1970); ICTY, *Prosecutor v Martic* (Rule 61 Decision, 8 March 1996) paras 15-17; *Prosecutor v Kupreskic* (n 27); ICTY, *Prosecutor v Galic* (Judgment of 5 December 2003) para 19; ICTY, *Prosecutor v. Strugar* (Judgment of 31 January 2005) para 6; ICC, *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges, 16 December 2011) para 143; *Nuclear Weapons AO* (n 54) paras 78-79.

[214] ILC, Draft principles on protection of the environment in relation to armed conflict, with commentaries, UN Doc A/77/10 (2022) 147, indicating that API Article 51(6) and Article 52(1), along with the Geneva Conventions prohibitions of reprisals are 'customary prohibitions'.

[215] ICRC (n 16) Rule 146.

[216] ILC, Draft conclusions on identification of customary international law, with commentaries, UN Doc A/73/10 (2018)152-153. Pellet (n 67) 462 indicates that 'a reservation could be a means for a "persistent objector" to demonstrate the persistence of its objection', and the UK's position has been maintained consistently since.

[217] Bowett (n 92) 75.

[218] McCall-Smith (n 89) 271-272.

[219] *Genocide Convention AO* (n 67) Joint Diss Op Judges Guerrero, McNair, Read & Hsu Mo, 42. Redgwell (n 67) 262, states that VCLT Article 19(c) was designed to allow objecting States to give effect to this viewpoint.

[220] Bowett (n 92) 84.

adopted by human rights treaty-monitoring mechanisms. In severing the impermissible reservation, the State Party remains bound by the treaty including the reserved provision. HRC General Comment 24 accordingly states that 'The normal consequence of an unacceptable reservation is not that the [treaty] will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the [treaty] will be operative for the reserving party without benefit of the reservation.'[221] This outcome seems to flow logically from the objective nullity of the reservation,[222] and offers the advantage that the reserving State remains subject to the obligations contained in the treaty.

Notably, the latter approach has been taken by the UK itself in relation to some reservations formulated to the 1949 Geneva Conventions. Objecting to the reservations lodged by several States to GCIII Articles 12 and 85 and GCIV Article 45, for example, the UK asserted that they were invalid (without specifying the precise basis for this) and that the application by any of the States in question of their reservations would be considered a breach of the relevant treaty provisions — i.e. that the States in question remained bound by the Conventions without the benefit of their reservations.[223]

The UK's position has not necessarily been consistent in this regard, however. More recent objections to reservations formulated in relation to the same (and other) provisions by Vietnam, Guinea Bissau, GDR and Angola involved an assertion that these were unacceptable because they were 'not of the kind which intending Parties to the Conventions are entitled to make', but without opposing the entry into force of the treaties between the UK and the States in question — and without specifying the consequences or legal effect of the impermissible reservations.[224] Nor, in common with a number of other States (and despite a body of State practice described as 'extensive — and essentially homogenous'),[225] does the UK consider that a presumption in favour of severing impermissible reservations reflects a norm of customary international law.[226]

---

[221] HRC General Comment No 24 (n 120) para 18. This varies slightly from the ECtHR approach which, whilst arriving at the same result, first seeks to clarify the intentions of the reserving state. See, e.g., *Belilos v Switzerland* (n 124) paras 54-55 and *Loizidou v Turkey* (n 90) paras 89 and 96-97, as discussed in Pellet (n 67) 424.

[222] McCall-Smith (n 132) 611, describes it as a 'natural extension' of permissibility. Benefits of the approach are further outlined in Simma & Hernàndez (n 133) 81-84.

[223] 278 UNTS (1957) 266-268, referring to the reservations of Albania, Byelorussian SSR, Bulgaria, China, Czechoslovakia, Poland, Romania, Ukrainian SSR, USSR and Yugoslavia. See also Hampson (n 6) 833-834; McCall-Smith (ibid) 618.

[224] (1976) 995 UNTS 394-396; (1985) 1404 UNTS 337.

[225] Fifteenth Report on Reservations to Treaties, by Mr Alain Pellet, Special Rapporteur, UN Doc A/CN.4/624 and Add.1-2 (31 March, 26 May and 31 May 2010) para 139.

[226] See *Reservations to Treaties: Comments from Governments* (n 134) 69-76, where opposition was expressed by Australia, France, Germany, Portugal, UK and US.

Responding to HRC General Comment 24, the UK maintained Bowett's view that, where a reservation is not compatible with the object and purpose of a treaty, the 'only sound approach' is that the reserving State cannot be considered a Party and that, even if 'severability of a kind' might offer a potential solution in certain cases, this must apply not only to the reservation itself, but also to the relevant part(s) of the treaty. Any other approach would be:

> … contrary to … the fundamental rule reflected in Article 38(1) of the Statute of the International Court of Justice, that international conventions establish rules 'expressly recognized by' the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations … which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept.[227]

On this view, either the UK would not be a Party to API at all, or else, given that it has not consented to the operation of Article 51(6) as per the terms of its reservation, even if the UK were to be regarded as a Party to API, the obligation to refrain from reprisals against enemy civilians would not be opposable to it. This may seem to offer the benefit of respecting State consent as the fundamental basis for the assumption of treaty obligations in international law. The approach is, however, problematic in that the ultimate effect may be to leave the reserving State bound by the treaty, but not by the provision in question — precisely the same position as had the reservation been consistent with the object and purpose, and *permissible* in the first place.[228] For a State to benefit for all practical purposes from a reservation that it is *not permitted* to make cannot be appropriate.

Faced with a lack of guidance in VCLT, and with at least some State practice and *opinio juris* opposed to a presumption in favour of severing impermissible reservations, the approach of the ILC *Guide to Practice on Reservations* was broadly similar to that of HRC — although perhaps slightly more nuanced in favour of the preserving the underlying intentions of the reserving State.[229] Suggesting that, 'Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State … without the benefit of the reservation',[230] the issue of whether the overarching intention of the reserving State is to be bound by a treaty becomes key. Returning us to the fundamental issue of consent, the approach has much to

---

[227] Observations on HRC General Comment No. 24 (n 125) 138.
[228] Müller (n 107) 526-527; DW Grieg, 'Reservations: Equity as a Balancing Factor?' (1995) 16 Australian YIL 21, 52.
[229] See ILC *Guide to Practice* (n 102) 511-520 and 524-542. Even in HRC General Comment No. 24, the word 'generally' does some heavy lifting.
[230] Ibid Guideline 4.5.3, para 2.

commend it. It cannot, however, avoid the difficulties inherent in determining whether an intention to be bound was actually present or not — something that 'the State *alone* could know'.[231] As Redgwell explains:

> … it is artificial to distinguish between an intention to be bound and an intention to modify certain provisions of the convention in their relation to the reserving State. Ratification, accession or acceptance of a convention is a voluntary act by a State indicating its intention to be bound on the terms stated; it is not to be interpreted … as a blanket acceptance of all the provisions of the convention where a contrary intention is indicated.[232]

The very act of ratification (even with the lodging of its reservation) might be taken to demonstrate that the overriding intention of the UK was to be bound by API,[233] just as the fact that the reservation is so carefully crafted may be seen as an indication of how seriously the UK takes the substantive content the Protocol.[234] In such circumstances, and buttressed by the presumption that States accept treaty obligations in good faith (and would not deliberately contradict or negate their acceptance by means of a reservation that they know to be inconsistent with the object and purpose), to start from the position that the reservation should be severed seems reasonable.[235] It provides legal certainty,[236] and reflects Simma's view that States voluntarily assume the risk that, should a reservation be found to be invalid, they may find themselves bound by the entire treaty.[237] On the other hand, it might also be reasonably assumed that States do not formulate and lodge reservations without careful consideration and that, as such, a reservation is likely to constitute an integral element of its consent to be bound by the treaty at all. In this case, it cannot be appropriate to simply disregard the reservation and hold the State bound by the treaty regardless.[238] The ILC approach at least offers reserving States the opportunity to provide clarity in this regard, and the effect of the UK's reservation would therefore turn upon the precise intended relationship between its reservation and its consent to be bound by API per se.

---

[231] *Report of the ILC on the Work of its Forty-Ninth Session*, UN Doc A/52/10 (1997), 49.
[232] Redgwell (n 67) 267.
[233] Pellet (n 225) para 179 suggests that the author of a reservation 'by definition wished to become a contracting Party'.
[234] Simma & Hernàndez (n 133) 61.
[235] Korkelia (n 81) 464-465.
[236] Pellet (n 225) paras 180-181.
[237] B Simma, 'Reservations to Human Rights Treaties: Some Recent Developments' in G Hafner, G Loibl, A Rest, L Sucharipa-Behrmann & K Zemanek (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (Kluwer, 1998) 659, 666-667.
[238] ICJ, *Interhandel* Case (*Switzerland v United States of America*) (Preliminary Objections) (Judgment of 21 March 1959) ICJ Rep 1959, 6, Diss Op Lauterpacht, 117.

For its part, however, the UK considered ILC Guideline 4.5.3 a 'skilful' but ultimately unconvincing attempt to arrive at a compromise between the opposing positions.[239] Maintaining a reliance on the lodging of objections by other Parties, and accepting that there are 'practical difficulties' in determining the impermissibility and/or invalidity of a reservation (especially in terms of its compatibility with the object and purpose of a treaty), the UK apparently still considers *lex lata* to be that, 'if a State has made an invalid reservation, it has not validly expressed its consent to bound and therefore treaty relations cannot arise'.[240] Applying this view of international law to its own reservation, unless/until the UK formally indicates its willingness to accept the treaty's obligations without the benefit of its reservation (and even assuming that it does not consider its reservation to be incompatible with the object and purpose and therefore impermissible) the UK would not be a Party to API.[241] Of course, whilst clarification of the UK's position in this regard is clearly desirable, it is only likely to be required (or indeed forthcoming) in the event of the compatibility of the reservation being called into question either by another Party or by an appropriate court or tribunal. It can only be hoped that at no stage will the actual resort to reprisals against enemy civilians by the UK make this a pressing issue. Until the relationship between its reservation and its intention to be bound is addressed by the UK, or the permissibility of the reservation is determined authoritatively, however, its validity and legal effects will remain open to question.

7. Conclusion

Belligerent reprisals are a brutal and ineffective method of enforcing the rules of IHL. Not only are they almost entirely discredited, opposition to their use is such that legal developments have seen them almost entirely prohibited — largely a result of API which, whilst ruling out a range of reprisals, perhaps most importantly prohibits reprisals against enemy civilians in Article 51(6). Despite these developments, upon ratification of API, the UK lodged a reservation which seeks to maintain the ability to target civilians with reprisal activity in response to a similar violation by an adversary. In light of the stated purpose of API — i.e. to reaffirm and develop the protection of victims of armed conflict — and the views of States as to the aims of the instrument, this article argues that the reservation serves to

[239] *Reservations to Treaties: Comments from Governments* (n 134) 74. The UK proposed that reserving States have 12 months from an objection in which to indicate either withdrawal of the reservation or else withdrawal from the treaty. If a response was not provided within 12 months, at that stage the reservation would be severed.
[240] Ibid 73-74.
[241] It would remain bound by the substance of API that represents customary IHL. See 36-37 above.

frustrate an enhanced level of civilian protection and that, as such, it is incompatible with the object and purpose of the treaty (or, at least, with one of its central objects and purposes). This is not necessarily a straightforward test to apply. Nonetheless, according to the regime set out in VCLT (intended by the Parties to regulate the Protocol), the result is that the reservation is impermissible as per VCLT Article 19(c). The fact that it prompted no objection from other States is irrelevant, as reservations which are impermissible per se are not open to acceptance. They are invalid on an objective basis, irrespective of the views or actions of the other Parties.

The question then becomes one of legal effect, and precisely what the consequences of the invalid reservation are. This is far from settled in international law. On one approach, perhaps best illustrated by HRC and ECtHR practice, the reservation would be severed and the UK bound by API, including Article 51(6). Adopting the proposed approach of the ILC, on the other hand, would offer the UK the opportunity to (re)consider and clarify whether the reservation was an essential component of its consent to be bound by API at all. If so, the UK would cease to be a Party. If not, the UK would remain bound by the treaty including Article 51(6). The UK's own approach to this thorny legal issue, however, seems to be that an impermissible reservation necessarily invalidates a State's consent to be bound by a treaty in the first place.

The overall picture is, then, far from clear. This should come as no surprise. After all, as the UK itself cautions, a regulatory framework 'that depends to any extent on the general criterion of compatibility with the object and purpose of a treaty as a whole will be uncertain in its operation in the absence of an objective method for determining whether the criterion is satisfied',[242] and even this precedes the apparently intractable question of the consequences of a reservation should it be deemed incompatible. In the context of a claimed ability to deliberately and directly attack enemy civilians, however — or, expressed in slightly more charged language, to engage in 'orchestrated state murder … [which] is the essence of barbarity in warfare',[243] lingering uncertainty as to the precise scope of the UK's international legal obligations is highly unsatisfactory. The hope must be that at no stage would the UK actually decide to engage in such activity, and that an authoritative determination of this particular question never proves necessary.

[242] Observations on General Comment No. 24 (n 125), 132.
[243] Newton (n 25) 373.