application binding even on States that have not signified their consent. Indeed, treaties that attract significant numbers of States parties are sometimes informally, if somewhat inaccurately, referred to as 'legislative treaties'.

1.33 A norm contained in an applicable treaty takes priority over a customary norm, so that in the event of an inconsistency the treaty norm prevails. However, there are some customary law norms of a peremptory character, usually known as *jus cogens* norms, from which treaties may not derogate and which will cause any inconsistent treaty to be void.[34]

1.34 The general principles of law provide a reservoir from which international lawyers may draw in order to fill gaps in the network of treaty and customary norms.[35] In this way, international law is able to function as a complete system in which lawyers are able to find a legal solution to every problem which may arise in international relations. The general principles are frequently employed to fill gaps in matters of international judicial administration so that, for example, the doctrine of *res judicata* and the entitlement to reparations for unlawful injury will be applied to international judicial or arbitral proceedings, even without express authorisation.

1.35 The term 'evidence' in international law has a somewhat different meaning from that which it normally bears in domestic law. In domestic legal systems, lawyers usually speak of material tending to establish facts as 'evidence' of those facts. In international law, 'evidence' is usually material which tends to establish the content and scope of particular norms derived from custom, treaties or the general principles.

Thus, the text of a treaty is evidence of what a treaty requires and a historical incident may be evidence of a customary norm's requirement. By contrast, it would be most unusual for a lawyer in a common law jurisdiction to speak of a statute as constituting evidence of what the legislature requires.

Occasionally, international lawyers will also use the term 'evidence' in the fact-establishing sense familiar to domestic lawyers, so that attention to context is needed in order to determine the sense in which the term 'evidence' is employed.

1.36 There is no doctrine of *stare decisis* in international law. Consequently, international courts and tribunals are not bound by earlier judicial decisions. Nevertheless, decisions of international and domestic courts and tribunals are often highly persuasive evidence for determining

34 See 2.106–2.110.
35 See 1.152–1.175.

the content and scope of international norms derived from treaties, custom and the general principles.[36] These norms may change over time so that, generally speaking, the older the judicial decision, the more cautious one should be in using it as evidence of a particular norm.

1.37 The writings of acknowledged experts in international law may also provide means for determining the existence, content and scope of international norms derived from custom, treaties and the general principles.[37] These experts (usually referred to by internationals lawyers as 'publicists') will normally be eminent academics, though the published works of diplomats or statesmen may also occasionally feature. Whereas judicial precedent plays a somewhat lesser role in international law as compared to common law systems, academic writings figure more prominently in resolving international legal problems than they do in most domestic legal systems. The evidential value of academic writings will vary according to the reputation of the author, the quality of the reasoning, and the degree of relevance and the age of the publication in question.

1.38 Resolutions of the UN General Assembly and other gatherings of State representatives in international organisations and conferences do not create norms per se. Nevertheless, if certain conditions are met, they may be evidence of an international customary norm.[38]

1.39 There is also a category of material that is sometimes referred to as 'soft law',[39] which includes such materials as non-binding guidelines formulated by international organisations or hortatory resolutions of conferences or assemblies of States. The term is also sometimes used in reference to resolutions or guidelines adopted by certain international non-governmental organisations where they perform functions officially recognised by treaties. Not in itself legally binding, soft law may, nevertheless, provide guidance in relation to international law's future development, or in helping to provide more precise shape to norms couched in general terms.

Institutions

1.40 Ever since the emergence of the modern State system, the most frequently used method of conducting international relations has been bilateral contact between diplomats of States. The embassies that States maintain in the capital cities of other States have traditionally been the

36 See 1.176–1.181.
37 See 1.182–1.188.
38 See 1.189–1.199.
39 See 1.203–1.205.

1.87 Although Art 38(1) was adopted for the relatively limited purpose of specifying the sources of law which the ICJ is to use in deciding cases before it, the provision is widely regarded as identifying the sources of international law generally.

1.88 Many publicists draw a distinction between 'formal sources of law' and 'material sources of law'. A material source of law is that which specifies the content of a legal obligation or entitlement in a particular case, whereas a formal source of law is that which endows the obligation or entitlement with a legally binding character. A 'material source of law' is, therefore, perhaps better understood as a 'source of obligation' (which obligation might or might not be legally binding, depending on whether it is also encompassed by a formal source of law).

Thus, a treaty or contract, considered in itself as a litany of promises and undertakings, is a source of obligation; it specifies merely the content of certain obligations which the parties have freely assumed towards each other. Yet it is perfectly possible for States and individuals to undertake obligations that are not legally binding (for example, 'understandings' or social promises). The formal source of law for a treaty or contract is the general principle of law known as *pacta sunt servanda* (agreements are to be complied with), which general principle is enlivened when all the elements specified by the positive law for the creation of an enforceable treaty or contract are in existence.

Similarly, a social practice does not per se create a customary law obligation or right. Such a practice will tell us about the way States or people habitually behave on certain occasions — and even, perhaps, that there is a social expectation of conformity to that behaviour. It tells us what States or people habitually do and, perhaps, that they are in some sense obliged to do it. The widespread practice is, in itself, at most a source of obligation. That obligation assumes a legal character only when the positive law requirements relating to the consistency of the practice and the way in which the community regards it ('a general practice accepted as law') are in existence.

Only after an agreement or a social practice falls within the scope of a formal source of law is it really appropriate to speak of that agreement or practice as a 'material source of law' instead of a mere 'source of obligation'.

1.89 Only Art 38(1)(a)–(c) of the ICJ Statute specifies formal sources of international law. Consequently, only conventions (that is, treaties, understood as including all the positive law elements which enliven *pacta sunt servanda*), custom (understood as 'a general practice accepted as law'), and the general principles of law are formal sources of law.

1.90 The materials referred to in Art 38(1)(d) are, as the text itself makes plain, 'subsidiary means for the determination of the rules of law'. Judicial decisions and the teachings of publicists are not themselves sources of law. Rather, they can be used to help prove the existence and content of legal norms sourced in treaties, custom or the general principles. They are among the objects that constitute evidence of the legal status and content of putative norms of international law.

That judicial decisions do not create binding precedent in international law is underlined by the reference to Art 59 in 38(1)(d) of the ICJ Statute. Article 59 provides that the 'decision of the Court has no binding force except between the parties and in respect of the particular case'.

1.91 There is no formal hierarchy among the three sources of law identified in paras (a)–(c). Article 38(1) merely sets out a rational methodology for technical legal reasoning, proceeding from the specific to the general. In determining the rules applicable to a particular problem, it is legally sound first to look for any obligations established between the parties as a result of their own agreement — that is, treaties. Failing any such obligations, or failing their sufficiency in resolving the problem, it is then necessary to examine any applicable customary law. Customary law will also provide rules by which the treaties may be interpreted and applied. Failing a sufficient solution being found in customary law, the general principles of law should then be looked at, in order to avoid a *non liquet* (that is, an inability to render judgment because of lacunae in the law) and for principles underpinning and modulating our understanding of treaties and custom — for example, and most significantly, *pacta sunt servanda*.

It is also possible for a treaty to generate customary law binding on States which are not parties to the treaty,[100] for State practice to affect the interpretation of treaties,[101] and for customary norms of a peremptory character *(jus cogens)* to render inconsistent treaties void.[102]

Treaties

1.92 A treaty is a legally binding arrangement between two or more States or public international organisations by which they agree to regulate their conduct in accordance with its terms. It is, in other words, a contractual engagement between States or organisations established by States.

100 See 1.138–1.146.
101 See 2.79.
102 See 2.106–2.110.

The Court was not persuaded that the Mali President's comments were seriously intended to bind Mali as a matter of international law. This was partly due to the nature and circumstances of the comments themselves. A larger factor in the Court's reasoning, however, was the fact that only one other State had an interest in the declaration's subject matter and a unilateral declaration was not the only way in which a legal obligation could be effectively undertaken.

The more normal method of an agreement based on reciprocity was practicably open to the parties, and it could not be lightly assumed that Mali's President intended to adopt some other method of committing his State. It would, therefore, seem that unilateral declarations will not easily have the effect of binding a State where only one other State has an interest in the declaration's subject matter.

Soft law

1.203 There is a category of legal materials that is often referred to, somewhat infelicitously, as 'soft law'. The reference is an unfortunate one because the material is not really law at all, and the label 'soft law' has a capacity to mislead the reader into ascribing to the materials a legal significance that they do not really possess.

1.204 Soft law is any material that is not intended to generate, or is not per se capable of generating, legal rules, but which may, nonetheless, produce certain legal effects. Those effects can range from providing the evidence of the State practice and *opinio juris* required to establish a rule of customary international law, through providing assistance in the interpretation and application of conventional and customary law, the precise requirements of which remain unclear, to indicating the likely future course of international law's development.

1.205 This rather amorphous category of materials is usually taken to mean non-binding instruments, such as declarations, resolutions and guidelines adopted by international organisations or assemblies of States. Occasionally, it can extend to similar instruments adopted by private associations, such as the International Committee of the Red Cross, where they are endowed with officially recognised functions by virtue of a treaty.[216]

Accordingly, although UN General Assembly resolutions are not usually per se capable of producing legal effects,[217] they may provide evidence of

216 Hilaire McCoubrey, (*International Humanitarian Law)*, (2nd ed, Ashgate, Dartmouth, 1999), 52–53.

217 But see 1.190.

a customary rule[218] or point to the *lex ferenda* (the future development of the law). The same is true of expressly non-legally binding international agreements or declarations, such as the declaration on principles governing the mutual relations of States adopted at the 1975 Helsinki Conference on Security and Co-operation in Europe.[219]

These materials may also provide a foundation upon which States eventually conclude treaties.

Question

The only true sources of international law are treaties and custom, of which treaties are superior in that they always displace customary law. Discuss.

Suggested answer

Both parts of the proposition are inaccurate: treaties and custom are not the only true sources of law. Indeed, treaties are not truly a source of law at all. Furthermore, treaties are not inherently superior to custom. It is certainly true that treaties and custom are the only varieties of purely positive international law, in the sense that they are both the result of choices made by States. Yet there is a third source of international law that is not entirely positive in character and which provides binding legal norms on the plane of international relations.

The general principles of law recognised by civilised nations are explicitly identified as a source of law by Art 38(1)(c) of the ICJ Statute. The general principles are part of the positive law in the sense that they are manifested, often as positive law, in the domestic legal systems of States. They are part of the natural law inasmuch as their applicability to international legal relations is merely 'recognised', and not enacted or consented to, by States.

Their most practical function in modern international law is to fill gaps in the positive law network of customs and treaties, so that international law may furnish an answer to every dispute arising in international relations (for example, the *Chorzów Factory* case and the *River Meuse* case). As conventional and customary international law develop, the significance of this function of the general principles recedes because the general principles cannot replace requirements of the positive law.

218 See 1.105–1.106.

219 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* Merits, ICJ Rep (1986) 14, para 189. See 9.10.

State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'être of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations. ...

... Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations — all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. ... The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect. ...

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation. ...

Having replied to Question I, the Court will now examine Question II ...

The considerations which form the basis of the Court's reply to Question I are to a large extent equally applicable here. As has been pointed out above, each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State; on the other hand, as will be pointed out later, such a decision might aim at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane.

The disadvantages which result from this possible divergence of views — which an article concerning the making of reservations could have obviated — are real; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. ...

It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.[66]

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation. ...

The Court is of the opinion, ... in so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide ...

On Question I:

... that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise that State cannot be regarded as being party to the Convention.

66 Article IX: 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

formulation of State jurisdiction accorded with customary international law, and that there was nothing inconsistent between that law and either domestic legislation or binding judicial precedent.

3.19 The decision in *Chung Chi Cheung* postulated that common law courts 'acknowledge the existence of a body of rules which nations accept amongst themselves'. In order to make that acknowledgement, so that a particular rule of customary international law is potentially available for incorporation into the common law, it is necessary that the putative rule be one which is widely recognised as such. In *Chow Hung Ching v R*[18] the High Court of Australia refused to incorporate into the common law a putative international customary law rule to the effect that members of visiting armed forces enjoyed a general immunity from prosecution in the host State's courts. There was no evidence of settled international practice because there was a divergent range of incompatible views among 'writers' and 'authorities' (Latham CJ), and it was a matter which State practice indicated was determined between them by treaty rather than custom (Starke J and Dixon J).

In *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 513, Lord Oliver remarked:

> A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.

3.20 Once a rule of customary international law is incorporated or adopted into the domestic legal order of a common law jurisdiction it becomes, in effect, part of the common law itself. It should therefore be unsurprising that such customary international law rules are not treated as foreign law for the purposes identifying them. Whereas the law of foreign jurisdictions (or at least, of non-common law foreign jurisdictions) is to be established as facts by expert evidence, the courts are taken to know customary international law just as they are taken to know the common law. In practice, this means that courts may inform themselves as to the requirements of customary international law in much the same way that they inform themselves of domestic law. They may thus consult domestic legislation and judicial precedent, take account of submissions by counsel, and refer to the teachings of publicists in textbooks and journal articles and such other written materials as seem relevant but which need not be

18 (1948) 77 CLR 449.

of a technically authoritative character.[19] They may, furthermore, consult treaties as well as the judicial decisions and practice of foreign States.[20]

Customary international law: stare decisis

3.21 As *Chung Chi Cheung* makes clear, a rule of customary international rule remains subject not only to inconsistent legislation, but also to binding judicial precedent which is inconsistent with the putatively adopted rule. The potential problem with this idea is that both the common law and customary international law are systems which are constantly evolving in order to meet the requirements of the communities they serve. It is therefore possible that a rule of customary international law may be accepted and adopted by a decision of a superior common law court, whereafter the international rule changes. A common law court in the same judicial hierarchy might then need to decide whether it is free to adopt the modified international rule or whether it is bound by *stare decisis* to apply the superseded version of the international rule.

3.22 That an adopted rule of international law becomes subject to *stare decisis* in the same way as rules of the common law generally was somewhat ambiguously suggested in *Chung Chi Cheung*: 'On any judicial issue they [the common law courts] seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or *finally declared by their tribunals*' (emphasis added). The ambiguity in this passage arises from the possibility that the rules already 'finally declared' by common law tribunals were not themselves rules adopted from customary international law. This interpretation of the crucial passage leaves open the possibility that rules adopted from customary international law might be subject to *stare decisis* only in relation to inconsistent common law rules that were not themselves sourced in international law.

3.23 The applicability of *stare decisis* to previously adopted rules of customary international law was embraced by a majority of the English Court of Appeal in *Thai-Europe Tapioca Service Ltd v Government of Pakistan (The Harmattan)*.[21] Lord Denning MR did not concur with this aspect of the majority's opinion and expressed a contrary view.

19 *Lord Advocate's Reference No 1 of 2000* [2001] SLT 507, 513, [2001] JC 143 at 152 (High Court of Justiciary, Scotland).

20 *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 569, [1977] 2 WLR 356, 379, per Stephenson LJ; *Compania Naviera Vascongada v The Cristina* [1938] AC 485, 497, [1938] 1 All ER 719, per Lord MacMillan.

21 [1975] 3 All ER 961; [1975] 1 WLR 1485 at 1493, 1495, per Lawton and Scarman LJJ (ECA).

Key treaties and instruments

Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States (Montevideo Convention) (1933): Art 1, Art 3

Charter of the United Nations (1945): Art 1(2), Art 55, Art 56

Declaration on the Granting of Independence to Colonial Territories and Peoples, General Assembly Resolution 1514 (XV) (1960): Arts 1–7

Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter, General Assembly Resolution 1541 (XV) (1960): Principle IV, Principle V

International Covenant on Civil and Political Rights (ICCPR) (1966): Art 1

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966): Art 1

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) (1970)

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly Resolution 47/135 (1992)

Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Rights of People for UNESCO, SNS 89/Conf 602/7 (1990)

Concept of personality

4.1 Every modern legal system possesses a concept of legal personality. Personality is a legal category under which entities may be assigned various combinations of legal rights, duties, powers, obligations and capacities. An entity which possesses any combination of such attributes also possesses legal personality. It is not, therefore, very instructive simply to say that a particular entity possesses legal personality. Such a statement reveals only that the entity possesses some combination of attributes, without indicating the extent of the attribution. The entity's capacity within the legal order might be complete, or it might be extremely limited.

In most domestic legal orders, individuals (or 'natural persons') are the entities who enjoy the most extensive legal personality. Unless they are subject to some special limitation (for example, minority, insanity, imprisonment, and so on), individuals are typically capable of exercising

or acquiring the full range of rights, duties, powers and obligations available within a domestic legal order. In many national legal orders, this total package of capacities is described as 'citizenship', which only individuals may enjoy. Other entities are often granted more limited forms of legal personality. Incorporated and unincorporated associations, some government agencies, and the State itself are also frequently accorded a form of legal personality. Their legal capacities are generally more limited. They are never given the capacity, for instance, to marry, vote, seek election to public office, or make a testamentary disposition. Nor are they capable of being imprisoned (though they may often be dissolved or fined). Nevertheless, they are often capable of suing and being sued, acquiring and disposing of property, incurring and acquiring tortious and contractual obligations and rights, and supporting many other legal capacities also applicable to individuals.

4.2 In the international legal system, States are the most important subjects. States are independent countries. They are the entities which bear the most extensive form of legal personality. As the international legal system is currently constituted, States are also the sole generators of international law. All rules and principles of international law are the result of treaties between States, of State activity which generates custom, or of general principles which emerge within the framework provided by the legal orders of States. States are free to confer legal personality on other entities. This frequently occurs when States conclude a treaty establishing an international organisation.

These sorts of treaties usually result in the conferral of a limited range of legal capacities on the organisation.[1] Since the Second World War, States have also concluded a number of important treaties which have conferred limited legal personality on individuals.[2]

4.3 Every legal system contains rules about which entities are entitled to possess a legal personality, and the extent to which the conferred personality results in the attribution of legal capacities. International law stipulates that all States possess legal personality and that their capacity is complete. This stipulation does not, however, identify which entities are to be regarded as 'States'. International law has rules which serve to identify which entities are entitled to statehood.[3]

The decentralised and highly political character of the international society of States means that an entity which claims to be a State might have its putative statehood denied by one or more other States. Similarly, the

1 See 4.57–4.61.
2 See 4.62–4.70.
3 See 4.4–4.17.

movement will be attributable to the State only if that movement becomes the State's new government. Otherwise, they remain acts of private persons for which the State is not responsible. This rule involves, in effect, a retrospective imposition of responsibility on a State for the conduct of a successful insurrectional movement.

5.38 The term 'insurrectional movement' is not defined by the Draft Articles. The ILC Commentaries, however, look to guidance from the 1977 first additional protocol to the Geneva Convention, which refers to 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over [the relevant State's] territory as to enable them to carry out sustained and concerted military operations'.[41] These examples are contrasted to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character'.[42]

5.39 The ILC Commentaries make clear that the conduct of both the successful insurrectional movement and the organs of the government against which it was struggling are attributable to the State. What is not quite so clear from the Commentaries is whether the conduct of the insurrectional movement is attributable to the State if it assumes power by non-insurrectional means — for example, if the government of a State yields power to an armed rebel movement as the result of a democratic election. On the one hand, the wording of Draft Art 10(1) requires only that the insurrectional movement 'becomes' the new government, without specifying that power was seized by insurrection. On the other hand, the Commentaries specify that Draft Art 10(1):[43]

> … covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous government of the State in question. The phrase 'which becomes the new government' is used to describe this consequence.

The ILC Commentaries further specify that Draft Art 10(1) is not intended to apply to circumstances where an insurrectional movement is incorporated into a government of national reconciliation whereby the insurrectional movement and the existing government agree to share power. The better view would therefore appear to be that Draft Art 10(1) does not apply to make the State responsible for the activities of an insurrectional

41 Article 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), UNTS, Vol 1125, p 3.
42 Ibid.
43 Yearbook of the International Law Commission, 2001, Vol II, Pt II, 51.

movement where that movement assumes power by non-insurrectional means.

5.40 It is the conduct of the insurrectional or other movement as such which becomes attributable to the State, 'not the individual acts of members of the movement, acting in their own capacity'.[44]

5.41 Draft Art 10(2) deals with the conduct of all movements which establish a new State in territory formerly belonging to another State or under another State's administration (for example, a colony). It therefore covers the conduct of secessionist or anti-colonial movements, and draws no distinction between insurrectional and 'other' movements.

It is therefore not necessary, for the purposes of applying Draft Art 10, for a movement to be insurrectional if it establishes a new State, as distinct from seizing power in an existing State. This implies that the conduct of successful secessionist or independence movements which are peaceful, or which use force short of actual insurrection, is capable of being attributed to the new State.

The movement must, however, have been operating outside the normal legal procedures of the existing State; the ILC Commentaries make it clear that the words 'insurrectional or other movements' do not 'extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State'.[45] A secessionist or anti-colonial movement waging a conventional political campaign within the parameters of the State's laws would not appear to be covered by Draft Art 10(2).

5.42 Another notable feature of Draft Art 10(2) is that, unlike Draft Art 10(1), there is no express requirement that the secessionist or anticolonial movement must have become the government of the new State before its conduct is attributable to the new State.

5.43 A State may, in exceptional circumstances, be responsible for the conduct of an insurrectional, separatist or anti-colonial movement, even where the movement is unsuccessful or not yet successful.

Draft Art 10(3) specifies a range of applicable exceptional circumstances. Of particular importance is the reference back to Draft Art 9. Thus, the conduct of a movement which has not succeeded, or not yet succeeded, will be attributable to the State if it is in fact exercising elements of governmental authority in the absence or default of the official authorities and in circumstances which call for the exercise of those elements of authority.

44 Ibid, 50.
45 Ibid, 51.

Convention on the Prevention and Punishment of the Crime of Genocide (1948): Art II

Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970): Art 1, Art 4

Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971): Art 1, Art 5

International Convention against the Taking of Hostages (1979): Art 1, Art 5(2)

International Convention for the Suppression of Terrorist Bombings (1977): Art 2, Art 6(4)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984): Art 1, Art 5(2)

Draft Articles on Jurisdictional Immunities of States and Their Property (1991): Art 1(c), Art 5, Art 6, Art 7, Art 8, Art 9, Art 10, Art 12, Art 13, Art 14, Art 16

United Nations Convention on Jurisdictional Immunities of States and Their Property (2005): Art 1(c), Art 5, Art 6, Art 7, Art 8, Art 9, Art 10, Art 11, Art 12, Art 13, Art 14, Art 16

Vienna Convention on Diplomatic Relations (1961): Art 9, Art 22, Art 24, Art 27(2), Art 27(3), Art 29, Art 31

Vienna Convention on Consular Relations (1963): Art 41, Art 43

Jurisdiction generally

6.1 Jurisdiction is a word with a multitude of meanings. It is commonly employed by lawyers to describe the scope of a court's legal authority to hear and determine a case before it. Lawyers might speak, for example, of a particular court's jurisdiction to hear a claim involving a certain sum of money, or involving certain parties, or involving events which occurred in a particular place, or arising from a specified statute. They might also discuss a court's jurisdiction to make a certain kind of order, or to impose a certain sentence, or even to adopt a particular procedure in the course of hearing a case. Lawyers and others might also consider a political authority's jurisdiction to make or enforce laws of a particular type or in relation to a certain place or subject matter. Sometimes the police are said to possess, or lack, jurisdiction in a certain kind of situation or in a particular place.

6.2 In international law, 'jurisdiction' is used to describe a crucial aspect of State sovereignty; indeed, it is sometimes referred to as 'jurisdictional sovereignty'. Jurisdictional sovereignty pertains to a State's sovereign

right to exercise authority over persons, things and events by use of its domestic law and its State organs.

6.3 There are two types of jurisdiction: prescriptive and enforcement. A State's prescriptive jurisdiction is its power to lay down legal rules, and this usually refers to the activities of persons or bodies exercising legislative power. Enforcement jurisdiction is a State's power to enforce legal rules already prescribed, by either judicial or executive action (for example, a court hearing and judgment, or the arrest of persons or seizure of property by police).

6.4 International law concerns itself with the scope and limits of the jurisdictional sovereignty of States. These limits arise most frequently because each State co-exists with other States. If there were no limits to permissible exercises of jurisdictional sovereignty, the occasions for international conflict would be dramatically increased.

It is one thing for a court in State A to convict a person for exceeding the road speed limit of State A while driving in State A. It is another thing for a court in State A to convict a citizen of State B for exceeding the road speed limit of State A while driving in State B. In the latter situation, the conduct of the court in State A would call into question the sovereignty of State B to exercise authority over persons, things and events within its own territory by use of its domestic law.

As shall be seen, customary international law has developed rules and principles which define the limits of a State's enforcement jurisdiction by reference primarily to the State's territory, the nationality of the persons affected by the exercise of jurisdiction, certain vital security interests of the State, and the defence of the international legal order as a whole.

Another source of conflict would arise where the courts of State A sought to adjudicate and enforce a claim against State B against the latter's wishes, or where the police of State A sought to arrest State B's representatives. These sorts of situations are dealt with by international law rules on immunity, which grant exemptions to certain foreign persons and bodies from a State's exercise of jurisdictional sovereignty.

6.5 Most State practice and arbitral decisions relating to jurisdictional sovereignty have dealt with criminal jurisdiction. This is largely because of the public nature of criminal law; prosecutions are almost always brought by organs of State, and police forces are usually involved somewhere in the process.

There is disagreement among eminent publicists as to the extent to which international law principles on jurisdiction apply to non-criminal matters. The applicable principles of international law are less settled in the case of non-criminal matters. The exercise of civil jurisdiction where

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

6.55 The premises of a diplomatic mission are inviolable; agents of the receiving State may not enter them without the permission of the ambassador or the person acting as head of the mission. The receiving State is, furthermore, under an obligation to prevent intrusion or damage and to prevent any disturbance of the peace of the mission or any act impairing its dignity. Neither the mission's premises nor its means of transport may be searched, and the mission is immune from any attachment or act of execution.[87] The mission's archives and documents,[88] official correspondence,[89] and diplomatic bags[90] are also inviolable.

The premises of a diplomatic mission are not, however, part of the sending State's sovereign territory. It remains part of the receiving State's territory for the purposes of prescriptive and enforcement jurisdiction, albeit subject to a special regime of immunities. Thus, in *R v Turnbull; Ex parte Petroff*,[91] the Supreme Court of the Australian Capital Territory rejected an argument that it lacked jurisdiction over an incident involving explosive substances being thrown at the Soviet Union's embassy in Canberra on the ground that the offence took place on Soviet territory. Australian law applied to the premises of the embassy subject only to the privileges and immunities enjoyed by the diplomatic mission.

6.56 The person of a diplomat is also inviolable. An accredited diplomat may not be arrested or detained, and the receiving State is required to take

87 Vienna Convention on Diplomatic Relations, Art 22.
88 Ibid, Art 24.
89 Ibid, Art 27(2).
90 Ibid, Art 27(3).
91 *R v Turnbull; Ex parte Petroff* (1971) 17 FLR 438.

all appropriate steps to prevent any attacks on his or her person, freedom or dignity.[92]

6.57 Diplomatic immunity is a procedural bar, not a defence. Accordingly, when a person ceases to be a diplomat, the person loses the protection which the immunity extended to him or her. Further, diplomatic immunity belongs to States and not diplomats individually. Accordingly, the sending State may waive the immunity of any of its diplomats.[93]

The receiving State may also, at any time and without explanation, declare a diplomat to be *persona non grata*. When this occurs, the sending State must recall the person or terminate the person's functions with the diplomatic mission.[94]

6.58 A diplomat represents his or her home State on political matters, whereas a consul is not a State representative. Rather, a consul's function is to protect the interests of his or her State's nationals in the receiving State (for example, passport and visa matters, the promotion of trade, tourism and cultural contacts, representations to local law enforcement agencies, and so on). Sometimes embassies also perform the functions of consulates — usually for reasons of economy — but this does not deprive an accredited diplomat of diplomatic status.

Consuls do not enjoy the same sweeping protections as diplomats. Their immunities are codified in the 1963 Vienna Convention on Consular Relations,[95] which finds Hong Kong domestic expression in the Consular Relations Ordinance (Cap 557). A consul does not enjoy immunity from the jurisdiction of local courts and agencies, except in matters arising from the performance of his or her official functions.[96]

Consuls may not, however, be arrested or detained, except in the case of a grave crime and pursuant to a decision by a competent judicial authority.[97]

Heads of State, Heads of Government and Foreign Ministers

6.59 As mentioned above, diplomats enjoy sweeping immunity from the jurisdiction of the States to which they are accredited so that they may properly perform their functions on the plane of international relations without exposure to personal coercion or pressure from those

92 Vienna Convention on Diplomatic Relations, Art 29.
93 Ibid, Art 32(1).
94 Ibid, Art 9.
95 UNTS, Vol 596, p 261.
96 Vienna Convention on Diplomatic Relations, Art 43.
97 Ibid, Art 41.

Certain Norwegian Loans (*France v Norway*) ICJ Rep (1957) 9

East Timor (*Portugal v Australia*) ICJ Rep (1995) 90

Certain Phosphate Lands in Nauru (*Nauru v Australia*) ICJ Rep (1992) 240

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) ICJ Rep (2007) 43

Legality of the Use by a State of Nuclear Weapons in Armed Conflict advisory opinion, ICJ Rep (1996) 66

Legality of the Threat or Use of Nuclear Weapons advisory opinion, ICJ Rep (1996) 226

Key treaties and instruments

United Nations Charter (1945): Art 2(3), Art 2(7), Art 33, Art 94, Art 96

Statute of the International Court of Justice (1945): Art 36(1), Art 36(2), Art 59

Dispute settlement generally

8.1 A cardinal function of every legal system is to provide rules and principles by which disputes may be authoritatively determined. Hardly less important is the associated function of applying those rules and principles to facts so that authoritative determinations of disputes may result. This dispute resolution function requires the establishment and maintenance of mechanisms and institutions which are, in turn, governed by just procedures.

The positive law and its dispute resolution machinery are human cultural artefacts which provide a means of dealing with conflicts so that disputes may be resolved either without resort to force, or by resort to force which is authoritatively sanctioned, regulated and limited. They are an important means of maintaining and advancing the common good[1] and for ensuring that relations among people do not degenerate into a state of general violence. In other words, they are an essential foundation for preserving a society.

8.2 A system of rules which did not advance these functions and purposes, however imperfectly, would not deserve the name 'law'. International law lacks a centralised system of law enforcement and adjudication. It has, however, established or evolved institutions and mechanisms for

1 See 1.79–1.81.

adjudication and enforcement which are reasonably appropriate to a system of international relations characterised by decentralisation and a relatively small number of State-subjects.

Obligation to resolve disputes peacefully

8.3 From at least the 18th century until 1945, international law placed no general prohibition on the use of force in relations among States, although from 1919 certain multilateral treaty obligations existed limiting a party's right to resort to war and imposing obligations to settle disputes peacefully.[2] This is not to say, however, that States possessed no peaceful means for resolving international disputes prior to the end of the First World War. Then, as now, the vast majority of disputes between States were settled by means of negotiation, enquiry, good offices, mediation, conciliation or arbitration.

Although resort to armed force was legally permissible, it remained in practice an exceptional and usually last-resort means of resolving international disputes. There was, however, no obligation under general international law to use any of these peaceful means.[3]

8.4 At the end of the Second World War, Art 2(4) of the United Nations Charter imposed a reasonably comprehensive prohibition on the threat or use of force in international relations.[4] This prohibition exists in tandem with the following obligation contained in Art 2(3) of the UN Charter:

> **Article 2**
>
> The Organisation and its Members, in pursuit of the Purposes Stated in Article 1, shall act in accordance with the following Principles. …
>
> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Article 33 of the UN Charter complements these provisions in the following terms:

> **Article 33**
>
> 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2 See 9.1–9.6.

3 *Status of Eastern Carelia* advisory opinion, PCIJ Rep (1923) Ser B No 5, 27-28.

4 See 9.9–9.10.

controversies' and renounced war 'as an instrument of national policy in their relations one with another'.[10]

The Kellogg-Briand Pact, like the League Covenant before it, did not define 'war' and so left open the question of its application to the use of armed force without a declaration of war. Furthermore, the Pact provided no effective enforcement machinery, but contented itself with a declaration that 'the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be ... shall never be sought except by pacific means'.[11] Almost every State had become party to the Kellogg-Briand Pact by the outbreak of the Second World War. Germany's adherence formed part of the prosecution's case against the principal National Socialist defendants on charges of crimes against the peace before the International Military Tribunal at Nuremberg in 1945.[12] This Treaty remains in force today.

Use of force prohibited

9.7 The victory of the allied powers at the end of the Second World War created the conditions for a transformation of international law in the realm of armed force. The Allies had begun referring to themselves as 'the United Nations' as early as 1942. An intergovernmental organisation of the same name was formally established on 24 October 1945 under the leadership of the principal allied powers: China, France, the Soviet Union, the United Kingdom and the United States. The principal axis powers were permitted to join only after various intervals of time: Italy in 1955, Japan in 1956, and Germany in 1973.

9.8 Article 2(3) of the UN Charter essentially reiterates the rule, contained in the Kellogg-Briand Pact, that all international dispute settlement should be peaceful:

> **Article 2**
>
> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

9.9 Article 2(4) of the UN Charter is, however, the crucial provision which transformed international law's requirements concerning the international use of force:

10 Article I.
11 Article II.
12 *Trial of German Major War Criminals*, Judgment of the International Military Tribunal (Nuremberg), 1 October 1946.

> **Article 2**
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This provision goes further than the prohibition on war prescribed by the League of Nations Covenant, in that resort to war is not preserved as a remedy of last resort should peaceful dispute settlement fail. Rather, the prohibition continues even after peaceful mechanisms prove unsuccessful. Furthermore, Art 2(4) goes further than either the League Covenant or the Kellogg-Briand Pact by proscribing not only 'war', but all threats or use of 'force' which are 'directed against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. In opting for the language of 'force' rather than 'war', the Charter makes clear that its prohibition applies even if there has been no formal declaration of war or threatened declaration of war. Article 2(4) represented, therefore, the most comprehensive prohibition on the use of armed force among States in the history of international law.

There are some exceptions. Self-defence[13] and the collective use of force under United Nations authority[14] are expressly provided for under the Charter. Some other possible exceptions which might exist in customary law are the protection of nationals abroad[15] and humanitarian intervention.[16]

Otherwise, the prohibition is complete. In particular, the provision makes it reasonably clear that the just war doctrine can no longer be used to justify the unilateral initiation of war or armed force in international relations, though the doctrine may continue a twilight existence as a foundation for the possible customary law exceptions to the Art 2(4) prohibition. The doctrine's substantive requirements will also, no doubt, continue to inform deliberations leading to the adoption of collective measures and most acts of self-defence, even if its name is not always expressly invoked.

9.10 Although the prohibition in Art 2(4) is contained in a treaty and is expressly addressed only to members of the United Nations, it nevertheless binds all States as a matter of customary international law. Thus, the few States which are not parties to the UN Charter are nevertheless bound by a customary prohibition in terms materially identical to Art 2(4). Even UN member States are bound by the prohibition simultaneously under the Charter and as a matter of custom. This simultaneous binding will be

13 See 9.19–9.42.
14 See 9.51–9.64.
15 See 9.65–9.69.
16 See 9.70–9.87.

Article 5

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

The 1951 Security Treaty between Australia, New Zealand and the United States (ANZUS)[71] provides similarly as follows:

Article IV

Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

9.40 The right of collective self-defence entitles third States to use armed force in support of a State which has been attacked. An act of collective self-defence must meet all the requirements of an act of individual self-defence: armed attack on the State entitled to engage in individual self-defence; proportionality; necessity; and observance of the *jus in bello*. Third States seeking to rely on a right of collective self-defence in justification of their use of armed force must also satisfy an additional mandatory requirement of an essentially procedural character.

According to the International Court of Justice in the *Nicaragua* case, the State which regards itself as the victim of an armed attack must call upon the third State to come to its defence. Where no such request has been made, the third State will have no entitlement to engage in acts of collective self-defence.[72] The Court found that, because El Salvador had not called

71 UNTS, Vol 131, p 84.

72 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States*) Merits, ICJ Rep (1986) 14, para 199.

upon the United States to come to its aid until well after the alleged attacks had occurred, the United States was unable to rely on a collective right of self-defence in order to justify its measures against Nicaragua.

9.41 Article 51 of the UN Charter requires States relying on a collective right of self-defence to report measures taken in reliance on that right immediately to the Security Council.[73]

A failure to comply with the reporting requirements of Art 51 will likely be relevant only where there are other reasons for doubting that there has, in fact, been an armed attack on the State said to be the target. This was the approach taken by the International Court of Justice to the United States' failure to make timely compliance with the reporting requirements of Art 51 in the *Nicaragua* case.

Security Council action

9.42 The extent to which Security Council action can abridge a State's right of individual or collective self-defence is discussed elsewhere.[74]

Intervention

9.43 According to Brierly, intervention 'means dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence'.[75] It is a broad concept which embraces both armed and unarmed State activities which seek to dictate another State's conduct in its internal affairs or external relations. Where an act of intervention involves the use of arms, it is also likely to violate the prohibition on the use of force contained in Art 2(4) of the UN Charter. According to the International Court of Justice in the *Nicaragua* case:[76]

> The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. … [T]his principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. … It has … been presented as a corollary of the principle of the sovereign equality of States.

73 Semble 9.32 for the identical obligation with respect to acts of individual self-defence.

74 See 9.61.

75 J L Brierly, *Brierly's Law of Nations*, ed Andrew Clapham, (7th ed, Oxford University Press, Oxford, 2012), 450.

76 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States*) Merits, ICJ Rep (1986) 14, para 202.

cooperation in the suppression of the slave trade and the granting of mutual rights of visit and search of vessels.[3]

10.5 By the close of the 19th century, international law did not impose criminal responsibility on individuals except for piracy and a relatively narrow range of war crimes. Where an individual committed any of these crimes, international law permitted States to exercise jurisdiction over them, there being no international tribunals to perform the function.

After the Second World War

10.6 The 20th century witnessed a significant expansion in the scope of individual criminal responsibility at international law. In particular, at the close of the Second World War the International Military Tribunal at Nuremberg (Nuremberg Tribunal) was established in order to try leading members and associates of Germany's National Socialist regime on charges of crimes against the peace, war crimes, and crimes against humanity. On the existence of individual criminal responsibility in international law, the Nuremberg Tribunal remarked:[4]

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. … Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. … The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law.

10.7 The United Nations General Assembly subsequently affirmed 'the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.[5] An International Military Tribunal for the Far East was later established at Tokyo for the purpose of trying defendants associated with Japan's wartime regime on charges similar to those prosecuted at Nuremberg.

3 Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, (9th ed, Longman, New York, 1992), § 429, 979-80.

4 *Trial of German Major War Criminals*, Judgment of the International Military Tribunal (Nuremberg) of 1st October 1946, pp 446–47.

5 General Assembly Resolution 95 (I) (1945).

10.8 Although genocide was not among the crimes identified in the Charter of the Nuremberg Tribunal,[6] a crime of genocide attracting individual criminal responsibility was recognised by the Convention on the Prevention and Punishment of the Crime of Genocide[7] (Genocide Convention) in 1948.

10.9 The following year saw the conclusion of the four Geneva Conventions: the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field[8] (Geneva Convention I); the Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea[9] (Geneva Convention II); the Geneva Convention relative to the treatment of prisoners of war[10] (Geneva Convention III); and the Geneva Convention relative to the protection of civilian persons in time of war[11] (Geneva Convention IV).

10.10 The four Geneva Conventions furnish the foundations of the modern international law regulating the use of force in armed conflict, also known as 'international humanitarian law'. Each of them provides for individual criminal responsibility in certain situations by stipulating that States parties 'undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' defined in the conventions.[12]

10.11 Although the four Geneva Conventions are primarily concerned with regulating international armed conflicts, Common Art 3 extends certain protections also to persons affected by a non-international (or internal) armed conflict, such as a civil war or domestic insurgency. The persons covered by this extended protection are limited to those 'taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause'. Common Art 3 of the four Geneva Conventions represents customary international law.[13]

6 The Charter of the Nuremberg Tribunal did, however, identify 'extermination' as constituting a crime against humanity: Art 6(b).

7 UNTS, Vol 78, p 277.

8 UNTS, Vol 75, p 32.

9 UNTS, Vol 75, p 86.

10 UNTS, Vol 75, p 136.

11 UNTS, Vol 75, p 288.

12 Geneva Convention I, Art 49; Geneva Convention II, Art 50; Geneva Convention III, Art 129; Geneva Convention IV, Art 146. Semble Geneva Protocol I, Art 85.

13 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States*) Merits, ICJ Rep (1986), para 218.

blows repeatedly inflicted on him during the lengthy interrogation sessions to which he was subjected throughout his time in police custody.

The Court considers that such treatment was intentionally meted out to the first applicant by agents of the State in the performance of their duties, with the aim of extracting a confession or information about the offences of which he was suspected.

96. In those circumstances the Court finds that the violence inflicted on the first applicant, taken as a whole and having regard to its purpose and duration, was particularly serious and cruel and was capable of causing 'severe' pain and suffering. It therefore amounted to torture within the meaning of Article 3 of the Convention.

97. There has consequently been a violation of Article 3 on that account.

10.71 The European Court of Human Rights in *Dikme v Turkey* held that the treatment meted out to the applicant over five days clearly crossed the threshold qualifying it as degrading within the meaning of Art 3 of the ECHR. Indeed, the mere fact that the applicant was, while deprived of his liberty, subjected to physical force not required as a response to his own conduct was enough to qualify the treatment as unlawfully degrading. The fact that his treatment was likely to arouse fear, anxiety and vulnerability likely to humiliate and debase him, and break his resistance and will, provided additional grounds for holding that the applicant was subjected to unlawfully inhuman and degrading treatment.

10.72 Having thus established that the treatment meted out to the applicant violated the prohibition in Art 3 on unlawful conduct falling short of torture, the next step was to consider whether any of the same conduct was so serious as to amount also to a violation of the prohibition on torture. The Court observed that the reason for dividing the prohibited conducted in Art 3 into torture and the other forms of prohibited conduct was to attach a 'special stigma to [torture as] deliberate inhuman treatment causing very serious and cruel suffering'. Most significantly, the degree of severity required in order for unlawful conduct to rise to the level of torture depends on 'all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the victim's sex, age and state of health'. In this regard, the court noted that the applicant lived for five days in a 'permanent state of physical pain and anxiety' owing to the 'particularly serious and cruel' violence deliberately inflicted on him by public officials in order to extract a confession. The Court found that the pain caused was, in all the circumstances, sufficiently severe as to qualify for the more serious violation of the prohibition on torture.

10.73 Finally, the Court in *Dikme v Turkey* reaffirmed its recently propounded jurisprudence in which the location of the threshold separating

from the other forms of conduct prohibited by Art 3 is subject to change. According to this view, some forms of conduct which were earlier considered to be insufficiently severe as to constitute torture would now be regarded as violating the prohibition on torture. This is because, in the Court's view, standards of human rights protection are becoming increasingly stringent over time. It is possible, therefore, that some or all of the 'five techniques' employed in *Ireland v United Kingdom* would now be held by the European Court of Human Rights to constitute torture.

Definitional significance

10.74 The four Geneva Conventions and their first two protocols, the ECHR, the ICCPR, the ACHR, the Torture Convention, the IACPPT, the ACHPR, the ICTY Statute, the ICTR Statute, the Rome Statute and the Arab Charter on Human Rights all prohibit or criminalise both torture and similar conduct, such as inhuman and degrading treatment. Why, then, is there any necessity to expend effort deciding whether a particular form of prohibited conduct rises to the level of 'torture'? There are a number of reasons why the distinction matters.

10.75 The first reason is less juridical than socio-psychological. As the European Court of Human Rights pointed out in *Dikme v Turkey*, 'the distinction was drawn in the Convention [ECHR] in order to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'.[174] Put another way, no civilised State wishes to attract the acute diplomatic odium, and no government the acute political odium, of a definitive judicial finding that it has engaged in acts of torture. In the context of individual criminal responsibility, this translates into the juridical reality that torture is a more serious charge even than one of cruel, inhuman or degrading treatment or punishment.

10.76 The distinction is also important in the context of the jurisdiction of domestic courts. States parties to the Torture Convention are obliged to ensure that all acts of torture, including attempts to commit torture and complicity or participation in torture, are offences under their criminal law.[175] They must also make these offences 'punishable by appropriate penalties which take into account their grave nature'.[176] The Torture Convention requires a State party to establish its jurisdiction over the crime of torture when the offence is committed in its own territory, when the alleged offender is a national of that State party (thereby requiring

174 *Dikme v Turkey*, Case 2086/92, [2000] ECHR 366, para 93.
175 Torture Convention, Art 4(1).
176 Ibid, Art 4(2).

However, this provision also fails to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts.[261]

566. Less broad parameters for the interpretation of 'other inhumane acts' can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. Thus, for example, serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights, of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1).[262] Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights), as well as the enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994).[263] Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes

be determined on a case-by-case basis and appears ultimately to be a question of fact [Ibid at para 544].' Finally, the footnote quotes from *Prosecutor v Kayishema*, ICTR-95-1-A, 21 May 1999, at para 151: '[T]he acts that rise to the level of inhuman acts should be determined on a case-by-case basis.'

261 A footnote here in the judgment quotes from the International Law Commission, commenting on Art 18 of its Draft Code of Crimes:

> ... [t]he Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.' (Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, UNGAOR 51st Session Supp No 10 (A/51/10) (Crimes Against the Peace and Security of Mankind), 103, para 17.)

262 In a footnote here, the ICTY states: 'As for the specification of what constitutes cruel, debasing, humiliating or degrading treatment, resort can of course be had to the important case-law of the relevant international bodies, chiefly to the United Nations Torture Committee and the European Commission and Court of Human Rights.'

263 Inter-American Convention on Forced Disappearance of Persons (1994) 33 ILM 1429.

of crimes provided for in the other provisions of Article 5. Once the legal parameters for determining the content of the category of 'inhumane acts' are identified, resort to the *ejusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted.

10.113 The acts specified in the instruments establishing the Nuremberg Tribunal, the ICTY, the ICTR and the ICC as constituting crimes against humanity (murder, extermination, and so on) are particular manifestations of a crime which can take many forms. A crime against humanity is any act (when committed in the prescribed context) which is as serious as the acts specified in the instruments.

Any act which violates a fundamental right recognised by international law (such as the right not to be subjected to cruel, inhuman or degrading treatment or punishment, or the right not to be arbitrarily deprived of one's life), and which causes either great suffering or serious injury to health, is capable of constituting a crime against humanity; the act must, however, be committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.

War crimes

War crimes and crimes against humanity contrasted

10.114 War crimes, like crimes against humanity, are international crimes attracting individual responsibility. There are, however, two important categorical distinctions separating the different types of offences.

10.115 First, whereas crimes against humanity occur in the context of a widespread or systematic attack on a civilian population, war crimes can occur only in the context of an armed conflict. There is obviously scope for overlap between the two different types of offences. Where an armed conflict includes a widespread or systematic attack on a civilian population, it is possible that a particular instance of prohibited conduct (for example, rape or torture) might be simultaneously a war crime and a crime against humanity.

10.116 Second, crimes against humanity are essentially a branch of international human rights law that attaches individual criminal responsibility to certain kinds of human rights violations. War crimes, on the other hand, originate in international humanitarian law (or the *jus in bello*),[264] the primary function of which is to place obligations on States. International humanitarian law has, however, evolved in such a way as also to attach individual criminal responsibility to certain

264 See 9.3.