that affirms or denies a domestic court's jurisdiction inconsistently with a customary norm of public international law. Once again, by applying such a domestic rule, the delinquent State violates its duty under public international law — in this case, the duty to comply with applicable customary legal obligations.

## 2. Development and Scope of International Law

**[1-6]** International law, understood simply as a body of norms regulating relations among political rulers, can be traced back to the period of early antiquity. Indeed, archaeologists have discovered treaties between kings of city-states in ancient Mesopotamia, the cradle of civilisation, dating from around 3000 BCE. Treaty relations among rulers remained a feature of political life throughout the ancient history of the Middle East and the Mediterranean, with most civilisations recognising the binding force of treaties and respecting the persons of diplomatic envoys.

**[1-7]** Medieval Europe enjoyed a more elaborate form of international law, though the structure of feudal realms was not well suited to the emergence of a distinctly separate legal system for the regulation of relations among sovereigns.

These feudal kingdoms, principalities and duchies were not States in the modern sense. There was usually no sovereign exercising undisputed authority within the realm's boundaries. Feudal princes shared power internally with an aristocratic class who often maintained their own armies and legal systems. Furthermore, the rulers, and sometimes their vassals, frequently owed political allegiance to external authorities such as the Church or the Holy Roman Emperor. There was, therefore, an absence of that specifically modern concept of sovereignty that is emblematic of modern statehood and that makes possible an autonomous body of international law: the exercise of political authority over a definite territory and population, unrestricted by any external political authority, and limited only by the requirements of international law.

In relation to any parcel of territory, there might easily have been a number of overlapping, and sometimes conflicting, political authorities — more than one of which participated directly in Europe's 'international' life. During this period, the law governing relations among European rulers was an expression mostly of the *jus gentium*: the 'law of nations' or the 'common law of all mankind', which has conceptual roots in both Roman law and the natural law. Thus, the principle *pacta sunt servanda* (agreements are to be observed) applied equally to treaties and to private commercial contracts as an expression of the *jus gentium*. Medieval princes





were bound like everyone to observe the universal principles of the *jus gentium* in their dealings with all people, regardless of whether they were commoners, nobles or other princes.

**[1-8]** During the course of the 15th and 16th centuries, several powerful States emerged (Spain, Portugal, England, France, the Netherlands and Sweden) in which internal authority became more centralised. These States, and especially those in Northern Europe where the Protestant revolution was most influential, refused to accept the political authority of entities beyond themselves. This development prepared the ground for the modern autonomous system of international law.

**[1-9]** In its origins, the modern system of international law was concerned almost exclusively with regulating relations among States as armed actors on the European stage. Emerging from the turmoil of Europe's religious wars in the 16th and 17th centuries, modern international law was long dominated by norms regulating the conduct of war and clarifying matters about which disagreements might lead to war. Indeed, the most influential book in international law's early modern period was *De iure belli ac pacis (On the Law of War and Peace)*, published in 1625 and written by the Dutch jurist and diplomat Hugo Grotius (1583–1645). This definitive work in three volumes was concerned with the lawfulness or justice of war itself, the causes of just war, and the legal status of particular acts performed in the course of waging war. Grotius also expounded upon issues such as the property of States and their freedom on the high seas, which provided notorious points of friction potentially leading to armed conflict between States.

Grotius explained the reason for his focus on the law of international armed conflict and security, and underscored modern international law's essentially European origins, in the following terms:[5]

> I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint.

For the next 300 years, international law was largely a matter of working through the terrain mapped by Grotius, although the precise content of the norms that emerged often departed substantially from those propounded by the great pioneer.

5. Hugo Grotius, *De jure belli ac pacis libri tres,* with an abridged translation by William Whewell, John W Parker, London, 1853, Vol I, lix (Prolegomena, 28).

**[1-10]** The emergence of the modern conception of statehood was a lengthy process with origins traceable to England and France in the 15th century. The treaties concluding the Peace of Westphalia at the end of the Thirty Years War (1618–1648) confirmed the modern State system, and feudal conceptions of international order were extinguished as a potent force animating intra-European relations. The treaties established the rights of numerous small States to participate directly in the international system, with only symbolic concessions to the pre-modern order represented chiefly by the Holy Roman Empire. The peace treaties confirmed the legitimacy of States based on differing versions of Christianity, established that no political authority existed over States, and enshrined the principle of religious tolerance for minorities in some parts of Europe.

The sovereignty of States was, thus, simultaneously established and limited in a way that dimly foreshadowed the later emergence of international human rights law. The treaties of Westphalia also established diplomatic machinery for the peaceful settlement of international disputes, though this system remained dormant.

The peace treaties of Westphalia, at whose negotiations over 190 established or nascent States were represented, settled and regulated many of the issues that had ignited the most destructive and exhausting series of wars Europe had yet endured. As a result, religion was largely eliminated as a cause likely to stir the European powers to open warfare among themselves.

**[1-11]** The Final Act of the Congress of Vienna (1815) and related international agreements sought to adapt the Westphalian State system to substantially new circumstances. The task of the Act and agreements was to maintain international peace in the situation brought about by the insistent movement within many European States away from monarchical despotism, under which territories and populations could be transferred at will, towards various forms of democratic control based on nationalism and national self-determination. This movement, whatever its merits in other regards, was revolutionary in character and proved highly disruptive to peace within Europe, as the recently concluded wars against Napoleonic France amply demonstrated.

The principal European powers established a formal system of collective security against revolutionary turmoil anywhere within Europe, which system was successfully employed on several occasions. The concept of formalised collective security would become a familiar refrain in international law. Other potential flashpoints of armed conflict were also addressed by, among other things, extending freedom of navigation to international rivers within Europe and codifying certain rules relating to





diplomats. The Final Act's formal condemnation of the slave trade was also a significant development in international law, and made another important conceptual link between human rights concerns and the maintenance of international peace.

**[1-12]** The increasingly destructive power of military technology during the course of the 19th century, and the emergence of mass military mobilisation, posed new challenges for international law, with its continuing focus on the law of war and peace.

The American Civil War (1861–1865), which up to that point was the world's most destructive war, killed more than 600,000 people and wounded more than 500,000. The Geneva Convention of 1864 gave legal protection to the wounded in international military conflicts and to those seeking to assist the wounded. The Brussels Conference of 1874 and the Hague Peace Conferences of 1899 and 1907 formulated and agreed upon rules protecting non-combatant civilians, as well as rules for the treatment of prisoners of war, in international armed conflicts. The 1899 conference also established the Permanent Court of Arbitration in an attempt to provide a standing mechanism for the peaceful settlement of international disputes.

**[1-13]** While international law, at this stage, retained its overriding focus on the law of war and peace, there was also an increasing interdependence of international life in the fields of transport, communications and economics. Indeed, the first great era of globalisation occurred in the late 19th and very early 20th centuries.

This period saw international law begin to broaden its domain beyond issues of war and peace, and turn its attention to facilitating international cooperation in a range of technical areas. Significant achievements during this period include the Paris Convention establishing the International Telegraph Union (1865), the Berne Convention establishing the General Postal Union (1874), the Paris Convention for the Protection of Industrial Property (1883), the Berne Convention for the Protection of Literary and Artistic Works (1886), the Brussels Convention for the Publication of Customs Tariffs (1890) and the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891). All these, and other similar, agreements foreshadowed the wide cooperation in technical matters that was to become a major feature of international law in the late 20th century.

**[1-14]** Just as the Thirty Years War and the Napoleonic Wars ended in peace conferences that changed the course of international law, so too did World War I. The Paris Peace Conference (1919) established the League of Nations, a bold experiment in international order. The traumatic

upon the entry into force of the Charter, or over time as States aligned their practice to the Charter's requirements.

An interesting question is whether the continuing non-occurrence of another global war is primarily due to this newer legal architecture, or whether other factors have been decisive. In particular, and in contrast to the League of Nations, the United Nations has not until recently had to deal with a multi-polar system in which several of the world powers were totalitarian States determined to establish or reclaim empires by force of arms, and where no other State or alliance of States was sufficiently resolute to deter them.

**[1-19]** The trial and conviction of many of the National Socialist leaders for crimes against the peace, crimes against humanity and war crimes was of monumental significance in demonstrating that responsibility for the most serious offences against international law could attach to political and military leaders, and not simply to the State whose affairs they directed. This was reaffirmed by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[14] which provides for punishment of individual offenders after conviction by a national court or an international criminal tribunal.

**[1-20]** Since World War I, there has been an unprecedented expansion in the material scope of international law beyond its traditional concern with issues of war and peace. While the law of armed force remains of central concern to many international lawyers, a range of political and technological developments have, over the last century, provided a climate in which there has been a dramatic expansion of the subject matter over which international law exercises authority. This process has gathered even further pace since the end of the Cold War, with increased opportunities for international economic and political cooperation.

**[1-21]** As noted above, the personal scope of international law has expanded to embrace individuals, at least for some purposes.[15] This has been primarily in the areas of human rights protection and the law relating to international crimes, such as crimes against the peace, crimes against humanity, war crimes and genocide. In the case of human rights protection, international law's traditional link with the maintenance of international peace is recognised in the preambles to the 1948 Universal Declaration of Human Rights (UDHR),[16] the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human

14. UNTS, Vol 999, p 171.
15. See **[1-3]**.
16. General Assembly Resolution 217A (III); UN Doc A/810, 71 (1948).





Rights, or ECHR),[17] the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)[18] and the 1966 International Covenant on Civil and Political Rights (ICCPR).[19]

**[1-22]** As Grotius and other early publicists recognised, competition for the use of the seas, which cover more than 70 per cent of the Earth's surface, was also intimately connected with the maintenance of international peace. It followed that the Law of the Sea was one of the earliest areas of international law to be developed.

This is also an area that has been the subject of extensive development and refinement since World War II.[20]

**[1-23]** As the factual interdependence of international society has increased, so has the material scope of international law naturally expanded to provide a framework within which States and other members of international society may fruitfully coordinate their joint and competing activities for the benefit of the common good.

**[1-24]** As with domestic law, international law frequently lags behind developments in the society to which it corresponds. Forces with vested or sectional interests may periodically retard developments in international law that would be beneficial to the society as a whole, just as such forces might sponsor new developments that undermine the common good.

The risk of such distortions appearing is generally increased wherever political authority is not, in some real sense, representative of the whole of the society that it governs. International society has, since the Peace of Westphalia and the transmission of the European State system to the rest of the world, been under the political authority of the society of States. The activities of these States generate the treaties and customs that constitute positive international law.[21]

It is notorious, however, that many States that participate in the exercise of this international political authority are not representative of their populations. These States frequently exercise domestic power and use their international authority directly against their people's fundamental interests and without their consent. Not being concerned with their own people's welfare or consent, such States have only limited interest in the development of international law in directions genuinely beneficial to international society as a whole. Furthermore, the continuing participation of such dysfunctional or dictatorial States in the generation

17. UNTS, Vol 213, p 221; Council of Europe Treaty Series, No 5.
18. UNTS, Vol 993, p 3.
19. UNTS, Vol 999, p 171.
20. See **Chapter 12**.
21. See **[1-27]**.

of international law sometimes creates a reluctance on the part of other States to entrust international law with a major role in the solution of international problems.

**[1-25]** Notwithstanding this serious weakness in the international legal system, there has emerged a universal system of legal cooperation in a large number of fields. These include areas that might be regarded as essentially systemic or constitutional to international law itself, such as a more fully developed conception of international law's sources,[22] the law relating to States and intergovernmental organisations,[23] title to territory,[24] the law of the sea,[25] the law relating to jurisdiction and immunities of States,[26] and peaceful dispute settlement.[27] So central has the law on the use of force been to the development of international law that this area, with its many important developments since World War II, might also be regarded as forming part of the international legal system's constitutional structure.[28]

This development towards universal cooperation also extends to numerous substantive subjects, many of which fell entirely or mostly within the domestic jurisdiction of States until relatively recently, and which have only an indirect connection to the maintenance of international peace. These subjects include protection of the environment, the regulation of trade, economic development and monetary stability, aerospace, communications, transport, health, food and agriculture, education, science, natural resources and nuclear energy.

International law will continue to provide indispensable tools wherever there is a need for States or their peoples to coordinate activities in relation to the preservation of the peace or the distribution or preservation of the world's resources, or where, for other reasons, stable and predictable frameworks are required for the advancement of the international common good.

## 3. Structure of the International System

### 3.1 Legal norms

**[1-26]** The single most striking feature of the international legal system is its decentralised and consensual character. On the international legal

22. See **[1-79]–[1-222]** and **Chapter 2**.
23. See **Chapter 4**.
24. See **Chapter 7**.
25. See **Chapter 6**.
26. See **Chapter 8**.
27. See **Chapter 8**.
28. See **Chapters 9–10**.





plane, and in contrast to domestic legal systems, it is not possible to point to institutions endowed with readily identifiable legislative and executive functions. Furthermore, such international judicial organs as exist are not endowed with compulsory jurisdiction. Indeed, it is not even possible to point to international legal instruments that possess the unambiguously normative character of domestic constitutions or legislation. In this limited sense, there is no international government and no system of international legislation. There are, however, two notable exceptions. First, certain resolutions adopted by the UN Security Council will impose legally binding obligations on all States.[29] Second, the European Union, while founded on a number of constitutive treaties, possesses most of the characteristics of a federal legal system, so that the Union's legislative organs may adopt laws that are effective in the member States in such a way that they may be directly relied upon by litigants in national courts and tribunals.

**[1-27]** The absence of an international legislature does not, however, result in international society being without the means of generating and modifying international legal rules. International law is primarily a system of customary law, increasingly supplemented by rules and principles that are agreed upon in treaties. These two sources of law are 'positive international law' in the sense that the norms that they generate have been chosen or agreed upon by States in their dealings with each other. Positive international law coexists with, and is conditioned by, numerous general principles of law that also find expression in most of the world's domestic legal systems.[30]

**[1-28]** Customary systems of law are generally characterised by their stability and high levels of compliance. Customary international law is no exception. Its stability results from the usually gradual method of its development. Ordinarily, though not invariably, a new customary norm requires considerable time to emerge through changing State practice, as well as for its obligatory character to be widely recognised by States. It will not come into existence without such widespread practice and recognition, and its modification is dependent upon a similar process occurring. This feature of customary law helps explain why violations are rare. By its nature, a customary norm will be one that enjoys widespread support among States. Typically, such norms do not impose onerous burdens and States find compliance convenient.

29. See **[9-53]–[9-65]**.
30. See **[1-160]–[1-189]**.

**[1-29]** It is possible that States that persistently object to an emerging customary law rule, and that maintain their objection after its emergence, will not be bound by the rule.[31]

**[1-30]** Most norms of customary international law are 'universal' in character — that is, they apply to the entire society of States. Exceptionally, norms of customary international law may be 'particular', 'local', 'regional' or 'special' in character, which means that they apply only as between two or several States.[32]

**[1-31]** Treaties are agreements between States, or between States and intergovernmental organisations, which the parties intend to be legally binding under international law.[33] They are almost always in writing, but may be concluded orally. Indeed, even unilateral declarations may be legally binding in certain circumstances.[34] Treaties are analogous to domestic law contracts and typically bind only those States or intergovernmental organisations that are a party to them.

**[1-32]** Sometimes, however, a treaty can be so widely adhered to and observed that its norms assume the character of customary international law. In that case, even States that are not party to the treaty can be bound by one or more of the norms that the treaty contains.[35] Treaties of this kind are analogous to domestic legislation in that they produce norms of general 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 that will cause any inconsistent treaty to be void.[36]

**[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.[37] 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 that may arise in international relations. The

31. See **[1-131]–[1-137]**.
32. See **[1-165]–[1-169]**.
33. See **[2-16]–[2-18]**.
34. See **[1-214]–[1-219]**.
35. See **[1-146]–[1-154]**.
36. See **[2-105]–[2-109]**.
37. See **[1-160]–[1-189]**.





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 that 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 the content and scope of international norms derived from treaties, custom and the general principles.[38] 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.[39] These experts (usually referred to by international 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

38. See **[1-190]–[1-195]**.
39. See **[1-196]–[1-202]**.

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.[40]

**[1-39]** There is also a category of material that is sometimes referred to as 'soft law',[41] 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, at least 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.

## 3.2 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 principal agents of official communication, discussion, cooperation, negotiation and agreement between the States concerned. Less frequently, these same functions are performed by diplomats on special missions to other States, especially where no permanent embassies are maintained between the States concerned.

The emergence of more efficient means of transport and communications has, over time, diminished somewhat the critical role played by diplomats, as national leaders are increasingly able to communicate swiftly with their diplomats abroad and, on more important issues, directly with the leaders of other States. Nevertheless, the vast bulk of State-to-State relations, which are the principal focus of international law, are still conducted by diplomats.

States are the basic units of the modern international system.[42] All the Earth's land territory, except possibly Antarctica, is under the authority of a State. States have either evolved (in the case of older States) or been

40. See **[1-203]–[1-213]**.
41. See **[1-220]–[1-222]**.
42. See **[4-2]**.





consciously established in order to advance the common good of particular human communities. According to JL Brierly (1881–1955), a State:[43]

> … is an *institution*; that is to say, it is a system whereby individuals establish relations among themselves in order to secure certain objects, the most fundamental being a system of order within which they can carry on their activities.

This functional view of a contingent State contrasts with the more romantic conception of writers such as GWF Hegel (1770–1831), according to whom the State is the 'realised ethical ideal or ethical spirit',[44] and the inevitable fruit of an objective historical process whose existence and vitality transcend human choice and other human purposes.

**[1-41]** There are, at present, no institutions other than States that exercise comprehensive political authority. Nevertheless, States are not the only institutions in the international system.

States themselves have established hundreds of bilateral, regional or universal organisations for the purposes of advancing the common good of their peoples in areas where unilateral State action would be less effective than international coordination or cooperation.

These organisations may be classified from the perspective of their scope *ratione materiae* (that is, their subject matter competence) or their scope *ratione personae* (that is, the range of States legally affected by their exercise of competence). Some organisations are very limited both *ratione materiae* and *ratione personae* — for example, the Channel Tunnel Intergovernmental Commission, which was established by the governments of France and the United Kingdom in the 1986 Treaty of Canterbury to supervise operation of the undersea tunnel connecting the two countries. Some are narrowly constructed *ratione materiae,* but are nearly universal *ratione personae* — for example, the Universal Postal Union, which has 192 member States. Yet others are broadly endowed *ratione materiae* but relatively limited *ratione personae* — for example, the 35-member Organization of American States, which has a sweeping set of purposes including promoting economic, social and cultural development; preserving peace and security; promoting democracy; and eradicating poverty.

**[1-42]** The UN is, however, the one international organisation that is almost universal in its membership (193 member States and 2 observer

43. Andrew Clapham (ed), *Brierly's Law of Nations,* ed, 7th ed, Oxford University Press, Oxford, 2012, p 139 (emphasis in original).
44. G W F Hegel, *Philosophy of Right* (*Grundlinien der Philosophie des Rechts*), trans S W Dyde, Batoche, Kitchener, Ontario, 2001, § 257, p 194.

States) and whose purposes extend to regulating most matters of international concern. It is the international institution that, more than any other, has shaped international relations and international law since the end of World War II.

**[1-43]** Article 1 of the UN Charter sets out the ambitious scope of the organisation's purposes. These purposes are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among the nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions in the attainment of these common ends.

**[1-44]** Equally important as its extensive scope *ratione materiae* and its near-universal scope *ratione personae,* the UN Charter makes a claim to international constitutional supremacy. Article 103 provides as follows:

> In the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

**[1-45]** The United Nations consists of six 'principal organs': the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat.[45]

**[1-46]** The General Assembly is the only principal organ on which all UN members are represented. It also has the broadest functions of any UN organ. The General Assembly is able to 'consider', 'discuss' and 'make recommendations' in relation to any matter within the Charter's scope, including the maintenance of international peace and security.[46]

**[1-47]** The Security Council consists of 15 members, five of which are permanent members (China, France, Russia as successor to the Soviet

45. UN Charter, Art 7(1).
46. ibid, Arts 9–11.





Union, the United Kingdom and the United States)[47] with a power of veto on all but procedural matters.[48] The other 10 members are elected for two-year terms by the General Assembly.[49] The Charter confers on the Security Council 'primary responsibility for the maintenance of international peace and security'.[50]

Although the range of the Security Council's competence is narrower than that of the General Assembly, the Security Council's powers are not limited to consideration, discussion and recommendation. In certain circumstances, the Security Council may adopt resolutions that legally bind all States to which the resolutions are addressed.[51]

The composition of the Security Council, and especially the current system of permanent membership, is widely criticised as being outdated because it reflects the international order as it existed in 1945. There are currently a number of proposals to reform the Security Council, most of which involve expanding the number of permanent members. The main contenders for inclusion in an expanded permanent membership are Brazil, Egypt, Germany, India, Japan, Nigeria and South Africa. Prospects for reform along these lines are limited owing mainly to the reluctance of some existing permanent members to dilute their influence.

**[1-48]** The Economic and Social Council (Ecosoc) has 54 members which are elected for three-year terms by the General Assembly.[52] Ecosoc is empowered to 'make or initiate studies and reports', 'make recommendations', 'prepare draft conventions' and call international conferences. It may do these things with respect to international economic, social, cultural, educational, health and 'related matters', including human rights.[53] Of particular significance to international law, the work of Ecosoc has led to the adoption of the ICESCR[54] and the ICCPR.[55]

**[1-49]** The Trusteeship Council was established under Ch XII (Arts 75–85) of the Charter. Its task was to supervise the administration by some member States of certain non-independent territories, known as 'trust territories', which had been placed under their control pursuant to Art 77 of the Charter. The last remaining trust territory — Palau — attained

47. ibid, Art 23(1).
48. ibid, Art 27.
49. ibid, Art 23(2).
50. ibid, Art 24(1).
51. See **[9-53]–[9-65]**.
52. UN Charter, Art 61(1).
53. ibid, Art 62.
54. UNTS, Vol 993, p 3.
55. UNTS, Vol 999, p 171.

(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

Consequently, any person may commit a State to any of the acts leading to treaty formation to the extent that the person is authorised by his or her full powers. The necessity for full powers may be impliedly dispensed with where circumstances justify concluding that the States involved considered the person as representing his or her State for the purposes of the acts he or she performed.

**[2-22]** Certain classes of persons are, without the need to produce full powers, deemed to be capable of representing their State. The extent of their capacity depends on the nature of their official office. These rules are contained in Art 7(2) of the VCLT:

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purposes of performing all acts relating to the conclusion of a treaty;
   (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
   (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Only Heads of State, Heads of Government and Foreign Ministers are deemed to be capable of representing a State for the purpose of performing all acts in the process of concluding a treaty. Therefore, if State A wishes to have its ambassador to State B sign a treaty with State B on its behalf, the ambassador must satisfy the requirements of Art 7(1): either he or she will need to be furnished with full powers, or there will need to be other evidence that States A and B regard the ambassador as representing State A for the purpose of signing the treaty. That other evidence could be provided by the past practice of the two States or by 'other circumstances', which might include diplomatic communications prior to the act of signing.

**[2-23]** Article 8 of the VCLT specifies that an 'act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorised to represent a State for that purpose is without legal effect unless afterwards confirmed by that State'. Failures of the kind envisaged by Art 8 are rare. Where they occur, States are clearly permitted to disavow the *ultra vires* act and to regard it as lacking legal consequence.





On the other hand, the ILC is of the view that a subsequent confirmation that rectifies a person's lack of authority may be implied by conduct such as invoking the treaty's terms or otherwise acting 'in such a way as to appear to treat the act of its representative as effective'.[33]

## 3.3 Adoption of the text

**[2-24]** Adoption of the text is an important step towards concluding a multilateral treaty. Numerous States might participate in the process of negotiating a particular treaty. If there is a large number of interested States, there will probably be an international conference at which the final phase of negotiations is conducted. Because of the large number of States involved, each with their own interests to protect and advance, much effort will frequently be expended in agreeing on a text that strikes a balance between advancing certain policy objectives and attracting the widest possible adherence to the treaty. At the end of the conference, if it is a success, a final text will be proposed on which the conference may vote. This text, if adopted, becomes the treaty that is thrown open for adherence by States. Article 9 of the VCLT provides:

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

**[2-25]** Where the adoption of a text occurs outside the context of an international conference, unanimity will be the rule unless the participating States unanimously agree to a different procedure. This generally arises only where there is a small number of participating States. At international conferences, States are free to accept either the two-thirds rule as specified in Art 9(2) or any other rule (for example, simple majority, three-quarters majority, or a system of weighted voting), provided the alternative rule is approved by two-thirds of the States present and voting.

**[2-26]** Sometimes, treaty texts are adopted within the framework of an intergovernmental organisation. Where this occurs, Art 9 of the VCLT will not apply if it is contradicted by the rules of that organisation.[34]

33. *Yearbook of the International Law Commission,* 1966, Vol II, p 192.
34. VCLT, Art 5.

## 3.4 Authentication of the text

**[2-27]** Once a text is adopted, a final version of the document is prepared, and then it is usually authenticated. However, a series of complicated votes may first be necessary, following debates conducted in different languages, in order that States can be certain that there is real agreement as to the document to which they will be invited to commit themselves. Article 10 of the VCLT provides:

> The text of a treaty is established as authentic and definitive:
>
> (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or
> (b) failing such procedure, by the signature, signature *ad referendum* or initialing by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Sometimes, authentication as a separate step is dispensed with. On other occasions, the adopted text may provide for a designated person or persons to authenticate the text (for example, the conference chairman). If the text was adopted within the framework of an intergovernmental organisation, any rules of that organisation as to authentication will be applicable.[35] Absent any such agreement, the procedure prescribed by Art 10(b) of the VCLT will apply.

## 3.5 Consent to be bound

**[2-28]** Consenting to be bound by a treaty is the most critical step in a treaty's formation. It is an act that frequently helps activate the treaty and that causes it to produce legal effects for the consenting State. No State can be considered bound by a treaty unless it has manifested its consent to be bound thereby; in this respect, treaties are identical to contracts under domestic law. In the case of domestic contracts, what constitutes a sufficient manifestation of consent to be bound varies from one jurisdiction to another. Usually, signature or the affixing of a corporate seal to a contract document is regarded as sufficient to indicate consent. Domestic legal systems also frequently specify that other acts, such as oral acceptance or acceptance implied by conduct, may be effective to manifest consent to be bound by a contract.

**[2-29]** States enjoy considerable freedom in deciding how their consent to be bound by a treaty will be manifested. Article 11 of the VCLT provides that a State's consent to be bound by a treaty 'may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'.

Article 2(1)(b) of the VCLT provides as follows:

> 1. For the purposes of the present Convention: …
>
> (b) 'ratification', 'acceptance', 'approval', and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty; …

**[2-30]** Consent to be bound by signature is dealt with by Art 12 of the VCLT, which provides:

> 1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:
>
> (a) the treaty provides that signature shall have that effect;
> (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
> (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.
>
> 2. For the purposes of paragraph 1:
>
> (a) the initialing of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
> (b) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Sometimes a signature is appended *ad referendum* — that is, subject to confirmation by the representative's State. Where this is the case, and the State subsequently confirms the representative's act, the signature then operates to bind the State. A signature affixed, but expressed to be subject to ratification, will not be effective to bind the State as a party until ratification occurs, even if the treaty specifies that signature is sufficient to bind the State.[36]

**[2-31]** States may occasionally express their consent to be bound by an exchange of instruments.[37] This procedure is more suitable to a bilateral treaty than to a multilateral treaty. In practice, exchange of instruments usually means that a State signs its copy of the treaty and then exchanges it for the copy signed by the other State. When the exchange occurs, the States have consented to be bound. Consent by exchange of instruments is applicable where the instruments themselves specify the procedure, or where it is otherwise established that the States were agreed on using the procedure.

35. ibid.

36. VCLT, Art 14(1)(c). See **[2-32]**.
37. VCLT, Art 13.

**[2-32]** Consenting to be bound by ratification, acceptance or approval is governed by Art 14 of the VCLT:

1. The consent of a State to be bound by a treaty is expressed by ratification when:
   (a) the treaty provides for such consent to be expressed by means of ratification;
   (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
   (c) the representative of the State has signed the treaty subject to ratification; or
   (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.
2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Ratification is a procedure of long standing in international treaty relations. Originally, it was a device suited to an age prior to modern communications. Representatives would negotiate and sign treaties, frequently in foreign lands and with limited opportunity to consult with, or seek instructions from, their own States. By making their signatures subject to ratification, representatives ensured that their sovereigns would have an opportunity to review the treaty before accepting it as definitively binding.

The act of ratification was simply a confirmation by the sovereign that he or she approved of the treaty and accepted its binding character. Sometimes it was asserted that ratification could not be withheld unless the representatives had exceeded their powers or violated secret instructions. It was the act of ratification, and not the representative's signature, which had the effect of definitively binding the State to the treaty's obligations.

The original necessity for ratification has largely evaporated with the modern revolution in communications and transportation. Ratification survives, however, as a common procedure for concluding treaties due to political changes in many countries.

Whereas in earlier times ratification was mainly a means by which the sovereign audited the activities of his or her representatives to foreign powers, it now serves the purpose of permitting some measure of democratic control of the decision to be bound by treaties. Many States, while leaving the formal act of ratification to the Head of State, subject treaties to scrutiny by authorities designated for that purpose under domestic law (usually the legislature or some component thereof). Once those authorities express their approval, ratification may occur. Ratification is now undoubtedly optional; States are free to ratify or withhold ratification at their absolute discretion.





**[2-33]** Treaties are sometimes expressed to be subject to 'acceptance' or 'approval'. These terms refer to less formal domestic procedures of review and endorsement of treaties than 'ratification', which often connotes formal constitutional procedures in many States. At the level of international law, nothing turns on the use of these three terms. Article 14 of the VCLT applies regardless of whether signatures by representatives are subject to ratification, acceptance or approval.

**[2-34]** Article 16 of the VCLT provides:

> Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
>
> (a) their exchange between the contracting States;
> (b) their deposit with the depositary; or
> (c) their notification to the contracting States or to the depositary, if so agreed.

The treaty itself will normally specify the way in which an act of ratification is to generate a consent to be bound by international law. Usually, this will mean specifying one of the procedures mentioned in Art 16. An exchange of instruments of ratification will normally be specified in the case of bilateral treaties. In the case of multilateral treaties, a 'depositary' is usually nominated as the authority to whom instruments of ratification are to be transmitted. The depositary is frequently the Foreign Minister of one of the States participating in the treaty's negotiation. If the treaty is negotiated within the framework of an intergovernmental organisation, the nominated depositary is usually the Secretary-General (or equivalent) of that organisation. Failure to complete an act of ratification on the international plane will result in the State failing to signify its consent to be bound, even if all the domestic law procedures for ratification have been properly concluded.[38]

**[2-35]** A State may also accede to a treaty, thereby expressing its consent to be bound. This is the normal means by which a State becomes party to a multilateral treaty that it has not signed. Multilateral treaties will normally specify which States are eligible to become parties, and how many ratifications or other manifestations of consent to be bound are necessary for it to enter into force. Sometimes a treaty will specify that it is open for signature only until a specified date, whereafter States that wish to become parties will need to accede.

Usually, after a treaty enters into force it is no longer open for signature (though the treaty itself may specify a different rule). Thereafter, a State that is eligible to become party to the treaty, and that wishes to do so, must accede to the treaty. The mode of acceding will usually be specified

38. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Jurisdiction and Admissibility)* ICJ Rep (1984) 392 at 398ff.

by the treaty. Sometimes, it is sufficient for a State simply to transmit an instrument of accession to the treaty's depositary. Other treaties have more rigorous requirements. For example, before a State can accede to the various treaties constituting the European Union, it must conclude a separate treaty of accession with all the existing States parties.[39]

## 3.6 Entry into force

**[2-36]** States participating in the creation of a treaty enjoy a wide discretion in deciding when and by what means it will come into force. The chosen mode will usually be expressed in the text of the treaty instrument itself.

In the case of bilateral treaties, the usual practice is for parties to provide that the treaty enters into force when both States have definitively expressed their consent to be bound, or on some specified date thereafter. In the case of multilateral treaties, the usual practice is for the adopted text to designate the number of signatures, ratifications or accessions required before the treaty enters into force, and then to indicate either that the treaty enters into force when the requisite number of such acts is reached or on some specified date thereafter. For example, Art 308(1) of the 1982 Convention on the Law of the Sea[40] provides that the treaty 'shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession'.

**[2-37]** Article 24 of the VCLT acknowledges the freedom that States enjoy in determining the manner and date for a treaty's entry into force. The provision also furnishes rules in default of such provision being made, and makes necessary provision for the authoritative determination of certain procedural steps before the treaty enters into force:

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

39. Article 49 of the Treaty on European Union, *Official Journal of the European Union*, C 321 E/5, 29 December 2006.
40. UNTS, Vol 1833, p 3.





# 4. Effect of Treaties

## 4.1 Effect of treaties before entry into force

**[2-38]** A treaty is fully effective only after it has entered into force, and in respect of States that are parties to it. Sometimes, however, a State will signify its intention to be bound by a treaty subject to ratification.[41] A State may also signify its consent to be bound before the treaty has entered into force. A question arises, in these cases, as to whether the treaty produces any legal effect on the State.

Article 18 of the VCLT provides:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

The position at customary international law prior to the VCLT was that the principle of good faith required States, prior to ratification, to refrain from acts 'intended substantially to impair the value of the undertaking as signed'.[42] The VCLT requires a State to refrain from acts that would defeat the treaty's 'object and purpose' once it has signed a treaty subject to ratification or once it has expressed a definitive consent to be bound pending the treaty's entry into force.

A State can escape from its obligation not to defeat the object and purpose of a treaty that it signed subject to ratification by manifesting a clear intention not to ratify the treaty. Politicians and journalists sometimes refer to this as 'un-signing' the treaty. Similarly, if a treaty's entry into force is 'unduly delayed', a State may revoke its consent to be bound before it enters into force. In either case, the State will thereafter be released from its obligation not to perform acts that would defeat the treaty's object and purpose. This will not affect the State's obligation to comply with identical legal requirements based in other treaties to which it is party, in customary law, or in the general principles of law.

41. See **[2-32]**.
42. Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, 9th ed, Longman, New York, 1992, § 612, p 1239.

## 4.2 Effect of treaty after entry into force

**[2-39]** Once a treaty enters into force, it binds the parties thereto pursuant to the general principle of law known as *pacta sunt servanda*.[43] This principle finds expression in Art 26 of the VCLT as follows:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 26 is also reflective of customary international law.[44]

As between the parties, a rule contained in a treaty will prevail over any inconsistent rule of customary international law except rules of the *jus cogens*.[45] To the extent that a treaty-based rule is identical in its content to a customary rule, both rules will apply simultaneously as between the parties to the treaty.[46]

## 4.3 Effect on third States

**[2-40]** As the terms of Art 26 of the VCLT indicate, a treaty is binding 'upon the parties to it'. However, it is exceptionally possible for parties to a treaty to confer rights, or impose obligations, on States that are not parties to the treaty. Article 34 of the VCLT provides:

> A treaty does not create either obligations or rights for a third State without its consent.

**[2-41]** The consent of a State is, therefore, necessary to establish that a treaty to which it is not a party has created rights or obligations for that State. In addition to the third State's consent, it is also necessary to establish that the States parties to the treaty actually intended to create rights or obligations for the third State.

**[2-42]** The rule for establishing the consent of a State to be bound by an obligation imposed by a treaty to which it is not a party is strict. Article 35 of the VCLT provides:

> An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the State expressly accepts that obligation in writing.

It is not possible for a third State to assume a binding obligation under a treaty by acquiescence, oral consent or implication from conduct. An obligation that has arisen for a third State under Art 35 of the VCLT may

43. See **[1-88]**.
44. *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Rep (2010) 29, at [145].
45. See **[2-106]–[2-110]**.
46. See **[1-154]**.





be revoked or modified only with the consent of the treaty's parties and of the third State, unless they have all agreed otherwise.[47]

**[2-43]** It is comparatively easy to establish the consent of a State to accept the conferral of a right by a treaty to which it is not a party. The third State's consent will normally be presumed. Article 36 of the VCLT provides:

> 1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
> 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

The third State's consent will not be presumed where the contrary is indicated — that is, where the third State has expressly, or by implication, rejected the conferral of the right. Nor will it be presumed where the treaty itself requires the third State to perform an act signifying its acceptance of the conferred right; in that case, the third State will need to comply with the treaty's requirements in order for the right to be effectively conferred.

A right that has arisen for a third State under Art 36 of the VCLT may not be revoked or modified by subsequent agreement of the treaty's parties if it can be shown that the parties' original intention in conferring the right was that revocation or modification could occur only with the consent of the third State.[48]

## 4.4 Effect of national law on treaty obligations

**[2-44]** On the plane of international law, a State party to a treaty may not invoke provisions of its internal law as justification for its failure to perform a treaty.[49] Accordingly, a national government may not plead that its State's failure to comply with a treaty is justified by an obstacle in national constitutional law, such as the constitutional inability of the executive branch to control the activities of the legislature, the judiciary or semi-sovereign federal units within the State. The obligation imposed by international law on the State as a whole, including all its official organs and constituent components, is to find the means to comply with its treaty obligations. This rule is subject to the operation of Art 46 of the VCLT on 'internal laws regarding competence to conclude treaties'.[50]

47. VCLT, Art 37(1).
48. ibid, Art 37(2).
49. ibid, Art 27. Cf, Draft Articles on State Responsibility, Art 3; see **[5-17]**.
50. See **[2-96]**.

## 4.5 Temporal effect of treaties

**[2-45]** Article 28 of the VCLT specifies that treaties do not, prima facie, produce retroactive effects:[51]

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

## 4.6 Territorial effect of treaties

**[2-46]** Article 29 of the VCLT provides as follows:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

A State will sometimes exercise its authority in respect of territories for whose international affairs it is responsible (for example, colonial possessions and dependent territories), or which are under the State's effective control (for example, by military occupation). In such cases, a question arises as to whether a treaty to which the State is a party binds the State in respect of those territories.

It is common practice for States exercising these types of authority to specify in the treaty's text, or by reservation or declaration when expressing their consent to be bound, the extent to which the treaty applies to such territories. A provision of this kind is usually referred to as a 'territorial clause'. Where there is no territorial clause, and if the parties' intention cannot be otherwise established (for example, by reference to the *travaux préparatoires*),[52] the ILC's Fourth Special Rapporteur on the law of treaties expressed the opinion that 'the general understanding today clearly is that … a treaty is presumed to apply to all territories for which the contracting States are internationally responsible'.[53] The 1966 International Covenant

51. Cf, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* ICJ Rep (2015) 3 February 2015 at [95] (jurisdiction to determine a dispute under the Genocide Convention could not extend to conduct that occurred prior to the Convention's entry into force for the respondent State); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Judgment, ICJ Rep (2012) 422 (obligation under the Torture Convention to refer to prosecuting authorities persons suspected of committing acts of torture, binding only in respect of such acts occurring after the Convention entered into force for the respondent State).
52. See **[2-82]**.
53. *Yearbook of the International Law Commission*, 1964, Vol II, p 189.





on Civil and Political Rights (ICCPR)[54] applies 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', such as jurisdiction pursuant to military occupation,[55] and the 1989 Convention on the Rights of the Child (CRC)[56] applies to territories under a State party's military occupation.[57]

## 4.7 Effect of inconsistent treaties

**[2-47]** States sometimes enter into new treaty obligations that are inconsistent with existing treaty obligations. In such circumstances, questions arise as to the legal effect of both the earlier and the later treaty obligations.

**[2-48]** Where all the parties to the earlier treaty are the same as the parties to the later, little difficulty is presented; the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[58] In other words, the later treaty overrides inconsistent provisions in the earlier treaty.

**[2-49]** Where only some of the parties to the earlier treaty are parties to the later treaty, then as between those States inter se the later treaty overrides inconsistent provisions in the earlier treaty.[59]

**[2-50]** It may be the case, however, that a State is party to both treaties, but another State is party to only one of them. In these circumstances, legal relations between the two States inter se are governed only by the treaty to which they are both parties.[60] No effect is given to the later treaty if both States are not parties to it.

**[2-51]** Were a State to enter into mutually exclusive treaty obligations with two different States (for instance, by concluding separate treaties with both of them, promising to extend to each of them the same exclusive right), then the promising State will incur responsibility for breach of treaty to whichever of the other States in respect of which it chooses not to honour the treaty obligation.[61] For example, State A might conclude a treaty with State B under

54. UNTS, Vol 999, p 171 (entered into force 23 March 1976).
55. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, ICJ Rep (2004) 136 at [111].
56. UNTS, Vol 1577, p 3 (entered into force 2 September 1990).
57. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, ICJ Rep (2004) 136 at [113].
58. VCLT, Art 30(3).
59. ibid, Art 30(4)(a).
60. ibid, Art 30(4)(b).
61. ibid, Art 30(5).

which companies incorporated in State B are given exclusive rights to exploit certain mineral resources in State A's territory. Subsequently, State A concludes a treaty with State C extending the same exclusive rights to companies incorporated in State C. Both treaties cannot be honoured, and State A decides to honour the treaty with State C. In these circumstances, State B will have a claim for breach of treaty against State A, notwithstanding that the treaty between State A and State C was concluded later in time. Similarly, were State A to permit exploitation of its mineral resources to companies incorporated in both State B and State C, in violation of the treaty's exclusivity clause, those States would both have a claim for breach of treaty against State A.

## 4.8 Registration of treaties

**[2-52]** Article 80 of the VCLT requires treaties to be transmitted to the UN Secretariat for registration or filing and recording, and for publication. This provision complements Art 102 of the UN Charter, which provides as follows:

> 1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
> 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

Article 102 was included in the UN Charter in order to combat the practice of concluding and maintaining secret treaties. Treaties that do not comply with the registration requirement in Art 102(2) remain legally binding, although they may not be 'invoked' before any organ of the United Nations (UN). Notwithstanding that the ICJ is a principal organ of the United Nations,[62] unregistered treaties and international agreements may be pleaded before the Court, which will give legal effect to them.[63]

# 5. Reservations

## 5.1 Definition and function of reservations

**[2-53]** A reservation is a device sometimes employed by States in the course of expressing their consent to be bound by a treaty. According to Art 2(1)(d) of the VCLT:

62. UN Charter, Art 7.
63. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* ICJ Rep (1994) 112 at [29].





> 1. For the purposes of the present Convention: …
>
> (d) 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State; …

**[2-54]** Not all unilateral statements made by States at the time of signing, ratifying or acceding to a treaty are reservations. It is not uncommon for States to make declarations concerning their understanding of the treaty's meaning or effect. Where such a declaration is not intended to exclude or modify the legal effect of any provisions of the treaty, it is not a reservation. These sorts of statements are usually referred to as 'interpretative declarations', and are not intended to signify that the declaring State's consent to be bound is contingent upon other States accepting the interpretation.

Sometimes, however, a unilateral statement in the form of an interpretative declaration is made with the intention of signifying that the declaring State's consent to be bound is contingent upon other States accepting the interpretation of the treaty contained in the statement. Where this occurs, the statement is a reservation, whatever the name formally attached to it by the State issuing the statement.[64]

**[2-55]** Reservations provide a mechanism by which a State can tailor the terms of a treaty, the text of which has already been adopted, to its own will. A State may wish to become party to a treaty, but only on condition that a small number of its provisions are excluded or modified in the treaty's application to that State. Reservations are employed almost exclusively in relation to multilateral treaties, though reservations to bilateral treaties have been made on occasion.

**[2-56]** The more common practice in relation to bilateral treaties is that a proposal to modify or amend its terms is taken as a proposal to amend the final text, which proposal is considered as part of the treaty's negotiation prior to signature. An attempted reservation to a bilateral treaty might occur where a State's signature is expressed to be subject to ratification, and ratification of the treaty is then accompanied by a reservation.

In such a case, the traditional position was that a ratification could produce legal effects only if the accompanying reservation was accepted by the other State; otherwise, the treaty would not enter into force.

64. *Belilos v Switzerland* [1988] Ser A No 132; [1988] ECHR 4; (1988) 10 EHRR 466; 88 ILR 635; IHRL 76 at [49].

## 5.2 From custom to VCLT

**[2-57]** The early modern law of reservations with respect to multilateral treaties, which prevailed almost unchallenged until the 1930s, was very similar. A State could not make a reservation to a treaty unless the treaty permitted reservations and all other States that had already consented to be bound accepted it.

This amounted to a veto on reservations, and on the participation in the treaty of States that wished to make a reservation. It was this approach that prevailed in multilateral treaties prepared under League of Nations auspices.

**[2-58]** Multilateral treaties are normally proposed in order to effect either a widespread or a universal change in the law relating to some aspect of international relations, or to codify and clarify existing customary law. Not infrequently, both purposes are pursued by different provisions of the same multilateral treaty. In any case, there will always be a tension between the need to maintain the integrity of the treaty's text and securing the most widespread adherence by States. Under the early modern law of reservations, priority was given to maintaining the integrity of treaty texts, at the expense of maximising the number of participating States.

**[2-59]** In the 1930s, there began a shift away from text integrity and towards encouraging widespread adherence. Treaties concluded under the aegis of the Pan-American Union adopted a more flexible policy to reservations by which a reserving State could adhere to a treaty, but no treaty relationship would be established with any other State that objected to the reservation. Accordingly, it was possible for two States parties to the same multilateral treaty not to have any legal rights and obligations vis-à-vis each other under that treaty. The rights and obligations between the reserving State and other States that had not objected would be governed on each side by the treaty as modified by the reservation; both the accepting State and the reserving State would be entitled to invoke the reservation in their relations inter se. Multilateral treaties were, in effect, regarded as creating a potentially complex network of bilateral relationships. This encouraged a wider participation in multilateral treaties by States, but at the expense of creating a non-uniform legal regime among the participants.

**[2-60]** By 1951, the move towards the universalism of multilateral treaties, and away from text integrity, had gathered momentum.





In the ***Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*** **advisory opinion**,[65] some States had made reservations to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[66] No provision for reservations was made in the Convention's text. The UN General Assembly requested the ICJ to furnish an advisory opinion in answer to the following questions:[67]

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

(a) The parties which object to the reservation?
(b) Those who accept it?

In answer to the first question, the Court said:

> It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any 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

65. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* advisory opinion, ICJ Rep (1951) 15.
66. UNTS, Vol 78, p 277.
67. ICJ Rep (1951) 15 at 16.

circumstances as apply under the 1970 Hague Convention.[53] It has more than 185 parties, including China (which accepts the Convention's application to Hong Kong).

## 5.7 Marine hijacking and sabotage

**[6-38]** Hijacking and sabotage of non-military ships are governed by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,[54] which substantially transposes to civil navigation the regime applicable to civil aviation.[55] The Convention has more than 155 parties, including China (which accepts the Convention's application to Hong Kong).

A materially identical regime is also adopted in relation to certain fixed platforms under the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.[56] The Protocol has more than 140 parties, including China (which accepts the Convention's application to Hong Kong).

## 5.8 Hostage-taking

**[6-39]** The taking of hostages is regulated under international law primarily by the 1979 International Convention against the Taking of Hostages,[57] which provides:

**Article 1**

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ('hostage-taking') within the meaning of this Convention.
2. Any person who:
   (a) attempts to commit an act of hostage-taking, or
   (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

Where a hostage-taker is present in the territory of a State, regardless of where the hostage-taking occurred or the nationality of any person

53. Articles 5(1)(c) and 5(2).
54. UNTS, vol 1678, p 201.
55. See especially Arts 3 and 6.
56. UNTS, vol 1678, p 304. See especially Arts 2 and 3.
57. UNTS, vol 1316, p 205.





involved, the State must either exercise its enforcement jurisdiction over the offence or extradite the offender to the State on whose territory the offence occurred, or whose nationality the offender or a victim possessed.[58] The Convention has more than 165 parties, including China (which accepts the Convention's application to Hong Kong).

## 5.9 Terrorist bombing and financing

**[6-40]** Certain terrorist bombings are also subject to universal jurisdiction under the terms of the 1977 International Convention for the Suppression of Terrorist Bombings,[59] which defines the offence as follows:

**Article 2**

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
   (a) With the intent to cause death or serious bodily injury; or
   (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.
2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.
3. Any person also commits an offence if that person:
   (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or
   (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or
   (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

Where an offender is present in the territory of a State, regardless of where the offence occurred or the nationality of any person involved, the State must either exercise its enforcement jurisdiction over the offence or extradite the offender to the State on whose territory it occurred, or whose nationality the offender or a victim possessed, or against whose government

58. Article 5(2).
59. UNTS, vol 2149, p 284.

facilities the offence was committed, or against whom the terrorists' demands were directed.[60] The Convention has more than 160 parties, including China (which accepts the Convention's application to Hong Kong).

**[6-41]** A similar regime of universal jurisdiction is established under the 1999 International Convention for the Suppression of the Financing of Terrorism,[61] by which it is an offence to provide or collect funds with the intention, or in the knowledge, that they are to be used in order to carry out a wide range of specified terrorist activities.[62] The Convention has more than 170 parties, including China (which accepts the Convention's application to Hong Kong).

**[6-42]** Both the 1977 Terrorist Financing Convention[63] and the 1999 Bombing Convention[64] include jurisdiction clauses worded in permissive terms authorising a State to establish extraterritorial jurisdiction. Both conventions authorise the establishment of jurisdiction where '[t]he offence is committed on board an aircraft which is operated by the Government of that State'.

## 5.10 Torture

**[6-43]** Universal jurisdiction over acts of torture is provided for under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[65] Torture is defined in the following terms:

> **Article 1**
>
> 1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Where a torturer is present in the territory of a State, regardless of where the act of torture occurred or the nationality of any person involved, the State must either exercise its enforcement jurisdiction over the offence or extradite the offender to the State on whose territory the offence occurred, or

60. Article 6(4).
61. UNTS, vol 2178, p 197.
62. Articles 2 and 7.
63. Article 7(2).
64. Article 6(2).
65. UNTS, vol 1465, p 85.





whose nationality the offender or a victim possessed.[66] The territorial State's choice is, however, circumscribed by the obligation to avoid impunity. Its primary duty is to prosecute the offender,[67] and extradition is merely a possible alternative. According to the International Court of Justice:

> [I]f the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.[68]

The Convention has more than 145 parties, including China (which accepts the Convention's application to Hong Kong).

## 5.11 Violence against protected persons

**[6-44]** Certain acts committed against the persons, premises or means of transport of Heads of State, Heads of Government and Foreign Ministers while they are abroad, or members of their accompanying families, will give rise to an obligation on any State that has custody of the offender to either prosecute the offender or extradite the offender to the victim's State. The prohibited acts include murder, kidnapping or other attacks, and any attempt or threat to commit such acts. Identical protection extends to any representative or official of a State or public international organisation who is legally entitled to special protection from any attack on his or her person, freedom or dignity.[69]

# 6. Sovereign Immunity

**[6-45]** International law postulates that all States are equal in their sovereignty. Indeed, Art 2(1) of the UN Charter provides that the organisation 'is based on the principle of the sovereign equality of all its Members'. UN General Assembly Resolution 2625 (XXV) also emphasises that all States

66. Articles 5(2) and 7(1).
67. *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) ICJ Rep (2012) 422 at [94].
68. ibid, at [95].
69. 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, UNTS, vol 1035, p 167, which has more than 170 parties, including China.

enjoy sovereign equality, that they have equal rights and duties, and that all States are required to respect the personality of other States.

As a corollary of this, international law contains a general principle that no State may be made subject to the jurisdiction of any other State against its will. This principle is a specific manifestation of the more general legal principle *par in parem non habet imperium* — one cannot exercise authority over one's equal. Sovereign immunity (or State immunity) is that body of rules and principles under international law that determines the extent to which a State is entitled to claim exemption from another State's jurisdiction.[70]

**[6-46]** The classical postulate of sovereign immunity under the common law was that neither a State, nor any of its emanations, nor a State's property could ever be subjected to the jurisdiction of a foreign State's courts unless the State consented. Thus, sovereign immunity conferred on a State absolute freedom from the jurisdiction of any other State.

The classical position was forcefully articulated by John Marshall (1755–1835), Chief Justice of the United States Supreme Court, in *Schooner Exchange v McFaddon*:[71]

> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.
>
> This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

**[6-47]** The broad scope of classical sovereign immunity is starkly illustrated by a series of English cases. In *De Haber v Queen of Portugal*, Lord Campbell observed that 'to cite a foreign potentate in a municipal court … is contrary to the law of nations and an insult which he is entitled to resent'.[72]

70. *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* ICJ Rep (2012) 99 at [56]–[57].
71. *Schooner Exchange v McFaddon* (1812) 7 Cranch 116 at 137.
72. *De Haber v Queen of Portugal* (1851) 17 QB 196 at 207.





The Court of Appeal in *Parlement Belge* considered its jurisdiction to hear proceedings against a mail vessel owned by the King of Belgium and said that every State:[73]

> … declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state, which is destined to public use … even though such sovereign, ambassador or property be within its jurisdiction.

In *Porto Alexandre*,[74] the Court of Appeal held that Portugal was entitled to claim sovereign immunity for a State-owned vessel, notwithstanding that it was engaged in purely commercial activity. In *Krajina v Tass Agency*,[75] sovereign immunity was recognised by the Court of Appeal as applying to a news agency that was an organ of the Soviet government. Similarly, in *Baccus SRL v Servicio Nacional del Trigo*,[76] the defendant was found to be an organ of the Spanish State, and therefore entitled to sovereign immunity, notwithstanding that it possessed a separate legal personality under Spanish law.

**[6-48]** During the course of the 20th century, and in response to the increasing involvement by many States in activities of an essentially commercial character, States began moving away from the absolute theory of sovereign immunity. This movement began in States possessing a civil law system, before spreading to common law States in the latter half of the century. The effect of this change was to extend sovereign immunity to foreign States only to the extent that their activities or property in question were for a governmental or public purpose *(jure imperii)*, and not for some commercial or other essentially private purpose *(jure gestionis)*. This move towards qualified sovereign immunity in common law jurisdictions received a statutory fillip with the passage of legislation such as the United States Foreign Sovereign Immunities Act 1976, the British State Immunity Act 1978, and the Australian Foreign States Immunities Act 1985 (Cth).

States controlled by communist dictatorships continued to adhere to an absolute conception of sovereign immunity. This currently remains true, for instance, of China; the absolute doctrine of sovereign immunity has applied to Hong Kong since the resumption of Chinese sovereignty over the territory in 1997.[77]

73. *Parlement Belge* (1880) PD 197 at 215.
74. *Porto Alexandre* [1920] P 30.
75. *Krajina v Tass Agency* [1949] 2 All ER 274.
76. *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438.
77. *Democratic Republic of the Congo v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95; [2011] 4 HKC 151 (Hong Kong Court of Final Appeal); China is, however, a signatory to the United Nations Convention on Jurisdictional Immunities

**[6-49]** The qualified variant of sovereign immunity found expression in the 1972 European Convention on State Immunity,[78] which influenced the drafting of domestic legislation in Europe and beyond.

In the meantime, the UN General Assembly decided in 1977 to include the topic of sovereign immunity in the work program of the International Law Commission (ILC).

At the 43rd session of the ILC in 1991, the Draft Articles on Jurisdictional Immunities of States and Their Property were presented to the UN General Assembly. The Draft Articles drew heavily on State practice and the 1972 European Convention. The UN Convention on Jurisdictional Immunities of States and Their Property[79] is closely based on the Draft Articles and was opened for signature on 17 January 2005. This Convention will not enter into force until there are 30 parties. China is a signatory but has not yet ratified.

It is likely that the restrictive variant of sovereign immunity is now part of customary international law.[80]

**[6-50]** The Draft Articles and the Convention commence with a presumption of immunity for States and their property from the jurisdiction of other States' courts.[81] A State will be taken to have waived its immunity if it commences the proceedings, if it counter-claims, or if it consented to the jurisdiction by international agreement, written contract or a communication to the court.[82] A proceeding shall be considered as having been commenced against a foreign State if either the State is named as a party to the proceeding, or the proceeding 'in effect seeks to affect the property, rights, interests or activities' of the foreign State.[83]

**[6-51]** The most significant provisions of the Draft Articles and the Convention deal with the circumstances in which sovereign immunity may

of States and Their Property (not in force), which adopts and codifies principles of restrictive or qualified immunity.

78. UNTS, vol 1495, p 182; Council of Europe Treaty Series, No 74.
79. General Assembly Resolution 59/38 (2004).
80. *FG Hemisphere Associates LLC v Democratic Republic of the Congo* [2010] 2 HKLRD 66 at 101–2 (Hong Kong Court of Appeal) (appeal allowed on different grounds: *Democratic Republic of the Congo v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95; [2011] 4 HKC 151 (Hong Kong Court of Final Appeal)). The ICJ has, however, recently elected to keep the question open: *Jurisdictional Immunities of the State* (*Germany v Italy: Greece Intervening*), Judgment, ICJ Rep (2012) 99 at [60].
81. Draft Art 5; United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 5.
82. ibid, Draft Arts 7–9; United Nations Convention on Jurisdictional Immunities of States and Their Property, Arts 7–9.
83. ibid, Draft Art 6; United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 6.





not be claimed. It is here that the Draft Articles and the Convention seek to codify the exclusion of acts and property *jure gestionis* from the scope of sovereign immunity.

**[6-52]** States are also not entitled to immunity in respect of disputes arising from 'commercial transactions'.[84] These are defined as any commercial contract or transaction for the sale of goods or supply of services, any contract for a loan or other transaction of a financial nature, or any other contract or transaction of a commercial, industrial, trading or professional nature, but not including employment contracts.[85] Nor may States invoke sovereign immunity where the commercial transaction involved a State enterprise or other entity established by the State that has an independent legal personality.[86] The immunity does, however, extend to commercial transactions between States.[87]

**[6-53]** States are not entitled to immunity from proceedings in respect of contracts of employment for work carried out in the forum State, unless the 'employee has been recruited to perform particular functions in the exercise of governmental authority', or if the employee is a diplomatic agent, consular officer or other person entitled to diplomatic immunity, or if the subject matter of the proceedings is the recruitment, renewal of employment or reinstatement of an individual.[88] As the following case demonstrates, other contracts of employment in the forum State are not protected by sovereign immunity.

> In ***State Immunity in Labour Law Matters***,[89] the Supreme Court of the Czech Republic ruled that Poland's embassy to the Czech Republic was unable to rely on sovereign immunity in respect of a claim by a former embassy driver for wrongful dismissal. It reached this conclusion on the basis, inter alia, of the restrictive theory of sovereign immunity:
>
> > The content of State immunity was previously perceived as absolute. Any connection of a State with the subject-matter of the dispute led to the finding of immunity and consequently an impossibility of conducting a proceeding against the State before a foreign court. However, the dynamic expansion of international relations resulted in the development towards a functional

84. ibid, Draft Art 10(1); United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 10(1).
85. ibid, Draft Art 1(c); United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 1(c).
86. ibid, Draft Art 10(3) (Alternative A); United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 10(3).
87. ibid, Draft Art 10(2); United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 10(3).
88. ibid, United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 11.
89. *State Immunity in Labour Law Matters* (2008) 142 ILR 206.

> conceptualization of this legal relationship. It is beyond doubt that a State enjoys a jurisdictional immunity for itself and for its property before the courts of another State (*par in parem non habet jurisdictionem*). However, the prevailing developing tendencies have crystallized into a conclusion ... that a State cannot invoke its jurisdictional immunity, not only in the cases in which it has explicitly waived it, but also in proceedings concerning its commercial transactions, labour contracts, ownership, possession or use of property, compensation for damage caused to property or persons, industrial or intellectual property, or participation in business companies; that is, substantially in the cases in which the State does not act as the executor of public authority (*acta iure imperii*). In a case where the States act 'as ordinary subjects of civil-law relationships regulated by the rules of international private law' ... it is appropriate, considering the nature of the matter, that the scope of privileges and immunities of the State reflects the fact of a State not acting as the public authority. In the matter under consideration, this means that in a case where a State acts not as a sovereign bearer of public authority, but as a juridical person in matters deriving from individual labour relationships characterized by the legal equality of their participants, the rules of international law justify the conclusion that this juridical person—the foreign State — does not enjoy functional immunity, and that Czech courts have jurisdiction in these matters.[90]

**[6-54]** Immunity is also withheld where the proceedings are for pecuniary compensation for death or injury to the person, or damage to tangible property, caused by an act attributable to the defendant State, and if the author of the act was present in the forum State's territory at the time of the act.[91] Where, however, the death or injury resulted from the activities of a foreign State's armed forces or other State organs in the context of an armed conflict, the foreign State will continue to enjoy sovereign immunity in civil proceedings even if the relevant conduct occurred in the territory of the forum State.[92]

**[6-55]** A State may not invoke immunity where the proceedings relate to the State's interest, rights or obligations concerning immovable property located in the forum State.[93]

**[6-56]** Immunity will not apply where the proceedings relate to an infringement by the State, in the territory of the forum State, of an industrial or intellectual property right.[94]

90 ibid, at 214–15.

91. Draft Art 12; United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 12.
92. *Jurisdictional Immunities of the State* (*Germany v Italy: Greece Intervening*), Judgment, ICJ Rep (2012) 99 at [77]–[78].
93. Draft Art 13; United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 13.
94. Draft Art 14; United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 14.





**[6-57]** A State that owns or operates a ship will not be able to claim sovereign immunity in proceedings relating to the operation of that ship unless, at the time the cause of action arises, it was being used for 'government non-commercial purposes'.[95]

**[6-58]** The law on sovereign immunity is essentially procedural in character.[96] As a result, it 'regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful'.[97]

**[6-59]** An important practical consequence is that the seriousness of the conduct that is the subject of the proceedings, even if it is a violation of the *jus cogens*, does not furnish an exception to sovereign immunity for the State itself.[98] Somewhat different consideration will apply to the sovereign immunity attaching to former heads of State, heads of government and foreign ministers.[99]

**[6-60]** Sovereign immunity extends not only to immunity from curial proceedings, but also to immunity from enforcement against its property. As the ICJ has observed:[100]

> [T]he immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow *ipso facto* that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.

**[6-61]** As with all immunities, sovereign immunity may be waived by the party whose interests the immunity protects. Once sovereign immunity

95. ibid, Draft Art 16; United Nations Convention on Jurisdictional Immunities of States and Their Property, Art 16.
96. *Arrest Warrant of 11 April 2000* (*Congo v Belgium*) ICJ Rep (2002) 3 at [60].
97. *Jurisdictional Immunities of the State* (*Germany v Italy: Greece Intervening*), Judgment, ICJ Rep (2012) 99 at [58]; see also [100].
98. ibid, at [91], [97]; *Armed Activities on the Territory of the Congo* (New Application: 2002) (*Congo v Rwanda*) ICJ Rep (2006) 6 at [64], [125]; semble (albeit without express reference to the *jus cogens*), *Arrest Warrant of 11 April 2000* (*Congo v Belgium*) ICJ Rep (2002) 3 at [58], [78].
99. See **[6-70]–[6-75]**.
100. *Jurisdictional Immunities of the State* (*Germany v Italy: Greece Intervening*), Judgment, ICJ Rep (2012) 99 at [113].

has been waived in a particular matter, it remains effective for the initial proceedings and all subsequent hearings and appeals. A State may not revive its sovereign immunity in relation to a particular matter that has been the subject of waiver. Nor may a State circumvent a waiver of sovereign immunity by arguing that principles of jurisdiction can instead be made to effect the same outcome.

In ***United States of America v Nolan***,[101] Nolan had been a local civilian employee at RSA Hythe, a United States military base in England. In 2006, the United States decided to close the base and Nolan was dismissed from her employment the day before the closure. The United States did not first consult Nolan or her representatives contrary to the requirements of s 118 of the Trade Union and Labour Relations (Consolidation) Act 1992 (UK) ('TULCRA'). Nolan appealed to the Employment Tribunal, which upheld her contention of unlawful failure to consult and made an order for remuneration in her favour. The United States' appeals to the Employment Appeal Tribunal and the Court of Appeal of England and Wales were dismissed. The United States brought a further appeal to the United Kingdom Supreme Court. No reliance was placed by the United States on sovereign immunity, which had already been waived by the United States submission to the jurisdiction of the Employment Tribunal. Rather, it was the United States' contention, inter alia, that it was not subject to the statutory duty to consultation as international law and English law required that domestic legislation be disapplied in cases where the legislation interfered with the *iure imperii* of another State.

> Lord Mance SCJ: ... The appellant did not rely on state immunity when the proceedings were begun. It is common ground that it could successfully have done so. ... As to why there was no plea of state immunity, it was not apparent at the outset that the duty to consult under [TULCRA] s 188 would apply to the closure of a base, rather than the consequences for employees after its closure. ...
>
> ... There is no lack of clarity in the wording of TULCRA. The base at RSA Hythe, the complainants, the contracts of employment and the dismissals for redundancy which were regulated (on the face of it) by TULCRA were and are all within the United Kingdom. I am ready to assume that the base was operated in the United Kingdom for strategic reasons, and it is common ground that the decision to close it was taken in the United States for strategic reasons. The appellant's case is that there should be carved out of TULCRA, or any other relevant legislation, an exception for circumstances in which a foreign state takes a decision or commits an act of a jure imperii nature abroad which would otherwise lead to a person in the United Kingdom having a domestic right and remedy in respect of domestic employment or other domestic activity in the United Kingdom. The submission is far-reaching. It would require substantial re-formulation and expansion of the presumptive principles of construction ... and I am unable to accept it.

101. *United States of America v Nolan* [2015] UKSC 15; [2016] 1 All ER 857; [2015] 3 WLR 1105; [2016] 1 CMLR 42; [2015] ICR 1347.





> The submission would amount, in effect, as Sir Daniel [Sir Daniel Bethlehem, counsel for the United States] recognised, to reading domestic legislation as subject to an exception or as inapplicable, at least prima facie, in relation to a foreign state in any circumstances where the foreign state could rely on a plea of state immunity, to avoid the adjudicative processes of another state in which proceedings had been brought against it. I do not accept that there is any such principle. It would make quite largely otiose the procedures and time for a plea of state immunity. As Hazel Fox CMG QC and Philippa Webb observe in the *Law of State Immunity* (3rd edn, 2013) p 20:
>
> > Jurisdiction and immunity are two separate concepts. Jurisdiction relates to the power of a state to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and exemption from the jurisdiction or competence of the courts and tribunals of a foreign state and is an essential characteristic of a state. Logically the existence of jurisdiction precedes the question of immunity from such jurisdiction but the two are 'inextricably linked' (see Chapter IV).
>
> In Ch IV, p 82, the authors go on further to explain the relationship, in this passage:
>
> > Immunity comports freedom or exemption from territorial jurisdiction. It bars the bringing of proceedings in the courts of the territorial state (the forum state) against another state. It says nothing about the underlying liability which the claimant alleges. Immunity does not confer impunity; the underlying accountability or substantive responsibility for the matters alleged in a claim remain; immunity merely bars the adjudication of that claim in a particular court ...
> >
> > As a matter of logic, the determination of jurisdiction precedes the consideration of immunity.
>
> In its written case ... the appellant put the same point in a way which met with the advocates to the court's assent:
>
> > A state's latitude to assert immunity in the face of a claim is different from the inapplicability of the law, by way of exemption or otherwise, to the impugned conduct of the foreign state in the first place. Immunity operates as a bar to the adjudicative jurisdiction of the courts of the forum state. It does not address the legislative or prescriptive jurisdiction of that state. A claim of immunity thus at some level acknowledges the forum state's legislative competence and the putative application of the domestic law in question to the foreign state but for the assertion of immunity.
>
> Sir Daniel Bethlehem sought to emphasise the importance for a foreign state such as the appellant of recognising in TULCRA an implied exemption for a decision to dismiss for redundancy taken on jure imperii grounds. The appellant would wish to comply with domestic law, and the ability to plead state immunity in any proceedings would not alter the fact that, without such an exemption, it would be and have been in breach of domestic law. That is true, but carried to its logical conclusion it would mean that all legislation should, however clear in scope, be read as inapplicable to a foreign state in

**[10-85]** Second, the Torture Convention requires a State party to establish its jurisdiction over the crime of torture. This obligation arises when the offence is committed in its own territory, when the alleged offender is a national of that State party (thereby requiring jurisdiction on the basis of the active nationality principle), or when the victim was a national of that State 'if that State considers it appropriate' (thereby permitting jurisdiction on the basis of the passive nationality principle).[221] Again, no similar obligation is prescribed for cruel, inhuman or degrading treatment or punishment.

**[10-86]** Third, a State party to the Torture Convention is also under an obligation to extradite an alleged torturer in its territory and under its jurisdiction to the State on whose territory the offence was committed, to the State of the alleged offender's nationality, or to the State of the victim's nationality. Unless the State party chooses one of these options, it must prosecute the offender itself — even if the only connection between the crime and the State is that the alleged offender is in the State's territory and under its jurisdiction.[222] Where a person alleged to have committed the offence of torture is in the territory of a State party, it must 'take him into custody or take other legal measures to ensure his presence' pending an inquiry into the facts and a decision as to whether he should be prosecuted or extradited.[223]

Thus, the Torture Convention establishes, at least for those States party to it and who have adopted any necessary domestic juridical measures giving effect to it,[224] a version of universal jurisdiction for the crime of torture. No such jurisdictional regime is established for cruel, unusual or degrading treatment or punishment.

**[10-87]** Fourth, States parties to the Torture Convention must also 'afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of [torture offences], including the supply of all evidence at their disposal necessary for the proceedings'.[225] No similar obligation is prescribed for cruel, inhuman or degrading treatment or punishment.

**[10-88]** Fifth, States are forbidden to expel, return or extradite a person to any State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.[226] The Torture Convention contains no similar injunction for the lesser forms of proscribed conduct.

221. Ibid, Art 5(1). As to the active and passive personality principles of jurisdiction, see **[6-17]–[6-21]**.
222. Torture Convention, Arts 5(2), 7 and 8.
223. ibid, Art 6.
224. *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147; [1999] 2 WLR 827 (House of Lords). See **[6-73]**.
225. Torture Convention Art 9(1).
226. ibid, Art 3(1). See *Elmi v Australia* (2000) 7 IHRR 603 (CAT).





**[10-89]** Sixth, where the unlawful conduct is sufficiently severe to constitute torture, it is not possible to rely on 'any exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency … as a justification'.[227] Moreover, where the unlawful conduct of an accused person crosses the threshold of torture, an 'order from a superior officer or a public authority may not be invoked as a justification'.[228] Once again, the Torture Convention contains no similar caveat concerning the less severe forms of prohibited conduct.[229]

**[10-90]** Seventh and finally, the Torture Convention establishes a procedure whereby the CAT is empowered to conduct an inquiry when it 'receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party'.[230] No power of inquiry is conferred on the CAT in respect of conduct amounting to cruel, unusual or degrading treatment or punishment not rising to the level of torture.

**[10-91]** Torture as a crime against humanity — that is, torture when committed in the context of a widespread or systematic attack on a civilian population — is dealt with elsewhere.[231]

## 7. Crimes Against Humanity

**[10-92]** Crimes against humanity are international crimes attracting individual responsibility. They may be prosecuted before any international tribunal on which jurisdiction has been conferred by or under a treaty. This includes tribunals established by treaty such as the Nuremberg Tribunal or the ICC. It also includes tribunals, such as the ICTY and the ICTR, established under Ch VII of the UN Charter. They are also customary law obligations of a *jus cogens* character and may be prosecuted by national courts employing jurisdiction based on the universality principle.[232]

227. Torture Convention Art 2(2).
228. ibid, Art 2(3).
229. The major human rights charters provide, however, that States parties may never derogate from the obligation to prevent both torture and the less severe forms of prohibited conduct, even on grounds such as public emergency: ICCPR Art 4(2); ECHR Art 15(2); ACHR Art 27(2).
230. Torture Convention Art 20(1).
231. See **[10-121]–[10-124]**.
232. *Attorney-General of the Government of Israel v Eichmann* (1962) 36 ILR 5 (District Court of Jerusalem and Supreme Court of Israel); *Fédération Nationale des Déportés et Internés Résistants et Patriotes v Barbie* (1983–84) 78 ILR 125 (Court of Cassation, France); *R v Finta (No 3)* [1994] 1 SCR 701; (1994) 104 ILR 284 (Supreme Court of Canada); Malcolm N Shaw, *International Law*, 8th ed, Cambridge University Press, Cambridge, 2017 at 501–3.

## 7.1 Elements of crimes against humanity

**[10-93]** The Charter of the Nuremberg Tribunal was the first multilateral instrument to codify crimes against humanity. These crimes were constituted by specified acts committed in a prescribed context by a particular pool of potential defendants. The acts were murder, extermination, enslavement, deportation and 'other inhumane acts'. The context was the commission of any of the specified acts 'against any civilian population'. Persecutions on political, racial or religious grounds 'in execution of or in connection with' any crime within the Nuremberg Tribunal's jurisdiction also constituted crimes against humanity. The pool of potential defendants comprised 'persons … acting in the interests of the European Axis countries, whether as individuals or as members of organizations'.[233]

**[10-94]** The ICTY had jurisdiction over crimes against humanity where specified acts were committed in the context of 'armed conflict, whether international or internal in character, and directed against any civilian population'. These acts incorporated and expanded upon the list used at Nuremberg: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts.[234] The ICTR had jurisdiction over crimes against humanity where the same acts are committed 'as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'.[235]

**[10-95]** The Rome Statute confers jurisdiction on the ICC for crimes against humanity[236] and builds upon the Charter of the Nuremberg Tribunal and the Statutes of the ICTY and the ICTR by providing as follows:

> **Article 7**
>
> *Crimes Against Humanity*
>
> 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;

233. Charter of the Nuremberg Tribunal Art 6(b).
234. ICTY Statute Art 5. These crimes must also have been committed in the territory of the former Yugoslavia since 1991: ICTY Statute Arts 1 and 8.
235. ICTR Statute Art 3. These crimes must also have been committed by any persons in Rwanda or by Rwandan citizens in States neighbouring Rwanda between January 1991 and December 1994: ICTR Statute Arts 2, 3, 4 and 7.
236. Rome Statute Art 5(b).





> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3,[237] or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
>
> (i) Enforced disappearance of persons;
>
> (j) The crime of apartheid;
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

**[10-96]** As with the definitions of 'crimes against humanity' in the Charter of the Nuremberg Tribunal and in the Statutes of the ICTY and the ICTR, the Rome Statute defines the term by reference to a range of specified acts committed in a prescribed context.

**[10-97]** The specified acts in Art 7 of the Rome Statute are the same as those identified in the text of the ICTY and ICTR Statutes, but with the following express additions: enslavement; forcible transfer of population (that is, 'ethnic cleansing'); severe deprivation of physical liberty in violation of fundamental rules of international law (as distinct from 'imprisonment'); sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity (as distinct from 'rape'); persecution against any identifiable group or collectivity on national, ethnic, cultural, gender or other grounds that are universally recognised as impermissible under international law, in connection with any crime within the jurisdiction of the ICC (as distinct from persecution on 'political, racial or religious grounds'); enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally

237. Rome Statute Art 7(3) provides as follows: 'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.'

causing great suffering, or serious injury to body or to mental or physical health (as distinct from simply 'other inhumane acts').

## 7.2 Prescribed context

**[10-98]** The context required by the Rome Statute for crimes against humanity is that the specified acts must be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. A similar context was also required by the Charter of the Nuremberg Tribunal and by the Statutes of the ICTY[238] and the ICTR. Acts of murder, rape, enslavement, deportation and so on which are not committed as part of a widespread or systematic attack on a civilian population cannot constitute a crime against humanity. There are five general contextual elements to crimes against humanity: '(i) an attack directed against any civilian population, (ii) a State or organisational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack'.[239]

**[10-99]** The context in which the specified acts must be performed in order to constitute crimes against humanity include, according to the ICTR in *Prosecutor v Akayesu,* a requirement that they be committed on grounds discriminating on the basis of nationality, ethnicity, political considerations, race or religion.[240] Although discrimination was required by the terms of the ICTR Statute in order for the ICTR to exercise jurisdiction, it was not required by the ICTY Statute or the Rome Statute except for the specific act of persecution. Rather, the requirement of discrimination in the ICTR Statute is explained by the special circumstances that the Tribunal was established to address. Similarly, the identified pool of potential defendants in the Charter of the Nuremberg Tribunal was a creature of the special circumstances with which the victorious powers were confronted in 1945. Neither discrimination nor an association with National Socialist

238. Although Art 5 of the ICTY Statute does not expressly require a 'widespread and systematic attack', the ICTY has interpreted the provision to mean that a crime against humanity can be committed only where the prescribed acts 'occur on a widespread or systematic basis, … there must be some form of a governmental organizational or group policy to commit these acts and … the perpetrator must know of the context within which his actions are taken': *Prosecutor v Tadić*, IT-94-1-T, (1997) 112 ILR 1 at [644].
239. *Situation in the Republic of Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 at [79]; *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011 at [29].
240. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [578].





Germany or its European allies is required in order to establish crimes against humanity. A nexus to armed conflict was further required by Art 5 of the ICTY Statute (as with the Nuremberg and Tokyo Charters), but this nexus was required by neither the ICTR Statute nor the Rome Statute. Customary international law requires only that the prescribed acts be part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, without any of the additional contextual elements of discrimination or armed conflict.[241]

**[10-100]** As the ICTR indicated in *Akayesu,* the prescribed act must be committed as part of a widespread or systematic attack, and not just 'a random act of violence'.[242] An attack need not, however, involve military force or armed hostilities; it requires merely a 'course of conduct' or a 'campaign or operation' involving the commission of the enumerated acts.[243] There will be an 'attack' when any of the specified violent acts (murder, torture, rape and so on) are committed. An 'attack' can also occur in the form of non-violent 'pressure' to act in a particular way 'if orchestrated on a massive scale or in a systematic manner'.[244] The imposition of a regime of apartheid is given as an example, but other pressured acts compelling a civilian population to act in a way that denies basic human rights would also be covered. An example would be the suppression of religious freedom on a massive scale or in a systematic manner.

**[10-101]** The Rome Statute of the ICC uniquely requires an attack to be 'pursuant to or in furtherance of a State or organizational policy'.[245] This requires the attack to 'follow a regular pattern' or be 'planned, directed or organized'.[246] There need not be an expressly declared or precisely stated policy; an implicit or *de facto* policy will suffice.[247] An organisation exists

241. Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed, CH Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2016 at 164.
242. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [579]; Prosecutor v Bemba, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, at [75].
243. Situation in the Republic of Kenya, ICC-01/09, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, at [80].
244. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [581].
245. Art 7(2)(a).
246. *Prosecutor v Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, at [81].
247. *Prosecutor v Katanga and Ngudjolo*, No ICC-01/04-01/07-717, 30 September 2008, at [396]; *Prosecutor v Bemba*, ICC-01/05-01/08-424, 15 June 2009, at [81].

when a group is capable of performing 'acts which infringe on basic human values', and there is no need for any formal or highly organized group to exist.[248] The relevant considerations for organisation include '(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria'. Non-state entities and private individuals exercising *de facto* power can therefore constitute a group pursuing the proscribed organisational policy.[249]

**[10-102]** The attack will not be 'widespread' unless it is 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'. The main considerations are the geographical scope of the attack and the number of victims.[250] It cannot be 'systematic' unless it is 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources' involving 'some kind of preconceived plan or policy'.[251] This refers to the 'organised nature of the acts of violence and the improbability of their random occurence'.[252] Features such as planning, observable patterns of conduct including continuous commission of crimes, use of resources and united political objectives are relevant factors that demonstrate the required characteristic of organisation.

**[10-103]** The attack must be *either* widespread *or* systematic; it need not be both.[253] An entirely spontaneous unorganised attack probably does not suffice. There needs to be, at a minimum, some active promotion or encouragement of the attack from an organised entity, along with multiple victims or acts committed. According to the Elements of Crimes for Art 7 of the Rome Statute:[254]

248. *Situation in the Republic of Kenya*, No ICC-01/09-19, Decision on the Authorisation of Investigation, 31 March 2010, at [84], [85], [90].
249. ibid, at [93].
250. *Prosecutor v Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, at [83].
251. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [580].
252. Situation in the Republic of Kenya, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, at [96].
253. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [579].
254. Semble, Rome Statute Art 7(2)(a).





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

**[10-104]** The widespread or systematic attack must be directed against civilians, that is, civilians must be the 'primary object' of the attack.[255] The term 'civilian' is not defined in the Rome Statute, but 'comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants'.[256] Indeed, unlike war crimes, there is no requirement for crimes against humanity to have been committed as part of an armed conflict. The perpetrators may indeed be misusing their official powers against their own disarmed and unresisting population (as notoriously occurred during the period of communist rule in Cambodia from 1975 to 1979). Even if there are armed resisters among the civilian population, that does not deprive the population of its civilian status for the purpose of establishing crimes against humanity.[257] The word 'population' implies that crimes against humanity are collective in nature and exclude single random acts, but does not require the entire population of a State, entity or territory to be subject to the attack.[258]

**[10-105]** There must be a nexus between the accused's conduct and the attack ('as *part of* a widespread or systematic attack'). In determining the existence of such a nexus, 'the characteristics, the aims, the nature or consequences of the act' will be considered.[259]

**[10-106]** The Rome Statute of the ICC provides further that the perpetrator must have 'knowledge of the attack'.[260] This constitutes a further *mens rea* element in addition to any specific *mens rea* requirements for each of the underlying acts, which are specified in the Elements of Crimes. The

255. *Prosecutor v Kunarac*, IT-96-23&IT-96-23/1-A, 12 June 2002, at [91].
256. *Prosecutor v Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, at [78].
257. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [582].
258. *Prosecutor v Ruto and others*, No ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, at [164].
259. *Prosecutor v Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, at [84].
260. Art 7; The existence of this knowledge requirement was rejected by the ICTY Appeals Chamber in *Prosecutor v Kunarac*, IT-96-23&23-1, 12 June 2002, at [98].

which is knowledge on the part of the perpetrator that the death of a victim was a probable consequence of his act or omission.[270]

**[10-110]** The law of many domestic jurisdictions regards indifference or reckless indifference to the killed victim's fate as constitutive of murder,[271] and indifference is sufficient to constitute the act of murder as a crime against humanity and as a war crime. Unlike the ICTR, the ICTY did not include recklessness as a component of the *mens rea* of murder as a crime against humanity. The ICTR and ICTY held that the intention to inflict 'severe', 'grievous' or 'serious' bodily harm also met the *mens rea* requirement of murder as a crime against humanity.[272]

**[10-111]** Although the Elements of Crimes are silent on the *mens rea* requirement of murder, intention and knowledge as defined in Art 30 of the Rome Statute are required for murder as a crime against humanity.[273] However, unlike the approach adopted by the ICTY and ICTR, awareness that the act or omission would likely lead to death ('indirect' intent) will likely not suffice as *mens rea* for murder under the Rome Statute, as Art 30 requires the higher threshold of 'virtual certainty'.[274].

## 7.5 Extermination

**[10-112]** In order to constitute the specified act of extermination, the accused must have participated in the killing of at least one named or

270. A footnote in the judgment provides: *Delić* Trial Judgement, at [48]; *Martić* Trial Judgement, at [60]; *Strugar* Trial Judgement, at [235]–[236]; *Stakić* Trial Judgement, at [587]. See also *Stakić* Appeal Judgement, at [236], [239] and [242] discussing the application of *dolus eventualis* as the requisite *mens rea* of murder).
271. For example, Crimes Act 1900 (NSW) s 18(1):
    (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years. (b) Every other punishable homicide shall be taken to be manslaughter.
272. *Prosecutor v Krstić* IT-93-33-T, 2 August 2001, at [485]; *Prosecutor v Bisengimana*, ICTR-00-60-T, 13 April 2006, at [87].
273. *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, No ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, at [423]; *Prosecutor v Bemba*, ICC-01/05-01/08-424, 15 June 2009, at [138].
274. Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed, CH Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2016 at 185; *Prosecutor v Lubanga*, ICC-01/04-01/06-3121-Red, 1 December 2014, at [447] and [449].





described person by an act or omission that was both unlawful and intentional. Although the accused need not personally have committed multiple killings, his or her conduct must have been a participant in the killing of a group of people in an act of mass destruction.[275] The conduct must have 'constituted, or [taken] place as part of, a mass killing of members of a civilian population'.[276] Relevant factors in considering the scale of killings include (i) the time and place of the killings; (ii) the selection of victims and the manner in which they were targeted; (iii) whether the killings were aimed at a collective group rather than the victims individually.[277]

**[10-113]** In *Prosecutor v Krstić*, the ICTY said that in order for 'the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population'.[278]

**[10-114]** In *Prosecutor v Akayesu*,[279] the ICTR defined extermination as a crime against humanity in the following terms:[280]

> The Chamber considers that extermination is a crime against humanity, pursuant to Article 3(c) of the [ICTR] Statute. Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder.
>
> The Chamber defines the essential elements of extermination as the following:
>
> 1. the accused or his subordinate participated in the killing of certain named or described persons;
> 2. the act or omission was unlawful and intentional;
> 3. the unlawful act or omission must be part of a widespread or systematic attack;
> 4. the attack must be against the civilian population;
> 5. the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.

275. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [591]–[592]; Prosecutor v Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, at [96].
276. Elements of Crimes for Art 7(1)(b), Rome Statute.
277. *Prosecutor v Lukić and Lukić*, IT-98-32/1-A, 4 December 2012, at [538].
278. *Prosecutor v Krstić*, IT-98-33-T, 2 August 2001, at [503].
279. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608.
280. ibid, at [591]–[592].

**[10-115]** According to the Rome Statute of the International Criminal Court, extermination may include the 'intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'.

Unlike genocide, it is not necessary that there be an intention to destroy any permanent group of persons — such as a national, ethnic, racial or religious group — in whole or in part. It is only necessary that the victims be part of a civilian population.[281]

Nor is there any requirement that the acts of extermination be directed against civilians. In order to constitute a crime against humanity, the act of extermination must occur in the overall context of an attack against a civilian population; but the extermination itself can be targeted at either civilian or non-civilian individuals[282] (for example, prisoners or persons who are otherwise *hors de combat*).

## 7.6 Enslavement

**[10-116]** The Rome Statute of the International Criminal Court defines 'enslavement' to mean 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.[283] Thus framed, 'enslavement' imports the prohibitions on the slave trade and slavery in the Slavery Convention and the Supplementary Slavery Convention[284] when they are breached in the prescribed context of crimes against humanity.

In ***Prosecutor v Kunarac***,[285] the three accused were members of Bosnian Serb militia forces who, in 1992 and 1993, were engaged in fighting against Bosnian Muslim forces in the area around Foča in southern-eastern Bosnia. Two of the accused each deprived two Muslim women or girls of their freedom and treated them as their property. These two accused were convicted of

281. Rome Statute Art 7(2)(b); *Prosecutor v Krstić*, IT-98-33-T, 2 August 2001, at [499]. But see *Prosecutor v Al Bashir*, ICC-02/05-01/09-94, *Second Decision on the Prosecution's Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, 12 July 2010, at [33].
282. *Prosecutor v Mrkšić*, IT-95-13/1-A, 5 May 2009, at [32] (ICTY); *Prosecutor v Popović*, IT-05-88-A, 30 January 2015, at [569] (ICTY); *Prosecutor v Tolimir*, IT-05-88/2-A, 8 April 2015, at [141]–[142] (ICTY).
283. Rome Statute Art 7(2)(c).
284. See **[10-27]–[10-34]**.
285. *Prosecutor v Kunarac*, IT-96-23-T & IT-96-23/1-T, 22 February 2001.





enslavement as a crime against humanity, contrary to Art 5(c) of the ICTY Statute. The ICTY expounded upon the elements of enslavement:[286]

> ... [T]he Trial Chamber finds that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person.
>
> Thus, the Trial Chamber finds that the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers.
>
> ...
>
> Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited — strict conditions are, however, set for such labour or service. The 'acquisition' or 'disposal' of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.
>
> The Trial Chamber is ... in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.

286. ibid, at [539]–[543].

must have been aware of the factual circumstances that established the gravity of the conduct.[299] Fundamental rules of international law include treaties, customary international human rights, international humanitarian law and general principles of law.[300]

The ICTY has held that in order to constitute 'imprisonment' as a crime against humanity, there must be a deprivation of liberty without due process of law. Imprisonment of civilians will be unlawful where they are 'detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary', or where 'the procedural safeguards required by Art 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified'.[301] This means that the imprisoned person must have his or her detention reconsidered as soon as possible by a court or administrative board. Thereafter, the court or administrative board must give consideration to the case at least twice yearly with a view to a favourable amendment of the initial decision, if circumstances permit.

The UN Commission on Human Rights Working Group on Arbitrary Detention has identified three categories of 'arbitrary deprivation of liberty': (Category I) when it is 'clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)'; (Category II) when the deprivation of liberty results from the exercise of certain rights specified in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (for example, freedom of speech); and (Category III) 'when the total or partial non-observance of the international human rights norms relating to the right of a fair trial … is of such gravity as to give the deprivation of imprisonment an arbitrary character'.[302] The lawfulness of the initial arrest is also a relevant consideration.[303]

## 7.9 Torture

**[10-121]** The ICTR in *Akayesu* adopted verbatim the definition of torture contained in the Torture Convention, qualifying it only by the jurisdictional

299. ibid for Art 7(1)(e), Rome Statute.
300. Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed, CH Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2016 at 202.
301. *Prosecutor v Kordić*, IT-95-14/2-T, 26 February 2001, at [302]–[303].
302. Report of the UN Working Group on Arbitrary Detention, UN Doc E/CN.4/1998/44, 19 December 1997, at [8].
303. *Prosecutor v Ntagerura*, ICTR-99-46-T, 25 February 2004, at [702].





context for crimes against humanity.[304] Subsequently, however, the ICTY took a different approach. In *Prosecutor v Kunarac,* a distinction was drawn between torture as a violation of human rights law as embodied in instruments such as the Torture Convention and torture as a criminal violation of international humanitarian law:[305]

> The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.
>
> … the Trial Chamber holds that, in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows:
>
> (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
>
> (ii) The act or omission must be intentional.
>
> (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.

**[10-122]** The Rome Statute defines 'torture', in its mode as a crime against humanity, to mean 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'.[306] When committed as a crime against humanity, therefore, it is not necessary that torture be committed by a designated person such as a public official. It is enough that the impugned conduct be performed 'upon a person in the custody or under the control of the accused'. Thus, not only public officials but also persons such as members of unofficial militias or insurrectionary forces can be guilty of a crime against humanity when engaged in torture.[307]

**[10-123]** Torture as a crime against humanity differs from the Torture Convention crime also in not requiring a designated purpose, such as obtaining a confession or information. It is enough to establish torture as a crime against humanity that the severe pain or suffering was inflicted

304. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [593]–[595].
305. *Prosecutor v Kunarac*, IT-96-23-T & IT-96-23/1-T, 22 February 2001, at [496]–[497].
306. Rome Statute Art 7(2)(e).
307. *Prosecutor v Kvočka*, IT-95-30/1-T, 2 November 2001, at [139]; *Prosecutor v Kunarac*, No IT-96-23 & IT-96-23/1-A, 12 June 2002, at [148].

to intimidate, coerce or discriminate against the victim. What remains common to torture under the Torture Convention and torture as a crime against humanity is that there must be the intentional infliction of 'severe pain or suffering'. In order to be a crime against humanity, however, the infliction of severe pain or suffering must occur as part of a widespread or systematic attack on a civilian population.

**[10-124]** In defining the offence of torture, the Rome Statute of the ICC requires that the infliction of severe pain and suffering be 'intentional'.[308] As a result, Art 30 of the Rome Statute ('Mental element') does not apply and the prosecution does not need to prove that the accused had knowledge of the severity of the harm inflicted.[309]

## 7.10 Rape and sexual violence

**[10-125]** The Rome Statute includes '[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' among the acts specified to constitute crimes against humanity.[310]

**[10-126]** The ICTR in *Akayesu* defined rape in its mode as a crime against humanity as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[311] The Tribunal also defined 'sexual violence', which it took to be covered by 'rape', to include 'any act of a sexual nature which is committed on a person under circumstances which are coercive'.[312]

**[10-127]** The Elements of Crimes provide detailed guidance on rape and related specified conduct.

'Rape' is constituted by invasion of 'the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body'. An 'invasion' is intended to mean that the proscribed act is 'gender neutral'. The invasion must also be 'committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression

308. Rome Statute Art 7(2)(e).
309. *Prosecutor v Bemba*, ICC-01/05-01/08-42, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, at [194].
310. Rome Statute Art 7(1)(g).
311. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [598]. See also *Prosecutor v Delalić*, IT-96-21-T, 16 November 1998, at [479] (ICTY).
312. *Prosecutor v Akayesu*, ICTR-96-4-T, (1998) 9 IHRR 608 at [598].





or abuse of power … or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent'.[313] The element of 'force' or 'coercion' is satisfied where the victim has not consented to the 'invasion'.[314] It should also be noted that the perpetrator need not engage in the penetration himself or herself, this element is equally satisfied if the perpetrator is penetrated, as long as the invasion of the victim's body results in penetration.[315]

'Sexual slavery' occurs when the perpetrator exercises 'any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'. This list of examples is not exhaustive, but the 'powers attaching to the right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy'.[316] The subjective nature of this deprivation, that is, the victim's perception of the situation and reasonable fear, is also a relevant consideration.[317] The perpetrator must also cause the victim to 'engage in one or more acts of a sexual nature'.[318] Examples of this include domestic servitude or other forced labour involving compulsory sexual activity.[319]

'Enforced prostitution' means causing 'one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent'. There must also be an actual or expected 'pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature'.[320] Enforced prostitution can be either a continuing offence or a separate act.

313. Elements of Crimes for Art 7(1)(g)-1, Rome Statute; Semble, *Prosecutor v Furundžija*, IT-95-17/1-T, 10 December 1998, at [160] (ICTY). Also note that 'threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence': Prosecutor v Katanga, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, at [440].
314. *Prosecutor v Kunarac*, IT-96-23&23-1, 22 Feb 2001, at [440]–[460].
315. *Prosecutor v Katanga*, No ICC-01/04-01/07-3436-tENG, Judgement Pursuant to Article 74 of the Statute, 7 March 2013, at [963].
316. ibid, at [975].
317. ibid, at [977].
318. Elements of Crimes for Art 7(1)(g)-2, Rome Statute.
319. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, at [431].
320. Elements of Crimes for Art 7(1)(g)-3, Rome Statute.

'Forced pregnancy' is defined by the Rome Statute to mean 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.[321] The confinement need not be severe and no specific time frame or use of force is required – all that is required is some form of coercion.[322]

'Enforced sterilization' means the permanent deprivation of 'biological reproductive capacity' that is 'neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent'.[323] Consent obtained by deception is not genuine. The requirement of permanence is controversial since the imposition of non-permanent measures intended to prevent births still violates a wide array of human rights.[324]

'Other sexual violence' occurs when there is 'an act of a sexual nature against one or more persons … by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent'. Although 'an act of a sexual nature' is not expressly defined, it is not limited to a physical invasion of any part of the body. It can include an act, such as forced nudity,[325] that involves no physical contact.[326] The act must also be of a gravity comparable to that of the other acts prohibited by Art 7(1)(g) of the Rome Statute and the perpetrator must have been aware of the factual circumstances that established the gravity of the act.[327]

## 7.11 Persecution

**[10-128]** Certain kinds of persecution are capable of constituting crimes against humanity. The Rome Statute identifies persecution 'against any

321. Rome Statute Art 7(2)(f). The Elements of Crimes cast no additional light on this definition.
322. Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017 at 54.
323. Elements of Crimes for Art 7(1)(g)-5, Rome Statute.
324. Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed, CH Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2016 at 202.
325. The Pre-Trial Chamber of the ICC however refused to include a charge of sexual violence on this ground as the facts in that case were not 'of comparable gravity to other forms of sexual violence set forth in Article 7(1)(g)': *Prosecutor v Bemba*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, at [40].
326. *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, at [688].
327. Elements of Crimes for Art 7(1)(g)-6, Rome Statute.





identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognized as impermissible under international law' committed in connection with any other act specified as constituting a crime against humanity.[328] This does not require the actual existence of any defined groups, but the group or collectivity and their individual members must be subjectively identified and targeted by the perpetrator on the prescribed grounds. In this context, 'persecution' means 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[329]

**[10-129]** The Elements of Crimes indicate that the deprivation of fundamental rights must be 'severe',[330] but otherwise add little to the Rome Statute provisions prohibiting and defining the specified acts.

Persecution as a crime against humanity received attention in the judgment of the ICTY in ***Prosecutor v Kupreškić***.[331] Two of the six accused were members of Bosnian Croat militia forces who, in 1993, participated in an attack on mostly Muslim civilians in the village of Ahmici-Šantici in central Bosnia. More than 100 Muslim civilians were killed and 169 houses belonging to Muslims were burned. All six accused were charged with and convicted of, inter alia, committing persecutions on political, racial or religious grounds contrary to Art 5(h) of the ICTY Statute. The convictions of four of the accused were subsequently set aside on appeal because the supporting evidence was insufficiently reliable. The Trial Chamber made the following observations on the charges of persecution as a crime against humanity:[332]

> **3. The Definition of Persecution**
>
> … [T]he crime of persecution encompasses a wide variety of acts, including, *inter alia*, those of a physical, economic, or judicial nature that violate an individual's basic or fundamental rights. The discrimination must be on one of the listed grounds to constitute persecution. …
>
> … [T]his is a broad definition which could include acts prohibited under other subheadings of Article 5, acts prohibited under other Articles of the Statute, and acts not covered by the Statute. The same approach has been taken in Article 7(2)(g) of the ICC Statute, which states that '[p]ersecution means the intentional and severe deprivation of *fundamental rights* contrary to international law by reason of the identity of the group or collectivity' (emphasis added).
>
> However, this Trial Chamber holds the view that in order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty.

328. Rome Statute Art 7(1)(h).
329. ibid, Art 7(2)(g).
330. Elements of Crimes for Art 7(1)(h), Rome Statute.
331. *Prosecutor v Kupreškić*, IT-95-16-T, 14 January 2000.
332. ibid, at [616]–[631]. Emphasis in original.