CURRENT AFFAIRS

ITLOS delimits maritime boundary in Mauritius v. Maldives

On 28 April 2023, a special chamber of the International Tribunal for the Law of the Sea (the "Special Chamber") issued its merits judgment in the *Dispute concerning delimitation of the maritime boundary in the Indian Ocean* between the Republic of Mauritius ("Mauritius") and the Republic of Maldives (the "Maldives"). Mauritius had instituted proceedings before an arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS")Ruling unanimously, the Special Chamber delimited a single maritime boundary for the exclusive economic zone (the "EEZ") and continental shelf within 200 nautical miles ("nm") between the two States. In particular, Mauritius had failed to establish "a natural prolongation of *its* submerged land territory to the outer edge of *its* continental margin beyond 200 nm".

On 29 March 2023, the United Nations General Assembly (UNGA) adopted a resolution seeking an International Court of Justice (ICJ) advisory opinion on the obligations of States to combat climate change. The resolution was initiated by the Government of Vanuatu and co-sponsored by more than 130 States in accordance with Article 96 of the Charter of the United Nations

International Criminal Court issues arrest warrant to Putin over Ukraine.

About International Criminal Court - Governed by an international treaty called 'The Rome Statute', the ICC is the world's first permanent international criminal court. ○ It investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. ○ Through international criminal justice, ICC aims to hold those responsible for their crimes and to help prevent these crimes from happening again. ○ India is not a party to Rome Statute along with US and China.

Biodiversity beyond national jurisdiction (BBNJ) treaty, also known as Treaty of High seas is a proposed international agreement on conservation and sustainable use of marine biological diversity of High seas. Areas beyond national jurisdiction comprise 95% of ocean and provide invaluable ecological, economic, social, cultural, scientific, and food-security benefits. BBNJ will be another instrument under framework of United Convention on the Law of the Sea (UNCLOS), 1982.

On 4 March 2023, at an inter-governmental conference in the United Nations' headquarters in New York, delegates agreed the text of a legally-binding instrument under the United Nations Convention on the Law of Sea ("UNCLOS") on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the "BBNJ Agreement" or "Treaty"). The BBNJ Agreement marks the

culmination of nearly two decades of preparatory work and is the third implementing agreement under UNCLOS.

The objective of the BBNJ Agreement is "to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term" through "effective implementation" of UNCLOS and "further international cooperation and coordination". Parties to the Treaty can be States or regional economic integration organisations.

The BBNJ Agreement establishes specific mechanisms and processes for activities in the High Seas, as well the seabed, ocean floor and subsoil (the "Area"). The Treaty's provisions cover four main subjects: (i) marine genetic resources, including the fair and equitable sharing of benefits; (ii) measures such as area-based management tools, including marine protected areas; (iii) environmental impact assessments; and (iv) capacity-building and the transfer of marine technology.

The BBNJ Agreement also incorporates a number of "general principles and approaches" for activities in the High Seas and the Area – in particular, the polluter-pays principle, the precautionary principle/approach, an ecosystem approach, and an integrated approach to ocean management. Parties are required to cooperate to achieve the Treaty's objectives, including "through strengthening and enhancing cooperation with and promoting cooperation among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies".

In order to operationalise the BBNJ Agreement, a number of institutions were established, which include: (i) a Conference of the Parties (the "COP"); (ii) a Scientific and Technical Body; (iii) a Secretariat; (iv) an Implementation and Compliance Committee; and (v) a Clearing-House Mechanism, which serves as a centralised platform enabling Parties to access, provide and disseminate information regarding their activities. In the event of "a natural phenomenon or human-caused disaster", the COP "shall take decisions to adopt measures" on an "emergency basis, if necessary".

The dispute resolution provisions of Part XV of UNCLOS apply to the BBNJ Agreement, unless a Party accepts another procedure. However, where a dispute "concerns a matter of a technical nature", the Parties may refer the dispute to "an ad hoc expert panel".

The BBNJ Agreement will enter into force 120 days after the sixtieth instrument of ratification, approval, acceptance or accession.

Purse seine fishing - Supreme Court passes restricted interim order allowing the purse-seine fishing beyond the territorial waters of Tamil Nadu but within the Exclusive Economic Zone with conditions. *Fisherman Care v. Govt of Tamil Nadu*

Security Council: Vision ias Dec 2022

Anti-maritime piracy bill 2019

Dispute panel Of WTO has held that US decision to impose customs duties on certain steel and aluminium products is inconsistent with global trade normal. This ruling was given in the cases brought by China, Norway, Switzerland and Turkey against these duties. This report assumes significance for India also as in 2018 it had approached the WTO against the Us move to impose these duties (Dec 2022)

European Parliament declares Russia a state sponsor of terrorism

The court in Mohammad Salimullah v. UOI 2021 held:

"It is also true that the rights guaranteed under Articles 14 and 21 are available to all persons who may or may not be citizens. But the right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e)" The court is this case rejected the plea to stop deportation of the refugees.

Nov 2022;Turkey launched deadly airstrikes over northernnregions of Syria and Iraq targeting Kurdish groups and citing right to self defence under art 51

Terrorism (also IL) in the 'No money for terror's conference in New Delhi PM Modi obliquely criticised the West by stating that the reaction to a terror attack 'cannot vary based on where it happens' and called for a 'uniform, unified and zero- tolerance' approach

On 22 July 2022, the International Court of Justice (the "**ICJ**" or "**Court**") upheld jurisdiction in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, dismissing all four preliminary objections raised by Myanmar.

On 21 April 2022, the International Court of Justice (the "ICJ" or "Court") issued its merits ruling in Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, brought by Nicaragua against Colombia. The Court upheld most of Nicaragua's claims, ruling that Colombia had violated

Nicaragua's sovereign rights and jurisdiction in Nicaragua's exclusive economic zone ("EEZ"). (Nicaragua v. Colombia)

J Robert Oppenheimer -the man who invented the atom bomb was called testify before the US senate armed services committee and asked if there was any defence against a nuclear weapon. He promptly replied, 'Yes, peace.'

Preamble of UNESCO, 'Wars begin in the minds of men and it is in the minds of men that the defences of peace must be constructed.'

Topic 1: NATURE AND DEFINITION OF INTERNATIONAL LAW

1. *Discuss the various efforts made towards the codification of International Law during the 20th century. [2021 5(a)]*
2. *Do you agree with the view that International law is merely a positive morality? Discuss the nature and scope of International law. [2020]*
3. *"International Law is the vanishing point of Jurisprudence." Explain [2019 5(a)]*
4. *Explain the distinctions between traditional and modern definitions of international law. Critically examine the growing scope and importance of international law in the present context. [2018 5(a)]*
5. *Discuss the constituent elements of an international rule of customary law with the help of cases. [2016 8(a)]*
6. *Discuss the nature and basis of International Law. [2016 5(a)]*
7. *"Today there is a huge shift of the basis of International law though the principle component of International law is represented by binding rules, imposing duties and conferring rights upon the state." Comment critically. 2015 5(a)]*
8. *It is impossible to fix a precise date or period in history to mark the beginning of International Law as it predates recorded history. Critically examine the history, nature, scope and relevance of International Law in Contemporary International Society. [2014 5(a)]*
9. *One extreme view is that International Law is a system without sanctions. However, it is not quite true that there are no forcible means of compelling a state to comply with International Law. Comment and state various sanctions for the observance of International Law. [2011 5(a)]*
10. *"The fundamental principles of International law are passing through a serious crisis and this necessitates its reconstruction." Do you agree with this statement? Give reasons. [2010 5(a)]*
11. *The traditional definitions of International law with its restrictions to the conduct of States inter se, in view of developments during the last six decades cannot stand as a comprehensive description of all the rules now acknowledged to form part of International law. Elaborate with*

examples those developments which are not covered by the exclusive rules governing the conduct of States. [2010 6(a)]

12. *Write a short note on the Sanctions of International Law. [2009 8(a)]*
13. *International Law is defined as the Vanishing point of Jurisprudence (Holland). Examine this viewpoint with reference to the nature of International Law. [2007 5(a)]*
14. *Do you agree with the view that International Law is merely a positive morality? Discuss the nature of International Law. [2006 5(a)]*
15. *"The controversy whether International law is law or not is meaningless because, in fact, it is law and is generally obeyed." Highlight the views of prominent writers about the above statement. [2004 5(a)]*
16. *If we examine the 'opinions' on the definition of international Law, we are inclined to ask; 'What is so international into so-called international Law?'—Analysis. [2002 5(a)]*
17. *"International law has progressed by leaps and bounds; yet the theoretical controversy" about the nature of international law is far from over". Comment. [2001 5(a)]*
18. *International law is a 'weak law'. Do you agree with this statement? Give reasons. [2000 5(a)]*
19. *Write explanatory notes on- The theory of consent as the binding force of international law. [2000 8(b)]*
20. *It is too late to deny the legal character of international law, but in the present state of affairs it is tragically ineffective. Comment in about 200 words. [1999 5(a)]*
21. *What is the basis of obligation in International law? Discuss the respective view points of naturalist and positivist schools. [1999 7(b)]*
22. *International law is the name for the body of customary and treaty rules which are considered legally binding by states in their intercourse with each other". Discuss. [1995 5(a)]*
23. *'Common Consent of the family of nation is the basis of international law'. Discuss. [1992 5(c)]*
24. *Explain the statement that international Law is vanishing point of Jurisprudence. [1988 5(b)]*

Q.1. Discuss the nature and basis of International Law.

Stability with change, solidarity with variety, peace with justice, international law with national independence, these difficult conciliation, it is the task of international law to effect.

- Prof Quincy Wright

Oppenheim: IL is essentially a product of Christian civilisation' Not ture- ancient period eg Diplomatic Agents, Ancient Greece, Rome and India

First time- **Jermy Bentham in 1780** - Body of rules which regulate the relations among the States.

Definition :

Oppenheim: LoN or IL is the name for the **Body of customary and conventional rules** which are considered **legally binding** by **civilised States** in their intercourse with each other.'

Criticism: i. not only **'States'** but also public intl org; ii. use of **civilised** States eg China- 5000 years of culture- oriental status; iii. Individuals and pvt persons, rights and duties eg UDHR

iv. Not only **customary** and conventional rules

v. '**body of rules'** - static and inadequate

Charles G Fenwick: IL may be defined in broad terms as th**e body of general principles and specific rules** which are **binding** upon the members of the **international community** in their **mutual relations**

(Russian view- process of struggle and cooperation- will of the ruling classes; Chinese view: 'legal instrument in the service of foreign policy.'

Is IL Law?

National sov-stigma and contempt

Hobbes, Pufendorf, Austin: no supreme leg and enforcement- mere 'Positive morality.'

Austin- *command of sovereign*

Jeremy, Bentham and Jethro Brown:

1. No superior **political** authority

2. No effective **leg** machinery

3. No **sanction**

4. No **executive** power

5. Lack of **potent judiciary**

Thus, quasi law

Criticism:

Prof Oppenheim: defn of Austin does not cover unwritten o**r customary** law

Hart: Defn closer to **penal statutes,** not other varieties of law

IL is really Law:

Prof Oppenheim: Law is a **body of rules** for human conduct within a **community** which by **common consent** of this community shall be **enforced** by external power.

Sanction not an essential element of law but sanction present

Sanction in IL:Two extreme viewpoints (A) no sanction in IL (B) Even if no sanction, not essential element of law

1. **Chap VII** of UN Charter- SC can take app action

2. Decisions of ICJ binding on parties- **Art 94 of UN** if disobeyed- SC Council

3. **Art 2(4)** of Charter- respect territorial integrity and independence **Art 51-** right of individual and collective self-defence

Other illustrations:

1. Const of ILO- procedure for dealing with complaints

2. **Art 14** of Convention on **Narcotic Drugs 1961-** stoppage of drug imports or exports

3. Art **54-55 Convention on settlement of Investment Disputes-** pecuniary obligations

4. **Acts** by a State in violation of IL may be regarded by other States as invalid and inoperative

eg. *Nambia (South West Africa) case* : SA's presence in Nambia was illegal and UN members under obligation to recognise invalidity of the act

JG Starke 4 arguments:

1. Many communities- system of law- lacked formal leg authority

2. Austin's view true for his time but today law-making treaties and conventions > customary law

3. Authoritative agencies **do not consider** it as 'moral code'

4. UN based on true legality of IL

Oppenheim: 1. Constantly recognised as law- States feel legally and morally obligated; 2. States never deny existence while breaking IL- only try to justify the conduct

Frequent violations do not prove that law does not exist

Other argurments

1. Law cannot be limited to sovereign- **Sir Henry maine-** Historical jurisprudence- in primitive soceity no sovereign law existed

2. Customary treaties

3. Some states (UK and US eg) treat IL as part of their own law eg *Paquete v Habanna* Justice Gray- 'IL is part of our law'

Theory and Reality in IL

Emmanuel Kant's criticism '... this pompous law of nations which is so eloquent in books and silent in the cabinets of diplomats.'

IL aspects of IR are co-mingled with political, strategic, economic, geographical, social and other elements

Main reasons for diff in theory and reality: i. concept of sov eg recog (political)- but no longer indivisible nor unlimited; ii. Relationship bw IL and ML- subject to exceptions

Is IL a mere Positive morality ?

Prof Oppenheim: 'A rule is a rule of morality if by common consent it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by common sent of the community, it will eventually be enforced by external power.

Hart: Reasons for resisting IL as 'morality'

i. If morality, only reproach or praise. But, claims, demands, acknowledgment or rights and obligations under IL

ii. Disputes and claims: precedents, treaties, juristic writings- no mutual right, wrong, good or bad

iii. Like ML, IL is morally quite indifferent- convenient

iv. Obey rules at the cost of certain sacrifices

South-west Africa Cases (Second Phase) : ICJ made it clear- 'can take into acount of moral principles only insofar as these are given in a sufficient expression in legal form.'

Is IL the vanishing point of Juris?

Holland- IL is the vanishing point of juris

Justice VR Krishna Iyer- former member, Indian Law Commission: 'It is a sad truism that IL is still the vanishing point of juris.'

Not correct. Based on the preposition that there are **no sanctions** in IL

Holland- no judge or arbiter- today ICJ (PCIJ)

Art 59 of Statute of ICJ- binding

Art 94 of UN Charter- if fails, recourse of Secy Council eg. Gulf War (1991): Iraq's annexation of Kuwait- UNSC permitted USA to use force, passed political and economic sanctions against Iraw.

Sanctions of other IGOs

However weak enforcement

Does IL comprise Rules of Intl comity?

Intle comity: practices observed between States as a matter of courtesy or convenience.' Eg Canada and America- each other's nationals can enter without passports. But diplomatic agents- IL- Same with India and Nepal

Therefore comity- matter of courtesy or convenience IL- because binding on them.

'Law gets strength from acceptance by society that its rules are binding NOT from its enforceability. *International law is law because states regard it as law. Nothing need be further proved.* '

- Hart

Basis of International Law

There are two main theories in this connection. They are:

1. **Theories as to Law of Nature:** The jurists who adhere to this theory are of the view that international law is part of the law of the nature. Starke has submitted that the international relations were regulated by higher law. While in the beginning, Law of Nature was connected with religion (divine law), the jurists of 16th and 17th centuries secularised the concept of law of nature. Much of the credit for this goes to Grotius. According to him, natural law aws the 'dictate of right reason.' **Vattel, Pufendorf, Christian Thomasius** were other prominent exponents of the law of nature.
   Criticism: Each follower of the law of nature gives it different meanings and use it as a metaphor. HEnce, the actual meaning is very vague and uncertain. Moreover, it is not based on realities and actual practices of the States

   Despite the above criticism, the Law of Nature has greatly influenced the growth of International law. Traces of 'Natural Law' theory exists even today.

Positivism: Positivism is based on law positivum ie law which is in fact as contrasted with law which ought to be. According to the positivists, law enacted by appropriate legislative authority is binding. The positivists base their views on the actual practice of the states. In their view, treaties and customs are the

main sources of International law. **Bunker Shoek** one of the chief exponents of the Positivist school. The concept of the will of the State was first propounded by the German Philosopher **Hegel.** The Italian jurist, **Anzilotti** one of the chief exponents of the Positivist school who put the basis on *pacta sunt servanda* norm.

Criticism: 1. Fails to explain customary international law (esp not based on consent) 2. Concept of will of state is purely metaphorical 3. Need not be based on **consent** of State

Some other theories

Theory of Consent: Anzilotti, Triepel, Oppenheim- criticized by Stark, Brierly, Kelson, Fenwick etc as: i. All states are bound by international law ii. Even against their will iii. Fails to explain the recognition of a new State as wrong to state that by getting recognition, the recognised State has given its consent in respect of international law.

Auto Limitation Theory: IL is binding because they have restricted their powers through the process of auto limitation and agreed to abide by international law. Independence and sovereignty of the states. **Jellinck** is the chief exponent of this theory.
Criticism: will of the State is nothing but the will of the people; auto-limitation is no limitation at all.

Pacta sunt servanda: Anzilotti the binding force of I is based on the supreme fundamental norm or principle known as pacta sunt servanda: agreements entered into by States will be respected and followed by them. Finds mention in **Article 26** of Vienna Convention.
Criticism: not ONLY pacta sunt

Theory of FR: Naturalistic view: prior to the existence of the State , man used to live in the natural State and possessed some fundamental rights. Like man, the State also possessed those rights.
Criticism: i. Rights are meaningless without a legal system ii. Less emphasis on social relations and co-operation and more emphasis on freedoms iii. Rights a product of historical development

True basis of International law: In the modern period, no State can keep itself aloof from the affairs of the world. The positivists have greatly encouraged the realistic outlook in international law. However, no single theory is capable nor has it received general agreement and sanctions.

New Trends regarding basis: Since the beginning of modern IL, consent has been the basis of obligation of IL. The unanimity rule was the prevailing rule for every conference and treaty. Though the unanimity rule still continued, the UN Charter introduced majority rule in all of its organs. General Assembly started legislative activities and passed a number of resolutions which were considered binding or had legal

implications. A unique feature was that international law was found not only in law making conferences but also in law creating conferences such as those of UNCTAD, GATT, IMB, OECD, OPEC etc. One of the most important changes that has taken place is that many decisions are being adopted by consensus. The basis of obligation in international law is now changing from sovereignty oriented consent to community oriented consensus.

Q.2. "The fundamental principles of International law are passing through a serious crisis and this necessitates its reconstruction." Do you agree with this statement? Give reasons.

Change is the law of nature. As pointed out by **Roscoe Pound,** 'Law must be stable, and yet it cannot stand still.' The problem of change, flexibility and adaptability is much more acute and urgent in the international field.

1. **Traditional IL and New IL:** Changes- Spirit of UN Charter, individual, general principles of law not just customary and conventional rules, changing definitions
2. Communist Challenge: represented by Soviet Union and China: Soviet regards treaty or agreement as the only appropriate method of effecting changes in international law, and considers customs as inadequate and insignificant. Communist China has been a staunch supporter of the concept of 'unequal treaties' ie. it depends upon the State character, economic strength, adn substance of correlation
3. **Challenge of Nuclear Weapons:** eg CTBT not ratified by China, DPRK, Egypt, India, Israel, Pakistan and US. Also Treaty on Non-Proliferation of Nuclear Weapons 1970- four not yet parties ie India, Israel, Pakistan and North Korea.
4. **Scientific and Technological** Revolution
5. Dynamism in **Environmental Law:** Depletion of ozone layer, global warming etc. From UNFCC 1992 to Kyoto Treaty 2005, to Cop26
6. Challenge posed by **Terrorism:** No standard definition, no unity in respect of its elimination or destruction. Eg some countries like the US have attacked and bombarded selected places in Syria and Iraq but its approach has been selective in nature.
7. Emergence of a large number of **new States:** It has made 'Eurocentrism' as anachronistic in thinking.

<u>Need for Universal International Law:</u> In order to cope with the manifold changes with accelerating rhythm, the need to evolve a 'Universal International law' a relatively new phase, the insistence on a common set of values as a pre-condition for a viable legal order.

The term 'transnational law' has been described as including 'all law which regulates actions or events that transcends national frontier.' Some treaties that have received almost universal membership are UN Charter, UN Convention on Climate Change, WHO, FAO etc.

Dr. Quincy Wright has rightly pointed out that the foundations already exist in the formal acceptance of the states of the purposes, principles, organs and procedure of the UN. The challenge is to build on these foundations.

As put forward by **Jenks,** 'The whole future of man depends on his success in three quests: the quest for world peace, the quest for social justice, and the quest for personal freedom. These quests cannot succeed unless we develop a common law of mankind in an organised world community.'

Q. It is impossible to fix a precise date or period in history to mark the beginning of International law as it predates recorded history. Critically examine the history, nature, scope and relevance of IL in contemporary international society.

The term was coined by the English philosopher Jeremy Bentham (1748–1832). The essential structure of international law was mapped out during the European Renaissance, though its origins lay deep in history and can be traced to cooperative agreements between peoples in the ancient Middle East. Among the earliest of these agreements were a treaty between the rulers of Lagash and Umma (in the area of Mesopotamia) in approximately 2100 BCE The long and rich cultural traditions of ancient Israel, the Indian subcontinent, and China were also vital in the development of international law. In addition, basic notions of governance, of political relations, and of the interaction of independent units provided by ancient Greek political philosophy and the relations between the Greek city-states constituted important sources for the evolution of the international legal system.

Many of the concepts that today underpin the international legal order were established during the Roman Empire. The *jus gentium* (Latin: "law of nations"), for example, was invented by the Romans to govern the status of foreigners and the relations between foreigners and Roman citizens. In accord with the Greek concept of natural law, which they adopted, the Romans conceived of the *jus gentium* as having universal application. In the Middle Ages, the concept of natural law, infused with religious principles through the writings of the Jewish philosopher Moses Maimonides (1135–1204) and the theologian St. Thomas Aquinas (1224/25–1274), became the intellectual foundation of the new discipline of the law of nations, regarded as that part of natural law that applied to the relations between sovereign state

SOURCES

1. *"The substance of customary law must be looked into primarily in actual practice and 'opinio juris' of the States." In the light of the above statement and by referring to case law, explain the*

interplay between objective and subjective elements in acceptance of a particular custom as a source of international law. [2013 6(a)]

2. *It is often said that customary international law is easier to apply than to define. What are the inherent problems in defining 'custom' and how can a custom be considered as a source of international Law? [2012 5(a)]*
3. *"It is difficult to maintain the distinction between formal and material sources taking into account that material sources consist simply of quasi constitutional principles of inevitable but unhelpful generality. What matters is the variety of material sources, the all-important evidence of the existence of consensus among States concerning particular rules of practice." Critically examine the various sources of International Law in the development of Modern international Law, with the help of relevant case law. [2008 5(a)]*
4. *Discuss the importance of International Customs as a source of International Law. When does a usage crystallize into a custom ? [2007 6(a)]*
5. *"The term 'general principle of law recognised by civilized nations' is very wide and vague". Comment in the context of Article 38 (I) (c) of the Statute of the ICJ. [2003 5(c)]*
6. *Highlight the significance of "Judicial decisions" as a source of international law. [2001 5(c)]*
7. *"Before a usage may be considered as amounting to a customary rule of international law, the material and psychological aspects involved in the formation of the customary rule must be established". Discuss. [1997 5(a)]*
8. *A provision of treaty may sometimes generate a rule of customary international law. Discuss. [1996 5(a)]*
9. *Write short notes on- Nicaragua Vs U.S.A. - Case concerning military and para-military activities in and around Nicaragua-1986 C.J. [1996 8(c)]*
10. *".... Custom and treaties are the two principal sources of international law. " Discuss. [1994 5(a)]*
11. *"Decisions of courts and tribunals are a subsidiary and indirect source of international law" discuss this statement and explain how far decisions of judicial institutions lead to the formulation of the rules of international law. [1993 5(a)]*
12. *Examine the requirements for establishing a rule of Customary International Law. Assess how far the "Resolutions" of and ' Declaration of Principles by the General Assembly of the UNO have been sources of international Law. [1989 6(a)]*

Q1. Discuss the constituent elements of an international rule of customary law with the help of cases.

According to **Oppenheim,** international rule of customary law 'is the **oldest and the original** source, of international as well as of law in general.' **Article 38(b)** of the Statute of International Court of Justice recognises 'International Custom' as evidence of general practice accepted as law as one of the sources of international law.

The words custom and usage are often used as synonyms but that is not true. Usage is the early stage of custom. As pointed out by Starke, where custom begins, usage ends. Usage is an international habit which has not yet received the force of law.

Constituent Elements:

1. **Long Duration:** This is particularly true of a custom in Municipal Law. But this is not necessary for an international custom. Emphasis is not given on a practice being repeated for a long duration. What is more important is the practice of States accepting the practice concerned as law. In the field of international law, customs have emerged in a short duration, for example, customs relating to sovereignty over air space and continental shelf.
2. **Uniformity and consistency:** In the *Asylum case,* the ICJ observed that the rule invoked should be 'in accordance with a constant and uniform usage practised by the States in question.' In the *case concerning Military and Paramilitary Activities in and against Nicaragua,* the ICJ observed: 'it is not to be expected that the application of the rules in question should have been perfect. The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. The Court deems it sufficient that the conduct of states should in general, be consistent with such rules.
3. **Generality of practice:** Although universality of practice is not necessary, the practice should have been generally observed or repeated by numerous states
4. **Opinio juris et necessitatis:** According to Article 38, international custom should be the evidence of general practice 'accepted as law'. In the *North Sea Continental Shelf* case, the World Court observed that State practice should have occurred in such a way as to show a general recognition that the rule of law or legal obligation is involved. Thus, customary practice, even when it is general and consistent, is not customary unless opinio juris is present. two conditions must be fulfilled. "Not only must the acts [of State practice] concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be **evidence of a belief** that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation" (North Sea Continental Shelf, Judgment)

The Court's approach in the North Sea Continental Shelf Judgment differs from its previous approach in three critical respects.

First, the Court **rejected** the strong emphasis that the old approach placed on **repeated usages** in determining the existence of a customary international law rule. On the contrary, here the Court emphasized the importance of **opinio juris, that is, the legal conviction** that the act concerned is prompted by a sense of legal duty.

. Secondly, the Court clarified that State practice is not only composed of the usages of States, but may also include th**e rules established in multilateral conventions, as c*onsuetudo scripta.*** Unlike the

approach it took in the previously mentioned Asylum case, the Court drew a clear distinction between consent to be bound by a conventional norm and opinio juris, that is to say, the sense of legal duty compelling the performance of an act. The Court explained that, while a State may opt out of a treaty or certain treaty provisions through reservations, it cannot do the same with customary international law rules

Customary rules of IL have developed as a result of *(1) Diplomatic relations between states (2) Practice of international organs (3) State laws, decisions of State courts and State military or administrative practices and (4) Treaties between the States.*

Case Studies

1. Right of passage over Indian territory case [*Portugal v India*]

   Facts: Until 1954 Portugal possessed the right of passage through Indian territory. This right was subject to control and regulation by India. When the relation between the two countries worsened, the Indian Government suspended the right of passage of Portugal over this area. The claim of Portugal was based on the treaty of 1779.

   Question: whether Portugal had a right to send nationals and military through Indian territory? Whether India acted contrary to its obligations?

   Held: Portugal was not entitled to send its armed forces though the way which fell within the Indian territory. The Court ruled that India did not act contrary to its obligations. The Treaty of 1779 was a valid treaty and Portugal was entitled to get passage in consequence of the treaty.

   Importance: If under a treaty a State gets right of passage through territory of another State and if it **continues for a long time**, then it gains the force of law and thereby imposes the obligation upon the State affected to continue to give such right of passage.

Military and Paramilitary Activities in and Against Nicaragua

Question: Whether United States' reservation to its acceptance of Court's jurisdiction effectively excluded disputes relating to certain multilateral treaties if claims were also based on rules of customary international law incorporated in those treaties?

Held: This identity of content in treaty law and customary law did not exist. Even if the customary norma nd treaty norm were to have exactly the same content, this would not be a

reason for the court to hold that the incorporation of customary norm into treaty law must deprive the customary norm of its applicability.

In this respect, it must be emphasized that the Court's approach to the determination of what constitutes customary international law has changed over the years as a result of the evolution of international law and the expanded composition of international society. The universalization of international law following the adoption of the Charter of the United Nations, the emergence on the international scene of formerly colonized peoples as Member States of the United Nations, and the process of codification and progressive development of international law through multilateral conventions are some of the important factors that have contributed to this shift in its approach.

Q.2. "It is difficult to maintain the distinction between formal and material sources taking into account that material sources consist simply of quasi constitutional principles of inevitable but unhelpful generality. What matters is the variety of material sources, the all-important evidence of the existence of consensus among States concerning particular rules of practice." Critically examine the various sources of International Law in the development of Modern international Law, with the help of relevant case law

As pointed out by **Starke,** 'The **material sources** of IL may be defined as the **actual materials** from which an **international lawyer determines the rule** applicable to a given situation.' A distinction is made between the **formal and material sources** of law. As pointed out by **G Fitzmaurice,** they may be described as respectively, as **direct and indirect, as proximate or immediate and remote or ultimate.** Material sources may also be described as the **'origins'** of law. The essence of the distinction therefore is between the **thing which inspires the content of law, and the thing which gives that content** its binding character as law. The material sources provide evidence of the existence of rules which, when proved have the **status of legally binding rules** of general application.

<u>Sources of International law:</u>

Article 38 of the Statute of the International Court of Justice mentions the following sources of international law:

1. **International Conventions**

Article 38 of the statute of the ICJ lists 'international conventions whether general or particular, establishing rules expressly recognized by the contesting States as the first source of international law.' In the modern period, international treaties are the most important source of international law. According to **Article 2** of the Vienna convention on the Law of the Treaties 1969, 'A treaty is an agreement whereby **two or more States establish or seek to establish** a relationship between them governed by **international law.**' As correctly pointed out by **Prof Schwarzenberger,** 'Treaties are **agreements between subjects of international law** creating a **binding obligation** in international law.'

Article 26 of the **Vienna Convention** reiterates the principle of **Pacta sunt servanda.** It provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

International treaties can be of two types

Law making treaties

- Treaties enunciating rules of **universal** international law eg UN Charter
- International treaties which lay down **general principles** eg Vienna Convention on the Law of Treaties 1969

b. **Treaty contracts:** Entered into by two or more states

2) International customs

3) General Principles of Law recognized by civilized states [Article 38 (c)]

This source helps IL to adapt itself in accordance with the changing times and circumstances. As pointed out by **G Von Glahn,** renowned author, two views are prevalent about this phrase:

Such general principles which are found in **domestic jurisprudence** and can be applied to international legal questions

Natural law as interpreted during recent centuries in the western world

By general principles we mean those which have been **recognized by almost all the States.**

Judge Lauterpacht has rightly remarked that the main function of the 'general principles of law' has been that of a **safety valve t**o be kept in reserve rather than a source of frequent application. Indeed, it describes the **inexhaustible reservoir of legal principles** from which the tribunals can enrich and develop public international law.

Examples: *rule of pacta sunt servanda, that contracts must be kept; the principle that reparation must be made for damage caused by fault; the right of self defence for the individual against attack*

Case Studies:

- *R v Keyn:* International law is based on justice, equality and conscience
- *In the case of diversion of water from Muese:* PCIJ applied res judicata and estoppel
- *Mavrommatis Palestine Concessions Case:* applied general principle of estoppel
- *Frontier Dispute (Burkina Faso v Mali):* Equity must be kept in mind which is part of the interpretation of international law
- *Chorzow Factory (Indemnity) case*: PCIJ - res judicata and one who violates a rule is liable to make reparations

4) Decisions of Judicial or Arbitral tribunals and Juristic Works

Judicial/ Arbitral Tribunals decisions:

International Judicial Decisions: **Article 59** of the Statute of the ICJ makes it clear that the decisions of the court will have 'no binding force except between the parties and in respect of that particular case.' However, ordinarily the Court does not deviate from its earlier decisions and changes its earlier decisions only in very special circumstances.

State Judicial decisions:

- Treated as weighty precedents
- May become the customary rule of IL in the same way as customs are developed

c. Decisions of International Arbitral Tribunals: It is said that in most cases arbitrators act like mediators and diplomats rather than judges e.g. *Kutch Award 1968.* However the decisions of the Permanent Court of Arbitration are treated as weighty precedent and can be regarded as a source of IL.

B. Juristic works

Although juristic works cannot be treated as an independent source of IL, yet the view of the jurists may help in the development of law. According to Art 38, the works of highly qualified jurists are subsidiary means for the determination of the rules of IL. As stressed by Justice Gray in *Paquete Habana*: Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is.

5) Decisions or determinations of the organs of International Institutions

In fact, after the establishment of the UN, most of the development of IL and its modification has taken place through the instrumentality of international organisations. In fact, the ICJ itself is a judicial organ of the UN (**Article 92** of the UN Charter).

In the case concerning *Military and Para-military activities in and against Nicaragua* the ICJ relied on resolutions passed by Intl org and cited them as evidence of the existence of customary rules.

Some other sources:

1. **International comity:** When a State behaves in a particular way with other States the latter have also to behave in the same way.
2. **State paper:** In the famous case of *The Caroline 1841* the note of Mr Webster, Secretary of State of the US had written a note which said that for the intervention on the ground of self-defence, the necessity must be 'instant, overwhelming leaving no choice of means and no moment for deliberation.' Since then it has been recognized as a rule of IL.
3. **State guidance for their officers**
4. **Reason:** Whenever there is no rule of IL to guide the court, the matter is resolved on the basis of reason
5. **Equity and Justice:** *Barcelona Traction case* - strictly it cannot be a rule of law, but it may be an important factor in the process of decision.

In *Nicaragua v USA* the World Court has taken the view that the sources of IL are not hierarchical but are necessarily complementary and inter related.

Topic 2: RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. *Explain different theories on the relationship between International law and Municipal law. [2021 5(b)]*
2. *Explain the State practices relating to observing International law within the Municipal law. [2020]*
3. *What are the various theories prevalent for deciding the relationship between International Law and Domestic Law ? How do the National Courts in India apply the International Law ? [2019 6(a)]*
4. *What are the theories relating to the relationship between International Law and Municipal Law? Elaborate. [2017 5(a)]*
5. *Discuss how International Law becomes part of the law of the land in India. In case of conflict between the International Law and Municipal Law, which one would be applied by the Municipal Courts of this country? Explain. [2016 6(a)]*
6. *In the ultimate analysis individuals alone are the subjects of International law." Comment. Also discuss the Transformation theory in the context of the relation between International law and Municipal law. [2015 8(c)]*
7. *Define the concept of 'opposability' in the context of the relationship between International Law and Municipal Law. Also discuss the relevance of this concept in modern times with special reference to India. [2014 8(b)]*
8. *"Due to increasing penetration of international legal rules within the domestic systems, the distinction maintained between two autonomous zones of international and municipal law has been somewhat blurred." Explain with special reference to Indian practice. How international legal rules emanating from customs and treaties, influence the action of domestic agencies? [2013 5(a)]*
9. *With reference to the relationship between international law and municipal law, discuss the 'transformation' and 'specific adoption' theories. How can these two theories be harmonised with reference to States' obligations under relevant international law. [2012 5(b)]*
10. *In practice the relationship between international Law and Municipal Law exists in the mixture of International Law supremacy, Municipal Law supremacy and a co-ordination of legal system." Comment on the aforesaid statement of Edward Collins in the context of the relationship between International' Law and Municipal Law. [2009 5(d)]*
11. *"The relationship between International Law and Municipal Law is one of co-ordination and interdependence". Discuss. [2003 5(d)]*
12. *"The relationship between international law and municipal law has posed a difficult problem to municipal courts, namely to what extent may such courts give effect within the municipal sphere to rule of international law." Clearly examine the criterion which has been adopted by municipal courts to resolve this issue. [2001 6(a)]*
13. *Can a State invoke non-compliance with its domestic constitutional law as a ground for invalidating its consent to be bound by a treaty and if so when? [1997 5 (d)]*
14. *Discuss various theories as to the relationship between International Law and Municipal law and explain the practices followed by the United States, Britain and India for adopting International law into their own legal systems. [1995 6(a)]*
15. *"... the law of nations and the municipal law of several states are essentially different from each other". Explain and show how a reconciliation of the conflict is made by state practice. [1995(b)]*
16. *Discuss the relationship between International Law and Municipal law. [1988 5(a)]*

17. *'Treaties are the Supreme Law of the Land under the U.S. Constitution.' What is the position in Indian Law? [1986 5(a)]*

Q.1. What are the theories relating to the relationship between International Law and Municipal Law? Elaborate.

While international law is applied in the relations of the States and to other subjects of international law, national or State law (municipal law) is applied within a State to the individuals and corporate entities. Certain theories have been propounded to explain the relationship between IL and ML. Following are some of the prominent theories:

1. Monism:

- The exponents of this theory believe that law is a unified branch of knowledge. International obligation and municipal rules are facets of the same phenomenon, the two deriving ultimately from one basic norm and belonging to the unitary order composed by the conception of law. Thus, IL and ML are intimately connected with each other
- In the ultimate analysis of law we find that man is at the root of all laws. All laws are made for men and men only in the ultimate analysis.
- Wright, Kelson and Duguit are some of the prominent exponents of monism
- *Criticism:* Although a very sound theory, it is not followed in actual practice. ML and IL are two separate systems. Further, each state is sovereign and as such not bound by IL. States follow IL simply because they give their consent to do so and on account of other reasons.

Dualism:

- In the view of dualistic writers IL and ML are two separate laws.
- Origin: Monism remained in vogue for a long time. However in the 19th century, the existence of State will and complete sovereignty of the State were emphasized. The conception of State will was taken from Hegel, a German scholar and was further developed.
- The chief exponents of this theory are Triepel and Anzilloti. Triepel has pointed out the following differences between IL and ML:

  Regarding subject: Individual is the subject of State law, whereas State is the subject of IL

Regarding origin: Origin of State law is the will of the State whereas origin of IL is the common will of States.

Regarding fundamental principle: According to Anzilloti, the fp of ML is that laws are enacted by appropriate legislative authorities that are to be obeyed. The fp of IL is pacta sunt servanda i.e. agreement between States is to be respected.

- *Criticism:*
  It is not correct to contend that IL is binding only on States. In the modern period, IL is applicable to States, individuals and other non-State entities.

  The conception of State will as the source of State law is incorrect. State will is nothing but the will of the people who compose it. Furthermore, there are certain fundamental principles which are binding upon the State, even against their will.

  To assert that pacta sunt servanda is the only basis of IL seems to be far from the truth.

3. Specific Adoption theory:

- According to positivists, IL cannot be directly enforced in the field of ML. In order to enforce it, it is necessary to make its specific adoption.
- This view is generally followed by States in respect of International treaties. It is argued that unless there is specific adoption of the International treaties (such as Vienna Convention of Diplomatic Relations Act 1972) or there is some sort of transformation, treaties cannot be enforced in the municipal field.
- The SC observed in *Jolly George v Bank of Cochin* 'The positive commitment of the State parties ignites legislative action at home but does not automatically make the covenant enforceable as part of the corpus juris of India.'
- *Criticism:* This is not correct in respect of the whole of IL because there are many principles of IL (esp customary rules) which are applied in the field of ML without specific adoption

4. Transformation theory:

- The exponents of this theory contend that for the application of IL in the field of ML the rules of IL have to undergo transformation
- *Criticism:* It is not necessary nor materially essential for all treaties to undergo the process of transformation.

5. Delegation Theory:

- This has been put forward by the critics of the Transformation theory.
- The critics point out that the constitutional rule of IL permits each State to determine as to how intl treaties will become applicable in the field of State law. The rules of IL are applied in the field of State law in accordance with the procedure and system prevailing in each State in accordance with its Constitution.
- *Criticism:* Each State is equal and sovereign. Hence, there is no clarity on the existence of constitutional rules of IL and how these rules have delegated power to state constitutions.

Question of primacy:

No theory is complete in itself and it is not possible to include all the elements in it. For eg. in *Greco-Bulgarian Communities* case, the PCIJ held that 'the provisions of ML cannot prevail over the treaty.' On the other hand, when the Municipal courts find that the conflict between IL and ML is of such nature that cannot be avoided, primacy is given to ML.

Indian Practice:

Article 51(c) states that 'The State shall endeavor to- foster respect for IL and treaty obligations in the dealings of organised peoples with one another.'

Topic 3: STATE RECOGNITION AND STATE SUCCESSION

stinguish whether Recognition of States' is an act of policy or of law. Also distinguish between Constitutive and Declaratory theories on the recognition of States. [2021 6(a)]

1. *In resolution 67/19, the UNGA decides to accord to Palestine, a non-member observer status in the UN. Explain the importance of the resolution while determining the Statehood of Palestine. [2020]*
2. *What do you mean by State-Recognition ? What are the legal effects of recognition ? Differentiate between de-facto and de-jure recognition. [2019 5(d)]*
3. *International Law evidences the evidentiary theory of recognition. Discuss. [2016 5(e)]*
4. *Define and distinguish between the following: a. Recognition of State and Recognition of Government b. De facto and De jure recognition c. Also explain the concept of 'Collective recognition'. [2015 6(c)]*
5. *Recognition confers the legal status of a State under International Law upon the entity seeking recognition. Important legal effects are being derived from recognition. Critically examine the statement. [2014 5(c)]*

6. *"States are subject to a duty under International Law to recognize a new State fulfilling the legal requirements of Statehood, but the existence of such a duty is not borne out by the weight of precedents and practices of States. The decision of a State in according or withholding recognition is a matter of vital policy that each State is entitled to take by itself." Reconcile and argue which of these two statements (extreme views) regarding recognition of a State given by Lauterpacht (obligatory) and by Podesta Costa (Facultative) is more appropriate, with the help of instances in regard to de facto and de jure recognition. .[2013 6(b)]*
7. *"The distinction between 'dejure/defacto recognition' and 'recognition as the de jure and defacto government' is insubstantial, more especially as the question is one of intention and the legal consequences thereof in the particular case. If there is a distinction it does not seem to matter legally." Comment and discuss the distinction between the two. [2011 6(a)]*
8. *Discuss with illustrations the law and the practice of various State in relation to non-recognition of governments. [2010 6(b)]*
9. *Examine critically the different views regarding the recognition of States, highlighting the legal consequences of acts of recognition and policies of non-recognition. Also mention the difference between 'express recognition' and 'implied recognition. [2009 6(a)]*
10. *International practice supports the evidentiary theory as to the nature, effect and function of recognition. Comment. [2007 6(b)]*
11. *A State is and becomes, an international person through recognition only and exclusively. Discuss. Is there any duty under International Law to recognize a State? [2006 5(d)]*
12. *"The granting of recognition to a new state is not constitutive but a declaratory act." Do you agree with this view? Discuss the theories of recognition and state which theory is correct in your view. [2009 6(a)]*
13. *Explain recognition of a state and recognition of a government. [2003 5(b)]*
14. *Write explanatory notes on-Recognition of state and Recognition of Government. [2001 8(a)]*
15. *A revolution takes place in State 'X', 'Y' seizes power in an unconstitutional manner by installing himself as the Head of S a e 'X', What principles will govern the question of recognition of 'Y' as the Head of State 'X' on the part of other states. What consequences will ensue if recognition is accorded or refused? [2000 7(b)]*
16. *"So far the municipal law effects are concerned, the judicial decisions have virtually erased a number of distinctions between de jure and de facto recognition." Examine. [1997 5(b)]*
17. *State X deposited some gold in State Y. There was a rebellion in State X and the rebels were successful in establishing a parallel government. After some time State Y granted dejure recognition to the new government formed by rebels. The new government claims the gold deposited in State Y by the old government. Decide. [1996 7(b)]*
18. *Ten aircraft that belonged to the monarchical government of prerevolutionary Russia were lying in the British airfield even after they were sold to an American company. The communist Government that came to power in Russia after the revolution and was recognized de jure by Britain made a claim for the ownership of the aircraft. Discuss whether the previous transaction of sale is binding on the new government. [1995 7(a)]*
19. *The government of state X is overthrown Rebels established new Government. State Y continues to recognize the old government but accords de facto recognition to the new Government. A suit is filed in State Y by new government of state X against a bank for recovery of certain money due*

to State X. The old government opposes the suit claiming that the money belongs to the lawful representatives of States X. Decide. [1994 7(a)]

20. *Distinguish between de jure recognition and de facto recognition. [1993 6(b)]*
21. *'Recognition of a state is not a legal but political action'. Explain and illustrate. [1992 5(d)]*
22. *Recognition of a new State of Government is precondition for claiming that the new State or government has succeeded to the international rights and obligations of the extinct state or the changed government. Explain the rule of international Law on this matter making reference to cases. [1990 6(a)]*
23. *Clarify the status of Antarctica continent under contemporary international Law. [1990 5(b)]*
24. *Define recognition and distinguish between recognition of States and recognition of Governments. Explain the difference between de facto recognition and dejure recognition. Discuss critically the various theories of recognition. [1988 6(a)]*
25. *The lawful Government in a country X is overthrown by a dictator T, who confers an economic concession on a British national. Great Britain did not recognize the Government of T, as it has come to power by illegitimate means. T's Government is ousted in turn after two years, and the new Government repudiates the concession to the British national. Britain contends that the concession granted by T is binding on the new Government. The new Government argues that as Britain had not recognised the Government of T. It was stopped from putting forward the claim of its national. Decide. [1988 6(b)]*
26. *State the theories of recognition of a State. Explain the various modes of recognition. Distinguish between recognitions of State and recognization of India. Decide giving reason. [1987 6(b)]*
27. *A company registered in India was carrying on trade in Sikkim before it became part of India. The Government of Sikkim confiscated a few consignments to the company's office in Sikkim from India. Soon thereafter Sikkim became part of India. The company claims the consignments of their value from the Government of India. Decide giving reason. [1987 6(b)]*
28. *Discuss the legal effect of (i) recognition and (ii) non-recognition in the municipal law of a country. [1986 5(b)]*
29. *During his visit to India in 1956, the Chinese Prime Minister Mr. Chou En-lai told the Indian Prime Minister Mr. Nehru that in view of the friendly relation between China and India, he proposed to recognize the McMohan Line border with India and that he 'would like to consult the authorities of the Tibetan region of China' on this and that he 'proposed to do so'. Cite precedents and examine whether, in international law, this can be constructed as an act of recognition of the McMohan Line, binding on China. [1986 6(b)]*

Speaker Nancy Pelosi arrived in Taiwan in support of it. The US follows the One China Policy- meaning that PRC was and is the only china, with no recognition of RoC Taiwan. At the same time, the US refuses to give in to the PRCs demand to recognise Chinese sovereignty over Taiwan- it only acknowledges the Chinese position that Taiwan is a part of China. The word acknowledge is determinitive said the US representative when Chinese attempted to change it to 'recognise.'

According to Prof L Oppenheim, in recognising a State as a member of the intl community, the existing States declare that in their opinion the new State fulfils the conditions of Statehood as required by international law. According to Kelson, the conditions of a Statehood are: People, Territory, Government and Sovereignty.

Q.1. What are the factors that govern the recognition of insurgency and belligerency?

Recognition of Insurgency:

Insurgency denotes the state of political revolt in a State. Insurgency presupposes a civil war. In fact, insurgency is an intermediate stage between tranquility and belligerency. In the view of Judge Lauterpacht, if the State recognizes the insurgents of another State, it would imply that it would not treat such insurgents as violators of law. It also implies that a State wishes to establish relations with such insurgents on a temporary basis. It is not against international law to recognise insurgents as a de facto government over the territory under their control. It is merely an acknowledgment of fact for practical purposes.

Essential Conditions for recognising Insurgents:

1. Control over considerable part of territory
2. Considerable support to the insurgents from the majority of the people living in the territory
3. Insurgents should have the capacity and will to carry out the international obligations

Effects of recognition

1. They are not treated as pirates
2. The rebels of civil strive are treated as *hostes generis humani* (the public enemy) until they are recognized as insurgents
3. The international rules of war become applicable to them

Recently, Mali's largest military base was attacked by insurgents.

Recognition of belligerency:

When the insurgents are well organized, conduct hostilities according to laws of war and have a determinate territory under their control, they may be recognized as belligerents whether or not the parent State has already recognized the status. The case of recognition of belligerency is the question of policy and not of law. This hinges upon the national interest of recognizing Sate.

Essential conditions:

1. The armed conflict is to be of general character
2. The insurgents occupy and administer a considerable portion of the national territory
3. They conduct hostilities through armed forces under a responsible authority. Moreover, they conduct hostilities in accordance with the rules of war and
4. The hostilities are to be of such magnitude that the foreign States may find it necessary to define their attitude towards the belligerents and the established government

Effects of recognition of belligerents:

1. From the date of recognition, belligerency is accorded international law rules governing the conduct of hostilities apply
2. The conflict is internationalised and the belligerents get some rights under International law
3. The relations between the recognized belligerent authorities and the recognising States are governed by IL rather than ML.

Recently, the US has claimed that it will not stand by and tolerate Azerbaijan's belligerency against Armenian people.

Q.2. International Law evidences the evidentiary theory of recognition. Discuss.

There are two main theories of recognition 1) Constitutive theory and 2) Declaratory or Evidentiary theory

. Constitutive Theory

- **Hegel, Anzilloti, Oppenheim, Holland**

- Oppenheim: 'A State is, and becomes, an international person through recognition only and exclusivey.'
- Clothes with rights and duties

Criticism:

- **Lauterpacht-** no obligation/ legal duty
- Can neither have duty or rights eg China, Bangladesh

2. Declaratory Theory: Statehood or the authority of the new government exists prior to and independently of recognition. Recognition is merely a formal acknowledgement through which established facts are accepted. The act of recognition is merely declaratory of an existing fact that a particular State or government possesses essential attributes. **Hall, Wagner, Brierly, Pitt Corbett** and **Fisher** are main proponents.

According to **Prof Hall** a State enters into the family of nations as of right when it has acquired the essential attributes of Statehood. **Pitt Corbett** has expressed the view that the existence of a State is a matter of right. **Brierly** has also remarked that the granting of recognition is not a 'Constitutive' but a 'Declaratory' act. A State may exist without being recognised and if it exists in fact, then whether or not, it has been formally recognised by other States, it has a right to be treated by them as a State. The Soviet view and practice are also in favour of this theory.

Criticism: not entirely correct- some constitutive effect

Conclusion: Both, '*Recognition is declaratory of an existing fact but constitutive in nature.'*- Oppenheim

Cases:

Luther v Sagor it was held that there is no distinction between de facto and de jure recognition for the purpose of giving effect to the internal acts of recognised industry

Bank of Ethiopia v National Bank of Egypt and liquori, the Court ruled that in view of the fact that the British government granted recognition to the Italian Govt as being the de facto Government in the area of Abyssinia, which aws under Italian control, effect must be given to an Italian decree in Abyssinia dissolving the plaintiff bank appointing liquidator.

Arantzazu Mendi : R passed decree taking AR ship

Republican govt of Stain de jure- Britain

National Govt under General Franco de facto- Britain

No diff : writ in Foreign court (Britain) not possible

Thus, difference, not formally established legal effects- hardly any diff

William W Bishop: Political rather than legal

Q.3. Define and distinguish between the following: (i) Recognition of State and Recognition of Government (ii) De facto and De jure recognition Also explain the.concept 'Collective recognition'

I. Recognition of State and Govt

Generally a State is recognized when it possesses essential elements of Statehood. The recognition of a State means that it has been included as a member of the international community. But there is a difference between recognition of the State and the Government.

- How recognised: When a State possesses essential elements of Statehood, it gets recognised. Usually when the change in government takes place in accordance with the constitutional provision through peaceful means, then such a government ordinarily receives recognition. The position is different when the changes take place by use of force or revolution. In such a case, other States have to see whether the new government commands the respect of the people. It also has to be seen if it is permanent or stable. Eg Taliban
- Effect: Once a State is recognized, it becomes a member of the international community as it implies that the State possesses the essential qualities of a State and is able and willing to fulfil its international obligations.
  But insofar as the recognition of a government is concerned, it simply means that the government recognised is entitled to represent the State concerned.
- Revocation: Once recognized, especially de jure recognition, of the State, it cannot be revoked. The recognition of the Government depends on facts and circumstances.
- The distinction is aptly summed up by **PE Corbett** 'The recognition of governments is a different matter, but one clouded with similar ambiguities. What is involved is not the acknowledgement of statehood but the decision as to who is entitled to act for a given State.

Much of such recognition depends on the discretion and sweet free will of the countries. For eg China, while most of the States accepted China as a State, the Government of Communist China was not recognised. Speaker Nancy Pelosi arrived in Taiwan in support of it. The US follows the One China Policy- meaning that PRC was and is the only china, with no recognition of RoC Taiwan. At the same time, the US refuses to give in to the PRCs demand to recognise Chinese sovereignty over Taiwan- it only acknowledges the Chinese position that Taiwan is a part of China. The word acknowledge is determinitive said the US representative when Chinese attempted to change it to 'recognise.'

Recognition of governments serves three functions- i) it ensures that only regimes which **clearly deserve** such status are accepted as governments of States ii. It **assures** new governments that others will respect their status and iii. It serves to **inform** courts, government agencies and nationals of recognising states that a particular regime is in fact the government of another State.

In the view of Judge Lauterpacht, if a State possesses the essential elements, international law imposes a duty on other states to recognise such a community. But this view is not supported by the practice of the parties of the state, which is based on discretion.

ii) De facto and De jure recognition

De facto	**De jure**
1. It means that in the opinion of the recognizing State, provisionally and temporarily and with all due reservations for the future, the State or Govt recognized, fulfils the requirements laid down in the international law for effective participation. 2. It is a *lesser* degree of recognition, taking account on a provisional basis of present realities. 3. It may be made *dependent* on conditions with which the new State has to comply. If it fails to do so, the recognition may be withdrawn. 4. When the new State is formed through revolt, recognition may be granted after granting the de facto recognition.	1. It means that according to the recognizing State, the State or Government recognized formally (i.e. without reservation and on a definitive basis) fulfils the requirements laid down in international law for effective participation. It is the *fullest* kind of recognition. It is *final,* and once given cannot be withdrawn.
Full diplomatic relations cannot be established with a defacto recognised state	When a new State comes into existence peacefully and constitutionally de jure recognition may be granted directly
Full *diplomatic immunities* are not granted to the representatives. However in USA, such immunities are granted	Full diplomatic relations may be granted

Cannot make a claim to property situated in the territory of the recognizing State ie it lacks *extra-territorial jurisdiction.*	The representatives of the de jure recognised states are granted full immunities. Can do so eg the Soviet Govt could get possession of Tsarist Archives and other property in England only when the latter granted de jure recognition

Cases:

In *Luther v Sagor* it was held that there is no distinction between de facto and de jure recognition. In 1918, Russia nationalised timber and other industries. In 1920 the Russian government entered into a contract with the defendant to sell some timber etc. the P requested to declare that all the goods purchased by the D were his property. The D contended that Russia was a Sovereign State and by the act of the Sovereign State, the ownership of the plaintiff had ended. Britain had given de facto recognition to Russia. The Court decided in favour of the D as there is no difference between a Government recognised as de jure and de facto.

COLLECTIVE RECOGNITION

By collective recognition we mean the recognition granted by a number of States collectively. For eg, when a State is admitted to the UN, it will mean collective recognition by those states which voted in favour of the admission of such a state. In its advisory opinion on *Condition of admission of a State to the UN* the ICJ also opined that if a State is admitted as a member of the UN, it will amount to collective recognition by the States who voted in favour of the admission of the state.

It may, however, be noted here that recognition is the free act of each state. The collective recognition will therefore not mean that all the members of the UN have recognized such a state.

Judge Philip C Jessup has suggested that the matter of the existence of the statehood of a new State must be subject to the collective decision. In his view, unless a declaration is made in regard to the existence of the statehood of any political community, the members of the UN should not recognise such a new State. The GA may make such a declaration on the recommendation of the Security Council.

If this suggestion is accepted and implemented, recognition will cease to be a political and discretionary act and will become a matter under the international collective control.

Q. Recognition confers the legal status of a State under IL upon the entity seeking recognition. Important legal effects are being derived from recognition. Critically examine the statement.

Legal Effects of recognition:

As pointed out earlier, recognition is a political diplomatic function and depends upon the discretion of the recognizing state. But once recognition is accorded, certain legal effects ensue.

Some jurists are of the view that since recognition is a political act, there are no legal effects except the special agreements which are made at the time of granting recognition [for ex, Philip Marshall Brown]. But this view does not seem to be correct. The typical act of recognition has two legal functions

The determination of statehood, a question of law: Such recognition may have evidential effect before a tribunal

Act of recognition is a condition of the establishment of formal, optional and bilateral relations including diplomatic relations and the conclusion of treaties.

It is this second function which has been rightly described by some jurists as 'constitutivist' although here it is not a condition of statehood.'

Main Effects:

1. The recognized State becomes entitled to sue in the courts of the recognized State
2. The courts of the recognizing State given effect to the past as well as present legislation and executive acts of the recognized State
3. In case of de jure recognition, diplomatic relations are established and the rules of IL relating to privileges and immunities apply
4. A recognised State is entitled to sovereign immunity for itself as well as its property in the Courts of the recognising State.
5. The recognised State is also entitled to the succession and possession of the property situated in the territory of the recognising State.

For example State X deposited some gold in State Y. There is a rebellion in State X and the rebels are successful in establishing a parallel government. After some time Y grants de jure recognition to the new government. The new government which has been granted de jure recognition will be entitled to the succession and possession of the gold deposited by the old government for recognition of a government means the recognised government has effective control over the State and is fit to represent the State

Consequence of Non-recognition

Although recognition is essentially a political act, there are certain political as well as legal consequences of non-recognition as a State. There may be the following consequences:

1. An unrecognized State cannot sue in the courts of a non-recognising State. In *Russian Socialist Federated Soviet Public v Cirbaria* the New York Court had observed that such a State cannot sue as a matter of right in American courts. In In *US v Pink* the SC of USA laid down that the court shall decide the cases of only those States which has been recognised by the USA.
2. It is not entitled to enter into diplomatic relations with the non-recognising States
3. Do not possess immunities from legal processes in foreign states
4. They are not entitled to get their property situated in foreign States. Eg,*Bank of China v Wells Fargo Ban & Union Trust Co.* In this case, the D was a Californian Bank in which the money of the Bank of China was deposited. In 1950 the New People's Republic Government of China requested the court that the suit of Bank of China be dismissed to get the money deposited in the defendant bank. On the other hand, the Nationalist Government of China said that it was the lawful claimant of the said money. The court held that it was not the proper function of a domestic court of the US to attempt to judge which government best represents the interests of the Chinese State in the Bank of China. In this case, the Court should justly accept that government which the executive deems best able to further the mutual interests of China and US. Thus, the motion for judgment in favor of the Bank of China as controlled by nationalist Government was granted.

'States are subject to a duty under International law to recognize a new State fulfilling the legal requirements of Statehood, but the existence of such a duty is not borne out by the weight of precedents and practices of States. The decision of a State is a matter of vital policy that each State is entitled to take by itself.' Reconcile and argue which of these two statements (extreme views) regarding recognition of a State given by Lauterpacht (obligatory) and by Podesta Costa (Facultative) is more appropriate, with the help of instances in regard to de facto and de jure recognition.

Is there a duty to recognise?

- In the view of **Judge Lauterpacht,** if a State possesses the above mentioned essential elements, IL posits a duty on other States to recognise such a community
- This view is not supported by actual practice. As stated by **Kelson,** such an obligation, however desirable, is not stipulated by positive international law.

Facultative theory

- In fact, as stated by **podesta Costa** the granting of recognitiondepends upon the discretion of the recognizing Statte. It is a political function
- Prof Schwargenberger has also remarked , 'In the absence of established rules or treaty obligations to the contrary, recognition is a matter of discretion.'
- Eg *Bank of China v Wells Fargo Bank & Union Trust Co* 'The court should justly accept, as the representative of the Chinese State, that government which our executive deems best able to further the mutual interests of China and the US.'
- This is supported by Soviet, PRC, British and Indian practice.

Examine critically the different views regarding the recognition of States, highlighting the legal consequences of acts of recognition and policies of non-recognition. Also mention the difference between 'express recognition' and 'implied recognition.'

Implied recognition

Ordinarily, recognition is a unilateral act of State and when a State recognizes another State it makes the declaration in regard to the same either orally or in wiring. But sometimes recognition may be implied. Such recognition may be inferred when circumstances indicate that the State concerned has been accepted as a member of the international community. In practice, such an implied recognition may be only de facto. But in the following circumstances, such a recognition may also be deemed to be de jure:

1. When the recognized State and the recognizing State enter into a bilateral treaty and formally sign it
2. The beginning of formal diplomatic relations, exchange of consuls etc.

In addition to the above- mentioned conditions following circumstances may also indicate implied recognition

Participation of the State concerned in a multilateral treaty

Participation in international conference

Start of negotiations between the recognising and the recognised States.

Left overs:

Recognition subject to a condition

Is withdrawal of recognition possible

Retroactive effects of recognition

Various doctrines

India's practice

SUCCESSION

1. *What do you understand by 'State Succession'? Discuss various theories of State succession and explain the rights and obligations arising out of State succession. [2021 6(b)]*
2. *What do you understand about the principle of 'Continuity of State' in the context of succession of government? Pinpoint the major areas to be addressed to improve upon the existing position relating to State succession rules and practice. [2010 5(b)]*
3. *What do you understand by state succession? To what extent does succession take place to (a) the treaty rights and obligations, and (b) contractual obligations of the extinct state? Explain. [2005 8(b)]*
4. *A foreign bank has given a loan to the Government of State 'A' for the improvement of roads in 'X', a province of State 'A' 'X' is subsequently ceded to State 'B'. The Government of State 'B' refuses to accept any responsibility for the loan. Is State 'B' entitled to do so? Discuss. [2000 7(c)]*
5. *Pakistan had taken loans from certain international loaning agencies for its development. Part of the loan was spent on the development of the then East Pakistan which is now the independent State of Bangladesh. After East Pakistan seceded from Pakistan, Pakistan contended that the responsibility for the repayment of that portion of debt which was spent on East Pakistan had devolved on Bangladesh. Bangladesh denied it. Decide giving reasons. [1999 8(a)]*
6. *Smith and Company registered in India was carrying on trade with Sikkim before it became part of India. The government of Sikkim confiscated a few consignments sent to the company's office in Sikkim from India. Soon thereafter Sikkim became part of India. Smith and Company claims consignments or their value from the government of India. Discuss the liability of the government of India towards Smith and Company.[1997 7(b)]*
7. *While as a matter of international law, private rights acquired from an erstwhile sovereign do not cease to exist on a change of sovereignty, nevertheless, their enforcement as such right in the courts of the successor sovereign may be barred by the act of State doctrine. Discuss and illustrate. [1996 5(c)]*
8. *Write short notes on succession of contractual obligations of an extinct state. [1991 8(b)]*

Q. What do you understand about the principle of 'Continuity of State' in the context of succession of government? Pinpoint the major areas to be addressed to improve upon the existing position relating to State succession rules and practice.

A succession of governments occurs when the government of a State is replaced with a new one. State succession occurs when a State ceases to exist or a new State is formed within the territory of an existing State or territory is transferred from one State to another State. The rule of State succession was incorporated from the Roman law by Grotius.

Principle of Continuity of States

The succession of Governments is based on the principle of the continuity of States. The change in the Government of a State does not affect the legal personality of the State. This principle is based on the common interests of the international community.

Prof. DPO Connell classifies the theories of State succession into categories among which are the Theories of Continuity.

Theories of Continuity:

1. Theory of universal succession: if a ruler acts in a private capacity his contracts expire with his death or expulsion; but if he acts in his princely office his commitments relate not to himself but to people through whom in virtue of the social contract, he ultimately derives his authority.
2. The theory of popular continuity: Change of sovereignty involves no more than a change in the fictitious element in political organisation, the real element surviving intact. Obligations of a political character, such as treaties, attach to the element of sovereignty and lapse with it, obligations of a patrimonial character, including most economic and judicial matters attach to society and remain attached
3. The theory of organic substitution: the theory emphasises more the nature of change itself than the legal effects of political change. When states appear and disappear, the people and territory are integrated in a new organic being.
4. The theory of self abnegation: the state is at liberty to take over or reject whatever suits it in the previous legal order. It integrates within its own legal order all existing law which is compatible therewith and which is not expressly repealed. This theory emphasizes the continuity rather than disruption and constructs the legal bonds of continuity on the basis of tacit consent of all the parties concerned.

The Tinoco Arbitration: Great Britain- Costa Rica (1923): In 1917 the Govt of CR under the President was overthrown by the Secretary of war, Federico Tinoco. He established a new Constitution. This government continued till 1919. The old constitution was restored and elections held. In 1922 a Law of

Nullities was passed which invalidated all contracts between the executive power and the private persons. Great Britain objected as the decree to issue currency notes from banks and corporations with British shareholders was also nullified.

Held: The concession was in fact invaild under the Constitution of 1917.

Mr. Taft Arbitrator quoted with approval the observation of Dr JB moore, 'A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional or the reverse; but although the government changes, the nation remains, with rights and obligations unimpaired.'

Term 'State Succession' misnomer:

- This is because it is based on a municipal law analogy of the actual demise of a person and the transmission of his rights and liabilities to his successor used by classical international writers like Gentilis, Grotius, Pufendorf and Vattel.
- The significance of the term is limited to the factual situation which arises but does not necessarily presuppose a juridical substitution of the acquiring State in the complex of rights and duties possessed by the previous sovereign.

Q. Elaborate various theories of State Succession [15 M, 2022]

Prof DPO Connell:

1. Theories of Continuity

Theory of universal succession

Theory of popular continuity

Theory of organic substitution

Theories of self abnegation

Negative theories: since the universal succession theory did not take into account the existing facts of international practice, negative theories were developed during the later half of the 19th century. According to these theories, 'the sovereignty of the predecessor State over the absorbed territory is abandoned. The successor state does not exercise its jurisdiction over the territory in virtue of a transfer of power from its predecessor , but solely because it has acquired the possibility of expanding its own sovereignty in teh manner dictated by its own will.

Theories importing international law: according to this theory, IL, based on the positive practice of State 'directs the successor State to discharge certain of its predecessor's obligations and vests in it certain of its predecessor's rights.

Communist theory of State Succession: the main emphasis under this theory is that a successor State is unencumbered by the economic and political commitments of the predecessor

Prof DPO Connel has rightly concluded, 'the problem is to give expression to a reconciliation of two competitive pressures, that of stability in the international and internal orders, and that of adjustment of legal relationship to the social and economic effect of change. The solution lies in a presumption of continuity which concrete analysis may rebut.'

Q. What do you understand about state succession? To what extent does succession take place to a) treaty rights and obligations, and b) contractual obligations of the extinct State? Explain.

The rule of State succession was incorporated from the Roman law by Grotius. In Roman law when a person dies his rights and duties are succeeded by his successors. This principle was applied by Grotius in IL as well. The law of State succession is still developing.

State succession occurs when

- A State ceases to exist
- A new State is formed within the territory of an existing State
- Territory is transferred from one State to another State

State Successions are of two types

1. Universal succession

    - One state is completely absorbed in another State either through subjugation or voluntary merger
    - When a state breaks into several parts and each par becomes a separate international person or are annexed by surrounding international persons

Partial succession

- When a part of the State revolts and after achieving freedom becomes a separate international person eg breaking away of Bangladesh
- When a part of a State is ceded to another State

- When a sovereign State loses a part of its independence by joining the federal State or when a State accepts the suzerainty or becomes a protectorate of another State.

Succession of States in respect of Treaties.

The traditional doctrine of State succession in treaties has been rejected and new roles of 'moving treaty frontiers' and 'clean slate' are adopted. According to the clean slate rule, a newly independent state is unencumbered by the obligations and commitments. It has, therefore, full freedom to continue or discontinue the treaties of the predecessor State. The 'moving treaty frontiers' rule is based on the association of a territory with an already established state and on the basis of the prior legal nexus a newly independent State is entitled to claim its succession to multilateral treaties.

Art 1 of the VC on Succession of States in respect of treaties **1978** provides that the convention applies to the effects of a succession of States in respect of treaties between States.

Art 11 deals with boundary regimes and clearly provides that a succession of state does not as such affect: a) a boundary established by a treaty or b) obligations and rights established by a treaty and relating to the regime of a boundary.

Art 15 deals with Succession in respect of part of territory. It provides that when part of the territory of a state becomes part of territory of another state: a) treaties of the predecessor state cease to be in force; b) treaties of the successor state are in force in respect of the territory to which the succession of State relates to.

Art 16 provides that the newly independent State is not bound to maintain the treaty in force, or to become a party to any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates. This provision clearly follows clear state rule.

Art 17 provides that a newly independent state may, by notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of states was in force in respect of the territory to which the succession of States relate.

Art 24 deals with conditions under which a bilateral treaty is considered as beign in force: a) when they expressly so agree or b) by reason of their conduct are considered as having so agreed.

Art 31 Any treaty in force at the date of succession of State does not continue in force unless:

The successor state and the other State party or state parties **otherwise agree** or

It appears from the treaty that the application of the treaty in respect of the successor State would be **incompatible with the object and purpose** of the treaty or would radically change the conditions for its operations.

Contracts

Most jurists are of the view that the succeeding State should be bound by the contract entered into by the extinct State. But in the *west rand central gold mining Co Ltd v King* the King's Bench of England ruled just the reverse. In this case, the Court ruled that the succeeding State is entitled to decide whether it would accept the financial obligations of the former State.

Facts: West Rand Central Gold Mining Co Ltd was a registered Company in England. It was engaged in the work of digging gold mines in Transval. Two parcels containing gold were seized by the officers of the South African Republic. According to the law, it was the responsibility of the South African republic to return the said parcels of gold. War broke out between Britain and the South African Republic and the latter was conquered by Britain. The court rejected the contentions of the company and held that the conquering State is not liable to fulfill the private contractual obligations of the conquered State.

Concessionary contracts: although much depends upon the discretion of the succeeding State so far as the contracts in general of the former State are concerned, the position is different in respect of the concessionary contracts. By concessionary contracts, we mean the contracts through which certain concessions such as digging of mines, laying of railways etc are given through contracts. These are mostly of local nature.

Succeeding state may or may not be bound by it depending upon the facts and circumstances of each concessionary contract.

In *Premchibar v the UOI* wherein the government of India rejected the application of a former Portuguese citizen for extension of the period of licence granted to him by the then Portuguese Government the SC of India held that as subjects of the new sovereign they only had such rights as are granted or recognised by the new State, so far as the relations between the subject and sovereign are concerned.

Rights and Duties arising out of state Succession

1. Political rights and duties: No succession takes place in respect of political duties and rights of the extinct State (Prof Oppenheim). Thus the succeeding State is not bound by the political treaties of the former states. But as noted by Prof PK Menon, 'International practice as to succession to treaties is not sufficiently abundant and uniform to permit an attempt at generalization. The state

practice is haphazard and inconsistent. Even the same state adopts different attitudes at different times. Eg the admission of Texas into the USA extinguished the treaties of the independent republic of Texas. The position was the same when Korea merged into Japan.

In *Terlinden v Ames,* the question was whether an Extradition Treaty between Prussia and America could be given effect to after the incorporation of Prussia into the German Empire. The question was answered in the affirmative. Sovereignty in respect of the execution of treaties is not extinguished but where the power of the State concerned to execute the treaty is altogether gone, the treaty cannot be regarded as void.

Local rights and duties: Genuine succession takes place in respect of local rights and duties. In *German Settlers in Poland* the PCIJ held that private rights do not end by the change of sovereignty

Fiscal Property debts: According to Oppenheim, succession takes place in regard to fiscal prop. But no private person gets the right to claim the old debts from succeeding international persons.so far as the question of foreigners is concerned, they may seek the protection of their government and pressurize the succeeding international person to pay the whole debts.

- Public debts: Controversy. Jurists are of the view that it depends on discretion. Part IV of the Vienna Convention on State Property, Archive and Debts 1983 states in Article 36, that the succession does not affect the rights and obligations of creditors, Article 38 that agreement between newly independent tate, shall not infringe the principle of permanent sovereignty, and Art 40 mandates that in case of separation, the part of the territory of the predecessor State should pass to the successor state an 'equitable proportion'. It has not yet come into force.

Contracts and concessionary contracts

Laws: civil law continues until changed by succeeding states.

Unliquidated damages for torts: No succession as held in *Robert E Brown's* claim. Robert was an American citizen who went to South Africa to dig gold mines. After some time, it was held that South Africa would undertake the work. Robert filed a suit for recovery of compensation. In the meantime Great Britain had conquered South Africa.The arbitrators held that justice was denied to Robert Brown by South Africa. But Britain could not take the liability of torts committed by South africa.

Nationality: the nationals of a former state lose their nationality at the extinction of the State and become the nationals of a new international person.

Succession to property in foreign states: Succeeding states become the successors of such property. The passing of state prop without compensation. All measures to prevent damage or destruction by predecessor state while passing to successor state [Vienna Convention]

Succession to state archives: Art 25 of VC preserves the integral character of grounds of State archives.

Treaties

Succession regarding membership of the UN: First time after partition of India and aPak. India was originally a member after signing the UN Charter at San Francisco. Pak claimed that it should get membership automatically. GA rejected this claim. According to the GA when a State becomes an international person, it can become a member of the UN only after it is admitted in accordance with the provisions of the charter by ⅔ majority. It was not therefore a case of session, but a case of dismemberment, therefore the principle of state succession will apply to determine rights and obligations of both the parties [*Virendra Singh v State of UP*]

Succession in respect of international organisations: ordinarily, the succession depends upon the constituent instrument or special agreements. In the advisory opinion of 1950 *Status of South West Africa*, South Africa contended that after the extinction of the LoN, SW Africa ceased to be under control of any international institution. The Court advised that the Mandatory Commission was an Institution of international status and could not be modified unilaterally by South Africa.

Topic 4: LAW OF SEA

Biodiversity beyond national jurisdiction (BBNJ) treaty, also known as Treaty of High seas is a proposed international agreement on conservation and sustainable use of marine biological diversity of High seas. Areas beyond national jurisdiction comprise 95% of ocean and provide invaluable ecological, economic, social, cultural, scientific, and food-security benefits. BBNJ will be another instrument under the framework of United Convention on the Law of the Sea (UNCLOS), 1982.

Purse seine fishing - Supreme Court passes a restricted interim order allowing the purse-seine fishing beyond the territorial waters of Tamil Nadu but within the Exclusive Economic Zone with conditions. *Fisherman Care v. Govt of Tamil Nadu*

Q. Having regard to the UN Convention on Law of Sea UNCLOS III, which came into force in 1994 and its two predecessor UN Conventions on the Law of the Sea, analyse how far these conventions have been able to effectively codify customary international law of sea.

For more than three centuries, all the law on and about the hydrospace, covering 71.4% of the earth's surface, could be summed up in a simple formula: freedom of the seas. The hallmark of this law, right up to the first half of the 20th century, was freedom- meaning essentially non-regulation and laissez faire.

In the course of time, the uses of the sea multiplied resulting in conflicts between the wider claims of coastal states seeking to protect their economic interests over large parts of the sea and attempts by major

maritime powers to maintain the status quo on the other. These controversies assumed serious magnitude after the Second World War.

With a view to reconcile these claims and resolve controversies, the two UN Conferences on the Law of the Sea were held in Geneva in 1958 and 1960.

In the first conference, four conventions were adopted

Convention on the Territorial Sea and Contiguous Zone

COnvention on the High Seas

Convention on Fishing and Conservation of living resources

COnvention on the Continental Shelf

The second UN Conference was held to fix the breadth of the territorial sea but it could not achieve success.

After these two conferences, certain developments emerged

A large number of new States, mostly in Asia and Africa emerged

Rapid progress in science and technology made possible commercial exploitation of mineral and other resources at greater depths of the seabed eg polymetallic nodules

Unprecedented growth in population and demands for higher living standards intensified

Following extensive preparatory work and the development of important principles by teh UN Seabed Committee, the first session of the Third UN Conference on the Law of the Sea (UNCLOS) was convened in New York. In 1982 the conference adopted the draft of the Convention. The UNCLOS 1982 comprises 320 Articles (divided into XVII parts) and IX annexes. The convention came into force in 1994.

The UNCLOS 1982 is of great significance and its very existence modifies political, economic and legal relationships in countless ways. It has turned the dream of a comprehensive law for the oceans into reality. The law of the Sea Convention has almost become universal. It has been hoped that the US might join the Convention in the near future. It is now regarded as codification of the customary law on the Sea.

Q. Discuss the law of delimitation of the continental shelf of a State including the continental shelf common to two or more States.

AIR 52, Jayasree Pradhan

Every country bordering a sea has a continental shelf i.e. extension of the land territory beneath sea (submerged landmass). The concept acquired significance when the US President Truman in 1945 propounded it. India claimed it for the first time in 1955. The Geneva Convention 1958 gave the legal sanctity to the concept.

Article 1 of the Geneva Convention has laid down that 'the Continental shelf is the **sea-bed and sub-soil** of the submarine areas adjacent to the coast, but **outside the area of the territorial sea,** to a depth of 200 metres or beyond that limit to where the depth of superjacent waters admits of the exploitation of natural resources of the said areas.' The above definition is ambiguous and inadequate.

Definition under the **1982 Continental Shelf:** The 1982 Convention clarifies that continental shelf of a coastal State comprises seabed and subsoil of the submarine area (throughout the ***natural prolongation*** *of its land territory)* up to the **outer edge** of the continental margin or to a distance of 200 nm, whichever is more. This definition incorporates the concept of the CS as highlighted in the *North Sea Continental Shelf Case* (1969).

Further where a State's outer edge of continental m**argin extends beyond 200 nm,** the Convention lays down that CS shall not exceed **350 nm** from the baseline from which the breadth of the territorial sea is measured or shall not exceed **100 nm from the 2500 m isobaths.**

Delimitation of CS between two or more states:

As to the delimitation of CS between adjacent or opposite states, there has been much controversy. The GC 1958 adopted the 'equidistance- special circumstances rule.' Art 6 of it allows States to determine the boundary of their CS by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by the application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

In the *North Sea Continental Shelf case* 1969 the Court held: Article 6 of the Convention which lays down 'equidistance' principle was not, intended to be of a norm creating character.' This principle is not obligatory in all cases of delimitation of CS> In the present case, opinio juris was absent or not established (there was no evidence that the States so acted because they felt legally compelled to draw boundaries, according to the equidistance principle, by reason of a rule of customary law obligation, States might have been motivated by other obvious factors). Thus held that each of the States should have just and equitable share or shelf according to the length of its coastline.

[Refer to pg 37 of notes.]

Q. Define Continental shelf and distinguish it from the Exclusive Economic Zone. Critically evaluate the rights and obligations of coastal states in the EEZ.

Though the geographical and geological concept of the Continental Shelf is quite an old one, the legal concept of the Continental shelf was foreshadowed to some extent by the treaties and declarations of various countries e.g. the Truman Declaration of 1945. In order to develop and codify definite rules a conference was called at Geneva in 1958 which adopted the Convention of Continental Shelf 1958.

Definition

The Convention defined the term 'continental shelf' in Article I in the following words.

The continental shelf is

The sea bed and the subsoil of the submarine areas adjacent to the chaos, but outside the area of the territorial sea to a depth of 200 meters or beyond that limit to where the depth of superjacent waters admits of the exploitation of the natural resources of the said areas

The sea-bed and subsoil of similar submarine areas adjacent to the coast of island

The definition of CS contained in Art 1 contains three elements: adjacency, Depth and exploitability. The practice of the States shows that they do not consider all these elements essential. On the contrary, they take it as alternative criteria for example, advanced countries lay more emphasis on the exploitability.

It may be noted that instead of giving a definite form and certainty to the international law relating to the CS the definition adopted in the said convention made the matters more complicated, ambiguous and adequate. The obvious reason for this is that by 1958 scientific development was not capable of exploring and exploiting the resources beyond the depth of 200 m.

CS and EEZ distinguished

The concept of EEZ is related both to the exclusive Fisheries Zone and the Continental shelf.

The EEZ differs from the CS in that it extends to the living and non-living resources in the area of the sea, the outer limits of which are measured by distances rather than by depth or exploitability.

It differs from the latter in so far as it adopts a uniform approach to all resources- living and non-living thereby ignoring the functional differences between the two kinds of resources.

Q. Write explanatory notes on the Territorial Sea.

Maritime belt or territorial waters is that belt of the sea which is adjacent to the coastal State and over which the coastal State exercises the sovereignty [Article 1 of the Geneva Convention on Territorial waters and Contiguous zone 1958]

Breadth of Territorial waters

There was a great controversy in this connection for a considerable period of time. Up to the 18th century, the cannon shot rule was a prevalent principle (the range of cannon shot was three miles). This view was supported by Grotius and Vattel. Under the second conference on the Law of the Sea in 1960 America presented a compromise formula which provided that the breadth of territorial waters should be 6 miles and beyond this the coastal states should be given rights for fishing for another 6 miles. This proposal was defeated by a single vote.

In the *Anglo-Norwegian Fisheries case* the Court observed that the States are not completely free in respect of delimitation of territorial waters with regard to other States.

Rights and Duties of Coastal State:

Coastal state exercises sovereignty not only over the tw, but also over air space over the territorial sea as well as to its bed and subsoil [Art 2 of GC 1958]. According to Article 2(3) of the UNCLOS 1982 the sovereignty over the territorial waters is exercised subject to the convention and other rules of international law.

According to Article 15 of the Convention, where two coastal states are adjacent to each other, the maritime shall be delimited on the median line to be measured from the baseline from which the width of the maritime belt is measured.

Innocent Passage (17-32)

Q. Discuss the legal regime of right of innocent passage through the territorial waters (including international straits) of a State.

The doctrine of 'innocent passage' reconciles the interests of the world community on the one hand, and the coastal States on the other.

1958 Geneva Convention Article 2(6): Coastal States are empowered to take steps to prevent passage that is not innocent.

UNCLOS (Articles 17-32)

Article 18: Must be **continuous** and expeditions- ship may not 'hover' in territorial sea except in cases of distress or rescue.

Art 19: Defines **'innocent'** An act is deemed innocent so long as it is not prejudicial to peace, social order or security of the Coastal State. List of activities that some States require to be notified eg military activities, survey activities etc. The article illustrates that spying, fishing, causing marine pollution, launching or taking on board any aircraft etc shall be considered prejudicial to peace, good order and security of coastal State.

Article 20: In territorial sea, **submarines and other underwater vehicles** are required to navigate on the surface and show their flag.

Article 21: Can **act** regarding s*afety and traffic separation, fishing and environment conservation, customs and immigration*

Article 23: If **nuclear** substance, must carry documents and take precautionary steps

Article 24: Shall not hamper IP except in accordance with this Convention

Article 25: Applies only to ships passing through ts **without calling** at port- inbound and outbound are subject to criminal jurisdiction

Art 27: Coastal States

Not impose criminal juris

May include crimes that disturb peace of coastal State

Warships: Neither the UN Convention 1982 nor the customary international law throws any light on the issue of innocent passage of warships. Some states insist on the previous authorization of the coastal State for their transit; other States insist on prior notification to the coastal State for their transit.

Corfu Channel case: Warships may pass through tw. Albania guilty of firing at Britain and laying mines in that part of the sea.

Indian Law: TW, CS, EEZ and other MZA 1976: **Art 4:** All foreign ships (other than warships including submarines) enjoy the right of innocent passage. Foreign warships after giving prior notice, but must show flag. Can suspend or be subject to exceptions.

India US raised objections to Yuan Wang 5 at Hambantota Port of Sri Lanka- said not violated.

Q.5. Write short notes on the Exclusive Economic Zone.

The EEZ or 'Patrimonial Sea' aims to secure for coastal States the resources of the sea, the seabed and the subsoil, irrespective of variations in geographical or economic or ecological circumstances. The concept is advanced by some developing countries, including India, with an aim to offset the economic imbalance created by history in favour of a few powerful countries. The concept was initiated by Kenya in 1972 at the Geneva Session.

Art 57: EEZ may extend up to 200 nm from the coastal State's baseline. Clearly, EEZ comprises two categories of cases: i. The water column and ii. The sea bed and subsoil underlying the water column

4 concepts: i. Sovereign rights ii. Jurisdiction iii. Preserved rights of 3rd States iv. Residual rights

<u>I. Sovereign Rights (Exclusive Rights)</u>

Art 56(1): In EEZ, Coastal States have the sovereign rights for

i) the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living

ii) Other activities for economic exploitation such as the production of energy from water, currents and winds

Exclusive rights: If not exercised by coastal States, no one else can

Sovereign rights: Can take action to enforce those laws (limited)

<u>II. Jurisdiction</u>

Art 60 and 246: Artificial islands, economic installments and structures, marine scientific research conducted in water, preservation and protection of marine environment structures

III. Third States

Other States retain right on the high seas of navigation or overflight.

Right to lay submarine pipelines and cables

Art 58: the law of the HS (Art 88-115) continue to apply to EEZ as long as not incompatible with right and jurisdiction of coastal State

But third States must have **due regard** for the rights of the coastal State and comply with the laws and regulations

IV. Residual rights: when LoS not allocated

Art 59: Resolved on a case to case basis- equity, circumstances, interests of parties and international community

Vague, International Tribunals reluctant to go beyond their powers *[MV Saiga No 2 case]*

The ICJ in *Tunisia-Malta case* declared that the institution of EEZ is shown by the practice of States to have become a part of customary international law.

Indian Position: **Sec 7** of TW, CS, EEZ and other MZA 1976

EEZ 200 nm- CG may alter by notification

Sov rights to **explore, exploit, conserve and manage** natural resources

Exclusive rights and jurisdiction, construction and operation of *artificial islands, offshore terminals, installations, other structures*

Exclusive jurisdiction to authorise, regulate, control **scientific research**

Exclusive juris to prevent and control **marine pollution**

Such other rights recognised by IL

Recently, Japan protested after ballistic missiles of China landed in Japan's EEZ.

Q. Define 'high seas'. Discuss in brief the provisions of the convention on high seas. Is freedom of fishing on the high seas recognized?

The concept of the freedom of the open sea or high sea is very old. Modern times have added significance to it. In the olden days, it was considered to be the common heritage of mankind. In the 16th and 17th century, Queen Elizabeth had declared it to be the property of all mankind. By 1982 the high seas were reserved for peaceful purposes and were not treated as part of sovereignty.

Definition:

High Seas are that part of the sea which are beyond national jurisdictions. **Art 86** of the 1982 UN Convention explains the concept of high seas as all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelago State. Thus, internal waters, territorial waters or EEZ are excluded from the limits of the high seas.

The laws applicable to EEZ will be applicable to the high seas if not incompatible with the rights of the coastal states (Art 88-115)

Principle of Freedom of HS

Freedom of navigation

Freedom to carry out certain Activities

Article 87 (1)

Freedom of navigation

Freedom of overflight

Freedom to lay submarine cables and pipelines

Freedom to construct artificial islands

Freedom of **fishing**

Freedom of scientific research

Geneva Convention on Fishing and Conservation of the Living Resources on the High Seas 1958. **Article 1** provides that all States have the right for their nationals to engage in fishing on the high seas subject to

Their treaty obligations

Rights and duties and interests of coastal State as provided for in this convention

To the provisions contained in the other articles of the convention

Further, all States have the duty to adopt, or to co-operate with other States in adopting such measures for their respective nationals as may be necessary. Articles 116 to 120 of the UN Convention now deals with the conservation and management of the living resources of the high seas. not to pollute or overexploit

Recently the Union Minister of fisheries released guidelines for 'regulation of fishing by Indian flagged vessels in the high seas 2022,' issuing permits that will be valid for two years at a time.

Other provisions

1. Geographic extent
2. Principle of freedom of HS
3. Exclusive Flag State Juris

    - **Art 92 (1):** Exclusive juris over that vessel- save in exceptional cases -Juris over crew even if foreigners
    - **Art 92 (2):** If two or more states- can be treated stateless (does not mean will be treated as 'floating islands'
    - **Art 94 (3):** Flag state responsibilities:
      - construction, equipment and sea worthiness of ships; ship maintaining, labour conditions and crew training; signals, communications and prevention of collisions
    - Implemented by **International Maritime Organisation-** Conventions:
      a. International Convention for Safety of life at sea (SOLAS)
      b. Convention on International Regulations for Preventing Collisions at sea (COLREG)
      c. International Convention on Standards of Training, Certification and Watch Keeping for Sea Farers (STCW)

Flags of Convenience:

- State allows ship with little or no connection with it to register under its flag
- evade taxation and crewing standards

Exceptions to Exclusive Juris of Flag State

5.1. Hot Pursuit: Committed an offence within the juris of coastal State to be pursued onto hs and be arrested

Conditions- **Art III**

1. Should be identifiable as **govt service**
2. **Must have good reason**
3. Must commence within **maritime zone**
4. Visual or auditory **signal to stop-** after that
5. Must be **continuous**
6. Ends as soon as enters the **ts of another** state

5.2. Right of visit: Belligerent State may have certain rights to interfere with foreign ships supporting enemy war effort

Art 110: Piracy, slave trade, unauthorised hs broadcasting without nationality - refusing to show State flag

May have to compensate if unnecessary

Criticism of traditional doctrine of freedom of seas: Eurocentric, rich and powerful

Q. under modern International law, what meaning has been assigned to the term 'High Sea'? Explain. Also discuss the scope of the concept of freedom of the High Sea with reference to the legality of nuclear tests in the areas of high sea.

The question of the legality of nuclear or thermonuclear test explosions on the high seas arose following American test explosions of hydrogen bombs in the "Pacific Proving Grounds' [between 1946 and 62].

Two schools of thought emerged. It was argued by some that the test explosions were contrary to the laws of humanity and to the law of nations.1 Others, however, sought to justify the tests as necessary steps in the defense of the "free world."

Nuclear Tests Cases (Australia v. France; New Zealand v. France) 1974: On 9 May 1973, Australia and New Zealand each instituted proceedings against France concerning tests of nuclear weapons which France proposed to carry out in the atmosphere in the South Pacific region. France stated that it considered the Court manifestly to lack jurisdiction and refrained from appearing at the public hearings or filing any pleadings. By two Orders of 22 June 1973, the Court, at the request of Australia and New Zealand, indicated provisional measures to the effect, *inter alia* , that pending judgment France should avoid nuclear tests causing radioactive fall-out on Australian or New Zealand territory. By two Judgments delivered on 20 December 1974, the Court found that the Applications of Australia and New Zealand no longer had any object and that it was therefore not called upon to give any decision thereon. In so doing the Court based itself on the conclusion that the objective of Australia and New Zealand had been achieved inasmuch as France, in various public statements, had announced its intention of carrying out no further atmospheric nuclear tests on the completion of the 1974 series.

The Convention on the Territorial Sea and Contiguous Zone provides, at **article 24(1):** In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) prevent the infringement of its... sanitary regulations within its territory or territorial sea;

(b) punish infringement of the above regulations committed within its territory or territorial sea. **Article 7** of the **Convention on Fishing and Conservation of the Living Resources of the High Seas** allows any coastal state to adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, if such measures are not arrived at through negotiations with other interested states within six months

Similarly, **article 5(7)** of the Convention on the Continental Shelf makes protection of the living resources of the high seas from "harmful agents" mandatory for all coastal states.1

And **article 24** of the Convention on the High Seas requires states to "draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines, or resulting from the exploitation or exploration of the seabed and its subsoil, taking account of existing provisions on the subject."

The pertinent provisions of the Geneva Conventions represent important legal and political milestones for an incipient world-wide anti-pollution law.

Nuclear test explosions on the high seas violate the doctrine of the freedom of the high seas, inasmuch as they interfere with two of its most crucial incidents: the freedoms of navigation and of fishing. Whether the high seas are regarded as res communis or res nullius, no state has the right to monopolize, for its exclusive use, that which either belongs to everyone or can legally belong to no one.

Q. 'Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the freedom of the sea, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels.' Give a critical appraisal of this principle in the light of the case law and views of the international law commission.

The 1982 Convention provides that the high seas shall be reserved for peaceful purposes [Article 88]. No state may validly purport to subject any part of the high seas to its sovereignty [Article 89].

- Every state, whether coastal or land-locked has the right to sail ships flying its flag on the high seas: Article 90
- Every state effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag- 94(1)
- The 1982 Convention imposes certain duties upon every State to take measures for ships flying its flag as are necessary to ensure safety at sea - Art 94(3)
- It is the duty of every State to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship - 91
- Ships shall sail under the flag of one State only, and save in exceptional cases expressly provided for in international treaties or in the 1982 Convention on the Law of the sea, shall be subject to its exclusive jurisdiction on the high seas. Except in case of a real transfer of ownership or change of registry, a ship cannot change its fag during a voyage or while in a prot of call- 92
- Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag- 94
- Warships on high seas have complete immunity from the jurisdiction of any State other than the flag State: 95
- This immunity is only for State owned or operated by State and used only on government non-commercial service- 96
- In case of a collision or any other incident of navigation concerning a ship on the high seas, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national - Art 97

It is clear from the above provision that the legal order on the high seas is based on the rule of international law under which every ship on the high seas is required to have the nationality of and to fly the flag of one State. Thus international law leaves it upon municipal laws of various States to fix conditions to be fulfilled by ships authorized to sail under its flag. The rules of IL are thus supplemented by municipal laws of the States [Oppenheim].

Insert Case law and ILC

Q. Explain the rights and duties of coastal state over continental shelf, exclusive economic zone and high seas as defined under the provisions of UN Convention on Law of Sea (III), 1982.

As pointed out by McDougal and Burke, 'The historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention of general community interest.'

Rights and Duties of Coastal State [insert diagram]

1. Continental Shelf

Article 76 of UNCLOS 1982 provides:

For the purposes of this convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nm from the baselines from which the breadth of the territorial sea is measured.

Art 77 provides that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. These rights are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the consent of the coastal State. Moreover, the rights of the State over continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

Exclusive Economic Zone

Article 56: In the EEZ, the coastal state has

Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and sub-soil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the Zone such as the production of energy from the water currents and winds

Jurisdiction as provided for in the relevant provisions of this convention with regard to

i) the establishment and use of artificial islands, installation and structures
ii) marine scientific research

iii) the protection and preservation of the marine environment

c. Other rights and duties provided for in this convention.

2. In exercising its rights and performing its duties under this convention in the EEZ, the coastal States shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this convention

3. The rights set out in this article with respect to the sea-bed and sub-soil shall be exercised in accordance with Part VI.

Articles 61 to 73 develop in detail the rule in Article 56 as far as sovereign rights of the coastal states are concerned. [*MV Saiga case*]

High Seas:

Art 88: The 1982 convention further provides that the high seas shall be reserved for peaceful purposes.

Article 89: No state may validly purport to subject any part of the high seas to its sovereignty

Art 90: Every state, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

Art 94(1): Every State effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Article 2 of the 1958 Geneva Convention on the High Seas provides that the Freedom of the high seas comprises inter alia, both for coastal and non-coastal States:

1. Freedom of Navigation
2. Freedom fishing
3. Freedom to lay submarine cables and pipelines
4. Freedom to fly over the high seas.

These freedoms shall be exercised by all States with reasonable regard to the interests of other States.

Article 111 of UNCLOS 1982 provides that the hot pursuit of a foreign ship may be undertaken when the competent authorities of the State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State and may only be continued outside if the pursuit has not been interrupted. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or a third State.

Q.4. Discuss the functions, powers and jurisdiction of the International Tribunal for the Law of the Sea (ITLS) established under the UN Convention on the Law of the Sea, 1982

The International Tribunal for the Law of the Sea (ITLOS) is an **independent judicial body** established by the **1982** United Nations Convention on the Law of the Sea. It has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. Disputes relating to the Convention may concern the delimitation of maritime zones, navigation, conservation and management of the living resources of the sea, protection and preservation of the marine environment and marine scientific research.

The Tribunal has jurisdiction over any dispute concerning the **interpretation or application** of the Convention, and over all matters **specifically provided for in any other agreement** which confers jurisdiction on the Tribunal **(Statute, article 21).** The Tribunal is open to **States Parties** to the Convention (i.e. States and international organisations which are parties to the Convention). It is also open to **entities other than States Parties,** i.e., States or intergovernmental organisations which are not parties to the Convention, and to state enterprises and private entities "in any case expressly provided for in **Part XI** or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case" **(Statute, article 20)**

Dispute Settlement

art XV of the Convention lays down a comprehensive system for the settlement of disputes that might arise with respect to the interpretation and application of the Convention. It requires States Parties to settle their disputes concerning the interpretation or application of the Convention by **peaceful means** indicated in the **Charter of the United Nations.** However, if parties to a dispute fail to reach a settlement by peaceful means of their own choice, they are obliged to resort to the compulsory dispute settlement procedures entailing binding decisions, subject to limitations and exceptions contained in the Convention.

The mechanism established by the Convention provides for **four alternative means** for the settlement of disputes: the *International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII to the Convention, and a special arbitral tribunal constituted in accordance with Annex VIII to the Convention.*

A State Party is free to choose one or more of these means by a written declaration to be made under **article 287** of the Convention and deposited with the Secretary-General of the United Nations (declarations made by States Parties under article 287).

If the parties to a dispute have not accepted the same settlement procedure, the dispute may be submitted only to arbitration in accordance with **Annex VII,** unless the parties otherwise agree.

The Tribunal is open to States Parties to the Convention and, in certain cases, to entities other than States Parties (such as international organizations and natural or legal persons)

Jurisdiction

The jurisdiction of the Tribunal comprises **all disputes submitted to it** in accordance with the Convention. It also extends to all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. To date, **sixteen multilateral agreements** have been concluded which confer jurisdiction on the Tribunal (relevant provisions of these agreements).

Unless the parties otherwise agree, the jurisdiction of the Tribunal is **mandatory** in cases relating to the prompt release of vessels and crews under article 292 of the Convention and to provisional measures pending the constitution of an arbitral tribunal under article 290, paragraph 5, of the Convention.

The Seabed Disputes Chamber is competent to give advisory opinions on legal questions arising within the scope of the activities of the International Seabed Authority. The Tribunal may also give advisory opinions in certain cases under international agreements related to the purposes of the Convention.

Disputes before the Tribunal are instituted either by **written application or by notification** of a special agreement. The **procedure** to be followed for the conduct of cases submitted to the Tribunal is defined in its **Statute and Rules.**

Topic 5: INDIVIDUAL STATELESSNESS AND HUMAN RIGHTS

Q.1. Discuss the status of individual in International Law especially with respect to Human Rights Treaties.

Individuals are also treated as subjects of IL although they enjoy lesser rights than State. Thus, as stated by **Oppenheim,** it is no longer possible, as a matter of positive law, to regard States as the only subjects of IL. In the beginning they were accepted as an exception of the general rule but this view has now been discarded. In recent times, several treaties have been concluded wherein rights have been conferred and duties imposed upon individuals

1. **Pirates:** Under IL pirates are treated as enemies of mankind. Hence every State is entitled to apprehend and punish them.

2. **Harmful acts of individuals:** Punished for eg. *Ex parte Petroff 1971* SC of Australia, two persons guilty of throwing explosives on Soviet Chancery were convicted

3. **Foreigners:** Duty of each State to give those rights conferred upon its own citizens

4. **War Criminals:** Nuremberg and Tokyo Tribunals

5. **Espionage**

6. **Compensation** Claim: eg **Treaty of Varsailles** - individual could file suit against Germany

7. Certain rights available **immediately** eg. Convention on the **Settlement of Investment Disputes** bw States adn the Nationals of other States

WRT HR

7. Preamble of **UN Charter**- 'Peoples of the UN' - Art 1(3), Art 13(1)(b), Art 55(c), Art 62(3), Art 68 and Art 76(c)-

UDHR 1948

GA 1948- **Genocide** Convention

8. **ICCPR** 1966 and Optional Protocol-

9. UN Commission of HR (replaced by the **HR Council**) enabled the indivs to send petitions even against their own States - 47 members

States are becoming increasingly realistic in acknowledging the position of the individual in the legal order. The individual has become a subject of international law not having the same quality as a State (lacking in procedural capacity in most cases) but capable of asserting his rights himself before some international tribunal.

Q.2. It is generally viewed that "Rights and Duties are correlative." However, the International Human Rights Movement has developed more as rights-oriented than duties-oriented. Why has this happened? Explain with the help of various International Human Rights instruments. Can you think of a Human Duty Movement instead of a Human Rights Movement.?

Human rights may be regarded as those fundamental and inalienable rights which are essential for life as human beings. These are rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex etc by the simple fact of him being a human being. Thus, human rights are those that are inherent and inalienable in nature.

Why has the Human rights movement developed as more rights oriented?

- **Nature:** As fundamental or basic rights they are those that belong to men and women by their very nature. They may also be described as 'common rights' for they are rights which all men and women in the world would share. Eg the Preamble of the UN Charter begins with the words 'We the people of UN.'
- **Origin:** Since human rights are not created by any legislation, they resemble very much the natural rights. Any civilised country or body like the UN must recognise them. Eg the Preamble of the UN Charter affirms 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.'
- **History:** International concern with human rights as enshrined in the UN Charter is not a modern innovation It is in fact the heir to all the great historic movements for man's freedoms. Eg the appalling atrocities against the Jews during the Second World War- Preamble: *We determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind*
- **Internationalization and the Global World:** Human rights is underlined in the UN Charter and there are as many as seven references in the Preamble; *among purposes of the UN (Article 13),* among the *responsibilities of the General Assembly [Art 55(c)], objectives of the International Economic Co-operation [Art 13(2)], functions of ECOSOC [Art 62(2)], responsibility of one of ECOSOC's commission (Art 68),* and among the *objectives of the Trusteeship system [Art 76(c)].* The provisions of the UN Charter provides a foundation for and an impetus to further improvement in the protection of human rights. They indicate the wide possibilities of the international recognition of human rights.

Human Duties

1. Everyone has duties to the community in which alone the free and full development of his personality is possible. (**Art 29** of UN Charter)

Q.3. "International law is primarily concerned with rights, duties and interests of states." Critically examine the statement with reference to the place of individuals and non-state entities in international law." [20M]

Ordinarily international law deals with the rights and duties of the States. Generally it is the States who enter into treaties with one another and are thus bound by its provisions. This does not mean that other entities or individuals are outside the scope of international law. Following are the main theories prevalent in regard to subjects of IL.

1. States alone are the subjects of IL

- **PE Corbett:** the triumph of positivism in the late 18th century made the individual an object, not a subject of international law. The law is more and more emphasised on the State making its sovereignty the basic principle of international law.
- *Criticism:* Fails to explain the cases of slaves and pirates. While slaves have been conferred upon rights, pirates are treated as the enemies of mankind. Many of its rules are directly concerned with regulating the position and activities of individuals and many more indirectly effect them.

Only Individuals are the subjects of IL

- **Westlake** remarked 'The duties and rights of the States are only the duties and rights of men who compose them.'
- **Kelson** has analyzed the concept of State and expressed the view that it is a technical legal concept and includes the rules of law applicable on the persons living in a definite territory. He admits that the difference is only that the State law applies on individuals 'intermediately' whereas international law applies upon the individuals 'mediately.'
- *Criticism:* The actual practice of the States are concerned with the rights and duties of the States. Although an individual possesses a number of rights under international law, his procedural capacity to enforce the observance of these rights is grossly deficient.

State, individual and certain non-State entities are subjects: This view goes a step ahead to include international organisations and certain other non-State entities as subjects of international law.

- Several treaties have conferred upon individuals certain rights and duties eg *International Covenants on Human Rights and 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States*
- *1949 Geneva Convention on the Prisoners of War* has conferred certain rights on the PoW. The *Nuremberg and Tokyo Tibunals* propounded the principle that IL may impose obligations directly upon the individuals. The *Genocide Convention of 1948* has imposed certain duties directly upon the individuals. According to the convention, persons guilty of crime of genocide may be punished no matter whether they are teh head of the State, high officials or ordinary individuals
- Some rights are conferred upon individuals even against the States eg the *European Convention on Human Rights in 1950. The international Covenants on Human Rights 1966 and Optional Protocol* represent the culmination of this benign trend that individual can claim rights directly (ie without the medium of the State) under international law. An individual who is the victim of the violation of HR and whose State is the member of the UN may send a petition regarding violation of HR by his own State to the UN Commission on Human Rights.
- It is generally agreed that international organisations are also the subjects of international law. The advisory opinion of the ICJ in the case of *Reparation for injuries suffered in the services of UN* may be citied- it is in this case the the ICJ decided that the UN is an international Person under international law and is capable of possessing rights and duties and it has capacity to maintain its rights by bringing international claims.

Place of Individuals in international law.

In *Danzing Railways Official Case* the PCJ ruled that if in any treaty the intention of the parties is to confer certain rights upon some individuals, then IL will recognise such rights and enforce them. In this case, Poland had acquired, under an international agreement the railway company. Under the said agreement, Poland had agreed to provide certain facilities to the officials of the said company. Poland refused to provide those facilities stating that an international treaty only created rights and duties only in respect of the parties to the treaty and the individuals had no such right. The PCIJ rejected the contention of Poland, holding that international law would not only recognise the rights of the individual but also enforce them.

As Philip C Jessup has aptly remarked, 'While I agree that States are not the only subjects of IL, I do not go to the other extreme and say that individuals are the only subjects.'

Q.4. Define 'Nationality.' What are the modes of acquisition and loss of nationality? What is the position of nationality of married women?

The rules of nationality are determined by State law. But due to the lack of uniformity in State laws in regard to nationality, many difficulties were experienced. Consequently, difficult problems of Statelessness, double nationality etc arose. In **Hague Conference of 1930** endeavour was made to end the conflicts arising out of divergent State laws in respect of nationality. Consequently, a convention on the conflict of Nationality Law was signed and adopted. Besides this, the Convention of the Nationality of Married Women was adopted in 1957. Last but not the least, the Convention on the Reduction of Statelessness was adopted in 1961.

<u>DEFINITION of Nationality</u>

Nationality may be defined… 'as the **legal status of membership** of the **collectivity** of individuals whose **acts, decisions and policy** are vouchsafed through the legal concept of the State representing those individuals.' **(J G Starke)**

Fenwick defines the term nationality in the following words, 'Nationality may be defined as the **bond which unites a person to a given State** which **constitutes his membership** in the particular State which gives him a **claim to the protection of that State** and which **subjects him to the obligation** created by the laws of the state.'

In the case of *Re Lynch* the British Mexican Claims Commission defiend the term 'Nationality' as: 'A man's nationality forms the **continuing state of things** and **not a physical fact** which occurs at a particular moment. A man's nationality is a continuing legal relationship between the **sovereign State** on the one hand and the **citizen o**n the other.'

A similar definition was given by the ICJ in *Nottebhohm case.*

<u>Modes of Acquisition and Loss of Nationality</u>

In *US v Wong Kum Ark,* Justice Gray held that the State may determine as to what type or class of people may be entitled to citizenship. It is for the internal law of each State to determine as to who is, and who is not its national.

Acquisition

1. By **birth**
2. **Naturalisation**
3. By **resumption:** If a person has lost his nationality because of certain reasons, he may resume his nationality after fulfilling certain conditions.
4. By **subjugation:** When a State is defeated or conquered, all the citizens acquire the nationality of the conquering State.
5. **Cession:** When a Staet has been ceded in another State, all the people of the territory acquire the nationality of the State in which their territory has been merged.

Nottembohm's case: ICJ held that there is no obligation of the States to grant nationality if that man has no relationship with the state of Naturalisation. Thus the court applied the principle of effective nationality.

Born in Germany, Nottembohn remained a German national. Later, he resided in Guatemala where he carried on his business. After that he visited his brother in Liechtenstein and submitted an application for naturalisation as a citizen of Liechtenstein and the same was granted. When he returned to Guatemala, his property was seized and was arrested and handed over to the armed forces of the US.

Liechtenstein, espousing his case, filed a case in th eICJ. The Court noted that Guatemala was the main center of Nottebohm's business. As compared to this, his connection with Liechtenstein was extremely tenuous. At the time of his application of naturalization, he had neither settled abroad nor resided in that country for a long time. Applying the above principle the Court held that Nottebohm did not enjoy the nationality of Liechtenstein.

The Court held that it was the bond of nationality between a State and an individual which alone conferred upon the State the right to put forward a claim on his behalf on the international plane. Thus, the Court held that Liechtenstein was not entitled to espouse his case and put forward an international claim on his behalf against Guatemala.

<u>Loss:</u>

1. By **release**: It is necessary to submit an application for the same and for the submission to be accepted.
2. By **deprivation:** Law may provide that if the national of that State without seeking prior permission of the government obtains employment in another State, he will be deprived of his nationality.

3. Long **Residence Abroad**
4. By **Renunciation:** When a person acquires nationality of more than one State, he has to make a choice as to which country he will remain the national of. Consequently, he has to renounce the nationality of one
5. **Substitution:** A person may get nationality of a State in place of the nationality of another State.

Nationality of Married Women

Because of the conflict of the laws of nationality of different countries, a situation often arises when a person possesses the nationality of more than one State. For example a woman, who after her marriage acquires the nationality of her husband may continue to possess her original nationality. Double nationality may also be acquired by birth such as by the parents who are at the time of birth in a foreign State.

The **Hague Conference of 1930** in **Articles 8 to 11** provides for the nationality of married women. In these provisions, an endeavor has been made to remove difficulties arising out of double nationality. According to the principles, if a woman marries then she will automatically acquire the nationality of her husband.

Reference may also be made to the **Universal Declaration of Human Rights 1948.**

Art 15(1) of the Declaration provides that everyone has the right to nationality.

Art 15 (2) no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

However, the **ICCPR** has not incorporated the right of everyone to a nationality except that of a child's.

In recent times, the **Convention on the Nationality of Married Women** is yet another attempt to remove the difficulties and problems. It was adopted in January **1957.** It entered into force in **1958.**

Convention on Elimination of all forms of discrimination against women (1979) after its declaration in **1967.** Subsequently **Optional Protocol to the Convention 1999** was adopted. Under **Art 9** State Parties grant women equal rights with men to acquire, change or retain their nationality. They also undertook to ensure that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. State parties shall also grant women equal rights with respect to the nationality of their children.

Topic 6: TERRITORIAL JURISDICTION OF STATES: EXTRADITION AND ASYLUM

AIR 52, Jayasree Pradhan

The UK High Court allowed Nirav Modi's extradition to India. India-UK Exreadition Treaty was signed in 1992. The Ministry of External Affairs is the central authority that handles all extradition requests.

Q.1. Asylum ends where extradition begins." Comment. Distinguish between territorial asylum and extraterritorial asylum.

By asylum we mean **shelter and active protection** extended to a political refugee from another State by a State which admits him on his request. Asylum involves the following two elements- (1) a shelter which is **more than a temporary refuge** and (2) a **degree of active protection** on the part of the authorities which have control over the territory of asylum. The institute of IL has defined asylum as *'the protection which a State grants on its **territory** or in some other place under the **control of certain organs** to a person who comes to seek it.'*

Extradition is the **delivery of an accused** or a **convicted individual** to the State on whose territory he is alleged to have committed or to have been convicted of a crime, by the State on whose territory the alleged criminal happens to be for the time being.

According to **Starke,** the term **extradition** denotes the process whereby under **treaty** or upon a **basis of reciprocity** one State surrenders to another State at its request a person accused or convicted of a criminal offense committed against the laws of the requesting State, such requesting State being competent to try the alleged offender.

<u>Difference between Territorial and Extraterritorial Asylum</u>

Asylum may be classified into two categories (1) Territorial and (2) Extra-territorial

In the *Asylum case (Columbia v Peru)* the ICJ explained the distinction between territorial asylum and diplomatic asylum in the following words, 'In the case of extradition (territorial asylum), the refugee is **within the territory of the State of refuge.** A decision with regard to extradition implies only the normal exercise of territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in **no way derogates from the sovereignty** of that State.

In the case of diplomatic asylum, the refugee is **within the territory of the State where the offence was committed.** A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the Territorial State and such a derogation cannot be recognised unless its legal basis is established in such particular case.

Territorial Asylum: It is granted by a State in its own territory and is considered as an attribute of the territorial sovereignty of the State. On **1945 a Convention on Territorial Asylum** was adopted at **Caracas. Article 1** of the said convention provided, '**Every State has right in the exercise of its sovereignty t**o admit into its territory such persons as it deems advisable without, through the exercise of the right, giving **rise to complaint by any other State.**'

Besides this, **Article 1 of the Draft Declaration of Asylum** as adopted by the UNHRC provided, 'Asylum granted by a State in the exercise of its sovereignty to persons entitled to **invoke Article 14 of the UDHR** shall be respected by all other States.' **Article 3** also provided 'no one seeking or enjoying asylum shall be subjected to measures such as **rejection at the frontier, return or expulsion** which would result in compelling him to return or remain in a territory if there is a well founded fear of persecution endangering his life, physical integrity or liberty.'

A State is free to grant asylum to the people of other States but this freedom can be **restricted or regulated** through treaties.

For eg, the repressive policies and genocide committed by the military regime of General Yahya Khan forced millions of refugees to seek political refuge in India. India not only liberally granted political refuge to these oppressed people but also fed them setting an example and in keeping with Articles 1 and 3 of the Draft Declaration on Asylum adopted by HRC.

Extra-territorial or Diplomatic Asylum

This is granted by the State **outside its territory** eg its embassy or public vessels. This may be classified and discussed under the following heads:

Asylum in Foreign Embassies: International Law does not recognise a general right of a head of mission to grant asylum in the premises of the legation for the obvious reason that such a step would prevent territorial law taking its own course and would involve a derogation from the sovereignty of the State where the legislation or mission is situated. In the Asylum case, the ICJ observed that 'since the decision to grant diplomatic asylum involves a derogation from the sovereignty of that State, such a derogation cannot be recognised unless its **legal basis** is established in each particular case.

Thus, a general right of States to grant asylum in foreign legations is not conceded. Asylum may be granted in three exceptional cases:

- For a temporary period to individuals who are physically in the danger from mob violence or in case of a fugitive who is in **danger because of political corruption** in the local State
- Where there is a well-established **long recognised and binding local custom**

- If there is a **special treaty** between the territorial State and the State of the legation concerned.

b. *Consular Premises:* The general principles relating to legation premises are also applicable to the grant of asylum in Consular premises

a. Asylum in the *Premises of International Institutions:* IL does not recognise any rule regarding the grant of asylum in the premises of International Institutions. **Temporary** asylum may however be granted in case of danger of **imminent violence.**

a. Asylum in *war ships:* Some writers are of the view that the individuals, not being the members of the crew, cannot be arrested by the local authorities and removed from the vessel in case the commander of the ship refuses to hand over the fugitive. Some other writers have expressed the view that such fugitives should be handed over to the local police. Even such writers however concede that asylum may be granted only on humanitarian grounds in cases where there is **extreme danger to the life** of the individuals seeking asylum. Asylum may also be granted to political offenders **(Fenwick).**

a. Asylum in *Merchant Vessels:* Merchant vessels do not enjoy immunity from the local jurisdiction and consequently asylum cannot be granted to **local offenders** in merchant vessels.

Thus in both types of asylum, the ultimate purpose is to accord protection to the refugee or person concerned and to bring him under the jurisdiction of the granting State.

Q.2. "Where Extradition begins, Asylum ends." Critically examine the above statement with special reference to extraditable persons and extradition crimes. [10M]

Asylum and Extradition are mutually exclusive or Asylum stops, as it were, where extradition begins: Asylum is the protection which a State grants in its territory or in some of the places under control of certain of its organs to a person who comes to seek it. On the other hand, extradition is the surrender or delivery of the fugitive criminal to the State on whose territory he is alleged to have committed a crime, by the State on whose territory the alleged criminal happens to be. The institution of asylum confers the right upon the State to bring the person concerned within its jurisdiction. There are two kinds of asylum: territorial and extra-territorial.

In both types however, the ultimate purpose is to accord protection to the refugee or person concerned and to bring him under the jurisdiction of the granting State.

The institution of extradition does just the reverse. In case of extradition the fugitive criminal is in the territory and under the jurisdiction of the territorial State and either under an extradition treaty (or arrangement) or otherwise, it surrenders or returns the fugitive criminal to the state where he is alleged to

have committed the crime. Thus the fugitive criminal which is under the jurisdiction of the territorial State is transferred to the jurisdiction of the State where he is allied to have committed the crime.

Therefore asylum and extradition are mutually exclusive. Once the territorial State decides to extradite the fugitive criminal, the question of asylum does not at all arise, that is to say, asylum stops where extradition begins. On the other hand, once the State concerned decides to grant asylum to a person, the question of his extradition at least for the time being does not at all arise.

To conclude in the words of **Starke, '***The liberty of a State to accord asylum to a person overlaps to a certain extent which is its liberty to refuse extradition or rendition of him at the request of some other State. Asylum stops, as it were, where extradition or rendition begins and this interdependence makes it convenient to consider the two subjects together.'*

Extraditable persons and crimes:

1. **Non-political criminal:** It is a very important principle of IL that extradition for political crimes is not allowed. The practice began with the French Revolution of 1789. However, the most difficult problem is the definition of 'political' crimes.
   In *Re Castioni* the Swiss Government requested for the extradition of Castioni who was charged with murdering a member of the State Council. Political dissatisfaction was prevailing for some time. The Bench of England held that Castioni was guilty of a political crime and therefore he could not be extradited.
   In *Re Meunier,* the accused was an anarchist and charged with causing two explosions in Paris Cafe and two barracks. After committing the offence, he fled to England. France demanded his extradition. The Court held that for an offence to be political, it is necessary that there should be two or more than two parties in the State each wanting to establish its government in the State. In the present case, the offence committed was not a political offence.

   - *The Attentat Clause:* It was enacted by Belgium after the case of Jacquin in 1854. This related to the attempt to murder the Emperor Nepolean III by Jacquin by causing explosion on the railway line. The extradition was refused by the Belgian Court of Appeal which prohibited the extradition of political criminals. With this view, the Belgian Attentat clause was enacted. It provided that murder of the Head of a foreign Government or a member of his family, should not be considered a political crime. Britain and many other European States also adopted such attentat clause.
   - *The Russian Project of 1881:* In 1881, Emperor Alexander II was murdered. Influenced by the murder, Russia invited other states to hold an international conference to consider the proposal that murder or attempt to do so should not be considered as a political crime. But the Russian project failed to materialise.

- *The Swiss Solution to the problem in 1892:* In 1892 Switzerland enacted extradition law. Art 10 recognised the principle of non-extradition of political criminals. It also recognised that if the chief feature of the offence contained more aspect of an ordinary rather than a political crime then political criminal would not be surrendered.

Non-**military** crimes

Non-**religious** criminals

Rule of Specialty: An accused is extradited for a particular crime, and the country which gets back the criminal is entitled to prosecute that person only for the crime for which he was extradited. This is known as the rule of specialty. In *US v Rauscher* America got Rauscher extradited from Britain on the ground that he had fled to Britain after murdering a fellow servant in an American ship. In America, Rauscher was tried not for murder but for causing grievous hurt to a man named Janseen. The SC of USA held that when a person is brought under the juris of the Court under the extradition treaty, he may be tried only for such offence for his extradition was sought.

Double criminality: The crime for which E is claimed should be crime in both the countries.

Sufficient evidence for crimes relating to extradition, ie it should appear to be a crime prima facie.

Certain other **prescribed formalities** should be fulfilled

The conditions and the terms mentioned in the **Extradition Treaty** should be generally fulfilled.

Not necessary that at the time of offence the said person must be **present** in the said foreign State

Extradition is generally a matter of **bilateral treaty**

Generally States do not allow the extradition of their **own citizens**

Restrictions on Surrender under Indian law: **Section 31** of Extradition Act 1961

1. Offences of **political** character
2. Prosecution for offence being **barred by time**
3. Provision by law that the fugitive shall not be tried for any offence committed **prior** to his surrender or return
4. If accused of some offence in India **other than the offence** for which E is sought
5. After **expiration of 15 days** after being committed to prison.

Unfettered power or discretion of CG to discharge any fugitive criminal.

Q.3. International Law sets little or no limitation on the jurisdiction which a particular State may arrogate to itself. Explain the nature and scope of 'State Jurisdiction'. Critically examine the principles of 'State Jurisdiction. [10M]

Jurisdiction generally describes any authority over a certain area or certain persons. According to **Oppenheim** 'State jurisdiction connotes essentially the **extent of each State's right** to regulate conduct on the consequences of events.' A State may regulate its jurisdiction by legislation, through its courts or by taking executive or administrative action.

Nature and Scope:

In general, every State has exclusive jurisdiction within its own territory, but this jurisdiction is not absolute, because it is subject to certain limitations imposed by IL. Thus it is not always necessary that a State may exercise jurisdiction in its territory, in some circumstances, a State may exercise jurisdiction outside its territory also.

Moreover there is a distinction between exercise and basis of jurisdiction.

JES Fawcett has explained this with the following illustration:

An Englishman and a German murder a French man in Paris and thereafter run away to England.

France: They can be arrested and tried by French Courts for they have committed the murder in France and the fact that they are foreigners does not make any difference. Neither Germany nor England can interfere though they may demand their extradition.

England: The English courts can try the Englishman but not the German. This is because there is **no basis for jurisdiction** for English Courts to try a foreigner for having committed murder in foreign State.

In *Central Bank of India v Ram narian,* the Supreme Court considered the question whether Penal Code could be applied to a person who was not a citizen of India at the time of committing the offence. Illustration (a) Section 4 IPC: A, a coolie, who is native Indian subject commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found.

If A was not a native Indian subject at the time of commission, the provisions of Section 4 would not apply.

Principles of State Jurisdiction

By distinguishing between those situations in which a State may exercise its jurisdiction and those situations in which it may not, IL serves to clarify the authority of officials and to minimize friction among States.

Subjective Territorial principle: This may be regarded as the technical extension of the territorial principles. According to this principle, a State may claim jurisdiction over crimes **commenced within its territory** but completed or consummated outside its territory. Ordinarily, States do not exercise this type of jurisdiction. There are however certain situations wherein States where the crime commenced or was initiated are under duty to punish the accused. This is provided for eg under the **Geneva Convention for the Suppression of Counterfeiting of Currency (1929)** and the **Convention for the Supervision of the Illicit Drug Traffic (1936).** State parties to these conventions have accepted this obligation so as to prevent commission of crimes in other States.

II. Objective Territorial Principle: According to this principle, a State gets jurisdiction over the crime, if **any of the constituent elements of the crime** is consummated in its territory. For the State concerned to assume jurisdiction, it is also necessary that the act must have produced some harmful effect within or on the territory of the State.

In the *SS Lotus case* **Justice Moore** observed, 'It appears to be now universally admitted that when a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, IL, by reason of the constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction.'

Thus the jurisdiction of a State does not always coincide with its territory.

III. Extra-territorial operation of State Laws and protective Jurisdiction of State over foreigners: This has been discussed and clarified in a Full bench decision of the Madras HC namely *KTMS Abdul Cader and Others v UOI* :

The petitioner was alleged to have been smuggling. Detention orders were passed under two acts but a warrant of arrest could not be executed because the petitioners continued to live abroad. One of the petitioners was a foreign citizen. The HC rejected the contentions of the petitioners. The SC held that it is well established that a law passed by the Parl under Art 245 cannot be invalidated merely on the ground that it has extra territorial operation and such a law cannot be questioned on the ground that it may not be found capable of enforcement outside its territories.

The Bench further observed that the words 'extra-territorial operation' are used in two different senses normally connoting

First, **laws** in respects of acts and events which take place inside the state but have operation outside and

Secondly, laws with reference to the **national of a State** in respect of their acts outside.

The State's sovereign powers including the power to make its laws cannot be limited unless it is **prohibited by any IL or by agreement,** it has agreed to curtail its jurisdiction.

IV. Some exceptions of the exercise of Juris

1. Diplomatic agents
2. Foreign embassies
3. Foreign sovereigns
4. Immunity in respect of public property of Foreign Sovereign State
5. International organisations
6. Extradition treaties
7. Foreign troops
8. Immunity of warship and their crew.

V. State Juris According to the Universal Principles:

There are probably today only two clear-cut cases of Universal jurisdiction namely, the crime of piracy ijure gentium and war crimes (affirmed by the Geneva Conventions of 1949)

VI. International Servitude: Term used to denote exceptional restrictions made by treaty or otherwise on the territorial supremacy of a State by which a part or the whole of its territory is limited.' Servitude may be of the following four types

Positive: when a State permits another State to do some work over a certain part of its territory

Negative: When a State claims that other States should not work in its territory or a part of its territory in a particular way

Militar: For eg the State of Malta has given an island to Britain on lease and has allowed Britain to have its military base on it.

Economic Servitude: When one state allows another State certain commercial or transport facilities.

Topic 7: VIENNA CONVENTION ON LAW OF TREATIES

1. *What are the various steps involved for concluding an international treaty and bringing it into force? [2020]*
2. *Examine the extent and limits to which a treaty can confer rights and impose obligations on the third State which is not party to the treaty. [2019 7(b)]*
3. *Define 'International Treaty' and explain the growing importance of treaties in Modern International Law. Can a multilateral treaty be terminated? If so, on what grounds? Explain. [2018 5(d)]*
4. *Discuss the provisions relating to amendment and modification of treaties under the Vienna Convention on Law of Treaties, 1969. [2017 7(c)]*
5. *A treaty is void if it conflicts with an existing or new or emerging peremptory norm of international Law or 'jus cogens' at the time of its inclusion. Comment. [2016 5(c)]*
6. *Discuss whether the trend of convention providing a special clause prohibiting all kinds of reservations or some or specific or special kind of reservation or prohibiting reservations totally will hinder the growth of International Law. [2016 5(d)]*
7. *Explain the principles of 'Ratification of Treaty'. Also examine the consequences of non-ratification of a treaty. [2015 5(e)]*
8. *International Treaties are agreement of contractual character between States or organisation of States creating legal rights and obligations between the parties. Examine the statement critically and explain the growing importance of Treaties in Modern International Law. [2014 5(d)]*
9. *While concluding a multilateral treaty, a State can make reservation(s) and the other State(s) may accept or reject such reservation(s) without jeopardizing the object and integrity of the treaty. Discuss the need and relevance of reservations in treaty law in the light of above statement. [2013 5(b)]*
10. *Identify and comment on the three major grounds for a State party to avoid its treaty obligations. [2012 5(c)]*
11. *A reservation, which purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State, is accepted in practice, if it is compatible with object and purpose of the treaty. Discuss the practice of different nations and opinion of ICJ regarding admissibility of reservations to the conventions. [2010 5(d)]*
12. *Explain critically the principle of 'Jus cogens'. Distinguish between 'Equal Treaties' and 'Unequal Treaties'. Give examples and also discuss the salient features of Vienna Convention on the Law of Treaties. [2009 7(b)]*
13. *Write explanatory notes on the Jus Cogens. [2007 8(c)]*
14. *Explain the doctrine of Pacta sunt servanda. What are the exceptions to the above doctrine? [2007 5(b)]*
15. *In the eyes of International Law treaties are meant to be kept. Their obligation is perpetual. Comment. [2006 5(c)]*

16. *Write a critical note on the provisions of the Vienna Convention on the Law of Treaties, relating to the grounds of invalidity, termination and suspension of the operation of treaties. [2005 6(b)]*
17. *Explain 'Jus cogens'. Examine critically the Articles on 'Jus cogens'in the Vienna Convention. [2004 6(b)]*
18. *The principle 'Pacta sunt servanda' has long been recognised as a fundamental principle of international Law, which makes the treaty binding upon the parties to it, and must be performed by them in good faith (Vienna Convention).Explain. [2003 6(a)]*
19. *Write Short Notes on Rebus Sic Stantibus in the Vienna Convention 1969 on the law of treaties. [1996 8(d)]*
20. *'One of the most controversial provisions in the Vienna Convention on the Law of Treaties 1969 is in respect of Jus cogens.' Discuss. [1995 5(d)]*
21. *Write short notes on Jus cogens. [1993 8(d)] 22. Examine the extent to which a treaty can (i) confer rights and (ii) impose obligations, on third states not party to it. [1988 5 (d)]*
22. *Examine the rules regarding (i) reservations to multilateral treaties and (ii) registration of treaties. [1986 6(a)]*
23. *"International law, on the level of unorganized International Society, does not know of any jus cogens" (rules of International Public Policy) - Schwarzenbarger. Discuss, in the light of the relevant provisions of the Vienna Convention on the Law of treaties. [1985 5(b)]*

Q.1. Discuss the provisions relating to amendment and modification of treaties under the Vienna Convention on Law of Treaties, 1969.

The term treaty has been defined in the Vienna Convention on the law of treaties, 1969 under Article 2(1)(a) as, 'an international agreement concluded between States in written form and governed by international law.' The definition given by prof. Schwarzenberger gives a more exhaustive definition, 'Treaties are agreements between subjects of international law creating a binding obligation in International law.'

Amendment and Modification of Treaties:

The principle with respect to treaties is frequently expressed by the form of principle- pacta sunt servanda which means 'States are bound to fulfill in good faith the obligations assumed by them under treaties.' The principle of sanctity of contracts is an essential condition of life of any social community. Rebus sic stantibus is an important exception. According to it, there is an implied clause that provides that the agreement is binding only so long as the material circumstance on which it rests remain unchanged. Thus, pacta sunt servanda is not an absolute principle.

Amendment

The general rule regarding the amendment of treaties is that a treaty may be amended by agreement between the parties. This rule is contained in **Article 39** of the Vienna Convention on the Law of Treaties. As regards amendment of multilateral treaties, **Article 40** provides the following:

1. Unless the treaty otherwise provide, the amendment of multilateral treaties shall be governed by the following paragraphs
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

The **decision** as to the action to be taken in regard to such proposal;

The **negotiation and conclusion** of any agreement for the amendment of the treaty

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.

5. Any state which becomes a party to the treaty after the entry into force of the amending agreement shall failing an expression of a different intion by that state:

Be considered as a party to the treaty as amended, and

Be considered as a party to the unamending treaty in relation to any party to the treaty not bound by the amending treaty

Modification:

As regards agreements to modify multilateral treaties between certain of the parties only, Article 41 provides the following:

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if-

The possibility of such a modification is provided for by the treaty or

The modification in question is not prohibited by the treaty and

- Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligation;
- Does not relate to a provision, derogation from which is incompatible with the effective execution, of the object and purpose of the treaty as a whole

2. Unless in a case falling under para 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Kunz noted that "the pacta sunt servanda means the inviolability, not of the unchangeability of treaties. The revision of treaties is neither an exception nor in contradiction with the norm of pacta sunt servanda."

Q.2. What are the various steps involved for concluding an international treaty and bringing it into force? [20M]

The term treaty has been defined in the Vienna Convention on the law of treaties, 1969 under Article 2(1)(a) as, 'an international agreement concluded between States in written form and governed by international law.' The definition given by prof. Schwarzenberger gives a more exhaustive definition, 'Treaties are agreements between subjects of international law creating a binding obligation in International law.'

Following are the main steps in the formation of a treaty:

1. **Accrediting of persons on behalf of contracting parties:** States authorise some representatives to represent them for the negotiation, adoption and signature of a treaty. Unless these representatives are accredited or authorised, they cannot participate in the Conference.
2. **Negotiation and adoption**
3. **Signatures:** However, the treaty does not become binding unless it is ratified by the respective States
4. **Ratification:** The head of State or the SG by conforming to the provisions of the Constitution confirms or approves the signature made by their authorised representatives on the treaty. The State parties become bound by the treaty after ratification
5. **Accession or Adhesion:** Those states which *have not signed the treaties may also accept it later on*. This is called **accession.** A treaty becomes a law only after it has been ratified by the prescribed number of State parties. Even *after the prescribed number of State parties have signed,* the other States may also accept or adhere to that treaty. This is called **adhesion.**
6. **Entry into force:** This depends upon the provisions of the treaty. Some treaties enter into force immediately after the signature. But the treaty in which ratification is necessary enter into force

only after they have been ratified by the prescribed number of State parties. It is a fundamental principle of IL that only parties to a treaty are bound by that treaty. This is often expressed by the maxim *pacta terties nec nocent nec prosunt.*

7. **Registration and Publication: Article 102** of the UN Charter provides that the registration and publication is essential. If it is not registered, it cannot be invoked before any organ of the UN. This provision however does not mean that if an International treaty or agreement is not registered, it cannot be invoked before any organ of the UN. It means that if a treaty is not registered in the UN, it cannot be invoked before any organ of the UN. The object of this Article is to prevent the practice of secret agreements between States and make it possible for people of democratic States to repudiate such treaties when publicly disclosed.
8. **Application and Enforcement**: After a treaty is ratified, published and registered, it is applied and enforced.

<u>Ratification: Principles of Ratification of Treat</u>

Ordinarily, without ratification a treaty cannot become binding. Ratification means that the head of the State or its Government approves (or ratifies) the signatures of its authorised representative. **Article 2** of the VC states 'Ratification is the **international act** whereby a State **establishes on the International plain its consent** to be bound by a treaty.' It has **no retroactive** effect. Some jurists are of the view that without ratification a treaty has no value in law.

According to **Article 14** of the VC, a State becomes bound by treaty when it ratifies it positively or it becomes becomes bound by the treaty under the following circumstances:

1. When there is a **provision i**n the treaty to this effect
2. When the **parties express the view** that the ratification is necessary. In such a condition treaty becomes enforceable as a law only after ratification
3. When the treaty is signed under the condition that ratification is **necessary.**
4. When the **intention of ratification** is evident from the circumstances and talks during negotiations.

Following are the **reasons** for ratification of treaty

1. Through the process of ratification, the States get an **opportunity to consider in detail** the treaties which have been signed by their representatives.
2. On the basis of the **principle of sovereignty** each State is entitled to keep itself away from the treaty or repudiate it if so desires.
3. Sometimes the provisions of treaties **require some change in the State law.** Hence the time between the signature and ratification is utilized for bringing about changes in the State law.
4. Lastly, on the basis of democratic principles, the Govt of the States gets the opportunity to **respect public opinion** in respect of treaties or to get the consent of the Parliament.

Some treaties require the consent of Parliament before they are enforced in State law. But that is not always the case with others e.g. in Britain there is no such rule that all treaties should be ratified before they are enforced.

Is there a duty to ratify: Depends on the sweet will of the State concerned.

Reservation: Article 2(1) states that 'Reservations means a **unilateral statement** made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to **exclude or modify** the legal effect of certain provisions of the treaty in their application of the State.'

Consequences of non-ratification of Treaty: Ratification is not essential under some special circumstances. In *Mavrommatis Palestine Concession case* Justice **JB Moore** made it clear that the principle that a treaty becomes effective only after ratification has become very old. So far as the binding effect of a treaty is concerned, much depends upon the **intention** of the parties. So far as the application of an international treaty in the municipal field is concerned, it is applied only after it is ratified by the State concerned.

Q.3. Examine the extent to which a treaty can (i) confer rights and (ii) impose obligations, on third states not party to it. [30M]

It is a fundamental principle of the Law of Contract that only parties to a contract are bound by the contract. Similarly it is a general principle of the International Treaty that only parties to an International Treaty are bound by it. This is expressed in a Latin maxim called *'pacta terties nec nocent nec prosunt.'* This principle has been incorporated in **Article 34** of the Vienna Convention on the Law of Treaties 1969.

This principle is subject to certain **exceptions** which are contained in **Articles 35 to 38.** They are:

Treaty conferring rights

1. Treaties which concern the right of the third party. This provision finds mention in **Article 36** of the Vienna Convention. Through this provision even third parties can be conferred some rights under the treaty.

- (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 State or to all States. Its **assent shall be presumed** so long as the contrary is not included.
- (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.

When a right has arisen for a third State in conformity with Article 36, the right may not be **revoked or modified** by the parties if it is established that the right was **intended not** to be revocable or subject to modification **without the consent** of the third States.

B. Obligations

Multilateral treaties which declare the established customary IL may bind even non-parties.

Article 38 of the VC provides: 'Nothing in **Articles 34 to 37** precludes a rule set forth in a treaty from becoming binding upon a third State as a **customary rule of IL** recognised as such.'

Multilateral treaties which **create new rules of International law** may also bind non-parties for eg, **Article 2(6)** of the UN Charter provides that non-member shall act in accordance with the purposes of the UN Charter.

Some multilateral treaties have **universal application** applicable even on non-parties e.g. the *UN Charter*.

When a treaty imposes some obligation on a third party and a third party **accepts** that obligation, then such a third party becomes bound by that treaty.

Article 35: 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 third State expressly **accepts that obligation in writing.** But when an obligation has arisen for a third State in conformity with Article 35, the **obligation may be revoked or modified** only with the **consent of the parties to the treaty and of the third State,** unless it is established that they had otherwise agreed.

As regards **revocation or modification** of obligations or rights of third States, Article 37 provides that when an obligation has arisen for a third State in conformity with Article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed. It is further provided that when a right has arisen for a third

State in conformity with Article 36, the right may not be invoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Thus, a third party state unwilling to be saddled with an external treaty obligation, should ensure that neither by its **conduct nor by its declarations,** has it **assented** to imposition of the obligations.

As provided under Art 38 of the VC, even non-parties may be bound by a treaty if it creates customary rule of international law. One of the important examples is the **1958 Geneva Convention on the High Seas.** Even non-parties to the Convention are bound by the freedoms of the High Seas enunciated in it. Similarly, sovereignty over *airspace and sovereignty over continental shelf* to the extent of exploitation of resources are as a result of customary rules generated by **Chicago Convention on International Civil Aviation 1944 (Art 1)** and **1958 Geneva Convention on the continental shelf** respectively. In practice even non-parties to these conventions follow these provisions and consider them binding.

In *North Sea Continental Shelf Cases,* the ICJ expressed the view that provisions in treaties can generate customary law and may be of norm-creating character.

Q.4. Define 'international treaty' and explain the growing importance of treaties in Modern Intermational Law. Can a multilateral treaty be terminated? If so, on what grounds? Explain. [10M]

In 1982 the Internatioanl Commission adopted draft articles on a Convention on the Law of Treaties between States and International Organizations. In 1982, the General Assembly requested the Secy General to submit a report. Subsequently the Vienna Convention was concluded. The Vienna Convention on the law of treaties 1969 entered into force in 1980.

Definition: The term treaty has been defined in the Vienna Convention on the law of treaties, 1969 under **Article 2(1)(a)** as, 'an **international agreement** concluded between States in written form and governed by international law.' The definition given by **prof. Schwarzenberger** gives a more exhaustive definition, 'Treaties are agreements between subjects of international law creating a **binding obligation** in International law.' The latter definition is considered to be much better and more exhaustive.

According to **Prof Oppenheim,** 'International treaties are **agreements of a contractual character** between States or Organisations of States creating legal rights and treaties.'

Importance:

Article 18 provides that every party to the treaty has an obligation not to defeat the object and purpose of a treaty. Further **Article 26** iterates the principle of pacta sunt servanda (every treaty in force is binding upon the parties to it and must be performed in good faith).

In this connection, **Prof Oppenheim** has remarked that the question why international treaties have binding force always was and is still much disputed. Many writers find the binding force in the law of nature, others in religious and moral principles, others in the self-restraint exercised by States in being party to the treaty while others assert that it is a will of the contracting parties.

But the principle of sanctity of contracts is an essential condition of life of any social community. The life of the international community is based not only on relations between States but also to an ever-increasing degree of relations between States. No economic relations can exist without the principle of pacta sunt servanda.

Few rules for ordinary society have such a deep moral and religious influence as the principle of the sanctity of contracts: pacta sunt servanda.

Termination of Treaties: Treaties may be terminated by (1) operation of law or (2) act of the State parties

By operation of law: In the following cases:

1. **Extinction** of either party to a bilateral treaty
2. **Outbreak o**f war: In the modern period however, all teraties do not end at the outbreak of war. **Starke** has pointed out the following:

    - Treaties between belligerent States for which general, political and good relations are essential, cease at the outbreak of war
    - Treaties relating to completed situations such as fixation of boundaries remain unaffed by war
    - Treaties relating with the rules of war remain in force and remain binding upon the parties eg Hague Convention of 1899 and 1907 and four Geneva Conventions of 1949
    - Some multilateral treaties relating to health, service, protection of industrial property etc do not completely end at the outbreak of war. They simply remained suspended and revived at the end of the war
    - Sometimes there is an express provision in the treaty as to what would happen in case of the outbreak of war.

A **material breach** of bilateral treaty

Impossibility of performance: This provision is contained in Article 61 of the VC

Rebus sic stantibus: This means that when the fundamental circumstances under which the treaty was entered into change then this change entitles the other party to terminate the treaty.

Expiration of fixed term

Successive Denunciation: This provision is contained in Article 55 of the VC

Jus cogens of Emergence of new Peremtory Norm of general International law: According to Article 64 of the VC, if a new peremptory norm of general international law emerges any existing treaty which is in conflict with that norm becoms void and terminates.

Consequences of the Invalidity, Termination or Suspension of the operation of treaty:

Article 69 of the Vienna Convention on the Law of Treaties provides that a treaty the invalidity of which is established under the convention is void. If acts have nevertheless been performed in reliance of such a treaty

Each party may require any other party to establish that as far as possible in their mutual relations t**he position that would have existed if the acts had not been** performed

Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

As regards consequences of the termination of a treaty **Article 70 paragraph 1** provides that unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present convention:

Releases the parties from any obligation further to perform the treaty

Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. Paragraph 2 of Article 70 further provided that if a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71 of the Convention deals with the **consequences** of the invalidity of a treaty which conflicts with a preremptory norm of general IL. It provides that in the case of a treaty which is **void under Article 53**, the parties shall: (a) **eliminate** as far as possible th**e consequences of any act** performed in reliance on any provision which conflicts with the peremptory norm of general international law and (b) bring their **mutual relations into conformity** with the peremptory norm of general Il.

In the case of a treaty which becomes void and terminates under **Article 64,** the termination of the treaty

Releases the parties from any obligation further to perform the treaty

Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination: provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general IL.

As regards consequences of **suspension** of the operation of a treaty, the VC provides that unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the convention:

Releases the parties between which the operation of the treaty is suspended front he obligation to perform the treaty in their mutual relations during the period of suspension

Does not otherwise affect the legal relations between the parties established by the treaty.

Further during the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Q. A treaty is void if it conflicts with an existing or new or emerging peremptory norm of international law or 'jus cogens' at the time of its inclusion. Comment.

There are certain principles in IL which all States must observe, their non-observance may affect the very foundation of the legal system to which they belong. They therefore cannot be altered by concluding treaties. These basic or fundamental rules possess the character of jus cogens.

The evolution of jus cogens may be traced to Roman law doctrine *jus publicum privatorum pactis mutari non potest* which means that a public law or right cannot be altered by the agreements of private persons.

The concept is a controversial one.

- According to one approach (Schwarzenberger, Rousseau etc) jus cogens does not exist in international law as no existing rule of IL can be considered to possess the character of peremptory (authoritative or final) norms. Further, there is nothing like illegal objects in treaties

- The second approach (emphasised by modern European and Anglo-American jurists like Verdross, McNair etc) while acknowledging that majority of rules of international law are *jus dispositivum* (laws capable of being modified by contrary consensual agreements), recognizes that certain rules are absolute and non-rejectable i.e. *jus cogens.* This approach thus supports the lawful object of treaties. A treaty will be declared void if its performance involves an act which is illegal (Lauterpach)

Jus cogens and Vienna Convention: **Article 53, 64 and 66** form *jus cogens* regime of the Vienna Convention.

Article 53: A treaty is void, if **at the time of its conclusion,** it **conflicts with a peremptory norm** of general international law. For the purposes of the present Convention, a peremptory norm is one **accepted and recognised by the international community** of States as a whole as a norm from which **no derogation is permitted** and which can be **modified only by a subsequent norm of general IL** having the same character.

This article does not give content to the concept of jus cogens. However, it **lends dynamism** to the concept. What is jus cogens today may not remain jus cogens tomorrow. It is not a static concept and changes with change in social, political, humanitarian and strategic values.

Article 64 is a corollary of Art 53: If a **new peremptory norm** of general IL emerges, an **existing treaty** which is in conflict with that norm becomes void and terminates.

The necessity for it as a separate article springs from the fact that the different legal consequences attend a treaty that is entered into in violation of an existing rule of jus cogens (which is considered as void ab initio) and the annulment of an existing treaty by the emergence of a new rule. An example of the latter is treaties regulating the slave trade becoming void owing to the general recognition of the total illegality of all form of slavery in IL.

The convention provides for compulsory settlement of disputes relating to jus cogens. Art 66 provides that if no solution is reached within a period of **12 months** following the date on which the objection was raised, any one of the parties to a dispute concerning the application or interpretation of Art 53 or 64 may, by written application, submit it to the ICJ for a decision unless the parties by common consent agree to submit the dispute to arbitration.

There is no simple criterion by which to identify a general rule of IL as having the character of jus cogens. The Vienna Convention is silent as to what are the rules which are accepted and recognized by the international community. However, the commentary o**f International Law Commission** contains **three** illustrations of jus cogens, namely: a treaty contemplating an **unlawful use** offeree contrary to UN Charter, a treaty contemplating the performance of any other act **criminal** under IL, and a treaty contemplating or **conniving at the acts**, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to operate.

In the *Genocide Convention case,* the court did not refer to jus cogens as such but the language used by the Court is significant in the sense that it refers to teh common interest of the international community in *North Sea Continental Shelf case* it was held by three judges that a reservation would be null and void if it were contrary to an essential principle of Continental Shelf institution which must be recognised as jus cogens. In the *Barcelona Traction case* it was stated that principle of self-determination is a norm of jus cogens. In the *Namibia case* the imperative character of the right of people to self-determination and the imperative character of human rights was emphasized.

Q. Discuss whether the trend of convention providing a special clause prohibiting all kinds of reservations or some or specific or special kind of reservation or prohibiting reservations total will hinder the growth of international law.

There is a great controversy in regard to the reservation in the modern period. The term reservation has been defined in **Article 2(1)** of the **VC of the Law of Treaties 1969:** 'Reservations means a unilateral statement… made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby, it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to the state.'

So far as bilateral treaties are concerned, there are no difficulties because if either party refuses to accept the reservation, the treaty comes to an end. But the same is not true in case of multilateral treaties. At one time it was generally agreed that reservation could be allowed only when the treaty expressly made a provision in this regard. But the modern practice of States shows that a State is entitled to make reservations in a treaty and the relations of those states which do not oppose the said reservation are governed by the treaty.

In the advisory opinion given in 1951 on the *Reservations to the Convention on Prevention and Punishment of the Crime of Genociede,* the ICJ held:

A state which has made and maintained a reservation which has been objected by one or more of the parties to the convention but not by others can be regarded as a party to the Convention if the Reservation is compatible with the object and purpose of the Convention.

That if a party to the treaty objects to a reservation which it considers to be incompatible with the object and purpose of the treaty, it can consider that the reserving State is not a party to the treaty.

Belilos Case 1988: For the first time an international court [ECHR] held reservations invalid. The reservation basically meant that the right to a fair trial was limited as long as there was judicial review of the law. The reservation was too general.

The Vienna Convention adopts the view that modern practice along with the compatibility doctrine expressed by ICJ should be generally accepted. The two basic provisions on reservations are Article 19 on formulation and Article 20 on acceptance of and objection to reservation.

Article 19 provides: a state may formulate a reservation unless

The reservation is **prohibited** by the treaty

The treaty provides that **only specified reservations** which do not include the reservation in question may be made or

In cases not falling under a and b noted above, the **reservation is incompatible** with the object and purpose of the treaty.

Article 20 provides

1. A reservation expressly authorized by a treaty **does not require any subsequent acceptance** by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of negotiating States and the object and purpose of a treaty that the application of the treaty is in its entirety between all the parties is an **essential condition** of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organisation and unless it otherwise provides a reservation requires the **acceptance of the competent organ** of the organization
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides

    Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to the other State if or when the treaty is in force for those States

    An objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State

    An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

For the purposes of para 2 and 4 unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a **period of 12 months a**fter it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

As regards the legal effects of reservations and of objections to reservations, **Article 21** provides that a reservation established with regard to another party in accordance with Articles 19, 20 and 23

Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation and

Modifies those provisions to the same extent for that other party in its relations with reserving State

The reservation does not modify the provisions of the treaty for other parties to the treaty inter se.

The VC also provides for the withdrawal of reservations as well as objections to reservations. Article 22 provides that unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of the State which has not accepted the reservation is not required for its withdrawal.

Views of International Law Commission:

The large number of states have made it very difficult to draft the general multilateral conventions which will reconcile all interests and viewpoints. Frequently a number of States have found it possible to participate in the treaty subject to one or more reservations. It added that 'when today the number of negotiating States may be upwards of 100 States with very diverse cultural, economic and political conditions, it seems necessary to assume that the power to make reservations, may be a factor in promoting a more general acceptance of multilateral treaties. According to soviet members of the Commission, reservations were necessary institutions because treaties should be the expression of the will of the parties.

It would seem that on the whole, the approach serves the International community's need for wide acceptance of norms contained in the increasing number of law-making treaties. The traditional unanimity rule is acknowledged for the category of restricted multilateral treaties, that is to say, treaties concluded between a limited number of States. But for the rest, the convention regime incorporates by and large the flexible Pan-American doctrine on reservation.

Regarding the 'uncertainty' element introduced in the treaties by the reservations, Oppenheim has suggested: 'A more rational solution would seem to be able to confer the power to decide on the admissibility of a reservation either upon some international judicial,or administrative authority or upon the contracting parties themselves. These could act either through an organ created by them or by arriving at a decision themselves in the sense that a reservation should be regarded as admissible unless rejected by a substantial majority of the contracting parties.'

Q. Explain the principles of 'Ratification of a Treaty.' Also examine the consequences of non-ratification of a treaty.

Ratification is the international act whereby a State establishes on the international plain its **consent to be bound** by a treaty [**Article 2(1)(b)** of VC on LoT 1969]. It is generally agreed that ratification becomes effective from the day when it is made. It has no retroactive effect.

Principles of ratification:

Ordinarily, unless and until a treaty is ratified it does not bind the States concerned. Hence, it is a very important step in the formation of a treaty.

According to **article 14** of the VC, a State becomes bound by treaty when it ratifies it positively or it becomes bound by the treaty under the following circumstances:

1. When there is a **provision** in the treaty to this effect
2. When the parties **express the view** that the ratification is necessary. In such a condition treaty becomes enforceable as a law only after ratification
3. When the treaty signed under the **condition** that ratification is necessary
4. When the **intention** of ratification is evident from the circumstances and talks during negotiations.

International law does not prescribe any time within which ratification must be given. States certainly must allow each other a reasonable time in which a treaty has to be ratified (Oppenheim). In the case of certain *German Interests in Polish Upper Silesia* it was pointed out that a signatory States' misuse of its rights in the interval before ratification may amount to a beach of treaty.

According to **Starke**, following are the reasons for ratification of treaty

1. Through the process of ratification, the States get an opportunity to **consider in detail** the treaties which have been signed by their representatives
2. On the basis of the principle of sovereignty, each **State is entitled to keep itself away** from the treaty or repudiate it if it so desires
3. Sometimes the provisions of treaties require some **change in the State law.** Hence the time between the signature and ratification is utilized or bringing about changes in the State law
4. Lastly, on the basis of **democratic principles,** the government of the States gets the opportunity to respect public opinion in respect of treaties or to get the consent of the Parliament.

Mode of Ratification

Ratification of a treaty is an internal procedure, determined by the internal laws and usage of each State. Some treaties require the consent of Parliament before they are enforced in State law. For eg, in Britain there is no such rule that all the treaties should be ratified before they are enforced. But some treaties require the consent of the Parliament before they are enforced.

In the USA a treaty must be ratified by the President with the advice and consent of the Senate. In the UK ratification is done by the Crown on the advice of the minister concerned. In India, the President ratifies the treaty on the advice of the Central Cabinet.

Is there a duty to ratify?

On the basis of the principle of sovereignty, sovereign States possess unlimited powers in respect of treaties. If a treaty has been signed by the authorised representative of State, it does not create binding obligations. In other words, we may say international law does not impose any duty upon the States to ratify those treaties which have been signed by their representatives. Nor is it necessary for the States to explain the reason for not ratifying the treaty. In fact, it depends upon the sweet will of the State concerned whether or not to ratify a treaty.

However, it must be noted that under Articles 39 and 41 of the UN Charter, the SC is empowered to exert pressure against a State for the ratification of a treaty which is related to the maintenance of international peace and security.

<u>Consequences of non-ratification</u>

Ordinarily State parties are not bound by treaties until they ratify them. However it may be noted that it is not necessary in all cases for a treaty to be binding without ratification. Much depends upon the intention of the State parties. If a State party has intended that the ratification was essential then the treaty becomes enforceable in law only after ratification.

In *Mavrommatis Palestine Concession case,* Judge JB Moore made it clear that the principle that a treaty becomes effective only after ratification has become very old. It may, therefore be concluded that so far as the binding effect of a treaty is concerned, musch depends on the intention of the parties.

So far as the application of an international treaty in the municipal field is concerned, it is applied only after it is ratified by the State concerned.

In *North Sea Continental Shelf Case 1969,* a rule was sought to be imposed upon Germany who was signatory to the treaty in question but had not ratified it. The court observed that, ‘generally States that do not sign and ratify an international convention are not bound by its terms. But there is always a possibility

that a provision in a treaty may constitute the basis of a rule which if coupled with opinio juris can lead to the formation of a binding 'custom' governing all States, even non-members to it.

Thus this case implies that a treaty can be invoked against a State who has signed but has not ratified it if the treaty declares a customary rule of IL.

Q. Explain the doctrine of pacta sunt servanda. What are the exceptions to the above doctrine?

The principle of sanctity of contracts is an essential condition of life of any social community. No economic relations between States and foreign corporations can exist without the principle of pacta sunt servanda *[Hans Wehberg]*

There is a great controversy amongst the jurists in regard to the binding force of international treaty. In view of Italian jurist Anzilotti the binding force of international treaty is on account of the fundamental principle known as Pacta sunt servanda. According to this principle, States are bound to fulfill in good faith the obligations assumed by them under treaties.

Prof Oppenheim has remarked, 'the treaties are legally binding because there exists a customary rule of IL that treaties are binding.' This assumption is frequently expressed by the form of principle pacta sunt servanda.

Legal Provisions: **Preamble** of the Vienna Convention notes that the principle of pacta sunt servanda rule is universally recognized. **Article 26** of the said Convention provides that every treaty in force is **binding upon the parties to it** and must be performed by them in **good faith. Article 27** further provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

In [his dissenting opinion] in the 1958 *case concerning the application of the Convention of 1902 governing the Guardianship of Infants (Netherland v Sweden)* the Mexican Judge Cardova of the ICJ referred to the rule as 'a time honored and basic principle.' the ICJ in *its Advisory opinion of 1951 on the Reservation to the Genocide Convention* stated that 'None of the contracting parties is entitled to frustrate or impair by means of unilateral decisions or particular agreements the object and raison de-etre of the Convention.'

Exceptions:

Although the parties to a contract are given the freedom to decide the terms and conditions of a contract independently, those terms and conditions may not interfere with public policy. If the terms and conditions of the contract are deemed to be grossly exploitive of one of the parties or unconscionable, then those terms will have violated public policy.[3] [Sasfin v Beukes 1989]

Additionally, good faith is a principle used to acknowledge the opinions of the general public when determining what is fair, reasonable and just. Good faith is based on the idea that the parties to a contract should behave in a manner that is honest and fair when executing their duties towards each other. The court in Eerste Nasionale Bank van Suid Afrika Bpk v Saayman, stated that the function of good faith was to give expression to the public's idea of what is fair, just and reasonable. Therefore, a party to a contract cannot insert terms that are so one-sided that they promote their interest at the expense of the other contracting party. In some cases, a party will even have the duty to advise the other contracting party of the implications of being bound by the proposed contract.[4]

However as pointed out by a Soviet author **VM Shurshalov,** the maxim does not have an absolute importance and hence it cannot be applied to every treaty. For example, it will not apply to unequal treaties. Thus, the maxim only embraces lawfully concluded treaties, and only in relation to them can it play a progressive role. One may not accept the view expressed by the Soviet author for the concept of unequal treaties is still fluid and has not been finally adopted but it must be admitted that pacta sunt servanda is not an absolute principle for it fails to explain the binding force of customary rules of IL.

Q. Explain the maxim 'Pacta terties nec nocent nec prosunt' with relevant case laws [15M, 2022]

It is a fundamental principle of the Law of Contract that only parties to a contract are bound by the contract. Similarly it is a general principle of International treaty that only parties to the treaty are bound by it. This principle has been incorporated in Article 34 of the Vienna Convention on the Law of Treaties 1969. This principle is subject to certain exceptions which are contained in Articles 35 - 38. They are:

1. Treaties which concern the right of the third party- Article 36
2. Multilateral treaties which declare the established customary international law may bind even non-parties - Article 38
3. Multilateral treaties which create new rules of IL may also bind non-parties. For eg, Article 2(6) of the UN Charter provides that non-member shall act in accordance with the purposes of the UN Charter
4. Some multilateral treaties have universal application. In such treaties it may be provided that they will be applicable even on non-parties eg UN Charter
5. When a treaty imposes some obligation on a third party and third State party accepts that obligation, then such a third party becomes bound by that treaty- Art 35

As regards revocation or modification of obligations or rights of third States, Article 37 provides that when an obligation has arisen for a third State in conformity with Article 35, the obligation may be

revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

One of the important examples of such a treaty is the 1958 GC on the High Seas. even non-parties to the Convention are bound by the freedoms of the HIgh Seas enunciated in it.

In *North Sea Continental Shelf Cases,* the ICJ expressed the view that provisions in treaties can generate customary law and may be of norm creating character.

Thus it has been remarked, '*A treaty does not create rights or obligations for a third State without its consent but the rules set forth in a treaty may become binding on a non-Contracting State as customary rules of IL.'*

Basis of the binding force of the Intl Treaties: *Pacta Sunt Servanda*

According to Anzilotti the binding force is PSS. According to this principles, States are bound to fulfil in good faith the obligations assumed by them under treaties. The norm which constituted since times immemorial the axiom postulate adn categorical imperative of the science of Intl law and thus has rarely been denied on principle is undoubtedly a positive norm of IL (Josef L Kunz). Few rules for ordinary society have such deep moral and religious influence as the principle of sanctity of contracts PSS. This principle is an essential condition of life of any social community. The life of the international community is based not only on relations between states but also to an ever-increasing degree of relations between States and foreign corporations. No economic relations between States and foreign corporations can exist without the principle of PSS.

In his dissenting opinion in the 1958 *case concerning the application of the Convention of 1902 governing the Guardianship of Infants (Netherland v Sweden),* the ICJ referred to the rule as 'a time honored a basic principle.' In its advisory opinion in 1922 on the *Designation of Workers Delegates to the International Labour Conference,* the PCIJ emphasized that the contractual obligation was not merely 'moral obligation' but was 'an obligation by which, in law, the parties are bound to one another.' Later on the ICJ in *tis Advisory opinion of 1951 on the Reservation to the Genocide Convention* stated that, 'None of the contracting parties is entitled to frustrate or impair by means of unilateral decisions or particular agreements, the object and raison de etre of this Convention.'

Preamble of the VC notes that the principle of pacta sunt servanda rule is universally recognized. Art 26 of the said convention provides that every treaty n force is binding upon the parties to it and must be performed by them in good faith.

Unequal treaties: There is a great controversy in regard to the concept of unequal treaties. This concept has been developed by the communist countries, particularly the Soviet Union and China. The doctrine of unequal treaties was directly linked to the principle of the equality of Sovereign States. States could not be forced to accept obligations contrary to basic principles of International law. The principle that International treaties must be observed, does not extend to treaties which are imposed by force and which are unequal in character- such treaties contradict international law and hence cannot enjoy its protection. According to the Soviet view, an example of a special category of unequal treaties are those which were entered into between the imperialist powers and colonial and dependent nations.

Communist China also holds that unequal treaties are contrary to international law and have no legal validity.

Western States and jurists oppose the concept of 'unequal treaties.' However the CV on the LoT does not contain any provisions relating to 'unequal treaties'. But since many States had raised the matter relating to 'unequal treaties' in the Vienna Conference, a Declaration was adopted which said that in the past many States entered into treaties under duress and expressed the hope that in future they would not exercise duress or enter not such treaties with other states.

Rebus sic stantibus

RSS is also considered to be a ground for avoidance or termination of treaty. Teh maxim RSS means that if the fundamental or material circumstances under which a treaty is concluded change, then this change becomes a basis for the avoidance or change or termination of a treaty. This is based on the assumption that there is an 'implied clause in every treaty which provides that the agreement is binding only so long as the material circumstances on which it rests remain unchanged' (Edward Collins). Some writers have expressed the opinion that this principle as the basis for the termination of the treaty creates a very difficult problem. However, there may be situations in which the continued application of a treaty may be both contrary to the shared expectations of the parties and an intolerable burden on them.

Criticism: According to Starke, 'The RSS doctrine is one of the enigmas of IL. Its exact scope and application are uncertain, practice is inconsistent and Intl law tribunals feel shy of committing themselves to the pronouncements or decisions involving it.

However, Art 62 of the Convention provides for fundamental change of circumstances as one of the grounds for termination of treaties and determines the scope and limit of the application of this ground is no more an enigma of IL.

Art 62 (1) allows invocation only if

The existence of those circumstances which have changed constitute an essential basis of the consent of parties to be bound b the treaties

The effect of the change is radically to transform the extent of obligation still to be performed under the treaty

Art 62(2) excludes treaties that fix boundaries from the operation of the doctrine in order to avoid an obvious source of threat to the Peace.

Prof Oppenheim has also pointed out, 'The operation of the doctrine is necessarily limited for the simple reason that it is the function of the law to enforce contracts of treaties even when they become burdensome for the party bound by them.

In the case *Free Zones of Upper Savoy and District of Gex,* wherein the PCIJ decided in 1932 that 'the changes upon which France rely has no reference to the whole body of circumstances which the contracting parties has in mind at the time the free zones were created and hence they could not be taken into consideration.

The Report of the Intl Law Commission on which the VC is based, rejected the theory of an implied clause or term and preferred the doctrine of fundamental change upon grounds of equity and justice as the basis of the doctrine.

It is also significant to note that Art 62 does not at all mention the words RSS.

Soviet reluctance to use the principle of RSS as justification for denouncing treaties lies in the fact that it is a weak argument. American jurists have also rejected the term as 'unhelpful.'

Thus as pointed out, it is a fundamental principle that once the parties enter into a treaty, they are bound by its provisions. The PSS means the inviolability, not of the unchangeability of treaties. The revision of treaties is neuter exception nor in contradiction with the norm of PSS (Josef L Kunz)

According to Prof Brierly, there is a close similarity between the doctrine RSS and 'Frustration of Contract.'

However it needs to be properly defined.

Thus the two dictions PSS and RSS can be reconciled to some extent.

Topic 8: UNITED NATIONS: Its Principal organs, powers and functions and reform

1. *Discuss the powers of the Security Council for the maintenance of world peace and security. Has the Veto Power proved a hindrance in discharge of its duties by the Security Council ? Explain. [2021 7(a)]*
2. *Discuss the purpose and principle governing United Nations. What reforms, if any, do you suggest for the UN system? [2020]*
3. *What are the parameters of contentious jurisdiction exercisable by the International Court of Justice? [2020]*
4. *"United Nations is designated as the foremost forum to address the issues that transcend the national boundaries, which cannot be resolved by a country alone." In the light of this statement, discuss the functions of the General Assembly. [2019 7(c)]*
5. *"Membership of the Security Council is not democratic mainly because of its veto power. In view of that, the U.N Security Council should be expanded and should given more membership to other countries reflecting the demographic composition of the community of nations." Explain. [2018 6(c)]*
6. *Does the International Court of Justice (ICJ) have the competence to determine its own jurisdiction? Discuss with case law. [2017 5(c)]*
7. *Critically examine the provisions of the UN Charter which enables the UN to perform its primary role of 'peace keeping' among nations. What is your assessment regarding this function of the UN? Suggest some measures or a road-map for this purpose. [2015 8(a)]*
8. *The Republity of Marshall Islands (RMI) recently filed an application against India in the International Court of Justice (ICJ) alleging India's breach of its obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament. Would it fall under the compulsory jurisdiction of ICJ? Discuss. Also mention about the possibility of challenging jurisdiction by India. .[2015 6(a)]*
9. *Do you agree with the statement that 'United Nations is a World Government' ? Give reasons for your answer. [2012 5(e)]*
10. *'The United Nations is capable of legal development in accordance with the needs and circumstances. The Uniting for Peace Resolution, 1950 is its example.' Discuss the validity of this resolution. [2011 8(b)]*
11. *Normally the States are reluctant to resort to the International Court of Justice mainly due to political factors; the general conditions of international relations; the greater suitability of other tribunals; a flexibility of arbitration in comparison with a compulsory jurisdiction and difficulty in getting enforcement of the decisions of the court. However, the court has made a reasonable contribution in settling disputes. Critically evaluate the working of the court specially in contentious cases. [2010 7(a)]*
12. *Would you support the idea of the general review of the United Nations Charter? Give reasons. Also give your opinion about the continuity of the 'Veto System'. What is the stand of India in these respects? [2009 7(a)]*
13. *Discuss the powers of the Security Council to investigate any dispute or situation inimical to international peace and security. [2007 7(b)]*
14. *How does the ICJ get jurisdiction over contentious disputes? Can a state be compelled to submit its dispute with another sovereign state without its consent? [2007 5(c)]*
15. *Answer the following questions: The establishment of compulsory jurisdiction of the International Court of Justice is essential for the maintenance of international peace and security. Comment.*

Why are countries generally reluctant to accept the compulsory jurisdiction of the court. [2006 6(a)]

16. *Critically examine the provisions of the United Nations Charter which enables the United Nations to perform its primary role of peace-keeping. Does the Charter require any reform in this respect? [2005 8(a)]*
17. *Discuss the jurisdiction of International Court of Justice. Who will decide as to whether the Court has jurisdiction or not? [2004 8(a)]*
18. *"The General Assembly has become more powerful than the Security Council of the United Nations." Do you agree with this view? Give reasons. [2004 5(b)]*

OVERALL

Q.1. Discuss the purposes and principles governing the United Nations. What reforms, if any, do you suggest for the UN system? [10M]

The twentieth century witnessed two devastating World Wars. The League of Nations, though established after the First World War, failed to achieve its objectives. Consequently on **October 24, 1945** the UN was ultimately established.

Purposes of UN

These are enshrined in **Article 1** of the Charter.

1. To maintain **international peace and security:** Preamble '*to save the succeeding generations from the scourge of war.'* Also empowers to take **collective measures** for the prevention and removal of threats. Thus the purpose of the UN is world peace.
2. The **principle of self determination:** This has been incorporated in **Articles 1(2), 55 and 56** of the UN Charter. Art 55 deals with the promotion of International Economic and Social Cooperation 'with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights.'
3. **International Cooperation** in solving international problems of economic, social and humanitarian character
4. To make the **UN a center** for the attainment of the above common ends

Principles of UN

Article 2 of the UN provides that the Organisation and its members, in pursuit of the purposes enshrined in Art 1 shall act in accordance with the following principles:

1. Principle of the **sovereign equality** of all members: However the fact is that it is not an absolute principle and admits certain exceptions for eg, permanent members (great Powers) have been conferred some special privileges and rights, for the amendment of a Charter it is necessary that it should be adopted by two-thirds majority of the members of the UN and be subsequently ratified, but the majority of these members must include the permanent members of SC **(Art 108)**
2. All members, in order to ensure to all of them, the rights and benefits resulting from the membership, shall **fulfil in good faith the obligations assumed** by them in accordance with the present Charter
3. **Peaceful settlement** of International Disputes: By peaceful means in such a manner that international peace and security and justice are not endangered
4. Principle of **non-intervention:** All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or any other manner inconsistent with the purposes of the UN.
5. All members shall give the UN every **assistance in common action i**t takes in accordance with the present Charter and shall refrain from giving assistance to any State against which the UN is taking preventive or enforcement action.
6. The Organisation shall ensure that **States which are not members** of the UN act in accordance with these principles so far as may be necessary, for the maintenance of international peace and security.
7. **Non-intervention** in **domestic matters** of State: There is however, an exception to this general principle because **Article 2(7)** provides that this principle shall not prejudice the application of enforcement measures under **Chapter VII.** The word 'domestic jurisdiction' is not clear. Its meaning and implications are dependent upon the facts and circumstances.

<u>Reform</u>

1. In view of the changing international situation, demonstrated, for example, by the dramatic increase in the number of U.N. Member States and the emergence of new powers that have attained levels of global influence equal to those of the current permanent members, the legitimacy and credibility of the Security Council cannot be ensured unless the Security Council is composed in such a way that it reflects the general will of the member states. Even though U.N. membership has risen from **51 to 193** countries, the number of seats on the Security Council has only been increased from **11 to 15, since 1965.**
2. The **functions of the Security Council** should be further strengthened. Thus, the objective of the *United Nations' Open-Ended Working Group* on the Question of Equitable Representation on and Increase in the Membership of the Security Council, established in pursuance of the resolution 48/26 of December 3, 1993, of the U.N. The General Assembly is to enhance the legitimacy and effectiveness of the Security Council, while maintaining its efficiency.

3. Number of non-permanent seats, special consideration should be given to **regions** that are now underrepresented, namely Asia, Africa and Latin America.
4. The U.N. activities are **financed** by assessed contributions from all member states and by **voluntary** contributions. The U.N. budgets financed by assessed contributions are further divided into two categories: the **regular budget and the budgets for peace-keeping** operations. Necessary to establish a **clearer linkage** between the responsibility of each Member State and the share of the financial burden it is apportioned for support of the United Nations.
5. Revitalizing the United Nations in the field of **economic and social development** development strategy based on a new global partnership between developed and developing countries, setting development targets, and reinvesting savings resulting from improved cost effectiveness in development programs.
6. It is also essential to strengthen the Economic and Social Council **(ECOSOC)** in order to facilitate discussion and to formulate guidelines for U.N. development activities.

Q. Critically examine the provisions of the UN Charter which enables the UN to perform its primary role of 'peacekeeping' among nations. What is your assessment regarding this function of the UN? Suggest some measures or a road-map for this purpose.

'The purpose of the UN is world peace.'

- Prof Hans Kelson

The 20th century witnessed two devastating world wars. After the failure of the league of nations, there was an endeavor to establish an international organization so that mutual disputes could be resolved peacefully. The UN was ultimately established on Oct 24 1945.

1. Preamble: 'to save the succeeding generations from the scourge of war.'
2. Purpose of UN: Article 1- one of the purposes of the UN is 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 peace and to bring about by peaceful means, and in conformity with the principles of justice and IL adjustment or settlement of international dispute or situation which may lead to a breach of the peace.'
   Art 2: all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.
3. Article 11: Clause (1) - General Assembly may consider general principle sof cooperation in the maintenance of international peace and security including teh principles governing disarmaments adn regulations of armaments and may make recommendations with regard to such principles to the members or to the SEcurity Council or to both. Clause (3): the GA may call the attention of the SC to situations which are likely to endanger international peace and security.

4. Chapter VI (Articles 33-38): Pacific settlement of disputes
5. Chapter VII: Sanctions against aggressor or action with respect to threats to peace, breach of peace and acts of aggression.
6. ICJ

GENERAL ASSEMBLY

Q. The United Nations is designated as the foremost forum to address the issues that transcend the national boundaries, which cannot be resolved by a country alone." In the light of this statement, discuss the functions of the General Assembly. [15 M]

The General Assembly is one of the principal organs of the UN (**Art 7** of UN Charter). It consists of all members of the UN. Each member may not have more than five representatives in the GA (**Article 9**). At present, it comprises 193 members. Each member has one vote. Decisions on important questions are made by a two-thirds majority of the members.

Functions

Deliberative Functions: By this we mean the functions of the GA regarding discussion, studies and recommendations and passing of resolutions on different matters:

- May discuss any question or matter **within the scope** of the present Charter or relating to the powers and functions of any organ provided for in the Charter (**Article 10**). However there is an **exception under Article 12** which states that while the Security Council is exercising functions assigned to it in the present Charter, the GA shall not make any recommendation with respect to that dispute or situation unless the **Security Council so requests.**
- It may also consider **general principles of cooperation** in the maintenance of international peace and security including the principles governing disarmaments and regulations of armaments and may make recommendations with regard to such principles to the members or to the Security Council or to both (Article 11(1))
- May call the attention of the SC to situations which are likely to **endanger International Peace and Security** [Art 11(3)]
- Entitled to consider those matters or problems which are likely to endanger International Peace and Security and may make its **recommendations** in this connection.

- Entrusted important responsibilities under Article 13 which provides that the GA shall initiate studies, and make recommendations for the purpose of

  Promoting **international co-operation** in the political field and encouraging the **progressive development of IL** and its codification and

  Promote international co-operation in the **economic, social, cultual, education and health fields,** and assist in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or region.

II. Supervisory Functions

The GA supervises the functions of other principal organs and specialised agencies of the UN. It particularly exercises sufficient control over the two principal organs of the UN namely, the **Economic and Social Council and Trusteeship Council.** The former in fact works as a subordinate organ of the GA. Moreover, the SC and other organs of the UN have to submit annual reports to the GA.

The GA considers and **discusses** these reports

The GA also exercises some control over the **Secy Gen** of the UN. In fact, the annual session of the GA begins with the discussion and consideration over the report of the SG on the work of the organisation (Article 98)

III. Financial Functions

Article 17 provides that the GA shall consider and approve the budget of the organisation. It further provides that the expenses of the organsiation shall be borne by the members as apportioned by the GA.

Further the GA shall consider and approve any financial and budgetary arrangements with specialised agencies and shall examine the administrative budgets of each specialised agencies and shall examine the administrative budgets of such specialised agencies with a view to making recommendations to the agencies concerned. As the GA controls purse strings, it is a potent power.

V. Elective Functions

Two types: a. Regarding admissions of new States to teh UN and b. Election of members for other organs

Regarding **admission** of new States to the UN:

- The Charter uses the term 'admission' in this respect.' But as pointed out by **Prof Leonard,** it is in fact 'election' and therefore comes under the elective functions. A new State is admitted to the UN by **two-thirds majority** of the members present and voting.
- The GA also possesses certain powers in respect of **suspension and expulsion** of members

  A member against which preventive or enforcement action has been taken by the SC may be suspended from the exercise of rights and privileges (Art 5). This can be done by two-thirds majority on the recommendation of the SC

  Persistently violated the principles of the Charter may be expelled from the Organisation by the GA upon the recommendation of the SC (Art 6)

  Arrears of the payment of its financial contribution may be deprived of its vote by the GA (Art 19)

B. Regarding election of members to other organs:

1. It elects **10 non-permanent members** of the SC (Art 23)
2. It elects **54 members** of ECOSOC (Art 61)
3. It also elects some members of the **Trusteeship Council** (Art 87). For this Art 86 © provides that the GA shall elect as many members of TC for a period of three years as may be necessary to ensure that the total number of members is equally divided between those members of the UN which administer trust territories and those which do not.
4. Takes part in the election of the **Judges of the ICJ** (**Art 8** of the Statute of ICJ)
5. GA takes part in the appointment of the **Secy General** upon the recommendation of the SC **(Article 97)**

VI. Constituent Functions

- Takes part in the **amendment** of the Charter - adopted by all members by a two-thirds majority and ratified by the members including the permanent members of SC **(Art 108)**

IV. Security Functions (Expanding role of GA)

The powers of the GA reached their zenith with the passing of the **Uniting for Peace Resolution 1950.** This conferred upon the GA important powers relating to international peace and security. Under this provision the GA has been empowered to send the Emergency Forces of the UN for the supervision of

cease fire of conflict areas or to maintain international peace and security. Eeg when UN Emergency Forces (UNEF) were sent to Egypt during the Suez Crisis of 1956.

The ICJ in its advisory opinion *on certain expenses of the organisation* indirectly upheld the validity of the Uniting for Peace Resolution 1950 (expenses of the organisation could be apportioned by the GA among the members of the UN), and made it clear that the GA can do all that which is not prohibited under the Charter.

Limitations

1. Resolutions or declarations are not binding upon States but are mere recommendations
2. Article 2(7): non-intervention in the domestic jurisdiction of the State.

SECURITY COUNCIL

Q. "Membership of the Security Council is not democratic mainly because of its veto power. In view of that, the UN security council should be expanded and should give more membership to other countries reflecting the demographic composition of the community of nations." Explain. [15M]

The **Dumbarton proposals** emphasized the establishment of an executive organ, whose membership might be limited and which could be entrusted the 'primary responsibility for the maintenance and Security. In the **San Francisco Conference**, it was finally decided to establish such an organ in the form of the Security Council. In accordance with the provisions of **Article 7** of the UN Charter, the SC is one of the principal organs of the UN. It co

mprises 15 members (5 permanent members i.e. China, Russia, America, France and Britain and 10 non-permanent members).

Need for Enlargement of the Security Council

After the Gulf War (1991) and the breaking of the Soviet Union the need for the enlargement of the SC is being greatly felt in view of the changed situation. When the membership of the SC was increased from 11 to 15 in 1965, the membership of the UN was 113. Since then the membership of the UN has increased to 193.

Besides this there are other imbalances in the existing composition of the Security council. Africa and Latin America are underepresented. China, the largest continent from the point of area and population, is the sole representative of Asia in permanent members. Economic superpowers such as Japan and Germany are not permanent members. Moreover, India also ought to be made a permanent member.

Voting Rights: According to **Article 27,** each member of the SC shall have one vote. The decisions of the SC on procedural matters shall be made by affirmative votes of 9 members. But decisions on substantial matters requires votes of 9 members and affirmative votes of 5 permanent members. There is, however, an exception to this rule- for any decision under **Chapter VI and under paragraph 3 of Article 62,** a party to a dispute shall refrain from voting. A negative vote cast by a permanent member on a substantial matter is called a veto. Absence of the representative of a permanent member from the meeting of the Council is not considered as Veto eg in 1950 on the question of Korea, the SC took a decision because the representative of Soviet Union was not present. Later it was argued by Soviet Union that the absence constituted 'Veto' but other members did not accept this argument.

According to the **World Watch Institute**, a Washington think tank, the SC should be expanded to include India and other countries, stating that the current permanent members have usurped the Council's authority and have relegitimised wars eg the Gulf war whent he coalition led by the US was given a blank cheque for driving Iraq out of Kuwait.

The target date for enlarging and reforming the SC was the 50th anniversary of the UN in 1995. The target date having already passed, there is great uncertainty in this connection. A major shift in US policy came in the latter part of the year 1997. The US began advocating seats for developing nations in the SC. But it advocated regional or rotational basis for selecting new permanent members. This proposal was not at all acceptable to India. Rotation and permanent are contradictory terms.

G4 group floated a new UN SC reform draft. G4 (namely **India, Germany, Japan and Brazil**) stepped up their campaign to win permanent seats to theUNSC by floating a new proposal aimed at securing wider international support especially from African countries. Though this proposal was aimed at seeking support of the US and China for SC expansion, they were the first to reject this move.

Government of India has been according the highest priority to obtain a permanent membership for India in an expanded United Nations Security Council. Towards this objective, India is actively engaged in the ongoing **Inter-Governmental Negotiations (IGN)** on United Nations Security Council reforms at the United Nations and has been working with other reform-oriented countries through its membership of the G-4 (India, Brazil, Germany and Japan) and the **L.69 Group** (cross-regional grouping of developing countries of **Asia, Africa and Latin America).**

As a measure of its increasing stature and acceptability of its role in the United Nations Security Council, India was elected as a non-permanent member of the United Nations Security Council for the **8th time** during 2021-22, with an overwhelming majority (184 of 193 votes) during the elections held on June 17,

2020 in New York. A number of countries have bilaterally expressed official affirmations of support for India's candidature to a permanent seat in an expanded United Nations Security Council.

United Nations Security Council reforms and expansion of its membership, with India as a permanent member, continues to be one of Government of India's key priorities in all its bilateral and multilateral engagements including at the highest levels and the Government is engaging with other countries on this issue.

Formation and Purposes of UNSC. How far has it achieved its purposes for which it was made?

In June 2020 India was elected to the UNSC as a non-permanent member for 2021-22. This is India's eighth stint at the UNSC.

Formation:

The Dumbarton proposals emphasized the establishment of an executive organ whose membership might be limited. In the San Francisco Conference, it was finally decided to establish such an organ in the form of a Security Council. In accordance with the provisions of Article 7 of the UN Charter, the SC is one of the principal organs of the UN. It comprises 15 members (5 permanent and 10 non-permanent).

Purposes of UNSC

- Maintenance of International peace and security [Article 1 of Un Charter]
- Elective Functions
- Supervisory functions
- Constituent functions

Evaluation of success:

In accordance with **Article 27,** the affirmative vote of 9 members (including permanent members) are required giving them an effective veto. This has stood in the way of the smooth functioning of UNSC eg. It could not intervene in 1956 when the USSR invaded Hungary, in 2000s when Saudi invaded Kuwait, or recently when Russia invaded Ukraine.

Thus reform of UNSC is the need of the hour.

Art 27: each member of SC shall have one vote

- Procedural matters: 9 votes

- Substantial matters: 9 + 5 P5 and veto power

Exception: any decision under Chapter VI and Art 62 para 3, party to a dispute shall abstain from voting

Veto power: a negative vote caste by a permanent member on substantial matter

- Absence of P-5 member not veto eg in 1950 on the question of Korea, the SC could not take a decision because rep fo Soviet not present.

Maintenance of Peace and Security

1. Art 1 para 1

2. Art 2 para 3- all members peaceful means to settle

3. Art 2 para 7: Non intervention exception in respect of enforcement measures under Chap VII

4. Art 51: resp of SC to maintain or restore intl peace and Secy

5. Art 25: Members of UN have agreed to accept and carry out the decisions of SC

2. Elective Functions

1. SC and GA separately elect the judges of ICJ (Art 4 and 8 of Statute of ICJ)

2. Recommends the appointment of Sec Gen of UN (Art 97- GA appoints)

3. Supervisory function

1. Art 5: suspends members of UN against which preventive or enforcement action has been taken

2. Art 6: member of UN whihch has persistently violated the principles in the Charter may be expelled by GA

3. Control and supervision of strategic territories under Trusteeship system

4. Constituent function

- Art 108: amendments sall come into force for all members of UN when adopted by 2/3rd vote in GA and ratified by 2/3rd including all permanent members of SC

ICJ

Q. What are the parameters of contentious jurisdiction exercisable by the International Court of Justice? [10M]

On 22 July 2022, the International Court of Justice (the "**ICJ**" or "**Court**") upheld jurisdiction in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, dismissing all four preliminary objections raised by Myanmar. The Gambia instituted proceedings in 2019, arguing that Myanmar had violated the Convention on the Prevention and Punishment of the Crime of Genocide (the "**Genocide Convention**") through its treatment of members of the Rohingya group that resides primarily in Myanmar's Rakhine State. In January 2020, the Court unanimously prescribed provisional measures, which, *inter alia*, required Myanmar to prevent the commission of acts of genocide under Article II of the Genocide Convention.

Justice Nagendra Singh- Two basic pillars are necessary for the establishment of public order: the existence of a proper law and the machinery for enforcing it. At present there is the International Court of Justice which is the successor of the PCIJ which was established under the League of Nations. Disputes submitted are decided in accordance with international law and the Court applies sources of IL as enumerated in Art 38 of the Statute of the Court. Judicial settlement is given a prominence under the UN Charter as the Principal Judicial Organ under Article 92. The members are elected in such a way so that it represents 'the main forms of civilization and of the principal legal systems of the world.' (Article 9 of the Statute of ICJ)

Forum Prorogatum: The operation of the doctrine of forum prorogatum has not been envisaged under the Charter of the UN or the Statute of the ICJ. This doctrine states that the Court will have jurisdiction in a matter in which it does not otherwise have jurisdiction where a respondent consents to the jurisdiction. This principle was enunciated by the PCIJ in the *Right of Minorities in the Upper Silesia (Minority Schools) case.* It may also operate where the Court already has jurisdiction *ratione personae.* The Court does not apply this doctrine lightly.

After the dissolution of the LoN, the PCIJ was also dissolved. But it was immediately succeeded by the ICJ. As aptly pointed out by **Prof Goodspeed,** 'The new Court stepped into the shoes of the old and began its work in the same city in the same place and in the same hall in which the previous Court delivered its high judgments.'

The main heads of court's jurisdiction include: A. Contentious Jurisdiction and B. Advisory Jurisdiction

Contentious Jurisdiction: It may further be divided into following two heads:

Voluntary Jurisdiction

Optional Jurisdiction or compulsory Jurisdiction based on optional clause

Voluntary Jurisdiction

According to **Article 36(1)** of the Statute of the ICJ, the jurisdiction of the court comprises all cases which the **parties refer** to and all matters **specifically provided for in the Charter** of the UN or in treaties and conventions in force. Thus, if the parties to the statute refer a dispute to the courts, the court gets jurisdiction and by virtue of **Article 59,** the decision of the Court shall be **binding** upon the parties.

Optional Jurisdiction or compulsory Jurisdiction based on optional clause:

Article 36 (2) confers optional jurisdiction upon the court which provides that the State parties to the Statute may confer compulsory jurisdiction upon the Court by making such declaration in respect of any other State which also accepts similar obligations. This can be done without any special agreement to the same effect.

Under this provision, the State party to the Statute may confer compulsory jurisdiction upon the Court in respect of the following matters:

(i) **Interpretation** of a Treaty

(ii) Any **question** of IL

(iii) Existence of any **fact** which if established could constitute a **breach of international obligations** and

(iv) the nature and the extent of the **reparation t**o be made for the breach of an international obligations.

73 States have so far recognised the compulsory jurisdiction.

Article 36(3) further provides that the declarations referred to may be made **unconditionally or on condition of reciprocity** on the part of several or certain States, or for a certain time.

Thus in the *Right of Passage case* (Preliminary objections) India was unsuccessful in her contention that reciprocity applied so as to allow the respondent to take advantage of a reservation in the declaration of the applicant, Portugal of a right to exclude a given category or categories of disputes. The most common reservations which have been made by State parties to the statute are in respect of matters of domestic jurisdiction, time limits and reservations ratione temporis and reservations of past disputes.

The reservation made by the US that the Court will not have jurisdiction over matters 'which are essentially within the domestic jurisdiction of the UN as determined by the US' is known as **'Connally Amendment' or 'Connally Reservation.'** Other states such as India, France, Liberia, Mexico, Pakistan etc have also emulated America's example. However subsequently **India, France, Pakistan and UK** withdrew this reservation.

Under the optional clause ie Article 36 paragraph 2, States may accept the compulsory jurisdiction of the Court in the following ways:

State parties may **include a provision in a treaty** or convention that in case of any dispute in respect of its interpretation, the court shall have compulsory jurisdiction

State parties **may accept** compulsory jurisdiction under optional clause as discussed above.

As pointed out by **Prof Kelson,** the jurisdiction conferred upon the Court under Art 36 (2) is not, in fact compulsory jurisdiction, because for the creation of such jurisdiction the **prior consent** of the party is necessary. **Judge Hudson** has also expressed the view that the term 'compulsory jurisdiction' is 'misleading'

Transferred Jurisdiction: Granted by **Article 36 (5)** of the Statute. For eg, if A and B states conferred jurisdiction upon the Permanent Court of International Justice for a period of 15 years and the Permanent Court was dissolved after the expiry of five years, the present court would have the jurisdiction for the remaining period of 10 years.

In the international sphere, no order can be maintained if there is no existence of a well-defined and well-codified International law and an effective agency to enforce it (*Dr Nagendra Singh,* who served as one of the judges and President of the ICJ).

Q. Does the ICJ have the competence to determine its own jurisdiction? Discuss with case law.

The establishment of the rule of law in the world is necessary because it is only through this that peace and public order can be established in the international field [Dr. Nagendra Singh, former President of ICJ]

Jurisdiction:

It may be noted at the out-set that consent of the States is the basis of jurisdiction of the court. Main Heads: Contentious (Voluntary and Compulsory) and Advisory Jurisdiction

Court's competence in respect of determination of its own jurisdiction: in the event of a dispute as to whether the Court has jurisdiction, matter shall be settled by the decision of the Court **[Article 36, paragraph 6]**

For example, in the *case concerning the Aerial Incident of 4th September 1954 (US V USSR)*, the Court held that 'it can take no further steps upon this application.' Similarly in the *Anglo Iranian Oil Company case* the Court held that it had no jurisdiction to decide the case as it was related to the territorial sovereignty of Iran. In the *Fisheries Jurisdiction (UK v Iceland) case,* the Court held that it had jurisdiction to decide the case. Iceland had contended otherwise. In another *Fishories Jurisdiction case (Spain v Canada)* the ICJ pointed out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it, this has no relevance for the establishment of the Court's jurisdiction, which is a question of law to be resolved in the light of the relevant facts.

That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather it is for the Court to determine from all the facts and taking into account all the arguments advanced by the parties, 'whether the force of the arguments militating in favor of jurisdiction is preponderant and to ascertain whether an intention on the part of parties exists to confer jurisdiction upon it. [*Nicaragua v Honduras*]

Advisory juris Art 65:

Court may give advisory opinion on any legal question at request of whatever body or in acc with the Charter of the UN

Question shall be laid before the Court by written request containing exact statement of question on which opinion required.

Interpretation of Peace Treaties case (First Phase): consent is basis for contentious case. Different in advisory proceedings even if legal question pending between states. Advisory, not biding. Courts opinion is not given to States, but to the organ of the UN and in principle should not be refused.

Therefore, does not per se constitute a 'decision' which anyone is legally bound to comply. To disregard them is not outright defiance of the principal judicial organ of the UN, it does however, diminish the prestige of the tribunal, and that is disservice to the cause of world law (PE Corbett). Great value in building public opinion (Nagendra Singh)

Art 96: ICJ is not bound to give advisory opinion. If not legal, may refuse.

TOPIC 9: Peaceful settlement of disputes- different modes

1. *Is it a legal duty of States under international law to settle their disputes by peaceful means ? Can failure of peaceful means entitle States to use force to settle their disputes ? Discuss. [2021 8(a)]*
2. *Explain the role of arbitration for peaceful settlement of international disputes. [2020]*
3. *Discuss in brief, the various modes of peaceful settlement of international disputes. Do you think that these modes of settlement are effective or is any other mode required in the present scenario ? [2019 5(e)]*
4. *Define International Dispute. Explain the difference between peaceful settlement of disputes and compulsive settlement of disputes. Critically examine the growing importance of ADR methods in International Dispute settlement. [2018 6(b)]*
5. *Enumerate the various methods of Peaceful Settlement of International disputes. Elaborate on judicial settlement. [2017 6(c)]*
6. *Discuss, with the help of relevant case law, various methods specifically mentioned under Chapter VI of the UN Charter to resolve international disputes peacefully. Also discuss the role of Security Council in this regard. [2016 8(b)]*
7. *Discuss the various peaceful means of resolving International Disputes. Which one according to you is more practical in the context to problems of the present day? Give reasons. [2015 5(b)]*
8. *Chapter VI of UN Charter is devoted to peaceful settlement of International Disputes. Discuss the methods mentioned and explain the role of Security Council and General Assembly in this regard, and the role such settlement plays in obviating the need to resort to Chapter VII measures. [2013 8(a)]*
9. *"With the exception of disputes of an exclusively legal character which are usually submitted to arbitration or judicial settlement, it is purely a matter of policy or expediency which of the different methods is to be adopted for composing a particular difference between States." Explain the different methods of peace fill dispute settlement envisaged by the United Nations Charter and examine the appropriateness of each in different situations. [2012 7(a)*

10. *"The principle of States being obliged to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered is generally bashed aside by the tendencies of the nation-states of being reticent to submit disputes to independent, impartial adjudication, particularly not accepting in advance the compulsory jurisdiction of an independent judicial body." Explain the statement with reference at least to one such conflict exiting in the world and also prepare a module for promoting negotiations among nations using new opportunities created by globalization. [2011 7(a)]*
11. *Define and distinguish between 'arbitration' and judicial settlement' in the context of the rules of International Law. Also mention the relevant provisions regarding 'forum prorogatum.' [2009 5(a)]*
12. *Write short notes on the Manila Declaration, 1932. [2009 8(c)]*
13. *Answer the following questions: Arbitration is the most efficacious mode of settlement of international disputes. Elucidate. Discuss the advantages and disadvantages of arbitration as a method of settling international disputes. [2006 7(a)]*
14. *Explain the forcible methods of settlement of international disputes. [2004 5(c)]*

Q.1. Explain the role of arbitration for peaceful settlement of international disputes [10M]

A dispute has been defined as 'a **disagreement** on a point of law or fact, a **conflict of legal views or interests** between two persons' (*Mavrommatis Palestine Concessions (Preliminary Objections) case).* In international law, the objective is to develop means and methods through which the disputes may be resolved through peaceful means. In this respect the two **Hague Conferences of 1899 and 1907,** the covenant of the League of Nations and the UN Charter deserve special mention.

One of the major modes of the pacific means of settlement of international disputes is Arbitration.

Arbitration:

By arbitration we mean the method through which a dispute is referred to certain persons called arbitrators. Their decision is known as the award which is binding.

The history of settlement of international disputes through arbitration may be traced from very ancient times. But in modern times its history dates back from the **Jay Treaty of 1794** between **England and America.** The next important development was the *Alabama Claims Arbitration 1872.* In this case, America had claimed compensation from Britain on the ground that it had violated the laws of neutrality. The award was granted in favor of America. The next important event was the adoption of the **Hague Convention of 1899** where the law relating to arbitration was **codified.** It also established the **Permanent Court of Arbitration.** This work was completed by the Hague Conference of 1907.

Article 33 paragraph 1 of the **UN Charter** provides that the parties to any dispute shall, first of all seek a solution by pacific modes of dispute settlement among which one of them is arbitration. **Article 15** of the **Hague Convention of 1899** provides: 'International arbitration has for its **object** the **settlement of differences** between States by Judges of their own **choice** and on the basis of a **respect for law.'** This definition emphasises two elements- i) **consent** of parties to the arbitration ii) **settlement** on the basis of respect of law.

Permanent Court of Arbitration:

It comprises three institutions: i) Panel of Experts ii) Administrative Council and iii) International Bureau.

I. Panel of Experts: Each signatory power selects **four persons** competent in questions of IL and of highest moral reputation. They are inscribed in a list called panel of experts and the aggrieved States select **five experts** from this panel to constitute a **temporary arbitration Court.**

II. Administrative Council: Situated in **Hague,** the Administrative Council comprises the **diplomatic representatives** of the parties to the Convention.

III. International Bureau: It comprises a **General Secretary** and certain other employees. States wishing to avail the services of the Court are helped by this office through correspondence and it also serves as a **mediator** for the States who want to make use of the court.

Some of the more important decisions or awards are the *North Atlantic Fisheries case (1910) Muscat Dhows case (1905), Savarkar's case (1911), Island of palmas case (1928), Canberro's case (1912), Russian Indemnity case (1912) and Pious Funds case (1920).*

The *Kutch Arbitration Award (1968):* Pakistan claimed 3500 sq miles of the land. An armed conflict took place in 1965. After the ceasefire, both referred the matter to arbitration. The third arbitrator was nominated by the Secy Gen of the UN (Judge Gunnar Lagergen). According to the award, 320 sq miles (10% of the Pakistani claims) of the land belonged to Pakistan, and the rest to India.

This award has been criticised as 'political' and 'partial.' The arbitrator nominated by India gave his decision in favour of India and the arbitrator nominated by Pak gave his decision in favour of Pak. However, as rightly pointed out by **RP Anand,** by the very nature of things, settlement of any international dispute, through whatever means is bound to have political overtones and political repercussions. But that does not necessarily make it a political settlement.'

Regarding the implementation of the Kutch award, an important case is *Maghanbhai Ishwarbhai and Others v UOI.* Through the exchange of letters India and Pakistan agreed to implement the Kutch Award. The Petitioners contended that the implementation will amount to cession of Indian land and therefore it

required approval or ratification by the Indian Parliament. The SC observed that a settlement of boundary or land cannot be called a cession.

The IL of arbitration now exists in the form of *i) International Covenants of HR ii) International Public Law iii) Private IL and iv) Bilateral arbitration agreements* enforced under international arbitral conventions such as the **Geneva Protocol on Arbitration Clauses 1923, Geneva Convention on the Enforcement of Foreign Arbitral Awards 1927 and New York Convention on the Recognition and Enforcement of Foreign Awards 1958.**

Indian Council of Arbitration (ICA): In **1965** the ICA was established as the apex arbitral organisation at the apex level. Its rules of arbitration have now been revised on the basis of the Arbitration and Conciliation Act 1966.

Advantages:

1. Consensual procedure: As pointed out by Starke, 'There will always be a place for arbitration in the relations between States.' Combines judges of their own choice and respect for the law.
2. Less expensive
3. Without publicity: Parties can agree that award be not practice
4. Well recognised principles eg the ones governing the practice and powers of arbitral tribunals
5. Flexible procedure
6. Certainty of a binding award

Disadvantages:

1. Today a residual procedure eg its usefulness in fact finding can be equally well done by a commission of inquiry.
2. Political nature

The Central government will move the 'The New Delhi International Arbitration Centre (Amendment) Bill, 2022' in the Lok Sabha. The Act provides provision for setting up the New Delhi International Arbitration Centre and designates it as an institute of national importance.

Q.2. Discuss in brief, the various modes of peaceful settlement of international disputes. Do you think that these modes of settlement are effective or are any other mode required in the present scenario? [10 M]

The methods of the settlement of International disputes may be divided into two main categories: 1) Pacific means of settlement and 2) Compulsive or forcible means of settlement. **Article 33 paragraph 1** of the UN Charter provides that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall first of all seek a solution by peaceful means of settlement of disputes.

Modes:

1. **Arbitration: Article 15** of the Hague convention 1899 provides: 'International arbitration has for its **object the settlement of differences** between States by **Judges** of their own choice and on the **basis of a respect for law**.' Binding award.
2. **Judicial Settlement**: At present there is the International Court of Justice which is the successor of the PCIJ which was established under the League of Nations. Disputes submitted are decided in accordance with international law and the Court applies sources of IL as enumerated in **Art 38** of the Statute of the Court. Judicial settlement is given a prominence under the UN Charter as the **Principal Judicial Organ** under **Article 92.** The members are elected in such a way so that it represents *'the main forms of civilization and of the principal legal systems of the world.'* **(Article 9** of the Statute of ICJ)

   Forum Prorogatum: The operation of the doctrine of forum prorogatum has not been envisaged under the Charter of the UN or the Statute of the ICJ. This doctrine states that the Court will have jurisdiction in a matter in which it does not otherwise have jurisdiction where a respondent consents to the jurisdiction. This principle was enunciated by the PCIJ in the *Right of Minorities in the Upper Silesia (Minority Schools) case.* It may also operate where the Court already has jurisdiction *ratione personae.* The Court does not apply this doctrine lightly.

Negotiations: It is a much less formal method than judicial settlement. If negotiations fail to resolve disputes then other methods may be used along with negotiations. For example, **India and Canada** recently held negotiations on trade issues.

Good Offices: When two States are not able to resolve their disputes, a third State may offer its good offices for the same. The third State creates an environment that may be conducive for the settlement of the disputes. For e.g The **UNSC** offered its good offices in the disputes between **Indonesia and Netherlands in 1947, France** offered the same to **America and North Vietnam** to settle their mutual dispute so as to end the Vietnam War.

Mediation: The third State or individual not only offers its services but also actively participates in the talks to resolve the dispute e.g. **Tashkent Agreement** wherein Russia succeeded in bringing about an agreement between **India and Pakistan.** Russia has favoured India for playing the role of a mediator in the **Ukraine** crisis.

Conciliation: Conciliation is a method through which the other States or the impartial persons try to resolve the dispute peacefully through different means. Often the matter is referred to a **Commission or Committee** which submits its report and recommends certain measures. These proposals however are not binding. The **Hague Conventions** made provisions for a **Conciliation commission.** Eg. The **1965 Convention** of the Settlement of **Investment Disputes** provides for a Conciliation commission for the settlement of disputes.

Enquiry: This is not an independent method and is often used along with other methods. The main objective is to investigate relevant matters so as to establish facts which may help the ultimate solution of the problem. For eg, often Enquiry commissions are appointed in relation to the settlement of **border disputes.**

Settlement of International disputes under the auspices of **UN Organisation**

It is one of the **purposes** of the UN that State members should settle their disputes through peaceful means under **Art 2.**

GA may make recommendations for peaceful settlement of disputes **(Art 14)**

Articles 33 to 38 of **Chapter VI** made the provisions for the peaceful settlement of international disputes.

The **Security Council** may also make recommendations in regard to the settlement of disputes through peaceful means **(Art 33)**. It is also provided that if the parties fail to settle their dispute by the means indicated in the said Article they *shall* refer it to the SC. Then the SC shall decide whether to take action under **Article 36** or to recommend such terms as it may consider appropriate **(Art 37).**

Q.3. Define International Dispute. Explain the difference between peaceful settlement of disputes and compulsive settlement of disputes. Critically examine the growing importance of ADR methods in International Dispute settlement. [15M]

Coercive or compulsive means of settlement:

1. **Retorsion:** When a State behaves in a **discourteous manner** with another State, IL confers right upon the State affected to resort to retorsion. The word means retaliation. But the affected State can only take those measures which are permissible under IL. For eg, in retorsion diplomatic relations may be ended, privileges of diplomatic agents may be withdrawn and economic facilities may be stopped. Recently, Russia declared Bulgarian consular and embassy persona non grata in response to the steps taken by the Bulgarian government to reduce the number of

representatives in Russia after the Ukraine invasion by Russia. However, in accordance with the UN Charter, no State can take any action in the form of retorsion that may endanger international peace and security.

2. **Reprisals:** According to **Starke,** this connotes **coercive measures** adopted by one State against the other for the purpose of **settling some disputes** brought about by the latter's **illegal or unjustified act.** A leading case on reprisal is the *Naulilaa Incident.* In this case the tribunal laid down the following principles:

   Reprisals are **illegal** unless they are based upon a **previous act contrary** to IL

   There must be a certain **proportion** between the offence and the reprisals as a necessary condition for the legitimacy of the latter

   Reprisals are only legitimate when they have been preceded by an **unsuccessful demand of redress.** In fact, the employment of force is only justified by necessity.

For example, recently in 2022, US carried out reprisals in the form of airstrikes in areas of eastern Syria used by Iran-backed militias. It is a visa reprisal that the Ukrainian President, Volodymir Zelenskyi, now suggests. In a fervent appeal to Western powers, he has called for a blanket travel ban on Russians.

Difference between retorsion and reprisal: In retorsion only that action can be taken which is permitted under IL and depends on the sweet will of the States. In reprisal, those actions can also be taken which might otherwise be illegal but are allowed as reprisal in certain special circumstances.

3. **Embargo:** It is a type of reprisal. If a State violates international law or commits some international crime then the affected State becomes entitled to create **obstruction** in the **transport of its ships** which are within the territory of the affected State. An embargo is when one nation establishes a policy not to trade with another nation and not to allow its own ports or territory to be used for commerce with that nation. Eg EU's embargo on Russian coal in 2022 after the Ukraine invasion.

4. **Pacific Blockade:** The ingress and egress of the ports of the States are blockade so that the ships of other States may not reach those ports and the ships of the blockade State may not go out of the cords. Pacific blockade is one that is used in peacetime. It is often resorted to as a reprisal because through blockade the State may be compelled to settle its dispute. A blockade is closing to international commerce by military force the coast of another entity. A blockade prevents third parties from undertaking normal commercial activity. Eg. Blockade of Cuba by America in 1962 because it contended that Russia was going to supply some nuclear weapons to be stationed at Cuba. It has been predicted that even China is honing its ability to blockade Taiwan after Speaker Nancy Pelosi's visit created a stir.

5. Intervention

6. Settlement under the Auspices of the UN: **Chapter VII** of UN 'Action with respect to threats to the peace, breaches of the peace and acts of aggression. It provides for two main things

Collective intervention or Enforcement action and

Individual and collective self defense.

Definition of International Dispute

A dispute has been defined as 'a **disagreement** on a point of law or fact, a **conflict of legal views or interests** between two persons' (*Mavrommatis Palestine Concessions (Preliminary Objections) case).* In an international dispute, the dispute must be between States. In a case of a wrong done to a national of one State, it does not become an international dispute until it is taken up by the Government of teh State of the injured national. Secondly, the dispute must lead to some action by the aggrieved State. Thirdly, the dispute must relate to a reasonably well-defined subject matter.

In international law, the objective is to develop means and methods through which the disputes may be resolved through peaceful means. In this respect the two **Hague Conferences of 1899 and 1907,** the covenant of the League of Nations and the UN Charter deserve special mention.

Importance of ADR methods

The links between the principle of the peaceful settlement of disputes and other specific principles of international law are highlighted both in the friendly relations declaration and in the Manila Declaration, as follows:

1. The principle of non-use of force in international relations.
2. The principles of non-intervention in the internal affairs or external affairs of states.
3. Principles of equal rights and self-determination of people.
4. Principles of the sovereign equality of states.
5. Principles of international law concerning the sovereignty, independence, and territorial integrity of states.
6. Good faith in international relations.
7. Principles of justice and international law.

1. *A single procedure*.
2. *Party autonomy*.
3. *Neutrality*.
4. *Confidentiality*.
5. *Finality of Awards*.
6. *Enforceability of Awards*.

There are, of course, circumstances in which court litigation is preferable to ADR. For example, ADR's consensual nature makes it less appropriate if one of the two parties is extremely **uncooperative,** which may occur in the context of an extra-contractual infringement dispute. In addition, a court judgment will be preferable if, in order to **clarify its rights,** a party seeks to establish a public legal precedent rather than an award that is limited to the relationship between the parties. In any event, it is important that potential parties, and their advisors are aware of their dispute resolution options in order to be able to choose the procedure that best fits their needs.

Distinguish between Arbitration and Judicial settlement as methods of peaceful settlement of disputes in IL. [10M]

Article 1 of the UN Charter holds that one of the main purposes of the UN is the maintenance of peace and security.

JUDICIAL SETTLEMENT	ARBITRATION
1. ICJ is a permanent court governed by its statute.	1. PCA is neither a Court nor permanent.
2. The ICJ is situated at Hague	
3. Proceedings are public and its judgments are published	It has no permanent seat
4. ICJ is open to all States. But its jurisdiction depends upon the consent of States	The awards may or may not be published
5. Decided in accordance to IL as enumerated in Article 38 of the Statute of the Court	It is also a consensual procedure but the consent is necessary even for the establishment of the court
6. Elected in such a way so that it represents 'the main forms of civilization and the principle legal systems of the world.' [Article 9 of the Statute of ICJ]	Strict application of law is neither required nor insisted upon
7. Judicial settlement is given a place of prominence under the UN Charter. It is one of the principal judicial organ of the	The constitution of the arbitration court depends upon the consent of the parties to the dispute and

UN [Article 92]	therefore it can never be as representative as the ICJ. The UN Charter recognises arbitration as one of the pacific modes of settlement of disputes [Art 33] but it has not been given that prominent role which has been given to the ICJ.

Manila Declaration

MD on te Peaceful SEttlement of Intl Disputes 1982

1. Preamble: reaffirmed the Declaraton on Principles of IL concerning friendly relations and cooperation of states in acc with Charter of UN

2. Part I para 5: States shall seek in good faith and in a spirit of coop an early and equitable settlement of their intl disputes by N, I, M, C, A, JS, regional agencies or other peaceful means of own choice including good offices. Appropriate circumstances and natre of dispute.

3. Part I Para 13, neither existence of a dispute nor failure of ps shall permit the use or threat of force

4. Part II, Para I- full use of UN

5. Part II, Para 3- GA in PS

6. Part II, Para 4: Strenthen SC

7. Part II, Para 5: ICJ- referred and secondly desirable: a. Inserting in treaties submission of icj b) recognises compulsory juris c) identify cases to hand to ICJ

TOPIC 10: Lawful Recourse to force: aggressions, self-defence, intervention

1. *Write note on (2) Grounds of Intervention [2020]*
2. *What are the rules of International Law governing the lawful use of force by the States in the exercise of their inherent right of self-defence ? [2019 5(b)]*
3. *What are the factors that govern the recognition of insurgency and belligerency? [2017 5 (b)]*
4. *Comment on the provisions relating to prohibition of use of force and exceptions thereto under the U.N. Charter, 1945. [2017 5(e)]*
5. *Define intervention and mention the grounds under which it is justified. Also throw light on the violations of this principle of International Law. [2014 7(c)]*

6. *The concepts of 'necessity' and 'proportionality' are at the heart of self-defence in International Law. Explain, in the light of UN Charter and recent trend of extending these to 'pre-emptive' or anticipatory' self-defence due to 'the imminence of attacks and advancement in. armaments'. [2013 7(a)]*
7. *'Legal restraint on the use of force' is the fundamental postulate on which the conception of enforcement of peace is based upon in modern international law. Enumerate and elucidate various international legal instruments with the help of which this concept is actually practised. [2012 6(b)]*
8. *"It is evident that general International Law does not prohibit intervention under all circumstances, forcible interference in the sphere of interest of another State is permitted as reaction against violation of International Law." Critically examine the statement. [2008 7(a)]*
9. *Define intervention and state the grounds under which it is justified under International Law. [2005 5(c)]*
10. *In what circumstances may the use of force be legal under the United Nations Charter? Critically comment. [2005 5(d)]*

Q.1. Mention the Grounds of Intervention. [15M]

The word 'intervention' has been defined as **dictatorial interference** by a State in the affairs of another State for the purpose of **maintaining or altering the actual condition** of the thing' *(Oppenheim)*. In principle, IL prohibits intervention. But as pointed out by **Hans Kelsen**, IL does not prohibit intervention in all circumstances. In the view of **Quincy Wright,** 'Intervention may be **diplomatic as well as military.** A diplomatic communication of peremptory or threatening tone, implying possible use of military or other coercive measures may constitute intervention.k'

The **principle of non-intervention** propounded under the Charter under **Article 2(7)** is applicable to the UN and not to the States. This principle has been propounded in **Article 2(4)** of the UN Charter. This principle has been re-affirmed by the GA through its resolution **2131 (xx)** of December 1965.

<u>Grounds of Intervention</u>

The charter has introduced a new ground namely, collective measures or collective intervention founded on the concept of collective security. Broadly speaking there are now only two valid grounds- one for the states ie self defence and the other for the UN ie Collective intervention or enforcement action under Chapter VII of the Charter.

1. **Self Defence:** In this connection **Mr Webster**, the Secy of USA propounded a very important principle in the famous case, *The Caroline (1841).* In this case Mr Webster declared that the necessity of self-defence should be *instant, overwhelming and leaving no choice of means and no moment for deliberation.* This principle was affirmed by the **Nuremberg Tribunal in 1946.** The UN Charter enshrines the principle of individual and collective self-defence in **Article 51** which provides that 'Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the UN, until the SC has

taken the measures to maintain international peace and security.' For eg, US ascribed to **anticipatory** self defence wherein an airstrike was employed to kill al-Zawarhi (Al Qaeda leader) by stating that he represented a threat

2. **On humanitarian grounds:** It may only be done by the UN. On the basis of **Articles 1, 55 and 56** it may be said that Charter provisions relating to human rights create **legal obligation** upon the members in respect of human rights. But the Charter does not authorise any State to intervene in the affairs of another State. This is clear from Article 2(4). Even the UN has been prohibited under Article 2(7) from intervening in the domestic affairs of Member Stats. It can however be done so by connecting or linking the matter of human rights with the maintenance of international peace and security. That is to say, if under **Article 39** the Security Council determines that violation of human rights in any State poses a threat to peace or amounts to breach of peace then the Security Council may intervene for the provision of Chapter VII becomes applicable. Eg, invasion of the UN in Iraq on behalf of the Kurdish people.
3. **To enforce treaty rights:** Intervention was also permitted in the past to enforce treaty rights. The Charter of the UN **no** longer permits intervention on this ground.
4. **Intervention to prevent illegal intervention:** No longer permissible.
5. **Balance of power:** Not at all a valid ground. As a matter of fact, IL today tends to convert the system of BoP into a system of collective security.
6. **For protection of persons and their property:** No longer permissible.
7. **Collective intervention:** Under **Chapter VII,** SC has been empowered to take collective action. If there exists a threat or a breach of international peace and security or an aggression has taken place. In the first stage, the SC takes such collective measures as do not involve the use of force. But if such an action does not prove to be adequate, the Security Council is empowered to employ armed forces. The United Nations took such actions in Korea (1950), Congo (1961), Gulf War (1991).
8. **Intervention to maintain international law:** No more permissible.
9. **Intervention in civil wars:** Due to the continuous growth of the international community, it is quite natural that what happens in one State makes its effect on other States as well. For example in 1934-38 **Germany and Italy** intervened in the war of **Spain.** In 1968 **Russia** intervened in the Civil War of **Czechoslovakia.** Similarly, Russia intervened in the affairs of **Hungary.** The question arises as to how far such a type of intervention is justified in view of the fact that the UN Charter has propounded the principle of non-intervention by states in the affairs of other States. Jurists are of the view that russian interventions in Czechoslovakia and Hungary were not justified. The UN should take necessary action to check such types of war. A successful example of intervention by the UN is the case of Congo in 1951.
It may be noted that the UN can intervene in civil war only if the SC first determines under **Article 39** of the Charter that it poses a threat to the peace, breach of the peace, or amounts to an act of aggression. Some examples of such intervention by UNSC are: intervention in **Iraq** on behalf of the Kurdish people, intervention in the civil war of **Yugoslavia,** intervention in Somalia.

As pointed out by **Prof Louis Henkin** *'Article 2(4) lives and while its condition is grave indeed, its maladies are not necessarily terminal.'*

Q.2. What are the rules of International Law governing the lawful use of force by the States in the exercise of their inherent right of self-defence? [10M]

It has been a valid ground of intervention for a long time. In this connection Mr. Webster, the Secretary of the United States of America propounded a very important principle in the famous case *the Caroline (1841).* In this case Mr. Webster declared that the necessity of self defence should be **instant, overwhelming, and leaving no choice of means and no moment for deliberation.** This principle was affirmed by the **Nuremberg Tribunal in 1946.** The test laid down in The Caroline was finally affirmed by the International Court of Justice in the *Corfu Channel* case.

The test propounded by Mr Webster is still valid with the only difference that intervention on the ground of **self-preservation is no more** allowed. Thus instead of self-defence and self-preservation, the valid ground now is only self-defence that is too very much limited and curtailed by A**rticle 51** of the Charter of the UN. However the concept of self-defence as expounded under Article 51 includes the defence of others and is called the right of individual and **collective self-defence.**

The UN Charter enshrines the principle of individual and collective self-defence in Article 51. Art 51 provides, 'Nothing in the present Charter shall impair the **inherent right of individual** or **collective self defence** if an **armed attack** occurs **against a member of the UN,** until the SC has taken the measures to **maintain international peace and security.** Measures taken by members in exercise of this right shall be **immediately reported to the SC** and shall not in any way affect the authority and responsibility of the SC under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

The right of self defence under Article 51 is subject to the following conditions:

1. There should be an **armed attack**
2. The right exists until the **SC has taken any action**
3. It should be **reported** to the SC
4. It is subject to the **review** by SC
5. This right shall **not affect the responsibility of the SC** for the maintenance of peace and security
6. The right is **not available against a non-member** of the UN.

Thus the beginning of an armed attack is a condition precedent for resort to force in self defence.

<u>Illustration:</u>

1. State A receives information that its neighbour State B is preparing to invade its territory. In order to forestall the invasion A attacks B and disperses the troops amassed in B. A and B are both members of the UN. B brings a complaint against A in the SC that A has committed aggression. State A pleads self defence.
   In this illustration intervention by State A is not justified under Article 51 of the charter.

2. The territories of a big and powerful State 'X' lie between the territories of two small States A and B. State A is towards the east and State B is towards the west of State X. After certain border incidents, few soldiers belonging to each of the three States were killed and wounded. State X attacked States A and B and occupied major portions of their territories. The SC tried to intervene but the reply given by State X was that States A and B were about to attack X and the latter had started military operations in order to protect its interest. State X also contended that it alone could determine whether or not such danger existed. Intervention by State X is not justified because Article 51 permits the right of self defence only if 'an armed attack occurs against a member of the UN.'

In both the illustrations, armed attack had not taken place but the contention was that preparations were being made. Moreover, in the second illustration X's contention was that it alone could determine whether or not such danger existed is not justified because Article 51 of the SC clearly states that 'measures taken by members in exercise of this right shall not in any way affect the authority and responsibility of the SC under the present charter to take at any time such action as it deems necessary to maintain or restore international peace and security.

Thus alarming military preparations by a neighbouring State would not justify resort to anticipatory force. It has been rightly remarked that the principal lesson of the League experience and two world wars is that the plea of self-defence should be held within strict confines so that States may be precluded from embarking upon aggressive wars in the name of self-defence. The Charter of the UN has rightly restricted self defence to armed attack.

<u>Case Studies:</u>

1. *The Caroline Case* : In Canada, which was then the colony of Britain, some revolutionaries were trying to overthrow the government. The ship named Caroline was carrying arms and men from across the river Niagara to assist the rebels. The British govt lodged a protest against the American Govt but with no effect. Consequently the British soldiers crossed the river, seized the ship in American territory and left it floating. The American Govt protested and asked the British Govt to justify its action on the ground of self defence and self preservation. England failed to justify its action and had to express regret.
2. *Corfu Channel Case 1949:* North Corfu Channel is between Albania and Greece. Before 1946 British ships had removed the mines from the channel and had ensured that it was safe for the passage of ships. That very month, some British ships were fired at from the territory of Albania resulting in damage to the ships. In addition to this, after some time the British ships suffered loss and damages due to mines which were laid in the territorial waters of Albania. This also resulted in some loss of lives of persons. Consequently, the British ships removed mines and explosive substances from the said portion without seeking permission of the Albanian govt in this contention.
   The ICJ held that Albania was responsible for explosions in its territorial waters. But it also held that Britain violated the sovereignty of Albania by removing the explosive substances in the North Corfu Channel without its permission.

The Court observed that Albania was under an obligation to inform Britain about the mines and explosive substance in the North Corfu Channel. As no endeavour was made by Albania to prevent harm to Britain, Albania was liable for the loss and damage caused to the British warships on account of explosions and was also liable to pay compensation to Britain.

3. In case concerning *Military and Para-military activities in and against Nicaragua (Nicaragua v USA)* the ICJ held that the right of collective self defence pre-supposes that an armed attack has occurred. Further, States do not have a right of 'collective armed response to acts which do not constitute an 'armed attack.''
   As regards the definition of an armed attack, it was held that an armed attack must be understood as including not **merely action by regular armed forces** across an international border but also **'the sending by or on behalf' of a State** of **armed bands, groups, irregulars or mercenaries** which carry out acts of armed force against another State of such gravity as to amount an **actual armed attack**, or its **substantial involvement** therein.'

Distinction between

Self-defence and self - preservation: The latter is a much wider term than the former. Under the traditional international law, intervention on the ground of the former was permitted. Even military preparations in the neighbouring State could justify intervention in the affair of that State. But the Charter of the UN does not at all mention the term 'self-preservation'. As compared to self preservation, the right of self-defence is a very much restricted right and can be exercised only when an armed attack occurs. Other conditions mentioned in Article 51 must also be fulfilled.

Self defence and self help: The traditional international law recognised the right of self help in many situations. The Charter of Un has greatly restricted this right. The Charter confers on each State the right of individual and collective self-defence in case an armed attack occurs. Thus in case of an armed attack, even the Charter recognisest the right of self- help. But this right is subject to several restrictions.

Thus self help is the right which existed in the primitive legal order also available in the form of war and reprisal. On the contrary, self-defence is based on the illegality of war.

Q. Does the right to self-defence under International law include right to take pre-emptive action?

Article 2(4) contains prohibition of the unilateral use of force or threat thereof by States in their international relations. The only exception of this recognised under the UN Charter is individual and collective self defence as contained in Article 51.

Mr Webster the SEcretary of the USA propounded a very important principe in the famous case *The Caroline (1841).* In this case Mr Webster declared that the necessity of self-defence should be *instant, overwhelming and leaving no choice of means and no moment for deliberation.* This principle was by *Nuremberg Tribunal* in 1946.

customary international law recognises preemptive self-defence. While the statement is not explicit on preemptive nature, it uses the words "when the situation is imminent" which means the right of self-defence gets activated not only when the armed attack actually occurs but when it is imminent that it would occur.
This post deals with India's recent statement on the right of self-defence against the acts of non-state actors. India's statement at the Arria Formula meeting on 24 February 2021, organised by Mexico on the topic of 'Upholding the Collective Security System of the UN Charter: the Use of Force in International Law, Non-State Actors and Legitimate Self-Defence' attains significance not only for itself but in general on the issue. The statement is important at least on three counts. Firstly, through this statement, India for the first time, expressly contextualises its position on the question of the right of self-defence against the acts of non-state actors in international law. Secondly, the statement articulates the position that is arguably expansive than other States' positions on the issue. Thirdly, the statement makes a clear departure from its hitherto followed practice and implied views on the right of self-defence against the acts of non-state actors.

TOPIC 11: Legality of the use of nuclear weapons; Ban on testing of nuclear weapons; Nuclear non-proliferation treaty, CTST

Q.1. Discuss about Nuclear NonProliferation Treaty [15M]

'Nuclear weapons offer us nothing but a balance of terror, and a balance of terror is still terror.' - George Wald

The NPT is a landmark international treaty. The Treaty represents the **only binding commitment** in a multilateral treaty to the goal of disarmament by the nuclear-weapon States. The acute concern for control over proliferation and possible safeguards finally led to the creation of the Nuclear Non-proliferation treaty. The chief motivation of its sponsors, the USA, Great Britain and USSR was to prevent the further proliferation of nuclear weapons.

Opened for signature in 1968, the Treaty entered into force in **1970.** On 11 May **1995**, the Treaty was extended indefinitely. A total of **191 States** have joined the Treaty, including the **five nuclear-weapon States** (China, France, Russia, United Kingdom, and the United States). More countries have ratified the NPT than any other arms limitation and disarmament agreement, a testament to the Treaty's significance.

Signatories: The treaty divides the signatories into two categories: those who possess the nuclear bomb (those who possessed it prior to 1 Jan 1967) and those who did not.

Objective: The Treaty is regarded as the cornerstone of the global nuclear non-proliferation regime and an essential foundation for the pursuit of nuclear disarmament. It was designed to **prevent the spread** of

nuclear weapons, to **further the goals** of nuclear disarmament and general and complete disarmament, and to **promote cooperation** in the peaceful uses of nuclear energy

Provisions:

To further the goal of non-proliferation and as a **confidence-building measure** between States parties, the Treaty establishes a safeguards system under the responsibility of the **International Atomic Energy Agency (IAEA).** Safeguards are used to verify compliance with the Treaty through **inspections** conducted by the IAEA. The Treaty promotes cooperation in the field of peaceful nuclear technology and equal access to this technology for all States parties, while safeguards prevent the diversion of fissile material for weapons use.

The provisions of the Treaty, particularly **article VIII, paragraph 3,** envisage a review of the operation of the Treaty every **five years**, a provision which was reaffirmed by the States parties at the **1995** NPT Review and Extension Conference.

Art III commits the **non weapon states** to **inspection** of their holdings of nuclear materials. The NPT commits them to **negotiate safeguard agreements** with the **IAEA.** These safeguards however, are **not binding on the weapon** States.

In exchange of the commitment by the non-weapon states to refrain from producing or acquiring nuclear weapons, the weapon states agreed to the following:

1. **Not to transfer** nuclear weapons or other nuclear weapon devices and not to assist non-weapon states to acquire such weapons or devices (Article I)
2. To seek **discontinuance of all (underground) nuclear tests** as a corollary to the **1953 Partial Test Ban Treaty**
3. To **refrain from the threat or the use of force** in compliance of the UN Charter
4. To develop **research production** and use of nuclear energy for peaceful purposes and help the developing countries in this regard. Even non- weapons States have this 'inalienable' right (Article IV)
5. To make available to all States the **potential benefits** from and peaceful uses of nuclear explosions on a non-discriminatory basis (Article V)
6. **Pursue negotiations** to end the nuclear arms race and move towards nuccclear disarmament. (Article VI)
7. Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories. (Art VII)

Criticism:

The NPT became the first step to the construction of an effective international regime designed to halt the proliferation of nuclear weapons. There had been a consensus on the part of the Americans and the Soviets that unfettered proliferation of nuclear weapons would destabilize the international order. This

view had not been shared by France and China, who were suspicious of the US-Soviet control over the nuclear weapons. Both the countries did not sign the NPT at the time of its creation.

The non-nuclear weapon states were also critical of the treaty. They perceived this to be a discriminatory treaty. Their main points of criticism were:

1. The asymmetric nature of the treaty provisions that **imposed safeguards** only on the **non-weapons** states;
2. The preservation of **commercial interests of the weapon states** by providing them the right to explore peaceful uses programme
3. The **vagueness** of the commitments on part of the weapon states
4. The failure to address **legitimate security** concerns of the non-weapon states.

Under the signing of the NPT the debate about safeguards had been structured within technological parameters and frameworks. The unbalanced nature of the Treaty obligations under the NPT and the universality of its approach resulted in the shift of the debate from the technical to the **political arena.** Unlike the earlier era, the NPT system of safeguards came to be perceived as an infringement on the political sovereignty of the State. Eventually it was the **Indian test of 1974** that refocused international attention to the linkage between peaceful uses and weapons production.

Currently only five countries have not signed NPT which are, **India, Pakistan, Israel, South Sudan and North Korea**.

The NPT had provided for periodic review conferences. In 1995 the conference decided to extend the Treaty indefinitely.

Q.2. Discuss the main provisions of the Comprehensive Nuclear Test Ban Treaty (CTBT).Also explain the reasons why india has not signed this treaty [10M]

The history of the CTBT dates back to **March 1st 1954** when America tested a **15-megaton hydrogen bomb** in Namu Atoll, an island in the Pacific Ocean. By exceeding the estimated outcome and causing a rather large fallout beyond that of the restricted testing area, this test increased the fallout of dangerous radioactive materials. In **June 1995,** a conference was held in Geneva to adopt the CTBT. This Treaty contains a comprehensive plan to prohibit nuclear tests. In accordance with **Article XIV** of the Treaty, it will enter into force after all **44 States** listed in **Annex 2** to the Treaty have ratified it. **China, Democratic People's Republic of Korea, Egypt, India, Iran, Israel, Pakistan and the USA** have not ratified it yet.

<u>Main Provisions:</u>

1. **Article 1:** Para 1- Each State Party undertakes not to carry out any **nuclear weapon test explosion** or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion

Para 2- Each State Party undertakes, furthermore, to refrain from **causing, encouraging,** or in any way **participating** in the carrying out of any nuclear weapon test explosion

2. **Article II:** Para 1. establish the **Comprehensive Nuclear Test-Ban Treaty Organization** (hereinafter referred to as "the Organization") to achieve the object and purpose of this Treaty
   Para 2. All States Parties shall be **members** of the Organization
   Para 3. The seat of the Organization shall be **Vienna,** Republic of Austria.
   Para 4. There are hereby established as organs of the Organization: the **Conference of the States Parties, the Executive Council and the Technical Secretariat,** which shall include the **International Data Centre**
   Para 7. Each State Party shall treat as **confidential** and afford special handling to information and data that it receives
   Cost of activities to be borne by Financial contributions of States (Para 9 and 10)
3. **Article III:** Each State Party shall, in accordance with its constitutional processes, take any necessary measures to **implement** its obligations under this Treaty. (Para 1)
   Each State Party shall **cooperate** with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations (Para 2)
4. **Article IV,** Verification, A. General Provisions, Para 1- In order to verify compliance with this Treaty, a verification regime shall be established consisting of the following elements:
   (a) An International Monitoring System;
   (b) Consultation and clarification;
   (c) On-site inspections; and
   (d) Confidence-building measures.
   shall be carried out on the basis of full respect for the **sovereignty** of States Parties [Para 2] The provisions of this Treaty shall not be interpreted as restricting the international exchange of data for **scientific** purposes. [Para 10]

Why India won't sign CTBT

Since its independence in 1947, India had always viewed nuclear weapons as weapons of destruction, which would ultimately pose a severe threat to international peace and security. Hence, India opposed nuclear weapons and promoted the creation of a nuclear free world.

1. The main concern India had during the CTBT negotiations was that the treaty should **focus on disarmament** if it hoped to be effective.
2. The **final treaty** which emerged did not fall in line with what had been negotiated and a commitment for nuclear disarmament was missing.
3. India refused to sign the CTBT reasoning that the treaty was **discriminatory.** The United States, which had fired and tested more than 2000 nuclear devices which had the capacity of destroying the world many times over, apparently suddenly realized that there was no need to test nuclear devices any more.
4. The nuclear weapon states, which were led by the United States, were not agreeing to commit themselves to a **time-bound disarmament** schedule.

5. The CTBT would not help towards nuclear disarmament since it only banned nuclear explosive testing, but not **other activities related to nuclear weapons,** such as *sub-critical (non-nuclear explosive) experiments, or computer simulations.*
6. Also, India wanted to maintain a **strategic flexibility** keeping in mind its **national security considerations.**

In May **1998,** India conducted a nuclear test in Pokran (Rajasthan) and declared a temporary prohibition on further nuclear tests and announced that it would convert this *de facto* commitment into a *de jure* one.

TOPIC 13: International Terrorism, State sponsored Terrorism, Hijacking, International Criminal Court.

India's Counter terrorism measures at International level:

1. Inidai will chair the UNSC Counter Terrorism Committee CTC [established in 2001 by UNSC resolution 1373 after the 9/11 attacks] in 2022.
2. Global Counter Terrorism Forum GCTF- An action oriented platform outside the UN Framework to foster effective multilateral cooperation in counter terrorism
3. Counter Terrorism Implementation Task Force CTITF: to enhance coordination and coherence of counter-terrorism efforts of the UN system
4. UN Global Counter-Terrorism Strategy: Unique global instrument to enhance national, regional and international efforts to counter terrorism.

Q.1. International Terrorism. Write Short notes [15 M]

'Terrorism and deception are weapons not of the strong, but of the weak.' - Mahatma Gandhi

India's Position on Terrorism: S. Jaishankar's Speech

We, in India, have of course had more than our fair share of challenges and casualties. The 2008 Mumbai terror attack is imprinted in our memories. The 2016 Pathankot air base attack and the 2019 suicide bombing of our policemen at Pulwama are even more recent.

The international community holds a collective view that terrorism in all its forms and manifestations must be condemned. There cannot be any exception or any justification for any act of terrorism, regardless of motivations behind such acts. We also recognize that the menace of terrorism cannot be and should not be associated with any religion, nationality, civilization or any ethnic group. However, in spite of the progress we have made to tighten the legal, security, financing and other frameworks to combat terrorism, terrorists are constantly finding newer ways of motivating, resourcing and executing acts of terror. Unfortunately, there are also some countries who seek to undermine or subvert our collective resolve to fight terrorism. That cannot be allowed to pass.

In our own immediate neighborhood, ISIL-Khorasan (ISIL-K) has become more energetic and is constantly seeking to expand its footprint. This should be taken seriously. Events unfolding in Afghanistan have naturally enhanced global concerns about their implications for both regional and international security. Whether it is in Afghanistan or against India, groups like Lashkar-e-Toiba and Jaish-e-Mohammed continue to operate with both impunity and encouragement.

I had proposed an eight-point action plan for consideration. Let me reiterate some its cardinal principles:

· Summon the **political will:** don't justify terrorism, don't glorify terrorists,

· **No double standards.** Terrorists are terrorists; distinctions are made only at our own peril,

· **Don't place blocks and holds on listing requests** without any reason,

· **Discourage exclusivist thinking** and be on guard against new terminologies and false priorities,

· **Enlist and delist objectively**, not on political or religious considerations,

· Recognize the linkage to **organized crime,**

· Support and strengthen the **FATF**, and

· Provide greater funding to the **UN Office of Counter Terrorism.**

India has been at the forefront of global counter terrorism efforts, has taken part in all major global initiatives against international terrorism and is party to all United Nations' sectoral conventions relating to terrorism. We were pleased to play our role in strengthening the Global Counter-Terrorism Strategy adopted last month. We reiterate our full support for counter terrorism cooperation under the auspices of the UN.

Q.2. Short notes on State-sponsored terrorism [20M]

2021: State sponsored terrorism and violent extremism lead to **disharmony in societies** and increase in **discrimination against minorities,** India has said at the United Nations, calling on the UN bodies to ensure that **terrorism is not justified** on any ground. COVID-19 pandemic has further aggravated these divisions and existing inequalities and reinforced racial discrimination.

State sponsored terrorism is a growing threat to nations of all sizes and in almost every region of the world. In recent years, terrorist attacks have become more brazen and sophisticated. Even more alarming is the fact that terrorist attacks are far more difficult to predict and deter. These attacks follow no particular pattern and are not limited to any specific type of target. Modern terrorist organizations are **better funded, well organized, and well informed** on the nature and dynamics of their targets. This is the case primarily because more terrorist organizations are **sponsored by governments** in stead of individuals who are loyal to a particular agenda.

ANATOMY OF STATE-SPONSORED TERRORISM

A Defining State-Sponsored Terrorism

Just like terrorism, the notion of state-sponsored terrorism **lacks a universal definition.** Furthermore, the confusion over a precise definition of state-sponsored terrorism is in large part reflective of the basic disagreement over the elements of terrorism itself. There are, however, certain basic elements of state-sponsored terrorism: a **politically subversive violent act** or threat thereof; a **state sponsor**; an intended **political outcome**; and a **target,** whether civilian, military or material, whose death, injury or destruction can be **expected to influence** to some degree the desired political outcome. State sponsorship of terrorism involves both acts of commission and omission.

This position has been actively pursued by the International Law Commission ('ILC')34 in its quest to codify customary international law relating to state responsibility in its **Draft Articles on Responsibility of States for Internationally Wrongful Acts.Articles 8 and 11** codify the relevant rules pertaining to state responsibility for terrorist acts committed by private persons. **Article 8** is the classic formulation of the **de facto agency principle.** It reads: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons i**s in fact acting on the instructions of, or under the direction or control of,** that State in carrying out the conduct.36

Article 11, in contrast, **does not require proof** of a state's prior knowledge, instruction or control of a terrorist act in order to attribute a private person's conduct to the state. Under this rule, conduct ordinarily not attributable to a state under antecedent articles shall nevertheless be attributed to a state **if they acknowledge** such conduct as their own

B ICJ Jurisprudence and the Declaration concerning Friendly Relations

In two different cases the International Court of Justice ('ICJ') has had to determine whether a state was responsible for criminal and terrorist activities committed by private persons. In the *United States Diplomatic and ConsularStaff in Tehran (US v Iran)* (Merits),41 the ICJ held that Iran was responsible for the taking of US hostages by private militants because the Iranian Government sanctioned and perpetuated the hostage crisis.42 Six years later in Nicaragua, the ICJ ruled that the US was not responsible for the rebel activities of Nicaraguan Contras because evidence that the Contras were controlled and dependent on the US was insufficient to establish that the US directed the Contras' each and every act.43 The ICJ ruled that US support for the Contras infringed on Nicaragua's territorial sovereignty in contravention of international law,44 but concluded that the evidence did not demonstrate that the US 'actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.'In order to attribute the actions of the Contras to the US, the ICJ required proof in each instance that operations launched by the Contras 'reflected strategy and tactics wholly devised by the United States.

[w]hereas the judgment in the Tehran Case was met with general approval and approbation, the Nicaragua decision was criticised for its 'painstaking examination' of specific acts. In Nicaragua, the ICJ adopted an 'all or nothing' approach to state responsibility.

While state responsibility for terrorist activities that are actively supported by the state logically follows from the state's complicity in the offence,50 more problematic is a state's responsibility for acts of terrorism that it failed to prevent. A state is not expected to prevent every act of international terrorism. What is expected is that states exercise due diligence in the performance of their international obligations so as to take all reasonable measures under the circumstances to protect the rights and securities of other states.

Unlike **art 2(4)** of the UN Charter, which only requires that states *refrain from the threat or use of force*, the **Declaration concerning Friendly Relations** requires *positive action* on the part of the state so as not to acquiesce in or tolerate terrorist activities originating from within its territory. In any case, there is a long-standing General Assembly practice of passing resolutions that condemn both active and passive state support of terrorism,60 and in recent years, the Security Council has stated that 'all States shall [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts'.

Comparison between non- state actor terrorists and the state Terrorism: **Kanti Bajpai** wrpte, 'Both seeek to frighten. Both can be bloody. Both may seek to shock and disrupt. Neither tolerates rivals.'

But the two key differences are:

Terrorist organisations usually take, even if they do not positively affirm, responsibility for their violence for eg, Lashkar-e-Taiba took responsibility for the attack in Jammu (2002). States on the other hand, are reluctant to acknowledge the use of violence

Terrorist groups seek publicity for the outrage, but the State does not.

However such differences are not inherent and 'in the right circumstances, even the State may admit to and advertise its use of violence.'

Political Complexities: It is said that 'one man's terrorist is another man's freedom fighter.' In 2008 terrorists attacked one of India's biggest cities, Mumbai. 166 persons were killed in the attack. It was later clarified that the Pakistani based terrorist group **Lashkare-Taiba** was responsible for the attack. Information that later on was received was somewhat disturbing. When US officials arrested **David Coleman Headley**, a former informant for the US Drug Enforcement Administration, as one of the members of the team that had planned the attack, new information about how the planning of the attack took place surfaced. During the investigation of Headley and during his testimony, evidence that the terrorist attack and Headley himself had close connections to the Pakistani government and more specifically the Pakistani intelligence agency (ISI) was put forward (Rotella, 2013). When having this information, one could assume that Pakistan is one of the countries on the list of state sponsors of terrorism. But in fact, this is not the case. Instead, the countries designated as state sponsors of terrorism are **Syria, Iran, Sudan and North Korea** (US Departement of State - Bureau of Counterterrorism, 2019)

The UN was founded on the unfulfilled promise that the UN Security Council would protect international peace and security and in return, states would forgo self-help in favour of collective help. The reality is that the UN Charter system is not strongly coherent or controlling. An expansion of art 51 (individual and collective self defence) is preferable to the creation of unwritten exceptions under the UN Charter

Q.3. "The effectiveness of the International Criminal Court depends on the degree of co-operation provided by the States. This cooperation concerns not only the State party to the International Criminal Court but also the non-party State." Discuss. [10 M]

Proposals for the establishment of an ICC have been under consideration for more than 50 years. In 1948, the General Assembly in its resolution on 1989 requested the International Law Commission to study the desirability of establishing an international criminal court to try persons charged with genocide and other crimes. At the latter session of the ILC, the commission completed a draft statute for an ICC.

On 17th July 1998, the UN Diplomatic Conference adopted the statute known as the Rome Statute on the ICC. This Statute entered into force on 1st July. Besides the Preamble, there are 128 Articles in the statute which are divided into 13 parts.

The main features of the ICC are

1. Establishment of the Court: **Article 1** of the Statue which establishes the ICC provides that it shall be a **permanent institution** and shall have the power to exercis jurisdiction over persons for the **most serious crimes** of international concern, and shall be **complimentary to national criminal** jurisdiction. The seat of the Court shall be established at the **Hague in the Netherlands. (Article 3)**
2. Jurisdiction:
   a) The crime of genocide
   b) Crimes against humanity
   c) War crimes
   d) The crime of aggression **(Article 5)**
   The Court has jurisdiction only with respect to crimes committed after the entry into force of the statute **(Article 11)**. A State which becomes a party to the statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Art 5 **(Article 12).** However the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime **(Article 26).** The Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, shall in no case exempt a person from criminal responsibility under the statute nor constitute a ground for reduction of sentence. Immunities or special procedural rules attached to official capacity shall not bar the court from exercising its jurisdiction over such a person **(art 27).** ICC can generally exercise jurisdiction only in cases where the accused is a national of the State party, the alleged crime took place on the territory of the State Party or a situation is referred to the Court by the UNSC.
3. **Applicable Law:** According to Article 21 of the Statute: The Court shall apply:
   a) in the first place, this statute elements of crime and its Rules of Procedure and Evidence
   b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of IL, and that of armed conflict.
   c) Failing that, general principles of law derived by Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the statute and with IL and internationally recognized norms and standards.
   (2) The Court may apply principles and rules of law as interpreted in its previous decisions.
   (3) The application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights, and without any adverse distinction founded on grounds such as gender, age, race, colour, language or other status.

1. Nullum Crimen Sine Lege: A person shall not be criminally responsible under this statute unless the *conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court.* The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted **(Article 22)**
2. Nulla Poena Sine lege: A person convicted by the COurt may be *punished, only in accordance with this statute* **(Article 37)**
3. Non-retroactively ratione personal: *No personal shall be criminally responsible under this statute for conduct prior to the entry into force of the statute.* In the even of a change in the law applicable to a given case prior to final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply. **(Article 24)**

TOPIC 14: New International Economic Order and Monetary Law: WTO, TRIPS, GATT, IMF, World Bank

1. *Discuss the United Nations Declaration on the establishment of a New International Economic Order along with the Charter of Economic Rights and Duties of States. [2021 7(b)]*
2. *A WTO member country "X' agrees with a non-member country "Y' 'to reduce the tariff on product "A" to 7 percent. Can the WTO members claim the same tariff level on like product "A" from country "X"? How have the dispute settlement bodies defined the "like product" in Article I.1 of GATT? [2020]*
3. *Explain in detail the anti-dumping provisions under GATT and WTO. What are the methods laid down for determination of "anti-dumping" and "material injury"? [2020]*
4. *Explain the historical evolution, objectives and main principles of the General Agreement on Tariffs and Trade (GATT). [2019 8(c)]*
5. *Do you agree with the statement that "Globalization is a necessary evil"? Critically examine the implications of the reform process undertaken by the IMF and IBRD by way of structural adjustment programmes and policies on developing countries, with special reference to India. [2018 5(e)]*
6. *It is generally viewed that "What the U.N. did in the 20th century for maintenance of peace and security, the W.T.O. is going to play the same role on economic and trade relations in 21st century." Discuss the above statement in view of the changing notion of political sovereignty to economic sovereignty of State. [2018 8(c)]*
7. *Explain the differences between Paris and Bern regimes. Do you agree with the statement that, "the Trade Related Intellectual Property Rights (TRIPs) is nothing, but mere repetition of the Paris and Bern Conventions." Discuss. [2018 7(c)]*
8. *The Dispute Settlement Body (DSB) of the World Trade Organization (WTO) is playing an important role in maintaining the stability of the global economy. Comment. [2017 6(b)]*
9. *In several respects the TRIPS Agreement goes beyond the traditional GATT approach and further develops the law of International Trade'. Examine the important achievement of the Agreements on Trade Related Aspects of Intellectual Property Rights. (TRIPS). [2014 6(b)]*

10. *What are the objectives, structure and functioning of the World Trade Organisation? Does signing and ratifying WTO undermine the Parliamentary Autonomy of India? Discuss. [2014 7(a)]*
11. *How would you react to the statement that the TRIPS agreement on the one hand is a historic act but on the other hand it failed to achieve the goals of improving trading powers and trade issues of the least developed countries? Comment. [2010 7(b)]*
12. *Comment on the statement that 'WTO' is the main organ for implementation of Multilateral Trade Agreements and is the third economic pillar of the worldwide trade and commerce. [2010 5(c)]*
13. *"International Organisations are very important to International Trade Law." Examine the role of relevant International Organisations involved in the development of International Trade Law. [2008 6(a)]*
14. *Explain the need, objectives and outcome of the Bretton woods conference of 1944. Discuss the similarities and distinctions between the International Monetary Fund (IMF) and the 'International Bank for Reconstruction and Development (IBRD)'. Critically examine the role of the IMF and IBRD initiatives in the liberalization, privatization and globalization of economies, while focusing on the problems of the developing countries. [2008 6(b)]*
15. *Explain the concept and characteristics of "Third World Countries". Critically examine the demands and the achievements of "Third World Countries" in shaping the New International Economic Order. [2008 5(c)]*
16. *WTO aims at progressive liberalisation of world trade in goods and services and protection of intellectual property rights. Explain. How WTO is a facility extending the institutional structure of GALE? [2006 7(c)]*

Q.1. Explain in detail the antidumping provisions under GATT and WTO. What are the methods laid down for determination of "antidumping" and "material injury"? [15]

Dumping involves the export of a good at a **price below its home market price or below its cost of production.** This difference between the home market price or the cost of production and the export price is known as the **margin** of dumping. GATT permits countries to impose a **special duty** to offset the margin of dumping where it is shown that imports of dumped goods are causing or threatening injury to a domestic industry producing like goods in the importing country. GATT members' obligations regarding antidumping procedures are set out in **Article VI and the provisions of the Antidumping Code** first negotiated during the **Kennedy Round (1967)** and substantially revised during the **Tokyo Round (1979) of GATT negotiations.** Negotiations in the **Uruguay Round have resulted in a revision** of this Agreement which addresses many areas in which the current Agreement lacks precision and detail.

The **WTO Dispute Settlement Understanding** will also apply to the Agreement.

Dumping usually occurs in the following situations and for the following purposes:

1. When the price at which the product is sold is less or lower than the market value of the product. In other words, when the sale price is below the cost price.
2. Dumping usually happens to lower the inventory
3. Another rampant reason for dumping to take place is when the producers want to establish a monoply.

Factors responsible for Dumping

1. Stiff competition
2. Recession
3. Forward Pricing: The product is sold at a price below its initial cost price in order to maximise the profitability over the entire life cycle of the product
4. Predatory pricing : To drive out competition.

Article VI of GATT

Article VI of GATT established the framework for the law of dumping and antidumping which has remained unchanged for decades. Article VI accepts a proposition that dumping is **unfair** trade. It defines the term, and it commits the determination of dumping to the authority of the important state. Further, Article VI states that the **remedy** against dumping is an anti dumping duty which is to be imposed only upon a finding of injury caused by the dumped imports

History of Article VI of GATT 1947

In **1967 the Kennedy round** of negotiations drafted the first anti dumping policies negotiated at the auspices of GATT. The Code contained provisions concerning the determination of dumping determination of injury, definition of industry, initiation and conduct of Investigations, evidence, price undertakings, duration of anti-dumping duties and provisional measures, plus a general

article of obligating each party to ensure the conformity of its law, regulations and administrative procedure with the provisions of the code. Further, the code provides for the **establishment of a committee** on anti dumping practices to which parties to the code could complain about implementation of anti-dumping laws by other parties.

During the period **1973-79** the Committee on Anti-Dumping Practices became a forum for

amending the code, by modifying provisions that have proven unclear and by making provisions

for issues not dealt with in the 1967 code. In addition during the **Tokyo Round** of trade

negotiation anti dumping code was revised to make it **parallel to the Subsidies Code.** In particular the provisions in 1967 code that determination of injury shall be made only when the **authorities concerned are satisfied** that the dumped imports are demonstrably the principal cause of material injury.

The 1979 Anti-Dumping Code remained ,for the most part, an agreement among the industrial

countries, but **India and Brazil,** the states that have been the leaders among developing states in the GATT/WTO system, both became **original parties to the 1979 anti-dumping code,** and **Egypt, Korea, Mexico, Pakistan and Singapore** signed on subsequently.

In **2001 Doha Round of trade negotiation,** there was a substantial effort made to place **revision of 1994 Anti Dumping Agreement,** with a view to make it more difficult to establish dumping and to reduce the permissible levels of anti-dumping duties.

Article VI of GATT 1994

The contracting parties recognize and dumping by which products of one country are introduced into the commerce of another country at **less than the normal value of the products,** is to be condemned if it **causes or threatens material injury** to an established Industries in the territory of a contracting party or materially retards the establishment of a domestic industry.

According to this provision, there must be **three requirements:**

1. The **export price of a product must be lower** than the price of the product in the **domestic market of the exporting country.**
2. Exports of such products must

(1) **cause or threaten to cause material injury** to a domestic industry or

(2) **materially retard** the establishment of a domestic industry.

There must be a **casual relationship** between dumping and the injury or retardation.

Article VI also addresses the **injury determination.** Under this Article, National anti dumping authorities may impose an anti dumping duty only after first determining that the dumping causes or threatens material injury to an established domestic industry or materially retards the establishment of a domestic industry.

The GATT Article VI sets for the basic principles to be followed by the WTO Members when dealing with dumping issues, its terms are general and the content is rather sketchy.

Institutions and Notifications

The Antidumping Agreement establishes a **committee on Antidumping Practices** composed of representatives of **all WTO members.** The function of the committee is to seek information and provide a forum for consultation among members. All preliminary and final anti-dumping actions taken by Members must be promptly notified to the committee.

Developing Countries

Article 15 of the Antidumping Agreement recognizes that special regard must be given by developed country members to the special situation of developing country members when

considering the application of anti dumping measures under this agreement. Possibilities of constructive remedies provided for by this agreement shall be explored before applying anti-dumping duties where they would affect essential interest of developing country members.

For example: price undertaking, special rules for initiating an investigation, special import share and de minimis threshold for developing countries.

Uruguay Round of Anti-Dumping Code

WTO Provisions

The WTO Anti-dumping Agreement sets out the principles governing the conduct of dumping investigations and the application of anti-dumping measures against dumped imports found to be causing or threatening injury to a domestic industry as set out in Article VI of the GATT 1994. The main clarifications and/or improvements in its provisions include the following:

1. ***Initiating an investigation:*** **Article 5.2** of the Antidumping Agreement requires the National anti dumping authorities may initiate an anti-dumping investigation when a domestic industry files a petition or on their own. The petition must include **evidence** of dumping, **material injury** and **causation** that is **reasonably available** to the petitioner.

The application must contain **sufficient evidence** of the existence of dumping that causes or threatens to cause injury to a domestic industry. Further, the antidumping agreement sets a maximum period for an anti dumping investigation to be conducted within **one (1) year** and not **exceed 18 months.**

Determination of Dumping-The Agreement **(Article 2)** clarifies and augments the existing determination of dumping rules including:

- outlining more **rigorous standards** for excluding sales at a loss;

- requiring **normal values based on cost-plus methodologies** to use general selling and administrative costs and profits based on actual data;
- requiring that, during an investigation, dumping should normally be determined on the basis of **deducting weighted-average export prices from weighted-average normal values.**
  Thus, greater clarity and more detailed rules in relation to the method of determining that a product is dumped has been provided.

If the difference is **slight (less than 2% of the export price),** national antidumping

authorities must also **terminate** the investigation. Anti dumping authorities must also terminate

the investigation if the **volume of imports** of the dumped product is negligible **(less than 3% of**

imports of the like products).

Since comparing the normal value and export price is complicated, the comparison between

domestic price and export price of the product in question should in principle be made at the

same level of transaction.

Like Product: The Like Product issue is typically quite important in anti-dumping cases. The issue arises principally in three contexts.

- First, dumping involves a comparison of the prices of life products in the domestic market of the exporting country and the export market. There may be some differences in the characteristics of the products sold in the **two markets.**
- Second, the "like product" issue may come up in a context in which every manufacturer buys product components at below-cost prices from an **unrelated supplier** and assemble them into a product for resale in domestic and export markets.
- Third the "like product" issue may arise in the context of defining the domestic industry. **Article IV of the Antidumping Agreement** states that domestic industry includes domestic producers of "like products". However, the term "like product" is defined in the Antidumping Agreement to mean, "a product which is **identical"** or "has characteristics closely resembling the product under consideration"

Comparison of third- country prices

In two situations determination of dumping can be made by comparing the export price with the

price of the like product when exported to an "appropriate third country", provided that the third country price is **"representative".** These situations arise:

• When there are **no sales** of the like product in the ordinary course of trade in the home

country; or

• Where there is **no volume** of such sales.

***Determination of Injury*-Article 3** specifically requires that injury caused by factors other than dumping must not be attributed to dumped goods.

Material injury or threat of material injury

Determination of material injury to domestic industry must be based on evidence regarding:

• the **quantity** of dumped product and its effect on the price of like domestic products its

effect on producers of such domestic products.

• With regard to the quantity of dumped imports, the national anti dumping authority must

examine whether there is **significant increase** of the quantity of term product.

• An increase of import can be **absolute or relative.**

• With respect to price, the antidumping authority must investigate whether the dumped

product **undercuts** the like domestic products, depresses the domestic price, or prevents

the domestic price from rising.

Factors to be considered when determining injury

Article 3.4 requires National anti dumping authorities to consider for **all relevant economic**

factors and indices having a bearing in the state of the industry, including actual and potential

decline in sales, profits, output, market share, productivity return on investment, or utilization of capacity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment.

Further **Article 3.7** requires National anti-dumping authorities to consider **specific factors** while

determining whether a threat of material injury exists or not.

National anti-dumping authorities may **cumulate injuries** when

(1) **more than one exporting country** is involved and

(2) **exporters from all of the exporting countries** are engaged in dumping.

Under **Article 3.5** Anti-dumping Agreement, national anti dumping authorities must take into

consideration all of the **relevant factors** causing material injuries to domestic industry, including those other than dumping in assessing injury to domestic industry, and injury caused by those other factors must not be attributed to the dumped imports.

Standing and Initiation Requirements-**Article 5** requires that, for an investigation to be initiated, it must be supported by domestic producers whose collective output represents at least 50 percent of the total production of the like product produced by that part of the domestic industry either expressing support for or opposition to the complaint. No investigation is to be initiated when the support of domestic producers is less than 25 percent of the domestic production of like goods.

Termination of the Investigation-**Article 5** also requires investigating authorities to terminate an investigation where the margin of dumping is determined to be de minimis (less than two percent) or the volume of the dumped imports, actual or potential, is negligible (normally less than three percent of the total imports of the like product). These criteria are in addition to the existing termination criteria requiring termination where the injury is negligible, each of which is to be determined on a country-by-country basis.

Transparency of the Process-The Agreement will provide stricter disciplines on the conduct of investigations such as the use of best information available and on-the-spot investigations **(Article 6).** In addition, the new five-year sunset clause **(Article 11)** will require the termination of injury findings after five years unless the competent investigating authorities in the importing country review the matter and continue the order or finding.

Imposition of Anti Dumping Measures: **Article 7** of the Antidumping Agreement regulates the imposition of professional measures by national antidumping authorities. National anti dumping authorities may apply provisional measures only after making a **preliminary affirmative determination** of dumping and determining that professional measures are necessary to prevent damage that may occur during the period of Investigation. In general, provisional measures may be applied for no more than 4 months. Provisional measures may be applied for **6 (six) months,** however, if requested by exporters that account for a substantial portion of the transactions in question.

Undertakings-Undertakings will not be allowed prior to the preliminary determinations of dumping and injury **(Article 8)**. In addition, if the party requests, the investigating authorities must conclude their investigation. If the conclusion reveals either no dumping or no injury, all proceedings in the case would be terminated. If final determinations of dumping and injury are made, the undertaking stands.

Sampling-The Agreement recognizes that dumping investigations can be large and complex, involving many products and exporters. The new sampling provisions in Article 6 allow competent authorities to investigate statistically valid or largest percentage samples in order to determine the existence of dumping, injury and causality. Exporters not selected may, nonetheless, provide information to the investigating authority which would then review it, time permitting.

Expedited Reviews-**Article 9** provides for expedited reviews for goods exported by parties which have not previously been investigated. Exporters must both show that they have not previously been investigated and that they are not related to any exporter or producer that has been previously investigated. During an expedited review, the collection of dumping duties is suspended and the importing country may withhold appraisement or request a guarantee. Once the review is concluded, duties are retroactively assessed accordingly.

Dispute Settlement-**Article 17** notes that disputes related to the application of the Anti-dumping Agreement are to be dealt with in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Implementation: It provides for the **implementation and duration** of anti-dumping measure

11.1 An Antidumping duty shall remain in force only so long as and to the extent necessary to counteract the dumping that is causing injury. There is also an obligation to review the need for continued anti dumping duty after "a reasonable period of time". Under a general "sunset clause", in the Antidumping Agreement, antidumping duties must be terminated in any event on a date not later than unless it is determined that the expiry of the duty would be likely to lead to a continuation or recurrence of dumping and injury.

on the **duration** of anti-dumping measures have been strengthened. Thus, a significant improvement over the existing Agreement consists of the addition of a new provision under which anti-dumping measures **shall expire five years** after the date of imposition, unless a determination is made that, in the event of termination of the measures, dumping and injury would be likely to continue or recur.

11.2 The agreement calls for **prompt and detailed notification** of all preliminary or final anti-dumping actions to a Committee on Anti-dumping Practices. The agreement will afford parties the opportunity of consulting on any matter relating to the operation of the agreement or the furtherance of its objectives, and to request the establishment of panels to examine disputes.

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Cases:

- *Guatemala- Cement I:* Measure at issue was Guatemala's anti-dumping investigation. The Appellate body held that 'specific measures at issue' had failed to be identified. It rejected the contention that the term 'measures' should be interpreted broadly.
- *Thailand-H Beams:* Thailand's definitive anti-dumping determination. The Panel rejected Poland's claim that the Thai authorities' initiation of the investigation could not be justified due to the insufficiency of evidence originally contained in the application. The Panel considered that the application need not contain analysis, but only information. The Panel also rejected Poland's claim that Thailand violated Art. 5.5 by failing to provide a written notification of the filing of application for initiation of investigation. The Panel considered that a formal meeting could satisfy the requirement.
- *Mexico- Corn Syrup:* : Mexico's definitive anti-dumping duty measure. The Panel rejected the US claim that the anti-dumping application in this case was inconsistent due to insufficient evidence of threat of material injury. The applicant need provide only such information as is reasonably available to it. The Panel concluded that Mexico's retroactive levying of final anti-dumping duties was inconsistent, because such retroactive application for the period of provisional measure requires an authority to make a specific finding that, in the absence of provisional measures, the effect of the dumped imports would have led to a determination of injury to the domestic industry.

Q.2. Explain the historical evolution, objectives and main principles of the General Agreement on Tariffs and Trade (GATT). [15 M]

Historical Evolution of GATT

The United States, which emerged from the Second World War as the leading political and economic power, took the lead in establishing a new post-Second World War international economic system. At the **1944 Conference in Bretton Woods**, New Hampshire, the idea of founding an international organization to develop and coordinate international trade was agreed, but the main emphasis was placed on creating the International Monetary Fund (IMF) and the World Bank, so the details were left for later. After the founding of the United Nations (UN) in 1945, multilateral trade negotiations were conducted under the auspices of the UN Economic and Social Council, which in 1946 adopted a resolution in favour of forming an International Trade Organization (ITO) and convened a conference on the matter.

Negotiations over the **ITO** and the post-war international trading system were held in several stages: at *Lake Success, New York in 1947; in Geneva in 1947; and in Havana in 1948.* The Geneva meetings, which were pivotal, had three objectives:

(1) draft an **ITO charter**,

(2) prepare **schedules of tariff reductions**, and

(3) prepare a **multilateral treaty** containing general principles of trade, namely, the General Agreement on Tariffs and Trade (GATT).

The governments of the countries engaged in the negotiations were left with a problem: how to bring the tariff cuts and the GATT into force right away without waiting on the final round of negotiations to form the ITO. The solution was to adopt a **Protocol of Provisional Application** to apply the GATT 'provisionally on and after January 1, 1948.'1 In this way, the GATT and its tariff schedules could immediately enter into force, later the GATT could be revised to be consistent with the charter, and the GATT and the charter could finally be adopted. The countries participating in the **Havana Conference of 1948** completed work on the ITO charter, but the ITO charter never entered into force.

By the end of 1947, work had been completed on the tariff reductions and the GATT. The final work to complete a charter for the ITO was put off until 1948.

The GATT becomes an international organisation

The failure to adopt the ITO meant the absence of the 'third pillar' on which the Bretton Woods economic structure was to be built. In fact, the GATT, which was never intended to be an international organization, gradually filled this void. The GATT evolved into an international organization based in Geneva, taking as its 'charter' the GATT, practice under the GATT, and additional understandings and agreements.

Nevertheless, the GATT always suffered from 'birth defects', inherent weaknesses that handicapped its operation. These birth defects included:

1. The **lack of a charter** granting the GATT legal personality and establishing its procedures and organizational structure;

2. The fact that the GATT had only **'provisional' application;**

3. The fact that the Protocol of Provisional Application contained provisions enabling GATT contracting parties to maintain legislation that was in force on accession to the GATT and was inconsistent with the GATT (so-called grandfather rights); and

4. Ambiguity and confusion about the GATT's authority, decision-making ability, and legal status.

Objectives: The creation of the GATT as an international organization in the 1940s may best be understood against the background of the history of international trade policy. Although the modern theoretical foundations for international trade had been laid by economists such as Adam Smith and David Ricardo many years before, and trade

had long been conducted by means of bilateral treaty arrangements, the GATT was an extraordinary new departure built upon two new ideas: the desirability of

(1) multilateralism and

(2) institutionalism.

standard of living; full employment; develop world's resources; production and exchange of goods; eco dev; 'what the UN did in the 20th century for the maintenance of peace and security, WTO is going to play the same role on economic and trade relations in the 21st century.'

Five Principles of GATT:

1. MFN
2. Tariff Bindings
3. National Treatment

4. Prohibition of Quotas
5. Transparency

MRN: The MFN principle is a fundamental principle of trade ensuring non-discrimination between 'like' goods and services. It is a legal obligation to accord **equal treatment** to all nations accorded the benefits so for example, in case a country 'A' provides a tariff concession to a country 'B' by imposing a 10% duty on import of cars, 'A' is obligated to charge the same rate of 10% to the imports of cars by Country 'C'. Thus, with respect to the GATT, a Contracting Party is expected to treat every other Contracting Party as its favorite nation.

The elimination of discriminatory treatment in international trade relations is one of the core values of the multilateral trading system. In operational WTO law, this principle has found two main expressions:

(1) the obligation of most favoured nation (MFN) treatment, contained most prominently in

- GATT Article I,
- SPS Article 2.3,
- TBT Article 2.1 (with regard to goods),
- GATS Article II (with regard to services), and
- TRIPs Article 4 (with regard to intellectual property rights); and

(2) the national treatment (NT) obligation, contained most prominently in

- GATT Article III,
- GATS Article XVII, and
- TRIPs Article 3.

While a national treatment obligation prohibits discriminatory treatment of lawfully '**imported products vis-à-vis like domestic products' (' inland parity'**), the MFN obligation restricts the right of members to discriminate **'between and among like products of different origins**' (' **foreign parity'**).

<u>Most Favoured Nation</u>

The MFN principle has an ancient lineage. In particular, MFN was a cornerstone of the **US Reciprocal Trade Agreements Act of 1934,** which became the blueprint for the GATT and was a reason why the GATT was concluded as an executive agreement by the Truman administration in 1947.

GATT Article I: These significant advantages must be weighed against the one big (real or imagined) **disadvantage of MFN,** which is that **'free riders'** may take advantage of the system by claiming the benefits of trade liberalization while keeping their own markets closed.

Modes of discrimination

In order to obtain a thorough understanding of the principle of most-favored nation, it is vital to understand the forms of discrimination. Discrimination may either be de jure or de facto.

1. De jure discrimination: By de jure discrimination, we mean that discrimination that is **spelt out by law.** For example, there may be laws or regulations that have the impact of discriminating between goods and services that are like. Also, there may be an **application of taxes** in a different manner to domestic and imported goods, when in reality there is no real difference between the two.

De facto discrimination: De facto discrimination is discrimination that is not as explicit as de jure discrimination and is **implicit in the type of measures** used. For example, there may be a variable tax rate on beverages with high alcohol content than those with low alcohol content. There being no real discrimination apparent in such a measure, it will be regarded as de facto discrimination if, based on the market scenario, domestic beverages have a low alcohol content and imported beverages have a higher content. Discrimination must hence operate so as to distort the conditions of competition" between goods and services that are like. Mere existence of different rule, does not lead us to the conclusion that like goods and services have been discriminated unless the "conditions of competition" have been adversely impacted.

Article I:

- any **advantage, favour, privilege or immunity** granted by
- any contracting party to **any product originating in or destined** for anJiy other country shall be accorded
- **immediately and unconditionally** to the
- **like product** originating in or destined for the territories of all other contracting parties.

MFN coverage extends not only to **fiscal but also to non-fiscal border measures**; for instance, in *EC—Bananas III,* the border measures found to violate Article I:1 were the use of less complicated licensing procedures, incentives to operators to purchase bananas of a particular origin, the issuance of licences to import bananas of a particular origin dependent upon the economic activity performed by the economic operators requesting the licence, the granting of licences exclusively to operators representing producers of only certain countries, and the imposition of in-quota tariff

rates only for bananas originating from certain countries.

The *Belgian Family Allowances dispute* comprehensively elucidates the scope of discrimination, and the phrase "any advantage, favor, privilege or immunity" for the purpose of understanding the nature and scope of discrimination prohibited by the MFN principle.

In this dispute, the measure at issue was whether Belgium had violated the MFN principle

because of levying a charge on exports only due to the fact that such countries did not have a

similar family allowance policy in place. As a result, countries like **Denmark and Norway** had to pay a charge on exports only by reason of not having a similar family allowance policy as that of Belgium. The question was whether Belgium was justified in imposing a special charge on the

condition that exporting nations should also have a policy similar to that of Belgium. In this

context, the Panel held that Belgium had Article I:1 of the GATT as a result of this measure. It

elaborated that any advantage, etc. which was granted by one Contracting Party with respect to

products originating or destined for any country must also be granted to all other countries.

Hence, the Panel stated that such classifications made for certain products must exclusively be

based on the characteristics of the products themselves; **as against** being based on the

characteristics of the **country** where they originate from.

Like Product

The term like product has not received an authoritative definition in the text of the GATT. Clearly, 'like products' are characterized by common traits and show identical or similar characteristics. Given the

purpose of Article I to protect the equality of competitive opportunities, the determination of likeness is really a determination of competitive relationships between different products. Whereas the term like product is **used sixteen times in the GATT** alone, each provision must be interpreted on its own pursuant to its context and purpose: identical words may (but need not) have identical meaning.

The Appellate Body has described this ever present phenomenon of treaty interpretation with the following poetic picture:

"The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply."

Nevertheless, under well-established case law, all 'like-product' analyses have to consider the following four elements, in order to 'make a determination about the nature and extent of a competitive relationship between and among the products':

• the product's end-uses in a given market;

• consumers' tastes and habits, which change from country to country;

• the product's properties, nature, and quality; and

• tariff classification.

The *Japan-Alcoholic Beverages Case* is also known for its jurisprudence on the concept of "like products". The question before the Panel in this case was whether "vodka" and the Japanese drink "sochu" were alike. While Japan argued that the two shared no similarities, the Panel in its report (which was later upheld by the Appellate Body) stated that the two should be regarded as alike due to the fact that the two shared the same physical characteristics and even the same end- use. The differences in the same simply lie in the fact that the process of filtration is not the same.

Exceptions to MFN

Each and every of the many exceptions in the WTO Agreement may apply to the MFN obligation. Thus, for instance, **GATT Article XXI (the vital interests clause), GATT Article XX (the so-called 'general exception')** or, most importantly, **GATT Article XXIV (the Free Trade Agreement exception)** may justify departures from MFN.

1. Customs Union: defined in **Article XXIV: 8(a)** of the GATT, 1994 as "a substitution of a single customs territory for two or more customs territory so that duties and other restrictive regulations of commerce are eliminated w.r.t.substantially all trade between the constituent territories of the union or at least w.r.t. substantially all trade in products originating in such territories."
2. Free Trade Area: A free trade area is defined under **Article XXIV: 8 (b)** as "a group of two or more customs territories in which duties and other regulative restrictions are eliminated on substantially all trade between the constituent territories in products originating in such territories."
3. Preferential Treatment to Developing Countries:: The UNCTAD Special Committee on Preferences recognized as long as in the year 1970 that preferential treatment granted under the generalized scheme of preferences was a motivating factor for developing countries to increase their exports so as to promote industrialization and accelerate economic growth. Thereafter, the Waiver Decision on the Generalized System of Preferences was passed in the year 1971 to give effect to the Agreed Conclusions; which was eventually replaced as a result of the Tokyo Round Negotiations by the 1979 GATT Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries; commonly known as the "Enabling Clause".

Balance of Payment Emergencies: An exception to this rule is GATT Article XIV, which permits discriminatory administration of quotas. **Article XIV** applies, however, only in the case where quotas are authorized because a member is experiencing **balance of payment** problems. Since the 1970s, however, trade quotas to correct balance of payments problems have become rare; the majority of WTO members, supported by the **International Monetary Fund (IMF),** now regards quotas as an 'inefficient means of correcting balance of payment problems'. As a result, Article XIV has greatly receded in importance.

Waivers: Waivers of MFN are used sparingly and are approved primarily to benefit developing countries. For example, the **Waiver Decision on Preferential Tariff Treatment for Least Developed Countries (the '1999 LDC Waiver')** allows developing countries to grant special preferences to least-developed countries under certain conditions until 30 June 2019. It permits 'preferential tariff treatment'—as such incompatible with Article I:1—'provided on a generalized, non-reciprocal and non-discriminatory basis'. Thus, developed countries are **permitted until 2019** 'to provide such treatment to least-developed countries on a "non-discriminatory basis" under the 1999 LDC Waiver'

However, two very important exceptions specifically undercut the most favoured nation approach enshrined in the GATT:

(1) Preferential trade areas **(GATT Article XXIV)**: Customs unions and free trade agreements are specifically permitted under GATT Article XXIV in order to facilitate **'special relationships' between a sub-group** (two or more) of members. The number of **FTAs/RTAs/PTAs** has increased sharply over the last decade.

(2) special and differential treatment for developing countries: The present source of this exemption is the so-called **Enabling Clause**, which was adopted by the GATT contracting parties on **1979.**

In *EC—Tariff Preferences,* the Appellate Body had to deal with the following scenario: India and Pakistan both benefited from the European Community's General System of Preferences. Pakistan, however, received additional preferences because it qualified under the so-called Drug.

General and Security Exceptions: **Art XX and XXI** eg, environment, Public morals and security exceptions

National Treatment

National treatment means that a foreign person, product, or right—such as, for example, a good, a service, a service provider, an investor, an intellectual property right, or a (juridical or physical) person owning an (intellectual or other) property right—must be treated by a regulating state like their domestic ('national') equivalent.

Even in modern, treaty-based, international economic law, the right to national treatment is regularly only triggered once the foreign good, service, right, or person has legally entered the market or territory of the host (or receiving)

state. Thus, NT is, *de lege lata,* (law as it exists) conceptually linked to the full exposure to the jurisdiction of the regulating state, comparable to the situation of domestic products in their 'home' state.

The central NT obligation with regard to goods can be found in **GATT Article III.**

For instance, in *Korea-Beef case,* the appellate body considered whether Korea was infringing the national treatment of obligation by maintaining a dual retail system for marketing beef that can find sales of imported beef to specialized stores. Korean law created two distinct retail distribution system for beef. One for domestic true beef and another for imported beef. A large retailer could sell both domestic and

imported beef as long as it maintained separate sale areas. Retailers selling imported beef were required to display a sign reading "Specialised Imported Beef Store".

The Appellate Body, in analysing whether maintenance of the dual retail system violated Article III, concluded that formal separation does not, itself necessarily violate the national treatment obligation. The key inquiry is whether the maintenance of separate retail distribution system for domestic and imported products "modify the conditions of competition in the Korean beef market to the disadvantage of the imported product". This, in turn, depends upon the effect of the dual retail system. The Appellate Body noted that effect had been the reduction of retail outlets for imported beef, both in absolute terms and in comparison with the number of retail outlets for domestic beef. This "reduction of competitive opportunity" was not consistent with the requirements of Article 3 of the GATT.

National Treatment under WTO Agreements

- The central NT obligation of the Agreement on **Technical Barriers to Trade (TBT Agreement)** can be found in A**rticle 2.1** which states that 'in respect of their technical regulations, products imported from the territory of any Member be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country'. Clearly, the drafters of the TBT Agreement wanted to consolidate both NT and MFN in one provision.
- Similarly, the other important standard-related WTO agreement, the Agreement on the Application of **Sanitary and Phytosanitary Measures (SPS Agreement)** also contains several NT obligations; the central provision is SPS Agreement **Article 2.3.**
- National Treatment under **GATS- Article XVII**
- **TRIPS Agreement- Article 3**
- **GATT- Article III**

Aim and Effects Test: In *Malt Beverages,* Canada had challenged certain US state and federal taxes and sales regulations that resulted in differential treatment of domestic and imported alcoholic beverages. One measure challenged was a Mississippi wine tax imposing a lower tax rate on wines made from a certain grape variety. The Panel concluded that there was no other public policy purpose for taxing two types of wine differently than protecting local producers. Accordingly, the wine tax was found to be inconsistent with GATT Article III.

This argumentation was taken up and somewhat refined in *US—Taxes on Automobiles:*

A measure could be said to have the effect of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products. . . .

There is no doubt that since the *Asbestos case*, the Appellate Body has moved much closer to a rule of reason approach (certain trade-impeding state measures may be justified as reasonable, non-protectionist manifestation of legitimate non-trade policies, and do not constitute a violation of WTO law)

Likeness: the determination of likeness follows, according to established WTO case law, a multi-pronged test which includes consumer tastes and preferences.

Exceptions:

Like all GATT obligations, Article III is subject to

• the general exception, GATT Article XX;202

• the security exception, GATT Article XXI;

• the balance of payment exception and temporary application of quantitative restrictions in a discriminatory manner, GATT Articles XII, XVIII.B, and XIV;

• waivers (Article IX:3 of the Agreement Establishing the WTO).

Moreover, specific exceptions related to the national treatment principle may, in a nutshell, be summarized as follows:

8.1 Government procurement (GATT Article III:8(a)):

8.2 Subsidies to domestic producers (GATT Article III:8(b)):

8.3 Internal maximum price control measures (GATT Article III:9):

8.4 Cinematographic films (GATT Articles III:10 and IV): As an exception to the national treatment principle, members retained the possibility of giving preferences to goods produced by the national film industry (exposed cinematographic films). National preferences are governed by the provisions of GATT Article IV, and may take the form of internal quantitative regulations ('screen quotas')

Tariff Binding: Commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound, it may not be raised without compensating the affected parties.

Applied Tariff and Bound Tariff

1. Tariff below bound tariff; *Maximum tariff which can be imposed*
2. Cannot exceed Bound Tariff; *Need not be imposed as it is. A lower percentage of tariff can be imposed*
3. Depends upon the country's policy and may change on a daily basis; *Has to be changed by way of multilateral negotiation. Unilateral change not permitted*
4. MFN need not be followed; *Has to be applied.*

Every member draws up a schedule of concessions and each would contain different category of products and against those products will be the tariff commitment of the country along with the obligations.

Schedule of Concessions:

Pursuant to GATT Article II:1(a):

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

In WTO negotiations parlance, the difference between 'bound' and 'applied' tariffs is called **'juice'.**

Status of Concessions: As GATT **Article II:7** renders schedules 'an integral part' of the GATT—itself a covered agreement within the meaning of DSU Article 1—they are subject to WTO adjudication and interpretation.

This means it is binding on the members. It has been given the status of a treaty. By virtue of pacta sunt servanda, once the obligations are undertaken, it becomes binding.

Tariff schedules follow the format established by the Harmonized Commodity Description and Coding System ('Harmonized System' or HS), developed by the World Customs Organization. The Appellate Body and Panels have undertaken for themselves to find the 'true meaning' of a scheduled HS product category.

In the *EC—Chicken Cuts* case, only the rate for 'salted meat' allowed the (Brazilian and Thai) chicken industry importation into the EU at competitive prices, while the tariff rate for fresh chicken meat would have rendered export into the EU moot, due to the higher price. As a consequence, the outcome of this dispute was of existential importance for the chicken growers of all parties to the dispute.

Exceptions to Tariff Binding Obligation- Art II

1. Internal taxes consistent with Art III (NT)
2. Anti dumping or countervailing duty
3. Fees or other charges for services rendered.
4. Devaluation of currency- **Art II (6)**

- Devaluation should be **20% or more**
- Should be approved by **GATT contracting parties**

Quotas: Quotas are quantitative restrictions that are imposed on imports and exports of a specific product for a specified period. Countries use quotas as direct forms of administrative regulation of foreign trade, and it narrows down the range of countries where firms can trade certain commodities. It caps the number of goods that can be imported or exported at any given time.

Q.3. It is generally viewed that "what the UN did in the 20th century fruit maintenance of peace and security, the WTO is going to play the same role in economic and trade relations in the 21st century." Discuss the above statement in view of changing motion of political sovereignty to economic sovereignty of the States [15M]

The ever widening gap between the rich and the poor nations, prevalent injustice and inequality among the nations in the field of economic matters are some of the main reasons impelling the developing countries to make all out efforts to transform the existing world economic order.

This has been governed by GATT, the principle of non-discrimination and free trade. The UN Declaration on the Establishment of a new International Economic Order was voiced for the first time at the UNCTAD Conference in 1972. This was adopted by the UNGA in 1974.

The GATT served as the basis for eight 'rounds' of multilateral trade negotiations. These rounds were held periodically to reduce tariffs and other barriers to international trade and were increasingly complex and ambitious. All were ultimately successful.

The various negotiating rounds were named after the place in which the negotiations began or the person associated with initiating the round. The names and dates of the completed rounds25 are as follows:

• Geneva 1947, Annecy 1949, Torquay 1950, Geneva 1956, Dillon 1960–61, Kennedy 1962–67, Tokyo 1973–79, Uruguay 1986–94

The Uruguay Round culminated in the creation of an immense new body of international law relating to trade: the basic texts of the WTO agreements. The Final Act of the Uruguay Round transformed the GATT into a new, fully fledged international organization called the World Trade Organization (WTO).

Creation of WTO

The idea of creating a World Trade Organization emerged slowly from various needs and suggestions. Even at the beginning of the Uruguay Round, negotiators and observers realized that significant new agreements would require better institutional mechanisms and a better system for resolving disputes. One of the fifteen negotiations undertaken at the beginning of the Round was on the 'functioning of the GATT system', dubbed with the acronym 'FOGS'.

It was time to cure the 'birth defects' of the GATT by creating an organization that would be a UN specialized agency with an organizational structure and a dispute settlement mechanism. The **Draft Final Act** included agreements on transitional arrangements and the termination of the GATT 1947 and the Tokyo Round agreements on subjects covered by new WTO agreements. Finally, the negotiators decided that the WTO would come into being on 1 January 1995. The package of agreements that brought the WTO into being was opened for signature at Marrakesh on 15 April 1994. The package consisted of multilateral trade agreements annexed to a single document, namely, the **Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).**

Objectives: standard of living; full employment; develop world's resources; production and exchange of goods; eco dev

The WTO exists to '**facilitate the implementation, administration, and operation** as well as to further the **objectives'** of the WTO agreements.

The WTO has six key objectives:

(1) to set and **enforce rules** for international trade,

(2) to provide a **forum** for negotiating and monitoring further trade liberalization,

(3) to resolve **trade disputes,**

(4) to increase the **transparency** of decision-making processes,

(5) to **cooperate** with other major international economic institutions involved in global economic management, and

(6) to **help developing countries** benefit fully from the global trading system.

Beyond this general purpose, the WTO has other specific tasks:

(1) to administer the **Trade Policy Review Mechanism**; and

(4) to cooperate as needed with the **IMF and the World Bank**, the two other Bretton Woods institutions

(3) Regulate and **remove barriers** to trade: Tariff and non-tariff

(4) Make **agreements** for its objectives

(5) Cooperation and emphasis **sustainable development**

Structure and Powers of WTO

The WTO is formally endowed with existence, legal personality, and legal capacity as an international organization. It must be accorded privileges and immunities that are in accordance with its functions.

The WTO has two governing bodies: the Ministerial Conference and the General Council.

The **Ministerial Conference** is the supreme authority. It is composed of representatives of all WTO members and meets at least **once every two years.**

The **General Council** is the chief decision-making and policy body between meetings of the Ministerial Conference.37 The General Council also discharges the responsibilities of two important subsidiary bodies, namely, the **Dispute Settlement Body (DSB)** and the **Trade Policy Review Body (TPRB)**.38 The General Council is composed of all WTO members and meets 'as appropriate'. Thus, these three bodies, the General Council, the DSB, and the TPRB are really one administrative entity serving three different functions.

The General Council has control over the **WTO budget,** which is **prepared by the Director-General and the Committee on Budget, Finance and Administration.** The General Council has authority to arrange for cooperating with other inter-governmental organizations and non-governmental organizations.

Specialized councils and committees that **report to the General Council** do much of the day-to-day work of the WTO. The WTO Agreement establishes these councils:

- a Council for Trade in Goods;
- a Council for Trade in Services; and
- a Council for Trade- Related Aspects of Intellectual Property Rights (TRIPs).

These Councils have the **power to establish committees (or subsidiary bodies)** as required.

The **Ministerial Conference** has also established committees:

- a Committee on Trade and Development;
- a Committee on Balance of Payments;
- a Committee on Budget, Finance and Administration, and,
- by special action on 14 April 1994, a Committee on Trade and Environment.
- Additional councils and committees oversee the plurilateral trade agreements.

These also report to the WTO General Council.

The WTO has a **Secretariat** located in Geneva and presided over by a **Director- General,** who is appointed by the Ministerial Conference. The Ministerial Conference sets the powers and term of office of the Director-General, and the Director-General has the **power to appoint the staff and direct the duties** of the WTO Secretariat. Neither the Director-General nor the members of the Secretariat may seek or accept instructions from any national government, and both must act as **international officials.**

To deal with the plethora of matters that may arise concerning trade, the WTO commonly establishes **ad hoc working parties and committees** consisting of representatives of WTO members who participate on a voluntary, though official, basis.

The WTO Agreement created the WTO as a new international organization as of 1 January 1995, with a legal personality, legal capacity, and sufficient privileges and immunities. It also endowed the WTO with decision-making processes, an institutional structure, and distinctive functions. If it maintains the support of its members and gains public understanding and support, the WTO will continue to play a key global economic role in the twenty-first century.

The WTO maintains institutional relationships with other international organizations, such as the UN, the Food and Agriculture Organization, and the International Labour Organization. More than 140 international organizations have observer status in WTO bodies.

The structure of the organisation is instrumental to the goals of WTO. Process and substance are inextricably intertwined. This is known as substance-structure pairing. Effective global governance requires open attitudes towards multilateralism, shared perceptions on objectives, but also clear structures on all layers of government, local, national, regional and global.

1. Need for Proper rules and regulations: Overall, the WTO suffers from complex clashes of interests and a lack of attention to procedural issues. Except for dispute settlement, it is not clearly framed in institutional terms. Except for the General Council and the Ministerial Conference, nobody is mandated and authorised to address procedural issues in a comprehensive manner, coming forward with new ideas and informed proposals.
2. WTO Appellate Body Crisis: The United States is blocking the appointment of new members to the Appellate Body (AB). However, this is not the first time this has happened. . The US claims that the Appellate Body functions in a manner that is actively unfair and detrimental to its interests. One of the United States' main accusations against the Appellate Body is that it has overstepped its jurisdiction time and again, creating law and indulging in **"Judicial Activism".** Another problem observed by the US against the Appellate Body is that it creates **persuasive precedents.**
3. The structure and process of decision-making in the WTO: The consensus based diplomacy wants viable alternatives. A system of weighted voting, taking into account shares of world trade, openness of markets and size of population is today being contemplated. The issue of blocking powers is also hotly debated. Transparency and openness is required.
4. The structure and operation of WTO in the field of technical assistance and capacity building: What are the structural implications of enhanced technical cooperation in aid for trade? Should the WTO develop **regional offices**? How to cooperate with other international and regional organisations? How to cooperate with universities in the regions?

Q.4. Do you agree with the statement 'the Globalization is a necessary evil'? Critically examine the implications of the reform process undertaken by the IMF and IBRD by way of structural adjustment programmes and policies on developing countries, with special reference to India [10M]

Globalization is the **free movement** of **goods, services and people** across the world. Globalization has stimulated much controversy in recent years. The critics of globalization believe that free international trade in goods and financial assets does more harm than good. They view it as a vehicle for enriching corporate elites, to the detriment of poor people and the environment. On the other hand, the supporters of free international trade think that globalization holds the key to increasing the wealth of the world's people.

External Affairs Minister S. Jaishankar's remarks about globalisation are worth taking note of. The pandemic experience creates a case for 'shorter' supply chains with more 'national' capacities, he said, before chiding globalisation 'Gurus' for advocating open markets without acknowledging geopolitical motivations. That he cited the example of India's health-care supply chain vulnerabilities being exposed after the onset of COVID-19 makes it clear his broader message was aimed at China on whom India relied too much for critical pharma and health-care imports, and continues to run up large trade deficits with.

The initial stage of globalization was economic liberalization.

In brief, globalization seems to be more fruitful to advanced countries and it is ineffective to solve the fundamental problems of the third world. It is clear that globalization and liberalization are unable to solve the fundamental problems of the developing nations such as massive poverty, increasing unemployment and underemployment, lack of social and economic overheads, widespread and multidimensional human deprivations, hunger, social tension, increasing inequality, dislocations of millions of people and so on.

Reform Processes by IMF and IBRD:

The International Monetary Fund and the World Bank (IBRD and IDA) were both created at an international conference convened in Bretton Woods, New Hampshire, United States in July 1944. The goal of the conference was to establish a framework for economic cooperation and development that would lead to a more stable and prosperous global economy. While this goal remains central to both institutions, their work is constantly evolving in response to new economic developments and challenges.

The IMF's mandate.

- The IMF promotes monetary cooperation and provides policy advice
- capacity development support to preserve global macroeconomic and financial stability and help countries build and maintain strong economies.
- The IMF also provides **short- and medium-term loans** and helps countries design policy programs to solve **balance of payments** problems when sufficient financing cannot be obtained to meet net international payments obligations.
- IMF loans are funded mainly by the **pool of quota contributions** that its members provide.
- IMF staff are **primarily economist**s with wide experience in macroeconomic and financial policies.

The World Bank's mandate.

- The World Bank promotes **long-term economic development** and poverty reduction by providing **technical and financial** support to help countries reform certain sectors or implement specific **projects**—such as building schools and health centers, providing water and electricity, fighting disease, and protecting the environment.
- World Bank assistance is generally long term and is funded both by member country **contributions** and through bond issuance. World Bank staff are often specialists on particular issues, sectors, or techniques.

Since 1947, India has availed three International Monetary Fund (IMF) programmes:

1. In the **Fourth Plan,** India felt that there was a need for external assistance for **import liberalisation**. Discussions were held between Ashok Mehta, Minister of Planning and Pierre-Paul Schweitzer, Managing Director, IMF on 20 April 1966, in Washington, DC, following which India had agreed on **36.5 per cent rupee devaluation** to bring domestic prices in line with external prices, to enhance competitiveness of exports to address the country's trade and BOP. Along with devaluation, several existing special export promotion schemes providing import entitlements against exports, and the scheme for tax credit certificates were abolished.

2. In **1981,** India entered into an arrangement with the IMF to **borrow in SDR 5 billion** over a **3-year period** under the **Extended Fund Facility (EFF)** Arrangement. The improvement in the BOP was faster than expected. This enabled the Government to terminate the IMF arrangement in May 1984 after drawing SDR 3.9 billion out of the SDR 5 billion originally envisaged.

3. The **BOP crisis of 1991** was one of the biggest challenges in India's economic history. The rupee was devalued in two stages on 1 July and 3 July 1991 and the cumulative devaluation was about 18 per cent against major currencies. Along with the exchange rate adjustment, significant **structural reforms** were introduced in India's trade policy. The third major reforms were the changes introduced into the framework of industrial licensing, role of public sector, MRTP Act, and foreign direct investments and foreign technology agreements. These measures were accepted as part of the conditionalities accepted with the IMF loan in July 1991. In **1991, India pledged gold** to manage the crisis, and the IMF gave support. By **2008,** India was ready to buy IMF's gold. These should be convincing illustrations of the productive partnership between the IMF and India. The partnership between India and IMF has been one of great mutual benefit.

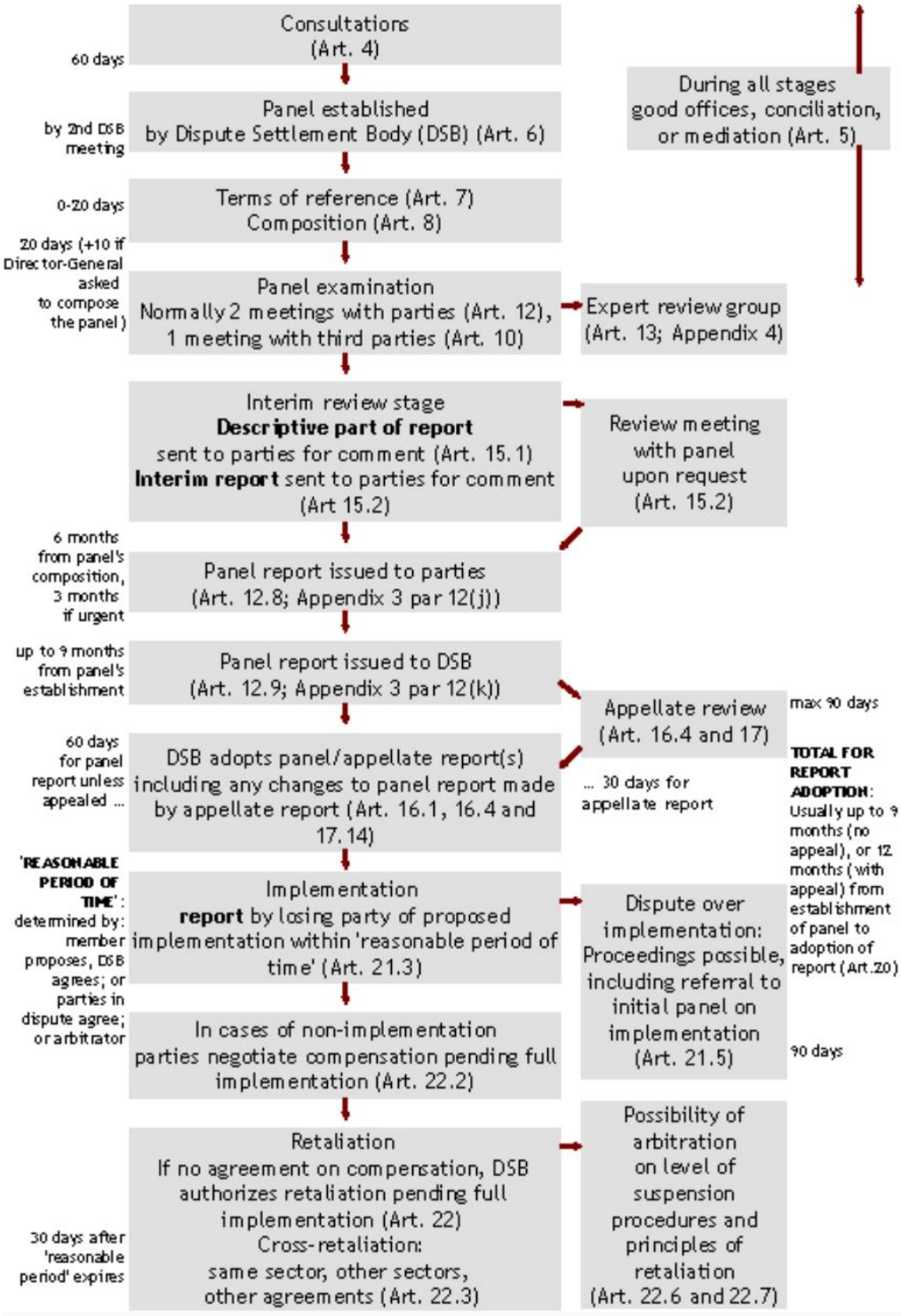
IBRD: In 1958, India was threatened by a balance of payments crisis midway through its Second Five-Year Development Plan. The situation was so dire, there was a fear that India's foreign exchange reserves would be wiped out by the end of the year with incomplete infrastructure and industry projects. The Indian government requested the World Bank Group to organize additional financial support. Given

India's status as a founding member of the Bank Group, and largest borrower, President Eugene R. Black took immediate action and organized a meeting to consult with interested parties and explore solutions to India's emergency.

India is not only a founder member, but for some time it was the **5th largest shareholder.** In addition, it had been the leader of the **voice of developing** countries – a voice that has been disproportionately large relative to its voting power. In recent years, India has also emerged as an important player in the global economy and, therefore, in the functioning of the IMF.

Q.5. The Dispute Settlement Body (DSB) of the World Trade Organization (WTO) is playing an important role in maintaining the stability of the global economy. Comment [15 M]

This chapter explains all the various stages through which a dispute can pass in the (WTO) dispute settlement system. There are two main ways to settle a dispute once a complaint has been filed in the WTO: (i) the parties find a **mutually agreed** solution, particularly during the phase of bilateral consultations; and (ii) through **adjudication,** including the subsequent implementation of the panel and Appellate Body reports, which are **binding** upon the parties once adopted by the DSB. There are three main stages to the WTO dispute settlement process: (i) **consultations** between the parties; (ii) **adjudication by panels** and, if applicable, by the Appellate Body; and (iii) the **implementation of the ruling,** which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.



Overall Notes

Economic and social inequalities are in part responsible for the failure to preserve peace because they are interwoven into the whole fabric of international relationships. Thus to ensure world peace, it is necessary to solve economic and social problems of the world. This awareness finds itself in putting forward the concepts of 'economic decolonisation', 'New International Economic Order', 'Collective economic security', 'Economic Rights and Duties' etc.

UN Charter Provisions:

- The UN Charter's Preamble expresses the resolve 'to promote social progress and better standards of life in greater freedom' and 'to employ international machinery for the promotion of the economic and social advancement of all peoples.'
- After having made this resolve, the Charter enlists the achievement of 'international cooperation in solving international problems of an economic, social, cultural or humanitarian character' [Art 13] as one of the purposes of the UN
- GA shall initiate studies and make recommendations for the purpose of promoting international cooperation in the economic field [Art 13 (1)(b)]
- Chapter IX comprising Articles 55-60 is exclusively devoted to International Economic and Social Cooperation.

Art 55 provides: The UN shall promote, a) higher standards of living; b) solution of international economic, social, health and related problems.

Art 56- all the members have pledged to take joint and separate action in cooperation with the organisation for the achievement of the purpose in Art 55.

Evolution of a New International Economic Order:

Background:

- Ever widening gap between the rich and poor nations, prevalent injustice and inequality and persistent denial of rightful place to the Third World in the world economic order.
- Concept envisaged by the developing countries when they realised that they had acquired a new bargaining strength which could enable them to make changes in their favour.
- In practice the principle of non-discrimination and free trade mentioned in GATT has not been applied.

UN Declaration on the Establishment of a New international economic order

- Officially voiced for the first time at the UNCTAD-III conference in Santiago (Chile) in 1972 by developing countries.

- The Sixth Special Session of the UN GA was devoted entirely to the consideration of matters relating to International Economic Cooperation: the most significant declaration was the UN Declaration on the Establishment of the New Internatioanl Economic Order.

New International Economic Order

- based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social system.
- Noted that developing countries, which constitute 70% of the world population, account for only 30% of the world's income.

Principles are:

1. Sovereign equality of States, self-determination of all peoples inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other states;
2. Broadest co-operation of all the member States of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all;
3. Full and effective participation on the basis of equality of all countries;
4. Every country has the right to adopt the economic and social system that it deems to be the most appropriate for its own development and not to be subjected to discrimination of any kind as a result
5. Full permanent sovereignty of every state over its natural resources and all economic activities
6. All States, territories and peoples under foreign occupation, alien and colonial domination or apartheid have the right to restitution and full compensation for the exploitationa dn depletion of damages to their natural and other resources of those states
7. Regulations and supervision of the activities of transnational corporations by taking measures in the interest of the national activities of transnational corporations by taking measures in the interest of the national economies of the countrys where such transnational corporation operate on the basis of the full sovereignty of those countries
8. Right of the developing countries and the peoples of territories under colonial and racial dominationa and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities
9. Extending of assistance to developing countries, peoples and territories under colonial and alien domination
10. Just and equitable relationship between the prices of raw materials, capital goods etc being exported by developing countries and ones being imported by them
11. Extension of active assistance to developing countries by the whole international community, free of any political or military conditions
12. Ensuring that one of the main aims shall be the promotion of the development of the developing countries
13. Improving the competitiveness of natural materials facing competition from synthetic substitutes
14. Preferential and non-reciprocal treatment of developing countries whenever feasible, in all fields

15. Securing favorable conditions for the transfer of financial resources to developing countries
16. To give to the developing countries access to the achievements of modern S&T
17. Necessity for all states to put an end to the waste of natural resources including food products
18. Need for developing countries to concentrate all their resources for the cause of development
19. Strengthening- through individual and collective action- of mutual cooperation
20. Facilitating the role which producers' associations may play within the framework of international cooperation

The Declaration further provided that UN as a universal Organisation should be capable of dealing with problems of international economic cooperation in a comprehensive manner and ensuring equality of the interest of all countries. It must have an even greater role in the establishment of a new international economic order.

Programme of Action on the Establishment of a New international Economic Order: A special programme was provided. It advocated 'joint marketing arrangements'. 'Orderly commodity trading'. 'Recovery, exploitation, development of raw materials.' equitous pricing policies, expeditious commodity arrangements, greater use of natural resources in preference to synthetic materials, etc.

Charter of Economic Rights and Duties

Background: the credit goes to UNCTAD 1972 'Let us take economic cooperation out of the realm of goodwill and put it into the realm of law.' The Charter of Economic Rights and Duties was finally adopted by the General Assembly in 1974. More than 2/3 rd of the Charter received general support and only six countries voted against the charter as a whole.

The developed countries who voted against the Charter [US apparently felt 'oppressed' by the 'tyranny of the majority'] argued that although they were small in number, they occupied a significant place in the field of International Economic Relations and as such their views could not be ignored.

However, it may be observed that public opinion being the ultimate and greatest sanction behind Internationla law, and for that matter any law, in the course of time the said developed countries may also end up supporting the Charter. Thus despite the fact that some 'essentail states' have not supported it, it is bound to have the desired impact on the International Economic Cooperation.

Structure of the Economic Charter: Comprises of 34 articles and a preamble.

- Preamble states: 'The Charter shall constitute an effective instrument towards the establishment of a new system of International Economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries.'
- Four Chapters namely: Fundamentals of international economic relations, Economic rigts and duties, Common responsibility towards the international community and final provisions.

Fundamental Principles: Chapter I provides that the economic as well as political and other relations among states shall be governed inter alia by the following principles

1. Sovereign, territorial integrity and political independence of states
2. Sovereign equality of all states
3. Non-aggression
4. Non-intervention
5. Mutual and equal benefit
6. Peaceful coexistence
7. Equal rights and self determination of people
8. Peaceful settlement of disputes
9. Remedying of injustices which have brought about by force and which deprive a nation of natural means necessary for its normal development
10. Fulfilment in good faith of international obligation
11. Respect for human rights and fundamental freedoms
12. No attempt to seek hegemony and spheres of influence
13. Promotion of social justice
14. International cooperation for development
15. Free access to and from sea by land locked countries within the framework of the above principles

Economic Rights and Duties: Chapter II- 'the essence of the Economic Charter'.

1. Permanent sovereignty over wealth and natural resources: Article 2 para 1- over wealth, natural resources and economic activities (developed countries did not object to natural resources but objected to wealth and economic activities)
2. Foreign investment: Each state has the right to regulate and exercise authority over foreign investment. No state to be compelled to give preferential treatment to foreign investment [Article 2(a)]
3. Transnational Corporations: Article 2(b)- right to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its rules. Every State would cooperate with other states in the exercise of this right.

4. Nationalisation and expropriation of foreign property: right of every state to nationalise, expropriate, or transfer ownership of foreign property in which case appropriate compensation should be paid by the state adopting such measures.
5. Organisation of primary commodity procedures: in order to develop their national economic resources to achieve stable financing for their development.
6. Transfer of technology- Art 13
7. Promotion, expansion and liberalization of world trade - Art 14 unanimously adopted
8. Utilization of resources freed by effective disarmament measures
9. Elimination of colonialism, apartheid, racial discrimination, neo-colonialism and restitution and full compensation for exploitation of the natural and other resources of the territory affected- Art 16
10. Extension of Tariff preferences- Art 18 provides that the developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to developing countries. Art 19- in order to accelerate economic growth of developed countries and bridge the economic gap, developed countries grant generalized preferential treatment.
11. MFN Treatment- Article 26
12. Indexation of prices- adjustments in prices of exports and imports of goods.

Common responsibility towards the International community: Chapter III- Articles 29 and 30

Significance: Strictly speaking a GA resolution is only of recommendatory character. Therefore the Charter will have the force which declarations have. But it is a declaration of special significance, in the context of the fact that 120 states supported its adoption.

TOPIC 15: Protection and Improvement of the Human Environment: International Efforts

1. *Discuss the role of the United Nations in protection and improvement of the human environment. [2021 8(c)]*
2. *Evaluate the main sources of International Environmental Law. Explain and discuss in particular the emergence of "Soft Law" and principles of International Environmental Law and how this has influenced the development of this area of International Law. [2020]*
3. *Write critical notes on the following: International efforts towards protection and improvement of human environment. [2019 8(a)(i)]*
4. *Do you agree with the statement that "Beginning with the Stockholm Declaration of 1972, there has been an increased reliance upon non-binding international instruments dealing with*

environment"? Why has this trend developed and have these instruments been more useful than treaties? Explain. [2018 8(b)]

5. *What do you mean by 'human environment ? Discuss the role of United Nations Organization (UNO) in protecting and improving the human environment. [2017 7(a)]*
6. *Discuss the constitution, jurisdiction, powers and authority of National Green Tribunal. How far has it been successful in achieving its objectives? Explain with the help of recent cases. [2017 6(a)]*
7. *"The object of Public Liability Insurance Act, 1991 is to provide relief to the victims of accidents in hazardous industries in addition to any other right to claim compensation." Explain with case law. [2016 8(c)]*
8. *Final words of Paris Agreement under the UNFCCC, 2015 was adopted unanimously by 195 countries. According to this Agreement, Nationally Determined Contributions (NDC) are to be reported every 5 years and are to be registered with UNFCCC Secretariat which will be 'progressive' depending upon the targets set by each country itself and therefore contributions have been made 'non-binding' as a matter of International Law and there will be a 'name and shame system' or 'name and encourage plan'. After explaining essential features, comments on the effectiveness of such an Agreement. [2016 8(c)]*
9. *Critically evaluate the laws/conventions/practices available for the protection and preservation of marine environment under International law. Also discuss the rules provided under International law for 'transit passage' and its causes. [2015 7(a)]*
10. *The Stockholm conference of 1972 on the human environment served to identify those areas in which rules of International environment law, acceptable to international community as a whole can be laid down, and as well as those areas in which the formation of environmental rules must encounter insurmountable obstacles. Discuss the principles of international environment law proclaimed in the Stockholm Declaration. [2011 5(c)]*
11. *"The general principles and prescriptions of International Law are not without applicability to problems of transnational pollution— and environmental degradation. Thus fundamental principles of international law limits action by one State which would cause injury in the territory of another state... There has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interest of another State..."Explain." [2008 7(b)]*
12. *The 1972 Stockholm "Declaration on Human Environment" and" Action Plan on Human Environment" create a new relationship of rights and obligations between developed and developing countries. Explain. [2005 7(b)]*
13. *Assess the contribution of the Johannesburg World Summit on Sustainable Development (WS.S.D.-August, 2002) and New Delhi 8th Conference of the Parties (C.O.P.-8 October, 2002) in combating climate change. [2004 7(b)]*
14. *Write short notes on outer space Treaty, 1967. [1996 8(a)]*

On 29 March 2023, the United Nations General Assembly (UNGA) adopted a resolution seeking an International Court of Justice (ICJ) advisory opinion on the obligations of States to combat climate change. The resolution was initiated by the Government of Vanuatu and co-sponsored by more than 130 States in accordance with Article 96 of the Charter of the United Nations

Q.1. Evaluate the main sources of International Environmental Law. Explain and discuss in particular the emergence of "Soft Law" and principles of International Environmental Law and how this has influenced the development of this area of International Law. [15 M]

International environmental law is a body of international law concerned with protecting the environment, primarily through bilateral and multilateral international agreements. International environmental law developed as a subset of international law in the mid-twentieth century. Although conservation movements developed in many nations in the nineteenth century, these movements typically only addressed environmental concerns within a single nation. A growing body of environmental scientific evidence from the 1950s and 1960s, however, illustrated global environmental stresses, along with the need for a multinational solution to environmental issues. Scientific research established that air and water pollution, overfishing, and other environmental issues often have effects that reach far beyond the borders of any particular nation. By the late-1960s, the international community realized that an international approach to environmental issues was required.

International environmental law is derived primarily from three sources: **customary international law; international treaties; and judicial decisions of international courts.**

Customary international law refers to a set of unwritten laws that have arisen from widespread custom and usage among nations. Examples of environmental international customary law include warning a neighboring nation about a major accident that could affect its environment. Eg Article 23: If **nuclear** substance, must carry documents and take precautionary steps.

Decisions by international courts or arbitrators, such as the International Court of Justice or the International Tribunal for the Law of the Sea, also shape international environmental law. The *Trail Smelter Arbitration* case of 1938 and 1941, one of the earliest international environmental law cases, involved a dispute between the United States and Canada over air pollution from a Canadian smelting factory. The pollution blew across the American-Canadian border and destroyed crops in the State of Washington. After 15 years, an international arbitration panel established the "polluter pays principle," a key foundation of international environmental law. The polluter pays principle holds that if pollution from one nation causes harm in another nation, then the polluter nation must pay to remedy the damage.

International treaties are the most recent, and most effective, source of international environmental law. The sovereignty of nations persists as the primary obstacle to all forms of international law. The principle of sovereignty holds that every nation has complete control over the activities within its borders unless that nation agrees to relinquish some control. Nations typically abrogate (eliminate) part of their sovereignty through bilateral or multilateral international treaties.

The destruction of ecosystems and the exploitation of wild flora and fauna were the first environmental issues to receive widespread international attention. In 1963, the World Conservation Union (IUCN), a nongovernmental organization (NGO) dedicated to environmental conservation, called on all nations to take steps to protect endangered species. Following a conference on the issue, 80 nations promulgated the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES is an international agreement designed to protect endangered plants and animals by regulating the trade of

endangered species or products derived from them. Since going into effect in 1975, CITES has developed widespread international support. Currently, 172 nations are party to the convention.

Soft Law

"Soft" law is a paradoxical term for defining an ambiguous phenomenon. Paradoxical because, from a general and classical point of view, the rule of law is usually considered "hard," i.e., compulsory, or it simply does not exist. Ambiguous because the reality thus designated, considering its legal effects as well as its manifestations, is often difficult to identify clearly. The primary function assumed by international institutions in the international "soft" law-making process has already been illustrated. In practice, the development of "soft" law norms with regard to the protection of the human environment began immediately after the Stockholm Conference, one of the consequences of which was the creation of a special subsidiary organ of the UN General Assembly devoted to the promotion of both universal and regional environmental law. This body, the **United Nations Environment Program ("UNEP")**, has played a leading role in the promotion of regional conventions aimed at, for example, protecting seas against pollution. Although it was not supposed to develop in such a manner, UNEP has also evolved into a standing structure for negotiating draft resolutions sent, after their elaboration, to the General Assembly, where their contents have been either passed as is or expressly referred to in resolutions. A prime example of this phenomenon is provided by the 1978 UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.5 At the regional level in general and in Europe in particular, several international institutions have engaged in important activities related to environmental protection: the **Organization for Economic Cooperation and Development ("OECD"),** which, in particular, has adopted a series of recommendations conceived of as a follow-up to the Universal Stockholm Declaration regarding the prevention and abatement of transfrontier pollution. The action of non-governmental organizations ("**NGOs**") has also contributed to the enunciation of:"soft" law principles regarding the environment. The **International Law Association ("ILA"),** for example, adopted an influential resolution in **1966 known as the Helsinki Rules** on the **Use of Waters of International Rivers** which was expanded and enlarged by the same institution in **1982** with the adoption of the **Montreal Rules of International Law Applicable to Transfrontier Pollution.'**The Institute of International Law ("IIL") has played an equally important role by promulgating resolutions on the Utilization of Non-Maritime International Waters;I' on the Pollution of Rivers and Lakes and International Law;12 and on Transboundary Air Pollution.

As with other areas in which "soft" law plays a part, **repetition** is a very important factor in the international environmental "soft" lawmaking process. The contemporary **"common heritage"** approach is reflected, for example, in the UN General Assembly Resolution 43/53 of January 27, 1989, in which it is recognized "that climate change is a **common concern** of mankind

involves the principle of *information and consultation.*
environmental impact assessment procedures.
principle of non-discrimination
"common heritage of mankind"

A "soft" norm can help to define the standards of good behavior corresponding to what is nowadays to be expected from a "well-governed State" without having been necessarily consecrated as an inforce customary norm.

Albeit indirect, the legal effect of "soft" law is nevertheless real. "Soft" law is not merely a new term for an old (customary) process; it is both a sign and product of the permanent state of multilateral cooperation and competition among the heterogeneous members of the contemporary world community.

Q.2. International efforts towards protection and improvement of human environment. Write critical notes. [20M]

Nature Conservation

1. **UN Conference on Environment and Development (UNCED)**

Also known as the **Rio Summit** or the Earth summit it was held in Rio de Janeiro in 1992. It resulted in the following documents

- **Rio Declaration** on Environment and Development
- **Agenda 21 :** comprehensive blueprint action to be taken globally, nationally and locally by organizations of the UN, governments, and major groups in every area. The implementation of the plan locally is known as 'Local Agenda 21 or LA 21.
- **Forest Principles**

Moreover, two important **legally binding** agreements

- Convention on **Biological Diversity**
- Framework Convention on Climate Change **(UNFCC)**

Later, in **1997 GA** of Un held a special session to appraise five years of progress on the implementation of Agenda 21 (Rio +5)
The **Johannesburg plan** of Implementation agreed at the World Summit on Sustainable Development affirmed UN's commitment to full implementation of Agenda 21.
Rio+20 took place in 2012 to reduce poverty, advance social equity and ensure environmental protection.

CBD: Legally binding Convention for conservation of biodiversity, sustainable use and sharing the benefits. The Protocols to it are: **Cartagena Protocol** (Advance Informed Agreement), **Nagoya- Kuala Lumpur Supplementary Protocol (**Access, Benefit-sharing and Compliance obligations, Traditional Knowledge)

Ramsar Convention on Wetlands (1971 and enforced in 1975 on 2nd February): For the prestige of international recognition and to take all steps necessary to ensure the maintenance of the ecological character of the site. **Montreux Record**: adopted by Brisbane 1996

Convention on International Trade in Endangered Species of Fauna and Flora **(CITES):** It is administered through the **UNEP.** Includes *Appendix I, II and III*

The Wildlife Trade Monitoring Network **(TRAFFIC): IUCN and WWF** - established in 1976

Convention on the Conservation of Migratory Species **(CMS):** also known as B**onn convention**, intergovernmental body

Coalition against Wildlife Trafficking **(CAWT):** Unique voluntary public-private coalition

International Tropical Timber Organization (ITTO): intergovernmental organization and its members represent about **80% of the global tropical forests** and **90% o**f the global tropical timber **trade.**

UN Forum on Forests **(UNFF): ECOSOC** established the UNFF in 2000 based on the Forest Principles of Rio Declaration. It has universal membership

International Union for Conservation of Nature and Natural Resources **(IUCN):** Founded in 1948 as IUPN whose name changed in 1956

Global Tiger Forum **(GTF):** Inter-governmental body to save the five sub-species of tigers over 14 tiger range countries. The General Assembly of GTF shall meet once in three years.

<u>Hazardous Material</u>

1. **Stockholm Convention:** The SC on PoP was adopted in 2001 and came into force 2004. 12 initial PoPs were recognised with 9 new added later.
2. **Basel Convention:** BC on the Control of Transboundary Movements of Hazardous Wastes and their disposal was adopted in 1989 in response to a public outcry following the discovery of toxic wastes imported from abroad.
3. **Rotterdam Convention:** Adopted in 1998 and entered into force in 2004. Creates legally binding obligations for the implementation of the Prior Informed Consent (PIC) procedure. It covers pesticides and industrial chemicals that have been banned or severely restricted for health or environmental sound use of those hazardous chemicals.

Land: UN Convention to Combat Desertification (UNCCD)- Established in 1994 it is the sole legally binding international agreement linking environmenta nad development to sustainable land management.

Marine Environment: International Whaling Commission (IWC): Intergovernmental body with headquarters in Cambridge, UK

Atmosphere

1. **Vienna Convention and Montreal Protocol**: Protect the ozone layer and reduce ozone depleting substances respectively.
   Kigali Amendment: phase out Hydrofluorocarbons (legally binding)
2. UN Framework Convention on Climate Change **(UNFCC)**: Limit global temperature increases. UNFCC secretariat supports all institutions particularly the Conference of parties
3. **Kyoto Protocol:** Sets binding emission reduction targets for industrialized countries. Works on the principles of a) Emissions reduction Commitments and b) Flexible Market Mechanisms (joint implementation, Clean Development Mechanism, Emission Trading
4. **Minamata Convention:** on Mercury to protect human health and environment from anthropogenic emissions and releases of mercury and mercury compounds.

Organisations:

1. **UNEP and UNEA (Environment Assembly):** World's highest level decision making body on the environment. Meets biennially in Nairobi Kenya. UNEA created in 2012 in Rio+20 summit.

Q.3. The Stockholm conference of 1972 on the human environment served to identify those areas in which rules of international environment law, acceptable to the international community as a whole can be laid down, and as well as those areas in which the formation of environmental rules must encounter insurmountable obstacles. Discuss the principles of international environment law proclaimed in the Stockholm Declaration. [15M]

'Man is both the creature and moulder of his environment.' - Stockholm Declaration

The 1972 UN Conference on the Environment in Stockholm was the **first** world Conference to make the environment a major issue. The participants adopted a series of principles for sound management of the environment, including the Stockholm Declaration and Action Plan for the Human environment and several resolutions.

The SD which contained **26 principles** placed environmental issues at the forefront of international concerns and marked the start of a dialogue between industrialised and developing countries as the link between economic growth, the pollution of air, water and oceans and the well being of people around the world.

The Action Plan contained three main categories

Global Environmental assessment Programme (watch plan)

Environmental management activities

International measures to support assessment and management activities carried out at the national and international levels.

These categories were broken down into **109 recommendations.** One of the major results of the Stockholm Conference was the creation of the **UNEP (Environment programme)**

Context and Aftermath:

Historical Perspective: Prior to 1950 the environment received little attention and challenges were viewed as local or to some extent, regional problems. But the continuous growth of population and exploitation of natural resources led to newer scientific and technological advancements which posed a serious threat to the earth.

The earliest international covenant relating to environment is of 1967 relating to fisheries (The Convention between France and Britain)

Development during 1945-2003

After WWII, a new phase started wherein there was growing awareness about the relationship between economic development and environmental degradation. The necessity for international action on environmental problems was brought to the world's attention especially due to the impact of the by-products of industrial revolution that caused transboundary pollution problems (e.g. acid rain in North America due to industries in Canada). *UK v Albania (Corfu Channel Case 1959)* is an example of application of international law for transboundary injuries.

The evolution of environmental issues on the agenda of international institutions can be better understood by dividing post war periods into three periods defined by two major landmark meetings- Stockholm 1972 and Earth Summit 1992

Aftermath:

The SC became the prototype for major world conferences, sometimes referred to as **'Global town meetings.'** In 1989, the UN adopted the 'Basel Convention on the control of Transboundary Movement of Hazardous Wastes.' The Brundtland Commission report entitled 'Our common Future' was released. IPCC report- 6th Assessment Report 'Climate Change 2021: The Physical Science' has predicted that global warming would hit 1.5*C in the early 2030s.

Principles:

P1: Man has the fundamental right to **freedom, equality and adequate conditions of life**
P2: Natural resources of the earth including air, water, land, flora, fauna to be safeguarded for the benefit of present and **future generations**
P3: **Capacity of the earth** to produce vital renewable resources must be maintained and wherever practicable restored or improved
P4: Man has **special responsibility** to safeguard and widely manage the heritage of wildlife and its habitat.
P5: The **non-renewable resources** to be safeguarded and employed in a way to guard against future exhaustion.
P6: Discharge of **toxic substances** must be halted.
P7: States to **prevent pollution of the seas** by substances liable to create hazards to human health
P8: **Economic and social development** essential for ensuring a favorable libing and working environment
P9: Environmental deficiencies generated by the conditions of under development and natural disasters be remedied.
P10: Stability of prices and raw materials- **economic factors**
P11: Environmental policies of States to enhance and not adversely affect present or future development policies
P12: Resouces used to preserve and improve the environment
P13: Rational management of resources- integrated and coordinated approach
P14: Rational Planning
P15: Plan for **human settlements** and **Urbanisation.**
P16: Democratic Policies
P17: National Institutions
P 18: Science and Tech
P19: Education in environmental matters
P20: Scientific information
P21: Sovereign right
P22: Co-operation
P23: International **standards**
P24: Interests of **all**
P25: International **organisations**
P26: Spared from the effects of **nuclear weapons** and all other means of mass destruction.

Framework on Environmental Action (insert picture)- Environmental Assessment (Evaluation and review, Research, Monitoring, Information exchange), Environmental Management (Goal setting and planning, international consultation and agreements) and Supporting Measures (Education & Training, Public information and Organisation, Financing)

Q.4. The general principles and prescriptions of International Law are not without applicability to problems of transnational pollution— and environmental degradation. Thus fundamental principle of international limits action by one State which would cause injury in the territory of another state... "There has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interest of another State...' Explain.[30M]

As rightly remarked by author **Cecil**, 'the general principles and prescriptions of IL are not without applicability to problems of **transnational pollution** or environment degradation.' Thus a fundamental principle of IL limits action by one State which would **cause injury** in the territory of another State [*Corfu Channel Case 1949*]. There has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interest of other States.

This principle is in turn a reflection of the fundamental doctrine, *Sic utere tuo ut olienum non leades*- one must use his own rights so as not to do injury to another.' This concept underlines the range of State-to-State relations just as it does in personal relations. This principle has also been recognised by Arbitration Tribunals (eg The *Lake Lanoux Arbitration* between France and Spain).

It is **not** suggested that general principles of international law provide the **degree of specificity** that will be required for a framework of international concern for global environmental conservation. These general principles of IL, however, do indicate the **duty of the State** not to engage in or permit conduct within its territory which would result in environmental injury outside its territory.

Reference may be made here to *Trail Smelter Arbitral Award.* This case related to the damage caused to the State of Washington by fumes of SO2 emitted from Trail Smelter on the Canadian territory. It was held by the Tribunal that Canada was responsible in IL for the conduct of Trail Smelter. It was further held that apart from the undertakings in the treaty between two states, the Govt of the Dominion of Canada was under duty to ensure that its conduct should be in conformity with the obligations under IL. The Tribunal held, 'Under IL, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein.'

Insert pictures of Stockholm Convention, Basel Convention and Rotterdam Conventionl

Q.4. Discuss the concept of 'sustainable development' highlighting contents of the Rio Declaration [UNCED] relating to protection of human environment [20M]

The United Nations conference on Environment and Development (UNCED) known as 'Earth Summit' was held in Rio De Janeiro Brazil in 1992. The global conference held on the occasion of the 20th Anniversary Stockholm, Sweden 1972 brought together political leaders, diplomats, scientists, representatives of the media, and NGOs.

A 'Global Forum' of NGOs was also held in Rio De Janeiro at the same time, bringing together an unprecedented number of NGO representatives.

Objective: Primary objective was to produce a broad agenda and a new blueprint for international action on environmental and developmental issues.
It highlighted how different social, economic and environmental factors are interdependent and evolve together, and how success in one sector requires action in other sectors to be sustained over time.

Significance/Achievements:

The Earth Summit concluded that the concept of **SD was an attainable goal** for all the people of the world, regardless of whether they were at the local, national, regional or international level.
Recognised that **integrating and balancing economic, social and environmental** concerns in meeting our needs is vital for sustaining human life.
Integrating requires **new perceptions** of the way we **produce and consume,** the way we live and work and the way we make decisions.
This concept was revolutionary at the time and it sparked a lively debate within governments.

Results:

27 Principles

Also known as the **Rio Summit** or the Earth summit it was held in Rio de Janeiro in 1992. It resulted in the following documents

- **Rio Declaration** on Environment and Development
- **Agenda 21 :** comprehensive blueprint action to be taken globally, nationally and locally by organizations of the UN, governments, and major groups in every area. The implementation of the plan locally is known as 'Local Agenda 21 or LA 21.
  Non binding instrument, Certain strategies and other detailed programmes.
  Divided into four parts:
  A. **Socio-economic dimensions (**habitat, health, demography, consumption and production pattern etc)
  B. **Conservation and resource** management (atmos, forest, water, waste etc)
  C. Strengthening the **role of NGOs** and other social action groups such as trade unions, women org, etc
  D. Measures for **implementation**
- **Forest Principles**

Moreover, two important **legally binding** agreements

- Convention on **Biological Diversity**
  Art 6: Develop **national strategies,** plans and programmes for **conservation**
  Art 8: In-situ conservation strategy- protected areas where special measures need to be taken
  Art 9: ex-situ conservation and research (eg seed banks, gene banks, cryopreservation of gametes
  Three main goals: Conservation, sustainable use, sharing the benefits
  Cartagena Protocol (access to and transfer of technologies, appropriate procedures- AIA Advance Informed Agreement); Nagoya Protocol (Access, benefit sharing and compliance obligations, Traditional knowledge)
- Framework Convention on Climate Change **(UNFCCC):**
  Prime Objective: Stabilise the **greenhouse effect** and prevent dangerous **anthropogenic interference** with climate system
  Also referred to **Vienna Convention for Protection of Ozone Layer 1985** and **Montreal Protocol on Substances that deplete the ozone layer**

I. Each state party to make **national policies** and take corresponding measures on mitigation of climate change by limiting anthropogenic emissions of GHGs.
II. **Protecting** and enhancing its greenhouse gas sinks and reservoirs
Kyoto Protocol of 1997 is a part of this Convention.

RIO PRINCIPLES

P1: Human beings are the center of concern for SD. They are entitled to a healthy and productive life in harmony with nature.
P2: States have in accordance with the UN Charter and principles of Il, the **sovereign right** to exploit their own resources and the **responsibility** to not cause damage to the environment.
P3: Right to development to be fulfilled so as to equitably meet developmental and environmental needs of present and **future generations.**
P4: In order to achieve SD, environmental protection shall constitute an integral part of the **developmental process** and cannot be considered in isolation from it.
P5: Essential task of **eradicating poverty** to decrease the disparities in standards of living
P6: Special situation and needs of **developing countries,** particularly least developed and environmentally vulnerable- special priority - interests of all countries
P7: Cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of Earth's ecosystem
P8: Reduce and eliminate unsustainable patterns of **production and consumption** and promote appropriate demographic policies
P9: Capacity building for SD by improving scientific understanding through exchange of scientific and technological knowledge.
P10: Participation of all **concerned citizens-** public assessment
P11: Effective **environmental legislation**
P12: Supportive and open **international economic system** (trade policy measures)
P13: Law regarding liability and compensation for **victims**
P14: Discourage or prevent the **relocation and transfer** to other States any activity that could cause environmental degradation
P15: Precautionary principle
P16: Internalisation of environmental costs- **Polluter Pays principle**
P17: EIA
P18: Notify other States of any natural disasters or other emergencies
P19: Timely notification and relevant information to potentially affected States.
P20: Role of **women-** vital
P21: Creativity, ideals and courage of **youth**
P22: Indigenous people and their communities and other local communities- vital role
P23: Environment and natural resources of people under **oppression, domination** and occupation shall be protected
P24: Warfare is inherently destructive of SD
P25: Peace, development and environmental protection are **interdependent and indivisible**

P26: Resolve all their environmental **disputes peacefully** and by appropriate means
P27: States and people cooperate in the field of SD

Acc to IPCCs 2023 Climate Cange Synthesis report, an estimated 2 million lost their lives between 1970 and 2019 due to extreme weather conditions and economic loss hovers to about 6.5 trillion dollars A mere 10% of the world's richest countries emit about 50% of the GHG while the poorest account for 12