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PIL | Unit 1 | Part B

Nature and Sources of International Law

Q1. "International Law is not true law." Critically examine.

PRIORITY: ★★★ | PART: B | FREQ: 6

Introduction

The proposition that international law is not true law was advanced by John Austin on the ground that it lacks a sovereign, a legislature, and a sanction. This view has been consistently rejected by modern jurisprudence and state practice, which confirm that international law is a genuine legal system binding upon states through consent, custom, and institutional obligation. The question requires a critical examination of Austin's position, the structural objections it raises, and the rebuttals that modern international law provides.

Definition

John Austin defines law as the command of a determinate human superior, backed by a sanction for disobedience, addressed to habitually obedient subjects. On Austin's test, international law satisfies none of these criteria and is therefore classified by him as positive morality, a body of rules binding in conscience but not in law. Oppenheim counters with a functional definition: international law is the body of customary and conventional rules considered legally binding by civilised states in their intercourse with each other, a definition rooted in obligation and practice rather than command and sanction.

Legal Foundation

Article 38(1), Statute of the International Court of Justice (ICJ Statute) : identifies determinate binding sources confirming international law has identifiable rules that courts apply
Article 94, Charter of the United Nations (UN Charter) : member states undertake to comply with ICJ judgments; enforcement mechanism exists at the institutional level
Article 25, UN Charter : member states agree to accept and carry out decisions of the United Nations Security Council (UNSC)
Article 26, Vienna Convention on the Law of Treaties (VCLT) 1969 : pacta sunt servanda; every treaty in force is binding on the parties and must be performed in good faith

[!tip] Thesis
International law is genuine law. Austin's critique targets the enforcement architecture of the international system, not the obligatory character of its rules. The absence of a centralised sanction does not negate legal obligation where states consistently treat rules as binding and breach is recognised as legally wrongful.

Austin | Sovereign | Jurisdiction | Consent | Henkin | Architecture | Gap

Austin

The attack on international law originates in John Austin's command theory of law, set out in his work The Province of Jurisprudence Determined (1832). Austin holds that law is the command of a determinate human superior backed by a sanction, and that subjects obey habitually out of fear of that sanction. International law, on Austin's analysis, has no world sovereign issuing commands, no standing legislature enacting rules, and no enforcement authority imposing sanctions for breach. On this basis Austin classified international law as positive morality, placing it in the same category as the rules of a club or the conventions of polite society: binding in practice but not in law.

Sovereign

Austin's first structural objection is the absence of a world sovereign. States are legally equal under Article 2(1) of the UN Charter, and the principle of sovereign equality means no state occupies the position of a superior capable of issuing commands to others. The United Nations General Assembly (UNGA) adopts resolutions by majority vote, but those resolutions are not binding on member states. The UNSC may adopt binding resolutions under Chapter VII of the UN Charter, but its authority is confined to matters of international peace and security and is subject to the veto of its five permanent members, which means enforcement is structurally dependent on political agreement among the most powerful states.

Jurisdiction

Austin's second structural objection is the absence of compulsory jurisdiction. The International Court of Justice (ICJ) cannot be seized of a dispute without the consent of both parties; its jurisdiction rests on optional clause declarations under Article 36(2) of the ICJ Statute, special agreements between parties, or treaty provisions specifically conferring jurisdiction on the Court. Even where the ICJ issues a judgment, enforcement under Article 94 of the UN Charter is routed through the UNSC, where any permanent member can veto enforcement action against itself. The United States exercised this veto directly in Nicaragua v USA (ICJ, 1986), refusing to comply with a judgment that found it in breach of international law.

Consent

The rebuttal to Austin begins with the observation that his test is too narrow: it is constructed on the model of domestic public law and does not accommodate legal systems that bind through consent among equals. Contract law binds private parties without a sovereign commanding them; the obligatory force flows from agreement, not from the threat of a superior. International law operates on precisely the same logic. Treaties bind states through express consent, confirmed by the principle of pacta sunt servanda under Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 1969. Customary rules bind through the acquiescence of states that could have objected as persistent objectors but chose not to. Consent is a fully adequate basis for legal obligation, and Austin's insistence on a commanding sovereign imports a domestic hierarchical model into a system structurally organised on horizontal principles.

Henkin

The second rebuttal is empirical. Louis Henkin, in How Nations Behave (1979), observed that almost all nations observe almost all principles of international law almost all of the time. This compliance record is not produced by coercion, because no centralised enforcement mechanism exists to compel it. States comply because they perceive international rules as legally obligatory, because they value the reciprocal benefits of a stable and predictable legal order, and because breach carries significant reputational and retaliatory consequences in a system of continuous inter-state relations. It is pertinent to note that compliance, not coercion, is the operational reality of international law, and that reality is entirely inconsistent with classifying it as mere positive morality.

Architecture

The third rebuttal is institutional. Austin wrote in the nineteenth century, before the construction of the international legal architecture that now exists. The UN Charter of 1945, the ICJ Statute, the Rome Statute of the International Criminal Court (ICC), the World Trade Organization (WTO) Dispute Settlement Mechanism, the United Nations Convention on the Law of the Sea (UNCLOS) tribunal system, and the network of human rights treaty monitoring bodies together constitute a functioning legal order with adjudicative, quasi-legislative, and enforcement mechanisms. These institutions apply identifiable legal rules drawn from the Article 38(1) sources, issue binding decisions, and generate compliance through a combination of legal obligation, institutional pressure, and the calculated self-interest of states in preserving a system from which they derive security, economic access, and political legitimacy. This architecture was entirely absent when Austin constructed his critique in 1832.

Gap

Austin's critique retains force at one precise point: the enforcement gap. Where a powerful state refuses to comply with an international obligation, the system carries no reliable mechanism of compulsion, as Nicaragua v USA demonstrated. The enforcement gap is real and its consequences are serious. However, it is submitted that the existence of an enforcement gap does not negate legal obligation: domestic legal systems also experience persistent non-compliance without losing their legal character. A court order that is ignored remains a court order; the judgment does not cease to be law because the losing party defies it. International law is law in obligation even where enforcement remains structurally state-dependent, and the breach of its rules generates legally recognised consequences including state responsibility and the obligation to make reparation.

[!example]- Case Laws

S.S. Lotus Case (France v Turkey, Permanent Court of International Justice (PCIJ), 1927)

📋 Facts

A French mail steamer, the Lotus, collided with a Turkish vessel on the high seas, killing Turkish nationals. Turkey arrested and prosecuted the French officer on board when the vessel docked in Constantinople, claiming jurisdiction over the incident.

🔨 Held

The PCIJ held Turkey's exercise of jurisdiction lawful, proceeding on the basis that international law sets binding limits on state conduct and states may act within those limits freely unless expressly prohibited.

💡 Principle

International law operates as a genuine constraint on state conduct; the framing of state action as either permitted or prohibited by international law presupposes its legal character.

West Rand Central Gold Mining Co v R (King's Bench (KB), 1905)

📋 Facts

A British company claimed the Crown, having annexed the Transvaal, was bound by debt obligations incurred by the former Boer government toward the company under international law.

🔨 Held

The KB rejected the claim and held that the Crown was not bound by the Boer obligations. The court acknowledged that established rules of international law may form part of English law, but only where sufficiently proved as settled custom accepted by the community of nations.

💡 Principle

International law is recognised by domestic courts but does not automatically bind the Crown; only rules proved as settled and accepted custom are received into English law. The case is a restrictive authority limiting adoption to well-established norms.

Nicaragua v USA (ICJ, 1986)

📋 Facts

The United States covertly supported Contra rebels in Nicaragua and mined Nicaraguan harbours. Nicaragua brought proceedings before the ICJ. The USA refused to participate in the merits phase and subsequently blocked UNSC enforcement action through its veto.

🔨 Held

The ICJ held the United States had breached customary international law on the prohibition of the use of force and the principle of non-intervention, and ordered reparation.

💡 Principle

The case confirms both the enforcement gap and the legal operativeness of the rules simultaneously; the breach was legally identified and declared wrongful regardless of the political failure of enforcement.

Barcelona Traction, Light and Power Co Ltd (Belgium v Spain, ICJ, 1970)

📋 Facts

A Canadian company operating in Spain went into bankruptcy. Belgium brought proceedings on behalf of Belgian shareholders, arguing Spain had violated international law in its treatment of the company.

🔨 Held

The ICJ held Belgium lacked standing to espouse the claim but articulated obligations erga omnes: obligations owed to the international community as a whole, the breach of which every state has a legal interest in having remedied.

💡 Principle
International law generates genuine legal obligations of a public character extending beyond bilateral consent, which is entirely incompatible with classifying it as positive morality.

Why International Law Qualifies as True Law

International law is true law: it has identifiable sources under Article 38(1) of the ICJ Statute, creates binding obligations that states treat as legally compulsory, is routinely applied by courts at both international and domestic levels, and its breach generates recognised consequences including state responsibility and reparation. Austin's critique identifies a genuine enforcement gap but mistakes an architectural feature of a horizontal legal order for the absence of law itself. The absence of a world sovereign does not dissolve legal obligation any more than the absence of a central authority dissolves the binding force of a contract between private parties. International law binds, is breached, and generates consequences for breach. That is the operational definition of law.

Q2. Discuss the sources of International Law under Article 38 of the ICJ Statute.

PRIORITY: ★★★ | PART: B | FREQ: 5

Introduction

The sources of international law are authoritatively catalogued in Article 38(1) of the Statute of the International Court of Justice (ICJ Statute), which directs the Court to apply treaties, international custom, and general principles of law as primary sources, and judicial decisions and writings of publicists as subsidiary means for determining the rules of law. Article 38(1) is widely accepted as the most authoritative enumeration of sources in international law, and its framework governs how courts, states, and practitioners identify binding international legal rules. A critical examination of each source reveals both the architecture of the system and its limitations.

Definition

A source of international law is the process or method by which legal rules come into existence and acquire binding force in the international legal order. Hugo Grotius, writing in the seventeenth century, identified the consent of states as the foundation of legal obligation, a principle that runs through all primary sources listed in Article 38(1). The distinction between primary sources, which create binding rules, and subsidiary sources, which identify and clarify existing rules, is fundamental to understanding the hierarchy within Article 38(1).

Legal Foundation

Article 38(1)(a), ICJ Statute : international conventions establishing rules expressly recognised by the contesting states
Article 38(1)(b), ICJ Statute : international custom as evidence of a general practice accepted as law
Article 38(1)(c), ICJ Statute : general principles of law recognised by civilised nations
Article 38(1)(d), ICJ Statute : judicial decisions and teachings of publicists as subsidiary means for determining rules of law
Article 59, ICJ Statute : ICJ decisions bind only the parties to the case; no formal doctrine of binding precedent
Article 26, VCLT 1969 : pacta sunt servanda; every treaty in force binds the parties and must be performed in good faith

[!tip] Thesis
Article 38(1) is not a closed hierarchy but a working toolkit. Courts draw on all sources simultaneously. The growth of soft law and consistent United Nations General Assembly (UNGA) resolutions has expanded the effective sources of international law well beyond the 1945 enumeration, but Article 38(1) remains the authoritative starting point.

Treaties | Custom | Principles | Judicial | Publicists | Modern | Hierarchy

Treaties

Treaties are the primary source under Article 38(1)(a) of the ICJ Statute: written agreements between states that expressly record their consent to be bound by specific rules. They are governed comprehensively by the Vienna Convention on the Law of Treaties (VCLT) 1969, which sets out the rules for their formation, validity, interpretation, and termination. The foundational principle governing treaties is pacta sunt servanda under Article 26 of the VCLT: every treaty in force is binding on the parties and must be performed in good faith. Treaties bind only the parties who consent to them, unlike custom which binds all states; however, multilateral treaties such as the UN Charter and UNCLOS have such broad participation that they approach universal application.

Custom

Custom under Article 38(1)(b) of the ICJ Statute is built from two elements that must coexist: state practice, which is the objective element of consistent and general conduct expressed through legislation, diplomatic acts, and court decisions, and opinio juris, which is the subjective element of belief that the practice is legally obligatory. The ICJ confirmed both requirements are independently necessary in the North Sea Continental Shelf Cases (ICJ, 1969), holding that widespread practice without the accompanying belief of legal obligation is mere usage, not custom. Custom is the most pervasive source of international law in areas not yet covered by treaty: it binds all states including those who played no part in its formation, subject only to the persistent objector rule.

Principles

General principles of law under Article 38(1)(c) of the ICJ Statute serve a gap-filling function: they are drawn from comparative domestic law and applied at the international level when no applicable treaty provision or customary rule governs the dispute. The court examines whether a principle is recognised across the major legal systems of the world, both civil law and common law, and if so treats it as available internationally. Principles applied in this way include good faith, res judicata (a matter already adjudged), estoppel, unjust enrichment, proportionality, and the fundamental rule that every legal wrong generates an obligation to make reparation, confirmed by the PCIJ in the Chorzow Factory Case (PCIJ, 1928). They prevent the court from declaring a non liquet, an inability to decide for want of applicable law.

Judicial

Judicial decisions under Article 38(1)(d) of the ICJ Statute are subsidiary means for determining the rules of law, not independent sources that create new rules. Article 59 of the ICJ Statute expressly provides that ICJ decisions bind only the parties to the particular case; there is no formal doctrine of binding precedent in international law equivalent to stare decisis in common law. However, in practice ICJ judgments carry enormous persuasive authority and build consistent doctrine across cases. Decisions of other international tribunals, including the International Tribunal for the Law of the Sea (ITLOS), the ICC, and the WTO Appellate Body, are similarly treated as authoritative evidence of what the law is without being formally binding on third parties.

Publicists

Teachings of the most highly qualified publicists under Article 38(1)(d) of the ICJ Statute are the second subsidiary means for determining rules of law. Scholars such as Grotius, Vattel, Oppenheim, and Brownlie have historically been cited to identify and clarify existing rules, particularly in areas where practice is thin or unsettled. Their role is to evidence the law, not to make it; writings of publicists carry weight in proportion to the quality of the reasoning and the reputation of the author. It is pertinent to note that their influence has diminished as the volume of judicial decisions and treaty texts has grown, but they remain relevant in emerging areas of international law.

Modern

Beyond the Article 38(1) catalogue, modern international law recognises additional normative inputs that shape legal development without fitting neatly into the 1945 enumeration. Consistent UNGA resolutions, while not formally binding, can crystallise opinio juris and contribute to the formation of customary rules, as the arbitral tribunal confirmed in Texaco v Libya (Arbitration, 1977). Soft law instruments, including declarations, guidelines, and codes of conduct adopted by international organisations, guide state behaviour and often harden into binding custom over time. Decisions of international organisations with legislative capacity, such as binding UNSC resolutions under Chapter VII of the UN Charter, also operate as sources of obligation for member states.

Hierarchy

A distinction must be drawn between the formal position and the operational reality. Formally, there is no hierarchy among the three primary sources: treaties, custom, and general principles coexist at the same normative level. Conflicts between them are resolved by the principles of lex posterior (the later rule prevails) and lex specialis (the more specific rule prevails). However, jus cogens norms, the peremptory norms of general international law defined in Article 53 of the VCLT 1969, stand above all other rules: any treaty or custom conflicting with a jus cogens norm is void. This creates a de facto hierarchy at the apex of the system even if no general hierarchy operates below it.

[!example]- Case Laws

North Sea Continental Shelf Cases (ICJ, 1969)

📋 Facts

Germany was not a party to the Geneva Convention on the Continental Shelf 1958. Denmark and the Netherlands sought to apply the equidistance method from that Convention against Germany as a rule of binding customary international law.

🔨 Held

The ICJ held that the equidistance rule had not crystallised into binding custom; both practice and opinio juris must be independently established, and the treaty text alone was insufficient.

💡 Principle

Codification in a treaty does not automatically confer customary status; treaty and custom are legally distinct sources requiring separate proof.

Texaco Overseas Petroleum Co v Libya (Arbitration, 1977)

📋 Facts

Libya nationalised oil concessions held by two American companies. The companies brought arbitration proceedings, and the question arose whether consistent UNGA resolutions on permanent sovereignty over natural resources had generated binding customary rules.

🔨 Held

The arbitrator (Dupuy) held that Libya had breached its obligations under the internationalised concession contracts. In analysing the legal framework, the arbitrator distinguished UNGA Resolution 1803 (adopted with broad consensus, including capital-exporting states) from Resolution 3281 (adopted over significant opposition), holding that only resolutions adopted with sufficient consensus can contribute to customary law formation.

💡 Principle

The primary holding confirms that internationalised contracts bind states. The secondary contribution establishes that consistent UNGA resolutions adopted with broad and representative participation can crystallise opinio juris and evidence custom, but resolutions adopted over significant opposition from specially affected states cannot.

Nicaragua v USA (ICJ, 1986)

📋 Facts

The United States argued the ICJ lacked jurisdiction over claims grounded in the UN Charter. Nicaragua relied on parallel rules of customary international law on non-intervention and non-use of force.

🔨 Held

The ICJ held that customary rules on non-intervention and non-use of force operate independently of their codified treaty equivalents and were applicable regardless of the jurisdictional objection to the UN Charter claims.

💡 Principle

The sources in Article 38(1) operate in parallel and reinforce each other; codification of a rule in a treaty does not extinguish the underlying customary rule.

Chorzow Factory Case (Germany v Poland, PCIJ, 1928)

📋 Facts

Poland expropriated a German-owned factory at Chorzow in breach of a German-Polish convention. Germany claimed full reparation before the PCIJ.

🔨 Held

The PCIJ held that reparation must wipe out all consequences of the illegal act and re-establish the position that would have existed had the act not been committed.

💡 Principle

The principle of full reparation for internationally wrongful acts is a general principle of law drawn from domestic legal systems and elevated to the international plane under Article 38(1)(c).

Article 38(1) as a Living Framework

The Article 38(1) catalogue remains the authoritative framework for identifying international law, with treaties, custom, and general principles as primary sources supplemented by judicial decisions and publicist writings. The framework has been expanded in practice by soft law, consistent UNGA resolutions, and the normative output of international organisations. Article 38(1) is not a closed list but a structured point of departure; the system it describes has grown significantly since 1945 while retaining the original catalogue as its foundation.

Q3. Explain the relationship between International Law and Municipal Law. Discuss Monism and Dualism.

PRIORITY: ★★★ | PART: B | FREQ: 5

Introduction

The relationship between international law and municipal law is governed by two competing theories: Monism, which treats both as a single unified legal order with international law supreme, and Dualism, which treats them as entirely separate systems requiring legislative transformation of international rules into domestic law before courts apply them. The tension between these theories has significant practical consequences: it determines whether a domestic court can apply a treaty directly, whether an individual can invoke international law without a statute, and how courts navigate a conflict between a domestic rule and an international obligation. India occupies a pragmatic position between the two theoretical poles.

Definition

Monism, associated with the Austrian jurist Hans Kelsen and Hersch Lauterpacht, holds that international and domestic law form one unified legal order in which international law is the grundnorm, the basic validating norm, from which all municipal law derives its authority. Dualism, associated with the German jurist Heinrich Triepel and the Italian scholar Dionisio Anzilotti, proceeds from the opposite premise: international and municipal law are two entirely distinct systems differing in their sources, their subjects, and their sanctions, and a rule from one system produces no legal effect in the other until expressly imported by a legislative act.

Legal Foundation

Article 27, Vienna Convention on the Law of Treaties (VCLT) 1969 : a state may not invoke its internal law as justification for failure to perform a treaty obligation
Article 253, Constitution of India : Parliament has the power to legislate for the purpose of implementing international treaties, agreements, and conventions
Article 51, Constitution of India : directive principle requiring the state to foster respect for international law and treaty obligations
Article 13, Constitution of India : laws inconsistent with fundamental rights are void; read with international human rights treaties in judicial interpretation

[!tip] Thesis
The monism-dualism debate is more theoretical than operational. What governs in practice is whether a state's constitution and courts treat international rules as self-executing or require a legislative bridge. Most states, including India, occupy a pragmatic middle position: custom is adopted directly, treaties require transformation, and courts use international law as an interpretive tool even in the absence of statute.

Conflict | Monism | Dualism | Adoption | Transformation | India | Art.27

Conflict

The relationship between international law and municipal law generates conflict when a domestic court is asked to apply a rule that diverges from an applicable international obligation. International law governs relations between states as sovereign equals; municipal law governs relations between the state and its subjects and between subjects themselves. The two systems serve different functions, address different actors, and draw their authority from different sources. A conflict arises, for example, when a domestic statute permits conduct that an international treaty prohibits, or when a treaty grants rights that domestic law has not yet recognised. The theory a state adopts determines which rule prevails in that court.

Monism

Monism resolves the conflict by treating international law as supreme within a single unified legal order. Kelsen's pure theory of law places international law as the grundnorm: the basic norm that validates all lower legal norms including state constitutions. Because both systems are parts of one order, a treaty once ratified becomes domestic law immediately without further legislative action, and a customary rule once formed binds domestic courts directly. In cases of conflict, international law overrides the inconsistent domestic rule. The practical consequence is significant: individuals may invoke international rules before domestic courts without waiting for implementing legislation, and courts may apply them directly.

Dualism

Dualism, the position of Triepel and Anzilotti, holds that international and municipal law are two entirely distinct systems. International law governs relations between states; municipal law governs individuals within the state. The two systems have different sources: international law draws on treaty and custom, municipal law on legislation and precedent. Because they are separate, a rule of international law produces no effect in the domestic order until the domestic legislature expressly enacts it. The domestic rule that courts apply is not the treaty itself but the statute that transforms the treaty into domestic law. Courts in a dualist system cannot apply an unincorporated treaty; they can only apply the domestic statute that gives it effect.

Adoption

The doctrine of adoption governs the treatment of customary international law in common law systems. Under this doctrine, established rules of customary international law are automatically part of domestic law without requiring any legislative transformation: courts adopt them and apply them directly. Lord Mansfield articulated this principle in Triquet v Bath (King's Bench (KB), 1764), holding that the law of nations is part of English law. The Court of Appeal reinforced this in Trendtex Trading Corp v Central Bank of Nigeria (Court of Appeal, 1977), holding that customary international law changes as international law changes and domestic courts must give effect to those changes without waiting for Parliament. A distinction must be drawn between this doctrine and monism: adoption applies to custom, not treaties, and operates within a broader dualist system; the adoption doctrine means that even dualist states apply custom directly while still requiring transformation for treaties.

Transformation

The transformation doctrine governs the treatment of treaties in dualist systems. A treaty binds the state internationally from the moment of ratification, but it produces no domestic legal effect until Parliament enacts implementing legislation transforming it into domestic statute. The Privy Council (PC) confirmed this in Attorney General for Canada v Attorney General for Ontario (PC, 1937), holding that ratification binds the state internationally but domestic effect requires legislation. In India, Article 253 of the Constitution gives Parliament the express power to legislate for implementing international treaties, agreements, and conventions. Without that legislation, no domestic court can enforce the treaty as law binding on individuals.

India

India's position is neither purely monist nor purely dualist; it is a pragmatic hybrid calibrated by constitutional architecture and judicial practice. For treaties, India is dualist: Article 253 requires Parliament to enact implementing legislation before a treaty binds domestic courts or creates enforceable rights for individuals. For customary international law, India is closer to the adoption position: courts apply established custom directly unless a contrary domestic statute exists. The Supreme Court of India (SCI) demonstrated creative judicial application of international law in Vishaka v State of Rajasthan (SCI, 1997), applying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) directly as an interpretive standard in the absence of domestic legislation. This is judicial monism operating within a formally dualist constitutional structure.

Art.27

The Article 27 paradox sits at the intersection of both theories. Article 27 of the VCLT 1969 provides that a state may not invoke its internal law as justification for failure to perform a treaty obligation. This confirms that at the international level, international law always prevails over domestic law: no state can escape its international obligations by pointing to a conflicting domestic statute. However, at the domestic level, a court may still be required to apply the conflicting domestic statute because it has not yet been superseded by implementing legislation. The two levels operate independently: the state remains internationally responsible for the breach even as its domestic courts apply the conflicting national rule.

[!example]- Case Laws

Triquet v Bath (KB, 1764)

📋 Facts

A servant of a foreign diplomat in England claimed immunity from civil arrest. There was no English statute covering the position of diplomatic servants; the claim rested entirely on international law.

🔨 Held

Lord Mansfield held that the law of nations is part of English law and that the servant was entitled to diplomatic immunity without any statutory basis.

💡 Principle

Foundational common law authority for the direct adoption of customary international law into domestic law; custom requires no transformation to bind English courts.

Attorney General for Canada v Attorney General for Ontario (Privy Council (PC), 1937)

📋 Facts

Canada ratified several International Labour Organization (ILO) conventions on working conditions. The provinces refused to enact the required implementing legislation, arguing labour matters fell within provincial jurisdiction under the Canadian constitution.

🔨 Held

The Privy Council held that ratification of a treaty binds the state internationally but produces no domestic legal effect; implementing legislation is required before the treaty creates rights enforceable in domestic courts.

💡 Principle

Transformation is not automatic; the international obligation and the domestic legal rule are produced by two separate acts and neither substitutes for the other.

Vishaka v State of Rajasthan (Supreme Court of India (SCI), 1997)

📋 Facts

A public interest litigation was filed following the gang rape of a social worker in Rajasthan. There was no domestic statute governing sexual harassment at the workplace, leaving a legal vacuum.

🔨 Held

The SCI applied CEDAW and other international standards directly as an interpretive framework, laid down binding guidelines on workplace sexual harassment, and held they would operate as law until Parliament enacted legislation.

💡 Principle

In the absence of domestic legislation, Indian courts may apply international treaty standards directly as an interpretive and normative tool; judicial monism operating within a formally dualist constitutional structure.

Monism and Dualism: Where India Stands

Monism and dualism mark opposite poles on a theoretical spectrum; most states, including India, operate between them. Custom is adopted directly by domestic courts; treaties require Parliamentary transformation under Article 253 of the Constitution before they bind individuals domestically. Article 27 of the VCLT 1969 ensures the international obligation survives intact at the international level regardless of how domestic law treats it, preserving state responsibility for breach even where domestic courts are constitutionally bound to apply the conflicting national rule. The monism-dualism debate clarifies the architecture of the system; it does not determine outcomes in every case, which depend ultimately on what the domestic constitution permits and what the domestic courts are willing to do.

Q4. Discuss the theories as to the basis of International Law.

PRIORITY: ★★★ | PART: B | FREQ: 4

Introduction

The basis of international law concerns the fundamental question: why are states bound by international law? What gives international legal rules their obligatory force? Various schools of thought have offered competing explanations, ranging from natural law and divine reason to state consent and social solidarity. A critical examination of these theories reveals the evolving foundations upon which the international legal order rests.

Definition

The basis of international law refers to the source of its binding force, the reason states are obliged to obey its rules. This is distinct from the formal sources listed in Article 38(1) of the ICJ Statute, which identify how rules are formed; the basis question asks why those rules bind at all.

Legal Foundation

Article 38(1), ICJ Statute : formal enumeration of sources, impliedly grounded in state consent and practice
Article 2(1), UN Charter : sovereign equality of states, the structural premise of the system
Article 26, VCLT 1969 : pacta sunt servanda, treaties bind because they are consented to in good faith

[!tip] Thesis
No single theory fully explains why international law binds. Natural law provides the moral foundation, positivism explains the mechanism of consent, and the Grotian school bridges both. Modern international law operates on a pragmatic combination of consent, reciprocity, and institutional obligation.

Natural Law | Positivism | Grotian | Consent | Sociological | Evaluation

Natural Law

The Natural Law school, the oldest theory, holds that international law derives its binding force from a higher moral order discoverable by human reason. Hugo Grotius, writing in De Jure Belli ac Pacis (1625), argued that certain rules govern inter-state relations by virtue of natural reason and the social nature of mankind, independent of state consent. Samuel Pufendorf took the pure natural law position further, arguing that the law of nations is simply the law of nature applied to states. Under this theory, international law binds because it reflects universal moral principles that no state can lawfully derogate from, regardless of consent.

Positivism

The Positivist school, dominant from the 19th century onwards, holds that international law derives its binding force exclusively from state consent. States are sovereign and can only be bound by rules they have agreed to, whether expressly through treaties or impliedly through consistent practice accepted as law (custom). Oppenheim was the leading positivist, defining international law as rules binding on states by virtue of their consent in intercourse with each other. Anzilotti grounded international law in the foundational norm of pacta sunt servanda: the agreement to keep agreements. Austin took positivism to its extreme and denied legal character altogether, holding that without a sovereign commanding obedience, international law is merely positive morality.

Grotian

The Grotian or Eclectic school occupies the middle ground: international law has natural law roots, but its operative rules are validated and developed through state consent and practice. Grotius himself combined both elements: he derived fundamental principles (good faith, respect for agreements, just war criteria) from natural reason, but accepted that the detailed content of the law of nations is shaped by treaty, custom, and usage among civilised states. This approach acknowledges that natural law provides the moral foundation and legitimacy while consent provides the mechanism and content.

Consent

The consent theory, a modern refinement of positivism, holds that states are bound because they have consented, expressly or impliedly. Treaties bind because states ratify them. Custom binds because states participate in practice with opinio juris. The persistent objector doctrine is the logical corollary: a state that consistently objects before a custom crystallises is not bound. The strength of the consent theory is its respect for sovereignty; its weakness is its inability to explain rules that bind new states which never consented to pre-existing custom, and its inability to explain jus cogens norms that bind regardless of consent.

Sociological

The Sociological school, associated with Alvarez and the policy-oriented approach of McDougal and Lasswell, holds that international law is grounded in social necessity and interdependence. States are bound not because they consented or because natural reason dictates, but because the structure of international society demands common rules for coexistence. Law reflects the social needs of the international community at any given time and evolves as those needs change. This approach explains the development of rules like environmental protection and human rights that bind even reluctant states through collective pressure.

Evaluation

No single theory provides a complete explanation. Natural law cannot explain why specific rules change over time if they are grounded in universal reason. Pure positivism cannot explain jus cogens or obligations imposed on new states. Consent theory fails where states are bound without having consented. The sociological approach lacks normative precision. Modern international law draws on all these foundations pragmatically: consent remains the primary basis for treaties, practice and opinio juris ground custom, natural law underpins jus cogens, and social necessity drives progressive development. The system is pluralist in its foundations.

[!example]- Case Laws

S.S. Lotus Case (France v Turkey, PCIJ, 1927)
📋 Facts
France challenged Turkey's exercise of criminal jurisdiction over a French officer involved in a high-seas collision that killed Turkish nationals.

🔨 Held
The PCIJ held that international law permits states to act freely unless a specific rule of prohibition exists, grounding the system in state consent: restrictions on sovereignty are not presumed but must be established.

💡 Principle

The positivist foundation: sovereignty is the default, and international law binds only where consent (express or implied through custom) has established a specific rule of prohibition.

North Sea Continental Shelf Cases (ICJ, 1969)

📋 Facts

Denmark and the Netherlands argued the equidistance rule from the Geneva Convention bound Germany through custom. Germany had not ratified the Convention.

🔨 Held

The ICJ held Germany was not bound; both practice and opinio juris must be independently proved. Consent through ratification and consent through acceptance of custom are distinct processes.

💡 Principle

Custom binds through implied consent (participation in practice with legal conviction), not through mere frequency of conduct; the positivist consent requirement applies equally to treaty and custom.

Reservations to the Genocide Convention (Advisory Opinion, ICJ, 1951)

📋 Facts

The UN General Assembly asked the ICJ whether states could make reservations to the Genocide Convention and still be considered parties.

🔨 Held

The ICJ held that reservations were permissible provided they were compatible with the object and purpose of the Convention, recognising that some obligations transcend bilateral consent.

💡 Principle

The Genocide Convention embodies principles recognised by civilised nations as binding even without conventional obligation; this reflects natural law foundations operating alongside consent. Some rules bind because of their inherent character, not merely because states agreed.

The Pluralist Foundation of Modern International Law

Modern international law does not rest on a single theoretical foundation. Consent remains the primary mechanism through which rules are created and accepted, but natural law provides the moral basis for non-derogable norms, and social necessity drives the progressive development of rules that respond to evolving international needs. The basis of international law is therefore pluralist: consent for most rules, inherent obligation for jus cogens, and collective necessity for the progressive development of the law.

PIL | Unit 2 | Part B

States, Recognition, Succession, Territory, and Responsibility

Q1. Discuss the theories, kinds, and consequences of recognition of states and governments.

PRIORITY: ★★★ | PART: B | FREQ: 6

Introduction

Recognition in international law is the formal acknowledgment by an existing state that a new state or government possesses the legal status necessary to participate in international relations. Two competing theories explain its legal effect: the Constitutive Theory, which treats recognition as the act that creates legal personality, and the Declaratory Theory, which treats it as acknowledging a fact that already exists. The distinction carries significant practical consequences in both international and domestic law, and the kinds of recognition available, ranging from de jure to implied, shape the legal relations that follow.

Definition

Oppenheim defines recognition as the acknowledgment by the society of nations that a new state or government possesses the attributes that entitle it to be regarded as a member of the community of nations. The Constitutive Theory associated with Oppenheim holds that this acknowledgment creates the legal personality being recognised. The Declaratory Theory, advanced by Lauterpacht and codified in Article 3 of the Montevideo Convention on the Rights and Duties of States (Montevideo Convention) 1933, holds that legal personality arises from satisfaction of the Montevideo criteria, and recognition merely declares what already exists.

Legal Foundation

Article 1, Montevideo Convention 1933 : four criteria for statehood: permanent population, defined territory, effective government, capacity for international relations
Article 3, Montevideo Convention 1933 : political existence of a state is independent of recognition by other states
Article 2, Vienna Convention on Diplomatic Relations (VCDR) 1961 : establishment of diplomatic relations by mutual consent
Article 2(1), Charter of the United Nations (UN Charter) 1945 : sovereign equality of all member states as foundational operating principle

[!tip] Thesis
The Declaratory Theory is legally coherent and dominant in modern practice because it grounds statehood in objective criteria rather than political discretion. But recognition is not merely a formality: it is the operational gateway to diplomatic relations, domestic court access, and treaty capacity in the recognising state, making its practical consequences as important as its theoretical basis.

Constitutive | Declaratory | Kinds | Estrada | Tobar | International | Domestic

Constitutive

The Constitutive Theory, associated with Oppenheim, holds that recognition is the act that constitutes legal personality: without it, an entity exists in a factual sense but carries no rights or obligations under international law. This position makes statehood dependent on the political will of existing states, producing what critics describe as partial statehood, a condition in which an entity is a state for some purposes but not for others depending on the recognising state. The Constitutive Theory struggles to explain why unrecognised states are still held internationally responsible for their conduct and why their nationals retain rights that other states must respect.

Declaratory

The Declaratory Theory, advanced by Lauterpacht and supported by Article 3 of the Montevideo Convention 1933, holds that statehood arises automatically when the four Montevideo criteria are satisfied: permanent population, defined territory, effective government, and capacity for international relations. Recognition acknowledges a pre-existing legal fact; it neither creates nor extinguishes the legal personality of the entity being recognised. The Permanent Court of Arbitration (PCA) confirmed the practical primacy of this position in the Tinoco Arbitration (1923), where Arbitrator Taft held that effective control, not recognition, determines the existence of a government for international law purposes.

Kinds

Recognition takes several forms, each carrying distinct legal consequences. De jure recognition is full, permanent, and unconditional: it creates the complete range of legal relations between the recognising and recognised states, including diplomatic relations, treaty capacity, and access to the recognising state's courts. De facto recognition is provisional, revocable, and limited: it acknowledges effective control without committing to legitimacy, and creates only commercial and consular relations without full diplomatic exchange. Express recognition is delivered through a formal communication or declaration. Implied recognition arises from conduct: entering a bilateral treaty, exchanging diplomatic missions, or voting for admission to an international organisation all imply recognition of the entity involved. Collective recognition arises from admission to an international organisation with universal or near-universal membership, of which the United Nations (UN) is the primary example.

Estrada

The Estrada Doctrine, adopted by Mexico in 1930 and followed by the United Kingdom (UK) in 1980, rejects the practice of making formal recognition decisions about governments as an interference in the internal affairs of another state. Under the Estrada approach, a state simply decides whether to maintain or withdraw its diplomatic relations based on the effective control exercised by the government in question, without making any formal pronouncement on whether it recognises that government. This eliminates the political signal inherent in recognition decisions and reflects the modern preference for effectiveness over legitimacy as the operative test for governmental authority.

Tobar

The Tobar Doctrine, originating in a 1907 proposal by Ecuador's Foreign Minister Carlos Tobar, takes the opposite position: recognition should be withheld from governments that come to power through unconstitutional means until their authority has been confirmed by a popular election or equivalent democratic process. The Tobar approach reflects a legitimist perspective that ties recognition to constitutional propriety rather than effective control. It is rarely followed in modern practice because the Estrada-style approach better serves the continuity of interstate relations and avoids using recognition as a tool of political interference.

International

The international consequences of recognition are substantial and operate across multiple dimensions. Recognition opens the right to diplomatic relations under Article 2 of the Vienna Convention on Diplomatic Relations (VCDR) 1961. It confers treaty-making capacity in the recognising state and standing before international tribunals. It entitles the recognised state to property held abroad and to participation in international organisations. It also activates the obligation to respect the recognised entity's sovereign immunity in the courts of the recognising state.

Domestic

The domestic legal consequences of recognition in the recognising state's courts are equally significant. Domestic courts give legal effect to the legislation and administrative acts of a recognised government within its own territory, as the Court of Appeal (CA) confirmed in Luther v Sagor (CA, 1921), where de facto recognition required retroactive legal effect to be given to Soviet nationalisation decrees. Courts treat executive certificates on recognition as conclusive, as confirmed in Duff Development Co v Government of Kelantan (House of Lords (HL), 1924). Even acts of unrecognised or de facto governments may be given limited domestic effect to prevent injustice to private parties, as the HL held in Carl Zeiss Stiftung v Rayner and Keeler (HL, 1967).

[!example]- Case Laws

Luther v Sagor (Court of Appeal (CA), 1921)

📋 Facts

UK courts were asked to apply a Soviet government decree nationalising timber belonging to a Russian company. The question was whether the Soviet government's decree had legal effect in English courts, given UK's de facto recognition.

🔨 Held

The CA held that UK's de facto recognition required courts to give retroactive legal effect to Soviet legislative acts, including the nationalisation decree covering property taken before the recognition date.

💡 Principle

De facto recognition obliges domestic courts to give legal effect to the recognised government's legislative acts within its own territory, operating retroactively from the date the government assumed control.

Duff Development Co v Government of Kelantan (HL, 1924)

📋 Facts

The Government of Kelantan sought to invoke sovereign immunity in English proceedings. The question was whether Kelantan was a sovereign state; the Crown produced an executive certificate confirming its status.

🔨 Held

The HL held that an executive certificate as to the recognition status of a foreign government is conclusive on domestic courts; courts do not independently assess or second-guess the executive's recognition decisions.

💡 Principle

Executive certificates on recognition are conclusive in domestic courts; judicial assessment of foreign sovereignty is displaced by the executive's determination.

Carl Zeiss Stiftung v Rayner and Keeler Ltd (HL, 1967)

📋 Facts

A dispute arose over acts of East German authorities. The UK had not recognised East Germany; the question was whether its administrative acts could produce legal effect in English courts for the benefit of private parties relying on them.

🔨 Held

The HL held that acts of a de facto government within its own territory could be given legal effect to prevent injustice to private parties, even in the absence of full recognition.

💡 Principle

Courts extend limited legal effect to acts of de facto or unrecognised governments where private parties would otherwise suffer injustice from a legal vacuum caused by the non-recognition of the governing authority.

Recognition: Law Meets Politics

Recognition doctrine reveals the persistent tension between law and politics in international law. The Declaratory Theory maintains legal coherence by grounding statehood in objective criteria, but recognition's practical consequences confirm that political acknowledgment remains the operational gateway to diplomatic relations, treaty capacity, and domestic court access. De jure recognition opens the full range of international legal relations; de facto recognition validates governmental acts in domestic courts; and the Estrada Doctrine reflects the dominant modern preference for effectiveness over legitimacy as the governing test.

Q2. Explain state succession, its kinds, and the consequential rights and duties of the successor state.

PRIORITY: ★★★ | PART: B | FREQ: 5

Introduction

State succession is the replacement of one state by another in the responsibility for the international relations of a territory. It arises from five distinct events: annexation, merger, dissolution, secession, and decolonisation. The legal consequences of succession, including which treaties bind the successor, what property passes, and which debts must be honoured, are governed by the Vienna Convention on Succession of States in Respect of Treaties (VCST) 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1983. A critical examination of these regimes reveals that the type of succession determines the applicable rule.

Definition

State succession, as defined in Article 2 of the VCST 1978, is the replacement of one state by another in the responsibility for the international relations of territory. The predecessor state is the one replaced; the successor state is the one assuming responsibility. Succession doctrine must balance two competing principles: the continuity of international obligations, which protects third states and trading partners who rely on treaty commitments, and the sovereign equality of new states, which resists encumbering a newly independent people with obligations imposed without their consent.

Legal Foundation

Article 2, VCST 1978 : definitions of state succession, predecessor state, and successor state
Article 16, VCST 1978 : clean slate rule for newly independent states emerging from decolonisation
Article 11, VCST 1978 : boundary treaties unaffected by any form of succession
Article 12, VCST 1978 : localised treaty obligations follow the territory regardless of succession type
Article 34, VCST 1978 : successor states of a dissolved predecessor inherit its treaties for the relevant territory

[!tip] Thesis
No single rule governs state succession. The clean slate rule protects newly independent states from inheriting colonial-era obligations imposed without their consent. Continuity rules protect third states in dissolution and merger scenarios. The type of succession event is the threshold question that determines which regime applies.

Triggers | Clean Slate | Exceptions | Property | Archives | Debt | Continuity

Triggers

Five events trigger state succession, each generating a distinct legal regime. Annexation is the absorption of one state by another, with the absorbed state ceasing to exist. Merger is the union of two or more states to form a new entity, with the predecessors ceasing independently. Dissolution is the fragmentation of one state into multiple successors, with the original state disappearing entirely. Secession is the separation of part of a state's territory to form a new state, with the predecessor continuing in reduced form. Decolonisation is the emergence of a new independent state from a colonial territory, historically the most significant trigger for the clean slate rule.

Clean Slate

The clean slate rule under Article 16 of the VCST 1978 is the foundational protection for newly independent states emerging from decolonisation: they are not bound by the treaties of the predecessor colonial power unless they expressly accept them by notification of succession. The rationale is grounded in sovereign equality and the history of colonialism: treaties concluded by colonial powers were imposed without the consent of colonised peoples and frequently served the economic and political interests of the colonial state rather than the population of the territory. Automatic succession to such treaties would perpetuate colonial dependency under a different label.

Exceptions

Three exceptions cut significantly into the clean slate. Boundary treaties under Article 11 of the VCST 1978 are wholly immune from the clean slate rule and pass automatically to all successors regardless of how sovereignty changes: this preserves the principle of uti possidetis, the rule that successor states inherit the administrative boundaries they held at independence, applied across African decolonisation (Organisation of African Unity (OAU) Resolution, 1964) and Yugoslav dissolution (Badinter Commission, 1991). Localised obligations under Article 12, meaning treaty rights and duties attached to a specific territory such as transit rights, concessions, or demilitarisation obligations, follow the territory rather than the treaty and bind the successor without need for acceptance. The successor may also opt in to any treaty by filing a notification of succession with the depositary.

Property

State property situated on the territory passes automatically to the successor state by the operation of Article 8 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1983. Immovable state property located on the territory follows the territory without requirement of an express act of transfer. Movable state property connected to the activities of the predecessor state in relation to the territory also passes. Property located outside the territory is apportioned equitably in cases of dissolution and merger; in decolonisation, property used for administration of the newly independent territory passes to the successor.

Archives

Archives indispensable to the normal administration of the territory pass to the successor state. Where the original archives are retained by the predecessor, the successor is entitled to certified copies of archives relating to the territory. This provision reflects the practical reality that effective administration of a territory requires documentary records of land ownership, judicial decisions, tax records, and government transactions; a successor state denied those records faces substantial administrative disadvantage.

Debt

The treatment of debt is the most contested area of succession doctrine. Neutral debt, meaning debt contracted for the general purposes of the predecessor state and not directed against the population of the territory, is apportioned equitably between predecessor and successors. Odious debt, meaning debt contracted specifically against the interests of the population of the territory, does not pass to the successor; this rule was applied in the context of colonial-era debts contracted without the benefit of the colonised population. Newly independent states benefit from a clean slate on colonial-era debt under Article 38 of the 1983 Convention, consistent with the broader clean slate principle.

Continuity

For dissolution and merger, the clean slate gives way to continuity rules that protect third states whose treaty rights would otherwise evaporate through no act of their own. Article 34 of the VCST 1978 provides that where a predecessor state dissolves, each successor state inherits the predecessor's treaties for the territory it now administers, unless all the parties otherwise agree or the treaty is incompatible with the new state's existence. This principle was applied in the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), where the Badinter Commission confirmed successor states' continuity obligations while also applying uti possidetis to fix territorial boundaries.

[!example]- Case Laws

Lighthouse Case (France v Greece, Arbitral Tribunal, 1956)

📋 Facts

Greece succeeded to Ottoman Empire territory in the eastern Mediterranean following World War I. A lighthouse concession granted by the Ottoman government to a French company was in dispute, and France claimed the concession survived succession and bound Greece.

🔨 Held

The Tribunal held that localised territorial obligations, including concessions attached to specific territory, follow the territory to the successor state and bind the successor regardless of the clean slate rule.

💡 Principle

Obligations running with the land constitute an exception to clean slate; the successor is bound by localised territorial obligations irrespective of the type of succession event.

West Rand Central Gold Mining Co v R (King's Bench (KB), 1905)

📋 Facts

A British company claimed the Crown, having annexed the Transvaal following the Boer War, was bound by the Boer government's debt obligations to the company under international law.

🔨 Held

The KB held the Crown was not automatically bound by the Boer Republic's obligations; proof of express assumption of the specific obligation was required beyond the fact of annexation and territorial control.

💡 Principle

Annexation does not automatically transfer all predecessor obligations; succession to debt requires express proof of assumption, placing the burden on the party asserting that the obligation passed.

State Succession: Type Determines Regime

State succession doctrine cannot be reduced to a single rule because the type of succession event determines the applicable regime. Clean slate protects newly independent states from colonial-era obligations while boundary and localised exceptions preserve territorial stability. Continuity rules for dissolution and merger protect third states. Property follows territory; odious debt does not follow the population it was directed against. The VCST 1978 allocates rights and duties across all five triggers with rules calibrated to the equities of each scenario.

Q3. Discuss the modes of acquiring state territory under international law with leading cases.

PRIORITY: ★★★ | PART: B | FREQ: 4

Introduction

The acquisition of sovereignty over territory is one of the oldest and most contested questions in international law. Five traditional modes have been recognised: occupation, prescription, cession, conquest, and accretion. The adoption of the Charter of the United Nations (UN Charter) in 1945 abolished conquest as a valid mode, transforming territorial sovereignty from a prize of war into a protected right. The decisive test across all surviving modes is now the effective and continuous exercise of state authority, confirmed through a series of landmark decisions by the Permanent Court of Arbitration (PCA) and the International Court of Justice (ICJ).

Definition

Territorial sovereignty, as defined by Arbitrator Max Huber in the Island of Palmas case (PCA, 1928), is the right to exercise, to the exclusion of any other state, the functions of a state over a given portion of the globe. Acquisition of territorial sovereignty is the process by which a state establishes this exclusive right over territory it did not previously administer. The modes of acquisition are the legally recognised pathways through which this right can be established, maintained, or transferred.

Legal Foundation

Article 2(4), UN Charter 1945 : prohibition on the threat or use of force against the territorial integrity of any state; abolishes conquest
United Nations General Assembly (UNGA) Resolution 2625 (1970) : no territorial acquisition resulting from the threat or use of force shall be recognised as legal
Article 52, Vienna Convention on the Law of Treaties (VCLT) 1969 : a treaty concluded under coercion of a state by the threat or use of force is void

[!tip] Thesis
Effective and continuous exercise of state authority is the unifying principle across all surviving modes of territorial acquisition. Discovery creates only an inchoate title; ancient historical claims yield to modern administrative acts; and the abolition of conquest under the UN Charter makes continuous peaceful administration the only reliable foundation for territorial title.

Occupation | Prescription | Cession | Conquest | Accretion | Contiguity | Uti Possidetis

Occupation

Occupation is the acquisition of terra nullius, territory belonging to no state, through the effective and continuous exercise of state authority combined with the intention to act as sovereign. Two elements must coexist: the animus occupandi, the intention to act as sovereign, and actual corpus, the performance of governmental functions including administration, legislation, and the exercise of judicial authority. Discovery alone is insufficient: it creates only an inchoate title that must be completed by effective occupation within a reasonable time. The standard of effectiveness is calibrated to the nature and population of the territory; in uninhabited or sparsely populated regions, very limited acts of state authority suffice to establish title.

Prescription

Prescription is the acquisition of sovereignty over territory previously belonging to another state through long, continuous, peaceful, and open exercise of state authority in the absence of timely and consistent protest by the original sovereign. It is distinguished from occupation in that occupation applies to territory belonging to no state, while prescription derives title from a prior sovereign through the operation of acquiescence over time. Modern administrative acts are consistently treated as more decisive than ancient historical claims: the ICJ confirmed in Minquiers and Ecrehos (ICJ, 1953) that systematic recent exercise of administrative and judicial functions prevails over mediaeval feudal title. Consistent and timely protest by the original sovereign interrupts the process and prevents title from maturing.

Cession

Cession is the voluntary transfer of sovereignty over territory from one state to another by treaty. It is the most legally straightforward mode because it is grounded in express consent and produces clear documentary title. Historical examples include the purchase of Alaska from Russia by the United States in 1867, the cession of Hong Kong by China to the UK under the Convention of Peking 1860, and post-war territorial settlements. A cession extracted under the threat or use of force is void under Article 52 of the VCLT 1969, which voids any treaty concluded by coercion of the state through threat or use of force. For populated territories, plebiscite is increasingly recognised as a requirement of democratic legitimacy even where the cession is otherwise formally valid.

Conquest

Conquest, the acquisition of territory by military victory and annexation following the defeat of the prior sovereign, was historically recognised as a valid mode of acquisition from the time of Grotius through the nineteenth century. Its abolition is one of the most significant transformations wrought by the UN Charter: Article 2(4) prohibits the threat or use of force against the territorial integrity of any state, and UNGA Resolution 2625 (1970) makes explicit that no territorial acquisition resulting from the threat or use of force shall be recognised as legal. The non-recognition doctrine, tracing to the Stimson Doctrine of 1932 regarding Japan's annexation of Manchuria, requires all states to withhold recognition from force-acquired territorial changes. Israel's occupation of Palestinian territories and Russia's annexation of Crimea in 2014 have both attracted non-recognition responses grounded in this principle.

Accretion

Accretion is the natural addition of territory through geological processes: alluvial deposits building up at river mouths or along coastlines, the formation of new islands through volcanic activity, or the gradual shifting of a river boundary. Title vests automatically in the coastal or riparian state without any formal act of acquisition; the extension of territory through natural processes requires no government action to take legal effect. A distinction must be drawn between gradual accretion, which does extend sovereignty, and sudden catastrophic change known as avulsion, where a river changes course abruptly. Avulsion does not shift established boundaries; only gradual and imperceptible natural change carries legal effect under this mode.

Contiguity

Contiguity, the claim that proximity to a state's existing territory creates a priority right over adjacent land or sea areas, has been rejected as an independent mode of acquisition. Arbitrator Huber dismissed it expressly in the Island of Palmas case: contiguity may serve as a secondary argument where two competing claims are otherwise equally balanced, but it cannot substitute for effective occupation and cannot itself generate territorial title. The rejection of contiguity prevents large states from claiming vast surrounding areas on the basis of geographic proximity without administering them.

Uti Possidetis

The principle of uti possidetis, originating in Roman law and applied to Latin American decolonisation in the nineteenth century, provides that successor states inherit the administrative boundaries held at the date of independence. It has been extended to African decolonisation by the Organisation of African Unity (OAU) in 1964 and applied to the dissolution of Yugoslavia by the Badinter Commission in 1991. The International Court of Justice (ICJ) confirmed its status as a general principle of international law applicable to all state succession in Burkina Faso v Mali (ICJ, 1986), where it was described as immediately operative upon independence regardless of the form of succession.

[!example]- Case Laws

Island of Palmas (Netherlands v USA, Permanent Court of Arbitration (PCA), 1928)

📋 Facts

The USA claimed the Island of Palmas by cession from Spain under the Treaty of Paris 1898. The Netherlands claimed the same island on the basis of centuries of continuous and peaceful administration exercised through the Dutch East India Company. Arbitrator Max Huber was appointed to resolve the competing claims.

🔨 Held

Arbitrator Huber held that the continuous and peaceful display of state functions by the Netherlands from the seventeenth century through the date of the dispute prevailed over the inchoate title acquired by Spain through discovery and purportedly ceded to the USA under the 1898 treaty.

💡 Principle

Discovery creates only an inchoate title requiring completion by effective occupation; continuous and peaceful display of state authority is the decisive and sufficient basis for territorial sovereignty.

Eastern Greenland (Denmark v Norway, PCIJ, 1933)

📋 Facts

Norway proclaimed sovereignty over uninhabited eastern Greenland as terra nullius in July 1931. Denmark challenged, citing Danish legislation consistently referencing Greenland, treaties in which other states recognised Danish rights over Greenland, and the Ihlen Declaration of 1919 in which Norway's own Foreign Minister acknowledged Denmark's position.

🔨 Held

The PCIJ held that a minimal exercise of state authority is sufficient in uninhabited and sparsely populated territory; Denmark's consistent legislative and treaty practice established title; and Norway was estopped by the Ihlen Declaration from asserting a claim inconsistent with its Foreign Minister's representation.

💡 Principle

The standard of effective occupation is proportionate to the nature and population of the territory; estoppel prevents a state from resiling from official representations that another state has relied upon.

Minquiers and Ecrehos (France v UK, ICJ, 1953)

📋 Facts

France and the United Kingdom each claimed sovereignty over two groups of small islands in the English Channel. France relied on ancient feudal title traceable to the Norman Conquest of England in 1066. The UK relied on modern administrative and judicial exercise of authority over the islands.

🔨 Held

The ICJ held that the UK's systematic and continuous exercise of local administrative and judicial functions in recent times was more decisive than France's ancient feudal claims, and awarded the islands to the UK.

💡 Principle

Modern administrative acts prevail over ancient historical claims; the court looks to actual exercise of state authority in the relevant period rather than to the antiquity of the legal chain of title.

Effective Administration as the Foundation of Territorial Title

Of the five traditional modes, only occupation, prescription, cession, and accretion remain lawful today; conquest is abolished. The UN Charter's prohibition of force transformed the acquisition of territory from a consequence of military power into a matter governed by effective and peaceful administration. Island of Palmas, Eastern Greenland, and Minquiers and Ecrehos together confirm that the continuous, peaceful, and actual exercise of state authority is the decisive test across all surviving modes, displacing historical claims unsupported by contemporaneous administration and preventing large states from extending sovereignty through geographic proximity alone.

Q4. Discuss the responsibility of states for international delinquencies and the consequences of such responsibility.

PRIORITY: ★★★ | PART: B | FREQ: 4

Introduction

State responsibility for international delinquencies is the doctrine under which a state incurs an obligation to make reparation when conduct attributable to it constitutes a breach of an international obligation causing injury to another state or its nationals. This doctrine is the enforcement mechanism of international law: without it, international obligations would carry no legal consequences, and breach would produce only political friction rather than legal liability. The International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts 2001 represent the most comprehensive and authoritative codification of this doctrine, distilled from centuries of state practice and judicial decision.

Definition

An international delinquency is an act or omission attributable to a state that constitutes a breach of a binding obligation under international law. Anzilotti defines state responsibility as the legal relationship between the wrongdoing state and the injured state, arising from the commission of an internationally wrongful act and obliging the wrongdoer to make reparation. The doctrine rests on the fundamental principle confirmed by the Permanent Court of International Justice (PCIJ) in the Chorzow Factory Case (PCIJ, 1928): a breach of an engagement involves an obligation to make reparation, and this is a general conception of law that must be respected in the international sphere.

Legal Foundation

ILC Articles on State Responsibility 2001, Article 1 : every internationally wrongful act of a state entails its international responsibility
ILC Articles, Article 4 : conduct of any state organ is attributable to the state regardless of whether the organ acted within its competence
ILC Articles, Article 12 : a breach exists when the state's conduct is not in conformity with what the obligation requires
ILC Articles, Article 31 : the responsible state is obligated to make full reparation for the injury caused
ILC Articles, Articles 35, 36, 37 : three forms of reparation: restitution, compensation, satisfaction

[!tip] Thesis
State responsibility is international law's enforcement architecture. Attribution, breach, and injury are the three elements that trigger it. The doctrine's power lies not only in bilateral claims between states but in the erga omnes obligations that allow any state to invoke responsibility for the gravest breaches, regardless of whether it suffered direct injury.

Attribution | Breach | Aliens | Reparation | Defences | Erga Omnes | Diplomatic

Attribution

Attribution is the first foundational element: the conduct must be legally attributable to the state before responsibility can arise. Article 4 of the ILC Articles provides that the conduct of any state organ is attributable to the state, regardless of whether the organ exercised legislative, executive, judicial, or other functions, and regardless of whether it acted within or beyond its competence. A state cannot escape responsibility by arguing the official acted ultra vires if the official acted in an official capacity and the conduct is connected to the exercise of official authority. Article 8 extends attribution to private persons acting on the instructions of or under the control of the state; Article 11 attributes conduct of private persons that the state subsequently endorses or adopts as its own.

Breach

Breach is the second element: the attributed conduct must fail to conform to what a binding international obligation requires of the state. Article 12 of the ILC Articles states that there is a breach when the state's conduct is not in conformity with what the obligation requires, regardless of the origin or character of that obligation. The obligation may arise from a treaty, from customary international law, or from a general principle of law. A pertinent distinction must be drawn between obligations of conduct, which require the state to take a specific action, and obligations of result, which require the state to achieve a particular outcome by any means available; the form of the obligation determines the standard against which compliance is assessed.

Aliens

The treatment of foreign nationals is a historically significant category of state responsibility, generating an extensive body of practice and case law. International law imposes a minimum standard of treatment for aliens that states must observe regardless of how they treat their own nationals: foreign nationals are entitled to a floor of protection that domestic equality cannot reduce below the international minimum. The Neer Claim (USA v Mexico, 1926) established the classic formulation: treatment must amount to an outrage, bad faith, or wilful neglect that falls so far short of the international standard that every reasonable and impartial person would recognise the insufficiency. The current content of the international minimum standard has been significantly expanded by international human rights law, which now provides a more demanding framework than the traditional Neer threshold.

Reparation

Reparation is the primary legal consequence of an internationally wrongful act and takes three forms under Articles 35 to 37 of the ILC Articles. Restitution is the primary remedy: the responsible state must restore the situation to what it would have been had the wrongful act not been committed. Where restitution is materially impossible or disproportionately burdensome, compensation takes its place: the responsible state must pay the financial equivalent of all damage caused by the wrongful act, including lost profits and consequential losses not already covered by restitution. Satisfaction addresses non-material harm: it may take the form of an acknowledgment of the breach, an expression of regret, a formal apology, or an assurance and guarantee of non-repetition. The Chorzow Factory Case (PCIJ, 1928) established that reparation must as far as possible wipe out all consequences of the illegal act and re-establish the situation that would have existed had the act not been committed.

Defences

Six circumstances preclude wrongfulness under Chapter V of the ILC Articles, suspending the legal consequences of the act without extinguishing the underlying international obligation. Consent of the injured state removes the wrongfulness of conduct otherwise in breach of an obligation owed to that state. Legitimate self-defence under Article 51 of the Charter of the United Nations (UN Charter) precludes wrongfulness for the use of force taken in response to an armed attack. Force majeure applies where the breach is caused by an irresistible force or unforeseen event beyond the state's control making performance materially impossible. Distress applies where the state has no other reasonable means of saving the lives of persons entrusted to its care. Necessity applies in exceptional circumstances where the act is the only way to safeguard an essential state interest against a grave and imminent peril, but cannot be invoked where the state contributed to the situation of necessity. Countermeasures permit a state injured by a prior internationally wrongful act to take otherwise wrongful measures to induce the responsible state to comply with its obligations.

Erga Omnes

The International Court of Justice (ICJ) articulated the doctrine of erga omnes obligations in Barcelona Traction, Light and Power Co Ltd (ICJ, 1970): some obligations are owed not merely to another state bilaterally but to the international community as a whole. Their breach is of concern to every state, and every state has a legal interest in their protection regardless of whether it suffered direct injury. Obligations universally accepted as erga omnes include the prohibition of genocide, slavery, racial discrimination, and aggression. Any state may invoke the responsibility of a state breaching an erga omnes obligation without needing to show it was individually harmed, significantly extending the enforcement reach of international law beyond bilateral claims.

Diplomatic

Diplomatic protection is the procedural mechanism through which a state espousing the claim of one of its nationals against another state brings an international claim for the injury suffered by that national. The espousing state asserts its own right in the person of its national: the claim at the international level is the state's claim, not the individual's. Two conditions must be satisfied before diplomatic protection is available: the individual must possess the nationality of the espousing state at the time of the injury and continuously until the date of the claim, and the individual must have exhausted all available and effective domestic remedies in the responsible state before the international claim can be brought. The exhaustion of local remedies rule ensures that the responsible state's own courts have a first opportunity to remedy the wrong before the matter is elevated to the international level.

[!example]- Case Laws

Chorzow Factory Case (Germany v Poland, PCIJ, 1928)
📋 Facts
Poland expropriated a factory at Chorzow in breach of a German-Polish treaty on Upper Silesia. Germany brought proceedings before the PCIJ claiming full reparation for the loss caused by the internationally wrongful expropriation.

🔨 Held
The PCIJ held that reparation must wipe out all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed; restitution is primary; compensation measures what restitution cannot restore.

💡 Principle
Full reparation is the foundational consequence of an internationally wrongful act; the standard is complete restoration of the prior situation, not a limited or discounted remedy.

Neer Claim (USA v Mexico, General Claims Commission, 1926)
📋 Facts
An American national, Paul Neer, was killed in Mexico. The United States claimed Mexico was internationally responsible because the Mexican investigation was inadequate and the perpetrators went unpunished.

🔨 Held
The Commission held that the treatment of Neer must amount to an outrage, bad faith, wilful neglect of duty, or gross insufficiency of government action so far below international standards that every impartial person would recognise the inadequacy. Mexico's conduct did not reach that threshold.

💡 Principle
The international minimum standard of treatment requires a threshold of egregious conduct; ordinary negligence or procedural delay in domestic proceedings does not trigger state responsibility for denial of justice.

US Diplomatic and Consular Staff in Tehran (USA v Iran, ICJ, 1980)

📋 Facts

Revolutionary students seized the US Embassy in Tehran and took diplomatic and consular staff hostage. The Iranian government endorsed and maintained the occupation rather than securing the release of the hostages and the inviolability of the premises.

🔨 Held

The ICJ held Iran responsible on two independent and cumulative grounds: first, for failure to protect the diplomatic mission as required by the Vienna Convention on Diplomatic Relations (VCDR) 1961 and Vienna Convention on Consular Relations (VCCR) 1963; second, for the subsequent endorsement that converted the private acts of the students into state conduct attributable to Iran.

💡 Principle

State responsibility arises both from failure to prevent foreseeable harm where a due diligence obligation exists, and from subsequent endorsement of private wrongful acts that transforms them into official state conduct.

State Responsibility as the Architecture of International Accountability

State responsibility is the principle that converts international obligations into enforceable legal duties: attribution connects the wrongful act to the state; breach identifies the violated obligation; injury triggers the obligation to make full reparation. The ILC Articles 2001 codify a comprehensive regime applicable across all categories of internationally wrongful acts. The erga omnes doctrine extends accountability beyond bilateral claims to the international community as a whole for the gravest breaches, confirming that international law is not merely a system of bilateral bargains but a genuine legal order with consequences for breach.

PIL | Unit 3 | Part B

Individuals, Nationality, Extradition, Asylum, Diplomatic Immunity, Treaties

Q1. Discuss the principles governing extradition and examine the political offence exception.

PRIORITY: ★★★ | PART: B | FREQ: 4

Introduction

Extradition is the formal process by which one state surrenders a person present on its territory to another state for trial or punishment for an offence committed within the requesting state's jurisdiction. It is the primary mechanism through which states cooperate in the enforcement of criminal law across borders, governed in India by the Extradition Act 1962 and internationally by bilateral treaties and multilateral conventions. Five governing principles structure the extradition relationship, of which the political offence exception is the most contested and the most rapidly evolving, as international law has progressively stripped it of its protection for terrorism and international crimes.

Definition

Extradition is defined in Section 2(d) of the Extradition Act 1962 as the surrender of a fugitive criminal to the state in which the offence was committed. At the international level it is not a customary obligation: absent a bilateral treaty, a state is under no general duty to surrender a fugitive. The principle of aut dedere aut judicare, extradite or submit the matter for prosecution, applies as a treaty-based obligation only for specific international crimes, including torture under Article 7 of the United Nations Convention Against Torture (CAT) 1984, genocide under the Convention on the Prevention and Punishment of the Crime of Genocide 1948, and terrorism under various sectoral conventions.

Legal Foundation

Extradition Act 1962, Section 2(d) : definition of extraditable offence; punishable with imprisonment exceeding one year
Extradition Act 1962, Section 31 : political offence exception; extradition refused for offences of a political character
Article 7, CAT 1984 : aut dedere aut judicare for torture
United Nations (UN) Model Treaty on Extradition 1990 : framework for bilateral treaty negotiation; incorporates dual criminality and specialty

[!tip] Thesis
The political offence exception was constructed to protect genuine political dissidents from prosecution disguised as ordinary crime. The progressive exclusion of terrorism, torture, and genocide from its scope reflects international law's shift away from sovereign immunity toward individual criminal accountability for the gravest offences.

Basis | Dual criminality | Specialty | Nationals | Double jeopardy | Political offence | Narrowing

Basis

Extradition rests on bilateral treaty: there is no rule of customary international law requiring a state to surrender a fugitive in the absence of a specific treaty obligation. Where no treaty exists, states may assist each other as a matter of comity, but this creates no enforceable legal obligation and the requested state retains full discretion to refuse. The aut dedere aut judicare principle supplements the treaty framework for international crimes by requiring the requested state, if it does not extradite, to submit the case to its own prosecutorial authorities for criminal proceedings.

Dual criminality

The dual criminality principle requires that the conduct forming the basis of the extradition request must constitute a crime in both the requesting and the requested state at the time of the surrender. The test is conduct-based: it examines the underlying acts, not the legal label or charge category applied in the requesting state. A person accused of an act that would be lawful in the requested state cannot be surrendered under this principle regardless of how seriously it is characterised in the requesting state.

Specialty

The specialty principle protects the surrendered person from being tried in the requesting state for any offence other than the offence for which extradition was granted. The requesting state binds itself by the terms of the extradition warrant; any extension of charges requires the prior consent of the surrendering state. A pertinent distinction must be drawn between the specialty principle and the political offence exception: specialty governs what the person may be tried for after surrender; the political offence exception determines whether surrender may occur at all.

Nationals

The treatment of a state's own nationals varies between legal traditions. Civil law states, including most continental European and many Asian and African states, refuse to extradite their own nationals and discharge their obligation through the aut dedere aut judicare rule: they prosecute the national domestically for the offence committed abroad. Common law states, including the United Kingdom (UK) and India, are generally willing to extradite their own nationals under bilateral treaty arrangements, though this is not a universal or customary rule.

Double jeopardy

The double jeopardy principle, known in Latin as ne bis in idem, requires extradition to be refused where the person has already been tried and finally convicted or acquitted for the same offence in the requested state. It prevents the international extradition mechanism from being used to subject a person to a second prosecution for conduct already adjudicated. The principle is recognised in Section 31 of the Indian Extradition Act 1962 and reflected in the UN Model Treaty on Extradition 1990.

Political offence

The political offence exception divides into two categories with distinct legal treatment. Pure political offences, including treason, sedition, and espionage directed solely at the state, are absolutely protected and cannot form the basis of an extradition request. Relative political offences, meaning ordinary crimes such as assault or homicide committed in a political context, are protected if the offence was committed as part of and in furtherance of a political event and is proportionate to the political objective pursued. The Queen's Bench (QB) in In re Castioni (QB, 1891) established the classic two-part test: the act must be incidental to and form part of a political uprising or disturbance.

Narrowing

The political offence exception has been progressively narrowed by multilateral conventions and jus cogens doctrine. The Queen's Bench in In re Meunier (QB, 1894) excluded anarchist bombings targeting the general public, holding that acts directed against the public at large rather than against the state specifically are not political offences. Multilateral conventions on terrorism, aircraft hijacking, hostage-taking, and torture have each expressly excluded their subject matter from the political offence exception. The House of Lords (HL) confirmed in R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 3) (HL, 1999) that jus cogens crimes, including systematic torture, can never be characterised as political offences regardless of the perpetrator's former official status, because no official function can legitimately include the systematic commission of acts that international law absolutely prohibits.

[!example]- Case Laws

In re Castioni (QB, 1891)
📋 Facts
A Swiss national killed a government official during a political uprising in Switzerland and fled to the UK. Switzerland sought his extradition for murder. The question was whether the killing fell within the political offence exception.

🔨 Held
The QB held that the offence was committed as part of and in furtherance of a political rising and therefore fell within the political offence exception; extradition was refused.

💡 Principle
The classic test for a relative political offence: the act must be committed as part of and in furtherance of a political event, directly connected to the political disturbance, not merely politically motivated.

In re Meunier (QB, 1894)
📋 Facts
A French anarchist detonated explosives at a Paris café and at French army barracks. France sought his extradition from the UK. He claimed the political offence exception on the basis that his acts were directed against the French state.

🔨 Held
The QB held that acts targeting the general public rather than specifically directed against the government or state apparatus are not political offences within the exception; extradition was ordered.

💡 Principle
The political offence exception does not protect acts of indiscriminate violence against civilians; a political offence must be directed at the state, not at the public at large.

R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 3) (HL, 1999)

📋 Facts

General Augusto Pinochet, former head of state of Chile, was arrested in the UK on a Spanish extradition warrant alleging systematic torture and crimes against humanity committed during his rule between 1973 and 1990. He claimed head of state immunity and the political offence exception.

🔨 Held

The HL held that the prohibition of torture is a jus cogens norm; that former head of state immunity cannot shield an individual from extradition for systematic torture; and that the political offence exception is inapplicable to jus cogens crimes because no legitimate official function can include systematic torture.

💡 Principle

Jus cogens crimes can never be political offences; functional immunity cannot shelter conduct that falls outside any legitimate official function; international criminal accountability overrides sovereign immunity for the gravest breaches.

Extradition and the Progressive Displacement of the Political Offence Exception

Extradition is structured by the five principles of dual criminality, specialty, non-extradition of nationals, double jeopardy, and the political offence exception. The exception, designed to protect genuine political dissidents, has been progressively stripped back by multilateral conventions and jus cogens, leaving terrorism, torture, genocide, and war crimes without its shelter. The trajectory of modern extradition law is toward individual criminal accountability for the gravest offences, overriding both sovereign immunity and the political offence exception.

Q2. Explain the privileges and immunities of diplomatic agents under the Vienna Convention on Diplomatic Relations, 1961.

PRIORITY: ★★★ | PART: B | FREQ: 5

Introduction

Diplomatic privileges and immunities are the rights, exemptions, and protections accorded to diplomatic missions and their personnel under the Vienna Convention on Diplomatic Relations (VCDR) 1961 to ensure the effective and independent performance of diplomatic functions. The VCDR codifies and systematises a body of customary international law that had evolved over centuries of diplomatic practice, creating a comprehensive regime governing personal inviolability, premises, communications, and jurisdiction. The functional necessity theory, which grounds immunity in operational necessity rather than personal privilege, is the dominant justification and simultaneously explains both the breadth and the limits of the immunities conferred.

Definition

Oppenheim defines diplomatic privileges as the special rights of legations and their members which derogate from the general rules of territorial jurisdiction. The Vienna Convention on Diplomatic Relations (VCDR) 1961 defines a diplomatic agent in Article 1(e) as the head of a mission or a member of the diplomatic staff. Three theories have been advanced to justify the privileges and immunities: extra-territoriality, which treats the mission as an extension of the sending state's territory; representative character, which grounds immunity in the dignity of the sovereign represented; and functional necessity, which holds that immunity is required to enable the effective and independent performance of diplomatic functions and is the dominant modern basis.

Legal Foundation

VCDR 1961, Article 9 : persona non grata; receiving state may declare any member of the mission PNG without explanation
VCDR 1961, Article 22 : absolute inviolability of mission premises
VCDR 1961, Article 27 : inviolability of official communications and diplomatic bag
VCDR 1961, Article 29 : personal inviolability of the diplomatic agent; no arrest or detention
VCDR 1961, Article 31 : immunity from criminal jurisdiction (absolute); from civil jurisdiction (general with three exceptions)
VCDR 1961, Article 32 : waiver by sending state only; expressed; separate waiver for execution
VCDR 1961, Article 37 : immunities of administrative, technical, and service staff
VCDR 1961, Article 41 : duties of diplomatic agent: respect receiving state's laws; not interfere in internal affairs

[!tip] Thesis
Diplomatic immunity is justified by functional necessity and is therefore bounded by function. The VCDR strikes a calibrated balance: absolute personal inviolability and premises protection enable diplomats to operate without fear; targeted exceptions to civil immunity prevent the most obvious abuses; and persona non grata gives the receiving state a practical remedy that avoids the impasse of contested immunity claims.

Theories | Inviolability | Premises | Communications | Criminal | Civil | Persona non grata

Theories

The extra-territoriality theory, which treats mission premises as part of the sending state's territory, was once influential but has been abandoned as a legal fiction that generates distorting consequences: taken literally, it would mean a crime committed on mission premises is committed in the sending state's territory, insulating it from local law entirely. The representative character theory grounds immunity in the dignity of the sovereign the diplomat represents, providing a historical justification that survives in the treatment of heads of state but does not explain the full reach of the VCDR regime. The functional necessity theory, now dominant, holds that immunity is justified precisely because and to the extent that it is required for the effective performance of diplomatic functions; this foundation simultaneously explains the breadth of the protections and sets the ceiling above which they cannot reach.

Inviolability

Personal inviolability of the diplomatic agent under Article 29 of the VCDR 1961 is absolute: the diplomat's person may not be arrested, detained, or subjected to physical interference of any kind. The receiving state is not merely prohibited from interfering itself; it is under a positive obligation to take all appropriate steps to protect the diplomatic agent against interference by any person. A pertinent distinction must be drawn between the inviolability of the diplomatic agent and immunity from jurisdiction: the former is absolute and procedural, preventing any interference with the person; the latter is substantive and, in civil matters, subject to exceptions.

Premises

Mission premises are absolutely inviolable under Article 22 of the VCDR 1961: agents of the receiving state may not enter without the express consent of the head of mission under any circumstances, including emergencies. The receiving state is under a specific and active duty to protect the premises against intrusion, damage, disturbance, or impairment of dignity. The International Court of Justice (ICJ) confirmed in United States Diplomatic and Consular Staff in Tehran (USA v Iran, ICJ, 1980) that this duty is absolute and active: failure to protect the premises engages full state responsibility, and subsequent endorsement of the violation independently constitutes a separate breach.

Communications

Official communications between the mission and the sending state are inviolable under Article 27 of the VCDR 1961 and may use any appropriate means including couriers and coded messages. The diplomatic bag, whether carried by a diplomatic courier or transmitted by other means, may not be opened or detained and is entitled to transit through third states without interference. The free communication guarantee is an operational necessity rather than a courtesy: diplomatic missions must be able to communicate with their governments without any risk of interception, monitoring, or seizure by the receiving state.

Criminal

Immunity from criminal jurisdiction under Article 31 of the VCDR 1961 is absolute for diplomatic agents and admits no exceptions. No criminal proceeding may be initiated or maintained against a diplomatic agent in the receiving state's courts for any act, whether committed in an official or a private capacity, during the period of the diplomatic mission. This immunity applies regardless of the gravity of the offence and regardless of whether the act was performed in the course of official duties. The House of Lords (HL) recognised in Pinochet (No 3) (HL, 1999) that functional immunity for official acts carries limits in relation to jus cogens crimes, but that case addressed head of state immunity for former officials after the mission had ended, not the current immunity of serving diplomatic agents under Article 31.

Civil

Immunity from civil and administrative jurisdiction under Article 31 is general but carries three express exceptions that the VCDR drafters inserted to prevent the most obvious abuses of the immunity shield. The first exception covers proceedings relating to private immovable property situated in the receiving state held by the diplomat in a personal and not an official capacity. The second covers succession proceedings in which the diplomat is involved as executor, administrator, heir, or legatee in a private capacity unconnected to the sending state. The third covers proceedings relating to any professional or commercial activity exercised by the diplomat in the receiving state outside official functions, a provision designed to prevent diplomats from conducting private business shielded from the ordinary civil liability that would apply to any private person engaged in commercial activities.

Persona non grata

The persona non grata mechanism under Article 9 of the VCDR 1961 is the receiving state's primary practical remedy against abuse of diplomatic privilege. The receiving state may at any time and without obligation to give reasons declare any member of the diplomatic mission persona non grata or not acceptable. The sending state must then recall the person or terminate their functions with the mission. If the sending state fails to comply within a reasonable time, the receiving state may refuse to recognise the person as a member of the mission, effectively stripping them of the immunity they would otherwise enjoy. Waiver of immunity under Article 32 must be express, is exercisable only by the sending state, and a separate express waiver is required for execution of any judgment or order even where immunity from the proceedings themselves has already been waived.

[!example]- Case Laws

United States Diplomatic and Consular Staff in Tehran (USA v Iran, ICJ, 1980)
📋 Facts
Revolutionary students seized the US Embassy in Tehran in November 1979 and held diplomatic and consular staff hostage. The Iranian government endorsed and maintained the occupation for over a year, refusing to secure the release of the hostages or the inviolability of the premises.

🔨 Held
The ICJ held Iran responsible for systematic violations of Articles 22, 29, and 31 of the VCDR 1961 and corresponding provisions of the Vienna Convention on Consular Relations (VCCR) 1963; Iran's subsequent endorsement of the students' occupation converted their private acts into state conduct, engaging an independent basis of responsibility.

💡 Principle
The receiving state's obligations under the VCDR are absolute and impose active protective duties; subsequent endorsement of a private violation independently constitutes a breach of state responsibility attributable to the receiving state.

R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 3) (HL, 1999)

📋 Facts

General Pinochet claimed head of state immunity to resist extradition from the UK to Spain for systematic torture committed while he was head of state of Chile. The question was whether functional immunity protected a former head of state from extradition proceedings for conduct performed in an official capacity.

🔨 Held

The HL held that functional immunity does not protect torture because no legitimate official function can include the systematic commission of acts prohibited by jus cogens; the immunity claimed was therefore inapplicable.

💡 Principle

Diplomatic and head of state immunity is grounded in functional necessity and cannot extend to protect conduct that falls entirely outside any legitimate official function; jus cogens crimes do not become official acts by virtue of being committed by a state official.

Diplomatic Immunity: Function Defines Both Scope and Limit

The VCDR 1961 creates a comprehensive regime of personal inviolability, premises protection, communications immunity, and jurisdictional immunity grounded in functional necessity. Absolute immunity from criminal jurisdiction and absolute personal inviolability enable independent diplomatic function. Targeted exceptions to civil immunity prevent abuse. Persona non grata gives the receiving state a practical remedy. Functional necessity as the justifying principle simultaneously explains the breadth of the regime and the ceiling it imposes: immunity extends as far as function requires, and no further.

Q3. Explain the kinds of asylum and the doctrine of non-refoulement.

PRIORITY: ★★★ | PART: B | FREQ: 4

Introduction

Asylum is the protection granted by a state to a foreign national who has fled persecution, prosecution, or danger originating in another state. It is a sovereign right of the granting state rather than an individual entitlement, and it exists in three recognised forms: territorial asylum, granted on the granting state's own territory; diplomatic asylum, granted in embassy premises on foreign soil; and extraterritorial asylum, granted in exceptional circumstances in state-controlled spaces outside the territory. Non-refoulement under Article 33 of the Convention Relating to the Status of Refugees (1951 Refugee Convention) is the individual's only enforceable right in this domain, and the Convention Against Torture (CAT) 1984 provides an absolute non-refoulement guarantee that admits no exceptions.

Definition

Asylum is the protection a state grants to a person against the exercise of jurisdiction by another state. The 1951 Refugee Convention, in Article 1(A)(2), defines a refugee as a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of nationality and is unable or unwilling to avail himself of the protection of that country. Article 14 of the Universal Declaration of Human Rights (UDHR) 1948 provides that everyone has the right to seek and enjoy asylum from persecution, but this provision creates no obligation on any state to grant it: the right is to seek, not to receive.

Legal Foundation

Article 14, UDHR 1948 : right to seek and enjoy asylum; no corresponding obligation on states to grant
Article 1(A)(2), 1951 Refugee Convention : definition of refugee
Article 33(1), 1951 Refugee Convention : non-refoulement prohibition on five grounds
Article 33(2), 1951 Refugee Convention : exceptions for national security and serious crime
Article 3, CAT 1984 : absolute prohibition on return to face torture; no exceptions
Havana Convention on Asylum 1928 : Latin American regional recognition of diplomatic asylum
Caracas Convention on Diplomatic Asylum 1954 : extended and elaborated regional regime for diplomatic asylum

[!tip] Thesis
The structure of international refugee law is asymmetric: the state has discretion; the individual has only one guaranteed right, which is non-refoulement. The critical distinction between asylum as a state right and non-refoulement as an individual right is the architectural principle of the entire framework. States may grant or refuse asylum; they cannot use that discretion to return people to persecution.

Nature | Territorial | Diplomatic | Extraterritorial | Refugee definition | Non-refoulement | CAT

Nature

Asylum is a sovereign act of the granting state: the decision to protect a foreign national against the claims of another state is an exercise of sovereign discretion, and neither the state of origin nor any third state has a legal right to demand that protection be withdrawn or refused. Article 14 of the UDHR 1948 confirms the asymmetry built into the system: it gives the individual the right to seek asylum from persecution but imposes no corresponding obligation on any state to grant it. The grant of asylum is not an unfriendly act toward the state of origin because it is an assertion of the granting state's own sovereign rights over persons present on its territory, not an endorsement of the asylum-seeker's political position.

Territorial

Territorial asylum is the protection granted on the granting state's own territory to a foreign national who has entered or is present there. It is the most effective and legally settled form of asylum: the granting state exercises full sovereign authority within its territory and can protect the individual against any external demand for surrender, subject only to specific extradition treaty obligations. Territorial asylum is firmly grounded in customary international law and requires no special treaty to justify; it flows directly from the principle of territorial sovereignty and the state's right to determine who may remain within its borders.

Diplomatic

Diplomatic asylum is the grant of protection within embassy or legation premises on foreign soil, or on warships and military aircraft in foreign territory. The ICJ confirmed in the Asylum Case (Colombia v Peru, ICJ, 1950) that diplomatic asylum is not a general right under customary international law: the inconsistent and fluctuating practice among Latin American states was insufficient to establish a binding customary rule, and Colombia had no right to unilaterally qualify Haya de la Torre's offence as political and demand safe conduct from Peru. Diplomatic asylum is a regionally recognised institution under the Havana Convention 1928 and the Caracas Convention 1954, and even within that framework the receiving state's sovereign rights over the premises remain fully operative.

Extraterritorial

Extraterritorial asylum covers the rare cases in which protection is extended in state-controlled spaces that are neither the home territory nor diplomatic premises: warships in foreign ports, military camps on foreign soil, and in some historical practice, consular premises. It rests on comity rather than any established legal right and is exceptional in both its frequency and its legal basis. It cannot be asserted against the wishes of the territorial state in the absence of a specific treaty or recognised customary rule, and neither the Havana nor the Caracas Convention extends to these spaces in a manner generating enforceable rights against non-parties.

Refugee definition

The 1951 Refugee Convention in Article 1(A)(2) defines the refugee as a person with a well-founded fear of persecution on five enumerated grounds: race, religion, nationality, membership of a particular social group, or political opinion. The well-founded fear standard combines a subjective element, the actual fear held by the applicant, and an objective element, the reasonable basis for that fear in the conditions prevailing in the country of origin. The House of Lords (HL) in R v Secretary of State for the Home Department ex parte Sivakumaran (HL, 1988) confirmed that the objective element is assessed by reference to whether a reasonable person in the applicant's circumstances would fear persecution; purely subjective fear without an objective basis is insufficient to qualify.

Non-refoulement

Non-refoulement under Article 33(1) of the 1951 Refugee Convention is the individual's core enforceable right: no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where life or freedom would be threatened on account of the five enumerated grounds. The obligation applies at the border, within the territory, and extends to indirect refoulement through chain deportation to a third state that will in turn return the person to the territory of persecution. Non-refoulement has hardened into a rule of customary international law binding on all states, including those that have not ratified the 1951 Convention, and applies regardless of whether the individual has been formally recognised as a refugee.

CAT

Article 3 of the CAT 1984 provides the strongest non-refoulement protection in international law: no state party shall expel, return, or extradite a person to another state where there are substantial grounds for believing the person would be in danger of being subjected to torture. There are no exceptions to this prohibition and no derogation permitted: unlike Article 33(2) of the 1951 Refugee Convention, which allows exceptions for national security and serious crime, the CAT's Article 3 is absolute. It also extends beyond the five grounds of the 1951 Convention to cover any person at risk of torture regardless of the reason, making it the single most protective instrument in the field for persons facing that specific form of persecution.

[!example]- Case Laws

Asylum Case (Colombia v Peru, ICJ, 1950)
📋 Facts
Colombia granted diplomatic asylum in its Bogota embassy to Victor Raul Haya de la Torre, a Peruvian national accused of leading a military rebellion against the Peruvian government. Colombia sought to invoke a right of diplomatic asylum under customary international law and under Latin American treaty practice, and demanded safe conduct allowing Haya de la Torre to leave Peru.

🔨 Held
The ICJ held that diplomatic asylum is not a rule of general customary international law; the inconsistent practice among Latin American states was insufficient to establish a binding custom; and Colombia had no right to unilaterally qualify the offence as political and could not demand safe conduct from Peru.

💡 Principle
Diplomatic asylum is not general custom; the granting state cannot unilaterally characterise the offence to override the territorial state's criminal jurisdiction, even within a regional treaty framework.

R v Secretary of State for the Home Department ex parte Sivakumaran (HL, 1988)
📋 Facts
Tamil asylum seekers from Sri Lanka applied for refugee status in the United Kingdom. The UK Home Office refused on the basis that their fear of persecution was subjective and not supported by objective evidence of a genuine risk in Sri Lanka at the relevant time.

🔨 Held
The HL held that the well-founded fear standard requires an objective assessment: the test is whether a reasonable person in the applicant's situation, with knowledge of the relevant conditions in the country of origin, would fear persecution on one of the five Convention grounds.

💡 Principle
Non-refoulement requires well-founded fear assessed objectively; purely subjective fear without reasonable factual basis does not engage the protection of Article 33 of the 1951 Refugee Convention.

Non-refoulement as the Individual's Floor in a System of State Discretion

Asylum exists in territorial, diplomatic, and extraterritorial forms, with territorial asylum firmly grounded in customary law and diplomatic asylum limited to Latin American treaty practice under the Havana and Caracas Conventions. The architecture of international refugee law grants discretion to states and one enforceable right to individuals: non-refoulement under Article 33 of the 1951 Refugee Convention, which has crystallised into customary international law. The CAT 1984 provides an absolute non-refoulement guarantee for persons at risk of torture, overriding the exceptions in Article 33(2) and extending protection beyond the five Convention grounds to any person facing that specific risk.

Q4. Discuss the formation, reservation, and termination of treaties under the Vienna Convention on the Law of Treaties, 1969.

PRIORITY: ★★★ | PART: B | FREQ: 4

Introduction

A treaty is the principal instrument through which states create legally binding obligations toward each other in international law. The Vienna Convention on the Law of Treaties (VCLT) 1969 governs the complete lifecycle of a treaty from negotiation through entry into force to performance and eventual termination. It codifies the rules on formation, the role of consent, the effect of reservations, the primary performance obligation of pacta sunt servanda, and the narrow grounds on which states may invoke termination or suspension. Understanding this lifecycle as an integrated system is essential: the same logic that makes treaties binding also defines precisely when and how they may be modified or ended.

Definition

Article 2(1)(a) of the VCLT 1969 defines a treaty as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. The pacta sunt servanda principle codified in Article 26 is the VCLT's operational core: every treaty in force is binding on its parties and must be performed in good faith. This principle is simultaneously a treaty rule and an independent customary rule that predates the VCLT and applies to all states regardless of ratification.

Legal Foundation

Article 2(1)(a), VCLT 1969 : definition of a treaty
Article 9, VCLT 1969 : adoption of treaty text; two-thirds majority for multilateral conferences
Article 19, VCLT 1969 : permissibility of reservations; object-and-purpose test
Article 26, VCLT 1969 : pacta sunt servanda; every treaty in force is binding and must be performed in good faith
Article 27, VCLT 1969 : internal law cannot justify failure to perform a treaty obligation
Article 53, VCLT 1969 : treaty conflicting with jus cogens void
Article 60, VCLT 1969 : material breach entitles other parties to suspend or terminate
Article 62, VCLT 1969 : fundamental change of circumstances; rebus sic stantibus; narrow application

[!tip] Thesis
The VCLT is a complete system: pacta sunt servanda locks treaty obligations in place; reservations provide controlled flexibility at the entry point; and the termination provisions create narrow escape valves calibrated to prevent abuse. The system is designed to make treaties stable without making them eternal, and to make participation broad without making obligations hollow.

Formation | Consent | Pacta | Reservations | Effect | Material breach | Rebus sic stantibus

Formation

Treaty formation passes through five sequential stages. Negotiation is conducted by plenipotentiaries holding full powers under Article 7 of the VCLT 1969 to represent the state in treaty-making. Adoption of the text at a multilateral treaty conference requires a two-thirds majority under Article 9 unless the conference decides otherwise. Authentication fixes the text as definitive and authentic, typically through signature or initialling. Expression of consent to be bound may take the form of signature alone, ratification of a signed text, accession by a state that did not participate in negotiation, or acceptance or approval. Entry into force occurs on the terms specified in the treaty itself, typically upon receipt of a specified number of ratifications or accessions.

Consent

The expression of consent to be bound is the decisive act that converts an authenticated treaty text into a binding obligation for a particular state. The distinction between signature and ratification is fundamental: signature is often an act of authentication and political commitment only, while ratification is the formal international act by which the state binds itself. Article 14 of the VCLT 1969 specifies the circumstances in which ratification is required: where the treaty so provides, where it is otherwise established that states agreed ratification was necessary, where the plenipotentiary signed subject to ratification, or where the state's intent to sign subject to ratification is evidenced by its full powers or was expressed during negotiation.

Pacta

Pacta sunt servanda under Article 26 of the VCLT 1969 is the foundational performance obligation: every treaty in force is binding on the parties and must be performed in good faith. Article 27 completes this structure: a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation. The international obligation subsists regardless of whether the state's domestic law has implemented it or whether a conflicting domestic rule has been subsequently enacted. At the domestic level the conflicting statute may still govern the courts; at the international level the obligation remains intact and breach engages full state responsibility.

Reservations

A reservation under Article 2(1)(d) of the VCLT 1969 is a unilateral statement made when signing, ratifying, or acceding to a treaty whereby the state purports to exclude or modify the legal effect of certain provisions in their application to itself. Article 19 permits reservations unless the treaty expressly prohibits them; the treaty permits only specified reservations and this is not among them; or the reservation is incompatible with the object and purpose of the treaty. The object-and-purpose test, articulated by the International Court of Justice (ICJ) in the Reservations to the Genocide Convention Advisory Opinion (ICJ, 1951), requires a substantive judgment about whether the reservation strikes at the core purpose the treaty was designed to achieve; it prevents the reservation mechanism from being weaponised to hollow out the treaty's central obligations while maintaining formal participation.

Effect

The effect of a reservation depends on the response of other states parties. Where an accepting state accepts the reservation, the treaty operates between the reserving and accepting states with the modification the reservation introduces. Where an objecting state objects to the reservation but does not oppose the treaty's entry into force, the reserved provision does not apply between the two states but the rest of the treaty remains operative. Where an objecting state expressly opposes entry into force between itself and the reserving state, no treaty relationship exists between them. The ICJ confirmed in the Genocide Convention Advisory Opinion that this flexible bilateral approach was appropriate for multilateral humanitarian conventions to maximise participation while protecting the core norms the treaty was designed to serve.

Material breach

Article 60 of the VCLT 1969 provides that a material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation. A material breach is defined as a repudiation of the treaty not sanctioned by the VCLT, or the violation of a provision essential to the accomplishment of the object and purpose of the treaty. In a multilateral treaty, a specially affected state may suspend the treaty as between itself and the defaulting state; the other parties by unanimous agreement may suspend it for all or terminate it entirely. The International Court of Justice (ICJ) applied this provision in Gabcikovo-Nagymaros Project (Hungary v Slovakia, ICJ, 1997), confirming that material breach must be of a provision essential to the treaty's object and purpose, not merely an incidental provision.

Rebus sic stantibus

The doctrine of rebus sic stantibus, codified in Article 62 of the VCLT 1969, permits a state to invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, but the conditions for its application are deliberately narrow. The change must have been unforeseen at the time the treaty was concluded; the existence of those circumstances must have constituted an essential basis of the parties' consent to be bound; and the effect of the change must be to radically transform the extent of obligations still to be performed. The doctrine cannot be invoked to terminate boundary treaties. The ICJ in Gabcikovo-Nagymaros confirmed that political and economic changes, however significant, do not meet the threshold: the change must go to the root of the obligations, not merely make performance more difficult or expensive.

[!example]- Case Laws

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (ICJ Advisory Opinion, 1951)

📋 Facts

Following the Genocide Convention's adoption in 1948, several states made reservations to specific provisions. Other states objected. The United Nations General Assembly (UNGA) sought an advisory opinion on the legal consequences of reservations to multilateral conventions lacking specific reservation clauses.

🔨 Held

The ICJ held that a state making a reservation incompatible with the object and purpose of the treaty cannot be considered a party to the treaty; and that the flexible bilateral approach should govern multilateral humanitarian conventions to maximise participation while protecting their essential character.

💡 Principle

The object-and-purpose test governs reservation admissibility; flexibility is appropriate for multilateral treaties to maximise participation but cannot extend to reservations that undermine the treaty's core purpose.

Gabcikovo-Nagymaros Project (Hungary v Slovakia, ICJ, 1997)

📋 Facts

Hungary and Czechoslovakia concluded a treaty in 1977 for the construction of a dam system on the Danube. Hungary subsequently suspended and abandoned its part of the project and sought to terminate the treaty on grounds of ecological necessity and fundamental changed circumstances. Slovakia continued construction and diverted the Danube unilaterally.

🔨 Held

The ICJ held that Hungary's invocation of necessity was not established on the facts; that the changed circumstances relied upon, including political and economic changes following the end of the Cold War, did not satisfy the conditions of Article 62; and that Hungary had wrongfully terminated the treaty.

💡 Principle

Rebus sic stantibus is a narrowly construed exception; political and economic changes, even of a fundamental character, do not satisfy Article 62 unless they go to the root of the obligations and radically transform what performance requires.

The VCLT as a Complete Lifecycle Framework

The VCLT 1969 governs the complete lifecycle of treaties from negotiation through performance to termination. Formation requires negotiation, adoption, authentication, consent, and entry into force. Pacta sunt servanda locks performance in place and Article 27 prevents domestic law from excusing breach at the international level. Reservations allow flexible participation within the object-and-purpose limit. Termination requires material breach, fundamental changed circumstances meeting the Article 62 threshold, supervening impossibility, or conflict with jus cogens. The architecture is designed to make treaties stable, participation broad, and escape routes narrow but genuine.

PIL | Unit 4 | Part B

Law of the Sea, Airspace, and Outer Space

Q1. Discuss the legal regime of the seas under UNCLOS, 1982, with particular reference to the maritime zones.

PRIORITY: ★★★ | PART: B | FREQ: 5

Introduction

The United Nations Convention on the Law of the Sea (UNCLOS) 1982, which entered into force in 1994, is the most comprehensive treaty in international law, governing all uses of the world's oceans and seas. It divides ocean space into six maritime zones, each with a distinct legal regime calibrated to balance coastal state sovereignty against the freedom of the seas as a global commons. The zones form a graduated system: sovereignty is strongest close to the coast and weakens progressively as distance from the baseline increases, until the high seas are reached where all states enjoy equal freedom. The deep seabed beyond national jurisdiction is governed by a separate common heritage regime.

Definition

UNCLOS 1982 is defined in its preamble as a contribution to the strengthening of peace, security, and cooperation among nations in conformity with the principles of justice and equal rights. The key organising concept is the baseline: the low-water line along the coast from which all maritime zones are measured. Straight baselines may be drawn across deeply indented coastlines or coastlines fringed with islands, as confirmed by the International Court of Justice (ICJ) in the Anglo-Norwegian Fisheries Case (ICJ, 1951), and the method of drawing baselines directly determines the seaward extent of every zone the coastal state claims.

Legal Foundation

Article 2, UNCLOS 1982 : full sovereignty over territorial sea, airspace above, and seabed and subsoil beneath
Article 17, UNCLOS 1982 : right of innocent passage through the territorial sea
Article 33, UNCLOS 1982 : contiguous zone; enforcement jurisdiction only
Articles 55 to 56, UNCLOS 1982 : EEZ sovereign rights over resources; other states' navigational freedoms preserved
Article 76, UNCLOS 1982 : continental shelf definition and outer limits
Articles 86 to 87, UNCLOS 1982 : high seas definition and six freedoms
Article 136, UNCLOS 1982 : the Area and its resources as the common heritage of mankind

[!tip] Thesis
UNCLOS is not six isolated regimes stitched together. It is one graduated system: sovereignty is fullest in internal waters, narrows progressively through the territorial sea and contiguous zone, becomes functional resource rights in the EEZ and continental shelf, and dissolves into equal freedom on the high seas. The architecture reflects the single organising tension of the law of the sea: coastal state interests against the freedom of navigation.

Internal waters | Territorial sea | Contiguous zone | EEZ | Continental shelf | High seas | Delimitation

Internal waters

Internal waters are all waters landward of the baseline: ports, harbours, bays, rivers, and lakes. The coastal state exercises full territorial sovereignty over internal waters equivalent to its land territory; there is no right of innocent passage for foreign ships. Foreign vessels may enter internal waters only with the permission of the coastal state. Where a state draws straight baselines that enclose areas previously used as a route for international shipping, Article 8(2) of UNCLOS 1982 preserves a right of innocent passage through those enclosed areas, preventing straight baselines from entirely eliminating navigation rights through previously navigable waters.

Territorial sea

The territorial sea extends up to 12 nautical miles from the baseline under Article 3 of UNCLOS 1982. The coastal state exercises full sovereignty over the territorial sea, the airspace above it, and the seabed and subsoil beneath it under Article 2. This sovereignty is qualified by the right of innocent passage for foreign ships under Article 17: foreign ships may navigate through the territorial sea continuously and expeditiously provided their passage is not prejudicial to the coastal state's peace, good order, or security. Article 19(2) catalogues twelve categories of non-innocent activity; submarines must navigate on the surface and show their flag; and the coastal state may temporarily suspend innocent passage in specific areas for security reasons under Article 25(3), without discriminating among the ships of different states.

Contiguous zone

The contiguous zone extends up to 24 nautical miles from the baseline under Article 33 of UNCLOS 1982. In this zone the coastal state may exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration, and sanitary laws committed within its territory or territorial sea. The contiguous zone does not confer territorial sovereignty or sovereign rights over resources; it is an enforcement zone limited to four specified subject matters. It is the most narrowly defined of all the maritime zones, conferring jurisdiction only to prevent and punish specifically identified categories of violation.

EEZ

The Exclusive Economic Zone (EEZ) extends up to 200 nautical miles from the baseline under Article 57 of UNCLOS 1982. In this zone the coastal state holds sovereign rights, not territorial sovereignty, for the purpose of exploring, exploiting, conserving, and managing the living and non-living natural resources of the waters, seabed, and subsoil, and energy from the water, currents, and winds. The coastal state also has jurisdiction over artificial islands, marine scientific research, and environmental protection within the EEZ. Other states retain within the EEZ the freedoms of navigation, overflight, and laying submarine cables and pipelines under Article 58, subject to due regard for the coastal state's rights and duties. The EEZ is a sui generis zone that distributes rights functionally between the coastal state and the international community within the same geographical space.

Continental shelf

The continental shelf extends to at least 200 nautical miles from the baseline regardless of geology under Article 76 of UNCLOS 1982, and may extend up to 350 nautical miles where the natural prolongation of the land territory continues beyond 200 nautical miles, subject to Commission on the Limits of the Continental Shelf (CLCS) approval. The coastal state holds exclusive sovereign rights over the seabed and subsoil for the purpose of exploring and exploiting natural resources including minerals and sedentary organisms. These rights exist ipso jure, automatically from statehood, without proclamation or occupation, as the ICJ confirmed in the North Sea Continental Shelf Cases (ICJ, 1969). The legal status of the superjacent waters as EEZ or high seas is unaffected by the continental shelf regime.

High seas

The high seas are all parts of the sea beyond the EEZ, territorial sea, internal waters, and archipelagic waters of archipelagic states under Article 86 of UNCLOS 1982. Article 87 lists the six freedoms available to all states equally: navigation, overflight, laying submarine cables and pipelines, construction of artificial islands, fishing, and scientific research. Ships on the high seas sail under the flag of one state and are subject to the exclusive jurisdiction of that flag state under Article 92. Four exceptions permit interference with foreign-flagged vessels: piracy under Article 105, which attracts universal jurisdiction; the right of visit under Article 110 on reasonable suspicion of piracy, slave trade, unauthorised broadcasting, or statelessness; hot pursuit under Article 111; and authority under applicable multilateral suppression conventions. The deep seabed beyond the limits of national jurisdiction, called the Area, is governed by the common heritage of mankind regime under Article 136 and managed by the International Seabed Authority (ISA).

Delimitation

Delimitation of overlapping maritime zones between opposite or adjacent states is governed by the principle of equitable principles and relevant circumstances. The ICJ established in the North Sea Continental Shelf Cases (ICJ, 1969) that equidistance is not a mandatory customary rule: delimitation requires an agreement producing an equitable result taking into account all relevant circumstances including the length of the respective coastlines, the configuration of the coast, and the presence of islands. Article 74 and Article 83 of UNCLOS 1982 codify this approach for the EEZ and continental shelf respectively, directing that delimitation shall be by agreement on the basis of international law in order to achieve an equitable solution.

[!example]- Case Laws

Corfu Channel Case (UK v Albania, ICJ, 1949)

📋 Facts

British warships exercising the right of innocent passage through the North Corfu Channel, an international strait used for international navigation, struck mines laid by Albania without notification. Two ships were damaged and sailors killed. Albania argued the UK had no right of passage.

🔨 Held

The ICJ held that the right of innocent passage through international straits used for international navigation is part of customary international law; Albania had an active duty to notify mariners of the danger; Albania was held internationally responsible.

💡 Principle

Freedom of navigation through international straits is customary law; the coastal state's duty to protect navigation is active, not merely passive.

Anglo-Norwegian Fisheries Case (UK v Norway, ICJ, 1951)

📋 Facts

Norway applied straight baselines drawn between outermost coastal points along its deeply indented coastline. The UK challenged the method, arguing the enclosed areas were high seas over which Norway had no jurisdiction to regulate British fishing.

🔨 Held

The ICJ held the straight baseline method valid for deeply indented or island-fringed coastlines; Norway's consistent practice acquiesced in by other states had become binding. The case directly influenced Articles 7 and 10 of UNCLOS 1982.

💡 Principle

Baseline methodology is the foundational step for all maritime zone calculations; straight baselines are permissible for appropriate coastline configurations and their use is validated by consistent acquiesced-in state practice.

North Sea Continental Shelf Cases (ICJ, 1969)

📋 Facts

Germany, Denmark, and the Netherlands disputed the delimitation of their overlapping continental shelf areas in the North Sea. Denmark and the Netherlands sought application of the equidistance method from the Geneva Convention on the Continental Shelf 1958; Germany, which had not ratified it, argued for a more equitable result.

🔨 Held

The ICJ held that equidistance is not a rule of binding customary law; delimitation must achieve an equitable result by agreement using equitable principles and all relevant circumstances; continental shelf rights exist automatically from sovereignty, not from proclamation.

💡 Principle

Equitable principles and relevant circumstances are the governing framework for maritime delimitation; ipso jure continental shelf rights vest automatically upon statehood regardless of proclamation or occupation.

UNCLOS as a Graduated Governance System

UNCLOS 1982 distributes maritime rights across six zones on a graduated basis calibrated to the organising tension between coastal state sovereignty and the freedom of the seas. Sovereignty is fullest in internal waters and the territorial sea, narrows to functional resource rights in the EEZ and continental shelf, and gives way to equal freedom on the high seas and common heritage management of the deep seabed. The baseline is the architectural starting point from which all zones are measured, and equitable principles govern the resolution of competing zone claims between adjacent or opposite states.

Q2. Discuss the legal regime of airspace and the five freedoms of the air under the Chicago Convention, 1944.

PRIORITY: ★★★ | PART: B | FREQ: 4

Introduction

The legal regime of airspace rests on a single foundational principle codified in Article 1 of the Chicago Convention on International Civil Aviation 1944: every state has complete and exclusive sovereignty over the airspace above its territory and territorial sea. This principle distinguishes airspace from the high seas and outer space: unlike those domains, national airspace is sovereign territory, and there is no right of innocent passage for aircraft equivalent to the maritime right. The five freedoms of the air are negotiated derogations from this sovereignty, exchangeable between states through bilateral air services agreements, and the entire architecture of international civil aviation is built on the premise that access to foreign airspace is a privilege to be negotiated, not a right to be exercised.

Definition

The Chicago Convention 1944 defines a scheduled international air service in Article 2 as any series of flights performed by aircraft for the transport of passengers, cargo, or mail for remuneration or hire. The principle of complete and exclusive sovereignty over airspace was first codified in the Paris Convention on the Regulation of Aerial Navigation 1919, which established that each state has complete and exclusive sovereignty over the air space above its territory. The Chicago Convention replaced and expanded the Paris Convention framework, created the International Civil Aviation Organization (ICAO) as the UN specialised agency for aviation, and established the five freedoms framework that governs commercial air services globally.

Legal Foundation

Article 1, Chicago Convention 1944 : complete and exclusive sovereignty of every state over its airspace
Article 6, Chicago Convention 1944 : scheduled international air services require special permission or authorisation
Article 17, Chicago Convention 1944 : aircraft have the nationality of the state in which they are registered
International Air Services Transit Agreement (IASTA) 1944 : first and second freedoms exchanged multilaterally
International Air Transport Agreement 1944 : all five freedoms; very limited ratification

[!tip] Thesis
The five freedoms of the air are commercially indispensable derogations from an otherwise impermeable sovereign airspace regime. Because access requires negotiated permission, the architecture of international aviation is fundamentally bilateral: each route is a product of a specific agreement between specific states, making aviation rights instruments of commercial diplomacy as much as of transport law.

Sovereignty | Pre-Chicago | ICAO | First and second | Third and fourth | Fifth | State aircraft

Sovereignty

Complete and exclusive sovereignty over national airspace under Article 1 of the Chicago Convention 1944 means that no aircraft of any foreign state may enter national airspace without the express permission of the territorial state. Unlike the law of the sea, which preserves innocent passage as a residual right in the territorial sea, the airspace regime contains no equivalent: foreign aircraft have no right of entry, overflight, or landing without specific authorisation. This principle was confirmed in state practice by the Soviet Union's shooting down of the US U-2 spy plane in 1960, which the international community treated as a lawful response to an unauthorised airspace violation.

Pre-Chicago

The Paris Convention on the Regulation of Aerial Navigation 1919 first codified airspace sovereignty at the international level in the immediate aftermath of World War I, when powered flight had made the governance of airspace a practical necessity. The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 established the liability regime for international air carriage, governing the liability of air carriers for passenger death, injury, and cargo damage. The Chicago Convention 1944 superseded the Paris Convention framework, expanded it to include the five freedoms structure, and created the institutional architecture of ICAO to develop and maintain global standards.

ICAO

The International Civil Aviation Organization (ICAO), created by the Chicago Convention 1944 as a specialised agency of the United Nations, develops Standards and Recommended Practices (SARPs) through technical annexes to the Convention covering all aspects of aviation safety, navigation, communications, environmental standards, and security. With 193 member states, ICAO sets the regulatory floor for international civil aviation globally. Non-compliance with ICAO SARPs results in audit, public identification, and potentially the restriction of flying rights into states that condition access on compliance with international safety standards.

First and second

The first freedom of the air is the right to fly over another state's territory without landing: a pure transit right that allows aircraft to cross foreign airspace on the way to a third destination without entering the foreign state. The second freedom is the right to land in another state for non-traffic purposes: refuelling, technical maintenance, or crew change, without embarking or disembarking revenue passengers or cargo. Both the first and second freedoms are exchanged multilaterally under the International Air Services Transit Agreement (IASTA) 1944, making them the most widely available commercial air rights and the technical foundation on which all international scheduled services depend.

Third and fourth

The third freedom is the right to carry passengers, mail, and cargo from the home state to a foreign state, the outbound commercial service. The fourth freedom is the right to carry passengers, mail, and cargo from that foreign state back to the home state, the inbound commercial service. Together the third and fourth freedoms constitute the commercial core of bilateral international air services: a round-trip operation between two states. They are negotiated bilaterally through air services agreements between specific pairs of states, not exchanged under any multilateral instrument, making each third and fourth freedom route a product of a specific bilateral negotiation.

Fifth

The fifth freedom is the right to carry revenue traffic between two foreign states on a service that originates in the home state: an airline picks up passengers in a foreign state and carries them to a third state, beyond the primary bilateral route. It is the most commercially significant and the most contested of the five freedoms because it enables foreign carriers to compete directly with national carriers on routes between third states. The fifth freedom is negotiated exclusively through bilateral air services agreements and is exchanged on the most restrictive terms of all five freedoms. Modern Open Skies Agreements between liberalising states have progressively expanded the fifth freedom and related beyond-rights, but exchange remains bilateral and subject to political negotiation.

State aircraft

The Chicago Convention 1944 applies only to civil aircraft: state aircraft, defined in Article 3 as aircraft used in military, customs, and police services, are excluded from the Convention's framework. State aircraft have no rights of overflight or landing under the Chicago Convention and require special authorisation from the territorial state before entering its airspace. This distinction preserves complete national discretion over military aviation and prevents the Chicago Convention's commercial framework from being invoked to justify military overflights.

[!example]- Case Laws

Chicago Convention 1944, Articles 1 and 6

📋 Facts

The Chicago Convention was concluded in November and December 1944 by 52 states as the foundational instrument for post-World War II international civil aviation. It replaced the Paris Convention 1919, created ICAO, and established the legal architecture for commercial air services.

🔨 Held

Article 1 establishes complete and exclusive sovereignty over national airspace; Article 6 confirms scheduled international services require special permission; the five freedoms are derogations from sovereignty, not inherent rights.

💡 Principle

All access to foreign airspace for scheduled international services requires negotiated permission; the five freedoms are instruments of commercial diplomacy rather than legal entitlements.

U-2 Incident (United States v Soviet Union, 1960)

📋 Facts

A United States U-2 high-altitude reconnaissance aircraft conducted unauthorised surveillance flights over Soviet territory. On 1 May 1960 a U-2 was shot down over the Ural Mountains. The Soviet Union protested the overflights, tried the American pilot, and the incident caused the collapse of the Paris Summit between Eisenhower and Khrushchev.

🔨 Held

The Soviet Union's protest and response were treated by the international community as a lawful exercise of sovereign rights over national airspace; the United States ultimately acknowledged that the flights violated Soviet sovereignty.

💡 Principle

Complete and exclusive sovereignty over airspace means any unauthorised overflight is a violation of international law; the territorial state may take appropriate measures to protect its sovereign airspace including the use of force as a last resort.

The Chicago Convention as the Foundation of Sovereign Airspace

The legal regime of airspace rests on complete and exclusive sovereignty under Article 1 of the Chicago Convention 1944; there is no right of innocent passage for aircraft, and every entry into foreign airspace requires specific permission. The five freedoms of the air are negotiated derogations from this sovereignty: the first and second are exchanged multilaterally; the third, fourth, and fifth are negotiated bilaterally. ICAO develops the global safety and regulatory standards that underpin the entire system, and the bilateral air services agreement structure makes access to foreign markets a product of reciprocal political agreement rather than legal entitlement.

Q3. Discuss the legal regime of outer space under the Outer Space Treaty, 1967, and the liability regime under the Liability Convention, 1972.

PRIORITY: ★★★ | PART: B | FREQ: 4

Introduction

The legal regime of outer space is governed by the Outer Space Treaty (OST) 1967 and four implementing conventions, establishing a framework built on three foundational principles: non-appropriation of outer space and celestial bodies, freedom of exploration and use by all states, and state responsibility for all national space activities. The Liability Convention on International Liability for Damage Caused by Space Objects 1972 completes the framework by imposing a two-tier liability regime on launching states, making the benefits of the outer space commons available to all while concentrating the risk of space activities on those with the technology to launch. Together, the OST and the Liability Convention constitute the constitutional framework of international space law.

Definition

The Outer Space Treaty 1967 defines outer space in functional terms through its prohibition on national appropriation rather than through a specific altitude boundary. The distinction between sovereign airspace and non-sovereign outer space is accepted as a matter of state practice but no agreed delimitation altitude has been fixed. The common working distinction places the boundary at approximately 100 kilometres above sea level, the Karman line where aerodynamic lift ceases and orbital mechanics take over, but this is a scientific reference point rather than a legally binding demarcation.

Legal Foundation

Article I, OST 1967 : exploration and use free for all states for the benefit and in the interests of all countries
Article II, OST 1967 : no national appropriation by sovereignty, use, occupation, or any other means
Article IV, OST 1967 : prohibition on nuclear weapons and WMDs in orbit; Moon and celestial bodies for peaceful purposes only
Article VI, OST 1967 : state bears international responsibility for national activities; private entities require authorisation and continuous supervision
Article VII, OST 1967 : launching state internationally liable for damage caused by space objects
Article II, Liability Convention 1972 : absolute liability for damage on Earth's surface or to aircraft in flight
Article III, Liability Convention 1972 : fault-based liability for damage in outer space between space objects

[!tip] Thesis
The outer space regime is the deliberate opposite of the airspace regime: where airspace is sovereign and closed, outer space is non-appropriable and open. The OST locked that openness in place in 1967 before any state had the technology to exploit it commercially; the Liability Convention shifted the financial risk of space activities onto launching states through absolute liability for surface damage. The two instruments together make the outer space commons genuinely available to all states while keeping its costs with those capable of causing them.

Non-appropriation | Freedom | Peaceful | State responsibility | Two-tier liability | Launching state | Rescue

Non-appropriation

Article II of the OST 1967 prohibits national appropriation of outer space, the Moon, and other celestial bodies by any means: claim of sovereignty, use, occupation, or otherwise. Outer space is res communis, the common heritage of all humanity in the sense of being available to all and appropriable by none. This principle was adopted before the Moon landings and has been confirmed in practice: neither the United States through the Apollo missions nor the Soviet Union through the Luna missions claimed any territorial right over the portions of the lunar surface their spacecraft occupied or explored. The Outer Space Treaty thus locked in the non-appropriation principle before commercial exploitation became technologically feasible, preventing any first-mover advantage from hardening into territorial claim.

Freedom

Article I of the OST 1967 establishes that outer space is free for exploration and use by all states on a basis of equality and in accordance with international law. The exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind. No state may restrict another state's access to outer space, establish exclusive zones in orbit, or monopolise particular orbital slots or frequencies without going through the regime of the International Telecommunication Union (ITU) for radio frequency and orbital position coordination. Freedom of exploration is the operational counterpart of non-appropriation: the two principles together ensure that outer space is genuinely accessible to all.

Peaceful

Article IV of the OST 1967 prohibits placing nuclear weapons or any other weapons of mass destruction in orbit, on celestial bodies, or in outer space in any other manner. The Moon and other celestial bodies are reserved exclusively for peaceful purposes: no military bases, installations, fortifications, or weapons tests are permitted on celestial bodies. A critical distinction applies to Earth orbit: Article IV prohibits weapons of mass destruction in orbit but does not prohibit military satellites used for reconnaissance, communications, navigation, and early warning, which are used by all major space powers and are treated as lawful under the OST regime. The peaceful use principle applies in full to celestial bodies but applies only to weapons of mass destruction in orbit, leaving conventional military activity in orbit in a regulatory grey zone.

State responsibility

Article VI of the OST 1967 makes states internationally responsible for all national space activities whether conducted by governmental agencies or non-governmental entities. A state cannot escape responsibility by characterising the activity as private: all non-governmental space activities carried out by a state's nationals require that state's authorisation and continuing supervision. This provision has become increasingly significant as commercial space activity has expanded: states authorising private launches, satellite deployments, and commercial space stations bear full international responsibility for the conduct of those activities even where they have no operational involvement. Failure to authorise or supervise adequately constitutes a breach of the OST and engages the state's international responsibility independently of any damage caused.

Two-tier liability

The Liability Convention 1972 implements Article VII of the OST by establishing a two-tier liability regime based on where the damage occurs. Article II imposes absolute liability, requiring no proof of fault, for damage caused by a space object on Earth's surface or to an aircraft in flight: the launching state is liable regardless of the care it took in design, manufacture, or operation of the space object. Article III applies fault-based liability for damage caused in outer space: where a space object of one launching state damages a space object of another, or persons or property aboard, the launching state is liable only if the damage results from its fault or the fault of persons for whom it is responsible. The two-tier structure reflects the different risk profiles of surface damage, where innocent third parties have no means of protection, and in-space collisions, where both states are conducting space activities and both bear some element of risk.

Launching state

Article I of the Liability Convention 1972 defines the launching state as a state that launches or procures the launching of a space object, or from whose territory or facility a space object is launched. Where more than one state qualifies as a launching state for the same object, they are jointly and severally liable for any damage under Article V of the Liability Convention. The joint and several liability provision addresses multi-state commercial launch arrangements and ensures that a claimant state need not identify which launching state bears primary responsibility before presenting its claim. Claims must be presented through the state's own government to the launching state through diplomatic channels.

Rescue

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968 supplements the OST by treating astronauts as envoys of mankind: any state party that learns of an astronaut in distress must provide all possible assistance and promptly return the astronaut to the launching state. This obligation applies regardless of the nationality of the astronaut or the flag state of the spacecraft. The Registration Convention 1976 requires states to register all space objects with the United Nations Secretary-General, and the state of registry retains jurisdiction and control over the registered object while it remains in outer space.

[!example]- Case Laws

Cosmos 954 Incident (Canada v USSR, 1978 to 1981)

📋 Facts

The Soviet nuclear-powered reconnaissance satellite Cosmos 954 suffered a malfunction in January 1978 and re-entered the atmosphere, disintegrating over northern Canada and scattering radioactive debris from the satellite's nuclear reactor over approximately 124,000 square kilometres of Canadian territory. Canada incurred substantial costs in the clean-up and recovery operation.

🔨 Held

Canada presented a claim to the USSR invoking absolute liability under Article II of the Liability Convention 1972, requiring no proof of fault for damage caused on Earth's surface. After extended negotiations the USSR settled the claim in 1981 for C$3 million.

💡 Principle

The launching state bears absolute liability for damage caused by its space objects on Earth's surface regardless of fault or the care taken in the space object's design and operation; the Cosmos 954 settlement is the first and most significant application of the space liability regime in international practice.

Outer Space Treaty 1967, Article II: State Practice on Non-Appropriation

📋 Facts

The United States conducted six successful crewed lunar landing missions under the Apollo programme between 1969 and 1972. The Soviet Union conducted multiple uncrewed lunar surface missions. Both states planted national flags and collected samples, and the United States established temporary surface installations. Neither state claimed sovereignty over any portion of the lunar surface.

🔨 Held

The consistent practice of the two dominant space powers of conducting extensive operations on the lunar surface without making territorial claims confirmed that Article II of the OST 1967 operates as a binding prohibition on appropriation regardless of the extent of the physical presence.

💡 Principle

Physical presence on a celestial body, however extensive, creates no territorial right; the non-appropriation principle under Article II of the OST 1967 applies absolutely and has been confirmed by the practice of the states most capable of challenging it.

Outer Space as the Non-Sovereign Commons

The Outer Space Treaty 1967 establishes outer space as a genuine global commons: free, non-appropriable, and governed by state responsibility for all national activities whether governmental or commercial. The Liability Convention 1972 completes the framework by imposing absolute liability on launching states for surface damage and fault-based liability for in-space collisions, making the financial risk of space activities follow the states with the technology to cause them. Together the two instruments ensure that the benefits of outer space exploration are available to all humanity while placing the costs and responsibilities squarely on those with the capability to act in space.

International Organisations, United Nations, ICJ, ICC, Specialised Agencies

Q1. Discuss the structure and functions of the United Nations and its principal organs.

PRIORITY: ★★★ | PART: B | FREQ: 5

Introduction

The United Nations (UN) was established by the UN Charter signed at San Francisco on 26 June 1945, entering into force on 24 October 1945, as the successor to the failed League of Nations and the primary institutional framework for the maintenance of international peace and security. Unlike the League, the UN was designed with compulsory enforcement mechanisms under Chapter VII, near-universal membership, and a permanent Security Council with binding decision-making power. The Charter identifies four purposes under Article 1: maintaining peace and security, developing friendly relations among nations, achieving international cooperation on economic and social problems, and harmonising the actions of nations. These purposes are pursued through six principal organs established under Article 7, each with distinct composition, powers, and functions.

Definition

The United Nations is defined by its Charter as an international organisation of sovereign states, built on the principle of sovereign equality under Article 2(1), with legal personality enabling it to enter treaties, hold property, and bring international claims as confirmed by the ICJ in Reparation for Injuries Suffered in the Service of the United Nations (ICJ Advisory Opinion, 1949). The Charter is the apex instrument of the international legal order: Article 103 provides that in the event of a conflict between Charter obligations and obligations under any other international agreement, Charter obligations prevail. This supremacy clause places the UN Charter above all other treaties in the international hierarchy.

Legal Foundation

Article 1, UN Charter : four purposes of the United Nations
Article 2, UN Charter : seven principles including sovereign equality, good faith, peaceful settlement, prohibition of force, and non-intervention in domestic jurisdiction subject to Chapter VII
Article 7, UN Charter : six principal organs: the General Assembly (GA), the Security Council (SC), the Economic and Social Council (ECOSOC), the Trusteeship Council, the Secretariat, and the International Court of Justice (ICJ)
Article 25, UN Charter : members agree to accept and carry out Security Council decisions
Article 103, UN Charter : Charter obligations prevail over all other treaty obligations in case of conflict

[!tip] Thesis
The UN was deliberately designed to learn from the League's structural failures: unanimity replaced by qualified majority plus veto; voluntary sanctions replaced by compulsory Chapter VII enforcement; partial membership replaced by near-universal participation. But the veto, chosen to keep great powers inside the system, replicated the League's paralysis in a different form: not unanimity among all members, but veto by five.

General Assembly | Security Council | ECOSOC | Trusteeship Council | Secretariat | ICJ | Article 103

General Assembly

The General Assembly under Articles 9 to 22 of the UN Charter consists of all 193 member states each with one vote. It is the UN's principal deliberative forum, empowered under Article 10 to discuss any question or matter within the scope of the Charter and to make recommendations to members or to the Security Council. Important questions require a two-thirds majority under Article 18; other questions require a simple majority. GA resolutions are recommendations, not binding decisions: member states are not legally obligated to comply with them. Article 12 restricts the GA from making recommendations on disputes or situations while the Security Council is exercising its functions on that matter. The Uniting for Peace Resolution of 1950 partially addresses this constraint by permitting the GA to convene emergency special sessions and recommend collective measures including use of armed force when Security Council paralysis prevents action.

Security Council

The Security Council under Articles 23 to 32 carries primary responsibility for international peace and security under Article 24. It consists of 15 members: five permanent members (the United States, United Kingdom, France, Russia, and China, collectively the P5) who hold permanent seats with veto power over substantive decisions, and ten non-permanent members elected by the GA for two-year terms. Substantive decisions require nine affirmative votes including the concurring votes of all five permanent members under Article 27(3). Under Chapter VI, the SC may recommend procedures for peaceful settlement. Under Chapter VII, upon determining a threat to the peace, breach of the peace, or act of aggression under Article 39, the SC may impose provisional measures (Article 40), non-military measures including economic sanctions and severance of diplomatic relations (Article 41), and military action (Article 42). Chapter VII decisions are binding on all member states under Article 25, and their authority prevails over conflicting treaty obligations under Article 103.

ECOSOC

The Economic and Social Council under Articles 61 to 72 consists of 54 members elected by the GA for three-year terms. ECOSOC coordinates the economic and social work of the UN system: it makes recommendations on economic, social, cultural, educational, and health matters; drafts conventions for submission to the GA; and convenes international conferences on matters within its competence. Crucially, Article 63 authorises ECOSOC to enter into relationship agreements with the UN's specialised agencies, coordinating their activities and receiving annual reports. ECOSOC's relationship agreements provide the institutional link between the UN and bodies such as the International Labour Organization, the World Health Organization, and the Food and Agriculture Organization. ECOSOC decisions are recommendations only; it has no binding enforcement authority.

Trusteeship Council

The Trusteeship Council under Articles 86 to 91 was established to supervise the administration of trust territories placed under the UN trusteeship system: former League of Nations mandates, territories detached from enemy states after World War II, and territories voluntarily placed under trusteeship. The Trusteeship Council suspended its operations on 1 November 1994 when Palau, the last remaining trust territory, became independent and joined the UN as a member state. The Council now exists as a dormant principal organ; it amended its rules of procedure to allow it to meet if and when the occasion required, but has held no substantive sessions since 1994.

Secretariat

The Secretariat under Articles 97 to 101 is the UN's international civil service, consisting of the Secretary-General and staff appointed by the Secretary-General under regulations established by the GA. The Secretary-General is appointed by the GA upon the recommendation of the SC for five-year renewable terms and serves as the chief administrative officer of the UN. Article 99 gives the Secretary-General a unique political role: the authority to bring to the attention of the Security Council any matter that in the Secretary-General's opinion may threaten international peace and security. This provision makes the Secretary-General an independent political actor within the UN system, not merely an administrative official. Past Secretaries-General including Dag Hammarskjöld used Article 99 and its broader implied powers to intervene in crises beyond their strictly administrative mandate.

ICJ

The International Court of Justice under Articles 92 to 96 is the principal judicial organ of the United Nations; its Statute is an integral part of the Charter. The Court has contentious jurisdiction over legal disputes between states requiring state consent and advisory jurisdiction on legal questions referred by the GA, the SC, or authorised UN organs and specialised agencies. Judgments in contentious cases are binding inter partes under Article 59 of the Statute; the enforcement mechanism under Article 94 requires compliance and allows the SC to take measures to enforce compliance, subject to the P5 veto. The ICJ operates in parallel with the Security Council; the two organs are not hierarchically ordered and veto power in the SC cannot remove the ICJ's jurisdiction as confirmed in Nicaragua v USA (ICJ, 1986).

Article 103

Article 103 of the UN Charter is the supremacy clause of the international legal order: in the event of a conflict between obligations under the Charter and obligations under any other international agreement, Charter obligations prevail. This provision makes the Charter superordinate to every other treaty, including agreements predating the Charter and agreements adopted under UN auspices. The ICJ affirmed the significance of Article 103 in the Nicaragua case and subsequent advisory opinions on nuclear weapons. Article 103 ensures that Security Council decisions under Chapter VII, as Charter obligations, override conflicting treaty commitments and cannot be circumvented by invoking rights under bilateral or multilateral treaties.

[!example]- Case Laws

Reparation for Injuries Suffered in the Service of the United Nations (ICJ Advisory Opinion, 1949)

📋 Facts

Count Folke Bernadotte, a United Nations mediator, was assassinated in Jerusalem in 1948. The UN wished to present an international claim for reparation against the responsible state. The question was whether the UN, as an international organisation rather than a state, had the legal personality to bring such a claim.

🔨 Held

The ICJ held that the United Nations has objective international legal personality: it possesses international rights and duties and has the capacity to bring international claims against states including non-members. The Court reasoned from the Charter's purposes, the powers conferred, and the practice of member states that the UN must be treated as an international person.

💡 Principle

International organisations established by treaty with wide international responsibilities possess objective international legal personality; the ICJ's foundational reasoning in Reparation for Injuries remains the authoritative statement on the legal personality of the UN and all its principal organs.

Certain Expenses of the United Nations (ICJ Advisory Opinion, 1962)

📋 Facts

The UN incurred substantial expenses in financing the United Nations Emergency Force (UNEF) following the Suez Crisis and the United Nations Operation in the Congo (ONUC). France and the Soviet Union refused to contribute to these expenses, arguing the GA had no authority to authorise peacekeeping operations which fell under the exclusive purview of the Security Council.

🔨 Held

The ICJ held that peacekeeping operations authorised by the General Assembly fall within the purposes of the UN and constitute legitimate expenses under Article 17; the Security Council's primary responsibility for peace does not give it exclusive authority over all UN activity in the peace and security field.

💡 Principle

Primary Security Council responsibility under Article 24 is not exclusive: the General Assembly has concurrent authority to act for peace where the SC is unable to; the functional distribution of powers among the UN's principal organs must be interpreted in light of the Charter's purposes and not confined by strict organ-specific readings.

The United Nations as Graduated Institutional Architecture

The United Nations operates through six principal organs with distinct powers calibrated to the Charter's purposes: the Security Council holds binding Chapter VII enforcement authority; the General Assembly serves as the universal deliberative forum with recommendatory power; ECOSOC coordinates the social and economic work including supervision of specialised agencies; the Secretariat provides independent administrative and political capacity under Article 99; and the ICJ provides judicial settlement. Article 103 binds the entire system together by establishing Charter obligations as the apex of the international legal order, prevailing over all other treaty commitments.

Q2. Discuss the composition and jurisdiction of the International Court of Justice. How does it compare with the ICC?

PRIORITY: ★★★ | PART: B | FREQ: 5

Introduction

The International Court of Justice (ICJ), established as the principal judicial organ of the United Nations under Article 92 of the UN Charter and the Statute of the International Court of Justice 1945, represents one pillar of international judicial accountability: it adjudicates legal disputes between states on the basis of state consent and gives advisory opinions on legal questions. The International Criminal Court (ICC), established by the Rome Statute 1998 which entered into force in 2002, represents the complementary pillar: it holds individuals criminally accountable for genocide, crimes against humanity, war crimes, and the crime of aggression when national courts are unable or unwilling to do so. Together the two courts reflect the proposition that both states and natural persons are subjects of binding international law and that both are amenable to international judicial accountability.

Definition

The ICJ is an interstate court of civil jurisdiction: it resolves legal disputes between sovereign states and clarifies the content of international law through advisory opinions. It does not exercise criminal jurisdiction and cannot convict or sentence individuals. The ICC is an international criminal tribunal of individual jurisdiction: it prosecutes and convicts natural persons for the most serious crimes of international concern. The fundamental distinction between the two courts is the identity of the respondent: states before the ICJ, individuals before the ICC. This distinction shapes their composition, jurisdiction, procedure, and enforcement mechanisms in every respect.

Legal Foundation

Article 92, UN Charter : ICJ is the principal judicial organ of the United Nations; Statute integral part of the Charter
Article 34, ICJ Statute : only states may be parties in contentious cases
Article 36, ICJ Statute : four bases of contentious jurisdiction
Article 38, ICJ Statute : sources of international law the Court applies
Article 59, ICJ Statute : judgments binding only inter partes and in respect of that particular case
Article 5, Rome Statute 1998 : four crimes within ICC jurisdiction: genocide, crimes against humanity, war crimes, crime of aggression
Article 17, Rome Statute 1998 : complementarity; ICC acts only when national courts are unwilling or unable to genuinely prosecute
Article 27, Rome Statute 1998 : irrelevance of official capacity; no immunity for heads of state or government officials

[!tip] Thesis
The ICJ and ICC represent two distinct but structurally complementary tracks of international accountability. The ICJ holds states responsible through civil interstate adjudication. The ICC holds individuals responsible through international criminal prosecution. Together they close the accountability gap that existed when states could violate international law and their agents could commit international crimes without either the state or the individual facing a binding international judicial process.

ICJ composition | ICJ jurisdiction | ICJ advisory | Sources | ICC composition | ICC jurisdiction | Comparison

ICJ composition

The ICJ consists of 15 judges elected by concurrent vote of the General Assembly and the Security Council for staggered nine-year terms. No two judges may be nationals of the same state. Judges sit in their personal capacity as independent jurists, not as representatives of their states or governments. Where a state party to a contentious case has no national among the 15 sitting judges, it may appoint an ad hoc judge for that specific case. The concurrent election requirement by both the GA and the SC ensures geographic representation across the major legal traditions of the world while maintaining the bench's independence from any particular state's control or influence.

ICJ jurisdiction

The ICJ's contentious jurisdiction is consent-based: no state can be brought before the Court without its consent. Article 36 of the ICJ Statute identifies four bases. A special agreement, or compromis, where both parties agree after the dispute has arisen to submit it to the ICJ. A treaty clause conferring ICJ jurisdiction over disputes arising from the relevant treaty. An optional clause declaration under Article 36(2), a unilateral declaration accepting compulsory ICJ jurisdiction reciprocally in relation to any other state accepting the same obligation, subject to reservations and conditions. Forum prorogatum, where a state participates in proceedings without contesting jurisdiction, thereby implicitly consenting. The optional clause system is the most significant: over 70 states have filed declarations, but many carry reservations that exclude categories of dispute, limiting the practical scope of compulsory jurisdiction.

ICJ advisory

The advisory jurisdiction of the ICJ under Article 65 permits the General Assembly, the Security Council, and UN organs and specialised agencies specifically authorised by the GA to request advisory opinions on legal questions. Advisory opinions are not binding: states have no legal obligation to comply with them. However, they carry substantial persuasive authority as the ICJ's considered pronouncements on international law and are routinely treated as authoritative by states, domestic courts, and other international tribunals. The advisory opinion jurisdiction gives the ICJ a normative function extending beyond the resolution of bilateral disputes: it clarifies and develops general international law on questions of broad systemic importance.

Sources

Article 38 of the ICJ Statute enumerates the sources of international law the Court applies: international conventions establishing rules expressly recognised by contesting states; international custom as evidence of a general practice accepted as law; general principles of law recognised by civilised nations; and as subsidiary means, judicial decisions and the teachings of highly qualified publicists. Jus cogens peremptory norms, though not mentioned in Article 38, override all other sources including treaties and customary rules and cannot be derogated from even by agreement. Article 38 is the authoritative catalogue of international law sources and is referenced across every branch of the subject including in ICC proceedings.

ICC composition

The ICC consists of 18 judges elected by the Assembly of States Parties for non-renewable nine-year terms, organised into three chambers: the Pre-Trial Chamber, which authorises investigations and confirms charges; the Trial Chamber, which conducts trials; and the Appeals Chamber. An independent Prosecutor, elected by the Assembly of States Parties, has broad investigative powers including the proprio motu authority to initiate investigations without a state party referral or a Security Council referral. The Registrar manages the non-judicial aspects of the Court's administration. The Assembly of States Parties, consisting of all states that have ratified the Rome Statute, serves as the ICC's governance body and approves the budget, elects judges, and oversees the Court's administration.

ICC jurisdiction

The ICC's jurisdiction covers four crimes under Article 5 of the Rome Statute: genocide as defined in Article 6; crimes against humanity as defined in Article 7; war crimes as defined in Article 8; and the crime of aggression as defined in Article 8 bis, effective since 2018. Jurisdiction requires either that the crime occurred on the territory of a state party, or that the accused is a national of a state party, or that the Security Council has referred the situation under Chapter VII, which extends jurisdiction to non-party states and nationals. The ICC acts only when the complementarity threshold is satisfied under Article 17: the national court with primary jurisdiction must be unwilling to genuinely prosecute, as where proceedings are designed to shield the accused, or unable to do so, as where the state has collapsed or the judicial system is unavailable.

Comparison

The ICJ and ICC differ across five fundamental dimensions. First, parties: only states may appear before the ICJ in contentious proceedings; only natural persons are prosecuted before the ICC. Second, subject matter: the ICJ adjudicates any legal dispute between states including treaty interpretation, territorial delimitation, diplomatic immunity, and state responsibility; the ICC is confined to four core international crimes. Third, basis of jurisdiction: the ICJ requires state consent through compromis, treaty clause, optional clause declaration, or forum prorogatum; the ICC's jurisdiction is treaty-based, territorial, and personal, with Security Council referral as the override. Fourth, outcome: the ICJ delivers a judgment binding on the parties to the specific dispute; the ICC delivers a criminal conviction or acquittal of an individual. Fifth, enforcement: ICJ judgment enforcement runs through Article 94 of the UN Charter subject to P5 veto; ICC enforcement depends on state cooperation in arresting and surrendering accused persons, with no direct coercive mechanism.

[!example]- Case Laws

Nicaragua v USA (ICJ, 1984 and 1986)

📋 Facts

Nicaragua brought proceedings against the United States alleging violations of customary international law on the non-use of force, non-intervention, and respect for sovereignty arising from US support for the Contras and the mining of Nicaraguan harbours. The United States challenged ICJ jurisdiction and later withdrew from the proceedings entirely.

🔨 Held

The ICJ upheld jurisdiction on the basis of Nicaragua's optional clause declaration and the US-Nicaragua Treaty of Friendship; it found the United States in breach of customary international law on the non-use of force and non-intervention; the US vetoed Security Council enforcement of the judgment.

💡 Principle

Optional clause jurisdiction is valid and reciprocal; withdrawal from proceedings does not divest the Court of jurisdiction; the Security Council's enforcement mechanism under Article 94 is structurally inoperative where the non-complying state is a permanent member; ICJ legitimacy rests on judicial authority rather than coercive enforcement capacity.

Prosecutor v Thomas Lubanga Dyilo (ICC, 2012)

📋 Facts

Thomas Lubanga Dyilo, commander of the Union of Congolese Patriots militia, was charged by the ICC Prosecutor with the war crime of conscripting and enlisting children under 15 years of age and using them to participate actively in hostilities in the Ituri region of the Democratic Republic of Congo between 2002 and 2003. The DRC referred the situation to the ICC and was found unable to prosecute, satisfying complementarity.

🔨 Held

The ICC Trial Chamber found Lubanga guilty of the war crime of conscripting and enlisting child soldiers under 15 and sentenced him to 14 years imprisonment. This was the first conviction delivered by the ICC since its establishment in 2002 and confirmed both the Court's operational capacity and the complementarity principle in practice.

💡 Principle

Complementarity under Article 17 of the Rome Statute activates ICC jurisdiction when a state with primary jurisdiction is unable to genuinely prosecute; the first ICC conviction established that the Court can deliver effective individual criminal accountability as a backstop to national justice systems.

ICJ and ICC as Complementary Pillars of International Accountability

The ICJ exercises consent-based interstate jurisdiction applying the Article 38 sources catalogue with judgments binding inter partes and advisory opinions carrying persuasive authority across the international legal system; the ICC exercises criminal jurisdiction over individuals for four core crimes on a complementarity basis when national courts are unwilling or unable to genuinely prosecute; the five-dimension comparison across parties, subject matter, jurisdiction, outcome, and enforcement reveals them as structurally complementary: the ICJ holds states accountable, the ICC holds individuals accountable, and together they represent the proposition that both subjects of international law answer to international judicial processes.

Q3. Discuss the role and functions of the specialised agencies of the United Nations with reference to the ILO and WHO.

PRIORITY: ★★ | PART: B | FREQ: 3

Introduction

Specialised agencies of the United Nations are independent intergovernmental organisations established by their own founding treaties with wide international responsibilities in economic, social, cultural, educational, health, and related fields, brought into relationship with the United Nations under Articles 57 and 63 of the Charter through relationship agreements negotiated with the Economic and Social Council (ECOSOC). They are not organs of the United Nations: they have their own membership, governance, constitutions, budgets, and legal personalities. Their relationship with the UN is one of coordination and information-sharing rather than subordination. The International Labour Organization (ILO) and the World Health Organization (WHO) are the most significant specialised agencies in terms of the breadth of their mandates, the depth of their standard-setting, and their practical impact on the daily lives of people across the world.

Definition

A specialised agency is defined by Article 57 of the UN Charter as an intergovernmental organisation established by intergovernmental agreement with wide international responsibilities as defined in its basic instrument in economic, social, cultural, educational, health, and related fields, brought into relationship with the United Nations. The key characteristics distinguishing a specialised agency from a UN organ are: independent founding treaty; independent membership, which may differ from UN membership; independent budget and governance; and a relationship with the UN mediated through a formal relationship agreement with ECOSOC rather than through the Charter's principal organ structure. Each specialised agency has its own objective international legal personality as confirmed by the Reparation for Injuries reasoning of the ICJ.

Legal Foundation

Article 57, UN Charter : specialised agencies brought into relationship with UN are independent organisations with wide international responsibilities

Article 63, UN Charter : ECOSOC authorised to enter relationship agreements with specialised agencies; may coordinate their activities and receive reports

ILO Constitution 1919 : tripartite structure; Labour Conventions and Recommendations as standard-setting instruments

Philadelphia Declaration 1944 : expanded ILO mandate to social justice as the foundation of universal peace

ILO Declaration on Fundamental Principles and Rights at Work 1998 : four fundamental labour rights binding on all member states

WHO Constitution 1948 : objective of the highest possible level of health for all peoples

International Health Regulations (IHR) 2005 : binding instrument on public health emergencies

[!tip] Thesis
Specialised agencies are the operational layer of the UN system: they translate the Charter's broad social and economic objectives into concrete technical standards, surveillance systems, and capacity-building programmes. Their effectiveness turns on the same structural reality that limits all international law: they set binding standards and provide technical assistance, but enforcement depends on political will and state cooperation since none possesses coercive authority over sovereign members.

Relationship with UN | ECOSOC coordination | ILO structure | ILO standards | WHO mandate | WHO achievements | Limits

Relationship with UN

Specialised agencies maintain their relationship with the United Nations through formal relationship agreements negotiated between ECOSOC and the agency, approved by the agency's governing body and the General Assembly. These agreements provide for reciprocal representation, consultation on matters of common concern, exchange of information, cooperation on budgetary and financial matters, and avoidance of duplication of effort. ECOSOC may make recommendations to specialised agencies on any matter within their competence but cannot issue binding instructions: the agencies remain independent organisations governed by their own constitutions and the decisions of their own member states. The relationship is one of institutional coordination within a common system rather than a principal-agent relationship with the UN at the apex.

ECOSOC coordination

ECOSOC's coordination role under Article 63 of the UN Charter is the principal institutional mechanism linking the specialised agencies to the UN's overarching purposes. ECOSOC receives annual reports from the specialised agencies, reviews their activities in relation to the GA's priorities, and makes recommendations aimed at coordinating their programmes with the broader UN agenda. In practice, coordination is imperfect: agencies have independent budgets funded by assessed and voluntary contributions from their own member states, and their governing bodies may set priorities that differ from ECOSOC recommendations. The UN System Chief Executives Board for Coordination, chaired by the Secretary-General, supplements ECOSOC coordination at the administrative level, but systemic fragmentation remains a structural feature of the UN specialised agency architecture.

ILO structure

The ILO's tripartite structure is unique in the international system. Each member state sends four delegates to the International Labour Conference, the ILO's supreme governing body: two government delegates, one employers' delegate nominated by the most representative employers' organisation, and one workers' delegate nominated by the most representative workers' organisation. Each delegate votes independently. This means that at the International Labour Conference, workers' and employers' delegates from every member state vote on the adoption of Conventions and Recommendations alongside government delegates, and their votes carry equal weight. No other international organisation gives non-governmental actors a direct constitutional role in the legislative process. The Governing Body, the ILO's executive organ, is similarly tripartite with government, employer, and worker representatives.

ILO standards

The ILO develops international labour standards through Conventions, which are binding treaties open for ratification by member states, and Recommendations, which are non-binding guidelines supplementing Conventions or addressing matters not suitable for a binding instrument. Ratification of an ILO Convention creates a binding international obligation to bring national law and practice into conformity with the Convention's requirements and to report periodically to the Committee of Experts on compliance. The supervisory architecture consists of the Committee of Experts on the Application of Conventions and Recommendations, the Conference Committee on the Application of Standards, and complaints procedures under Articles 24 and 26 of the ILO Constitution. The ILO Declaration on Fundamental Principles and Rights at Work 1998 establishes four fundamental rights binding on all 187 member states regardless of ratification: freedom of association and collective bargaining, elimination of forced labour, abolition of child labour, and elimination of employment discrimination.

WHO mandate

The WHO's mandate under its Constitution is to act as the directing and coordinating authority on international health: assisting governments in strengthening national health services; promoting health standards; stimulating the eradication of epidemic and endemic diseases; fostering activities in the field of mental health; and promoting cooperation among scientific and professional groups that contribute to the advancement of health. The WHO Constitution's definition of health as a state of complete physical, mental, and social well-being and not merely the absence of disease frames the mandate as encompassing social determinants of health, mental health, and health equity, not merely biomedical disease control. The WHO's standard-setting authority under Article 22 of its Constitution gives the World Health Assembly the power to adopt regulations on matters including sanitary requirements, standards of diagnostic procedures, and safety of biological products; these regulations enter into force for all member states unless they opt out.

WHO achievements

The WHO's landmark achievement is the global eradication of smallpox, certified by the World Health Assembly in 1980 after a coordinated international vaccination campaign: the first and to date only human infectious disease eradicated from the natural world through international action. The WHO developed and maintains the International Health Regulations 2005, a legally binding instrument under Article 22 of the WHO Constitution requiring all member states to report public health events that may constitute a public health emergency of international concern, develop core surveillance and response capacities, and cooperate with WHO emergency responses. The IHR 2005 replaced the earlier International Sanitary Regulations and expanded the scope of the reporting obligation from specified diseases to any event meeting the PHEIC criteria, giving the WHO Director-General authority to declare a Public Health Emergency of International Concern and recommend temporary or standing measures to address it.

Limits

The fundamental constraint on specialised agencies including the ILO and WHO is the absence of coercive enforcement authority over sovereign member states. The ILO cannot impose sanctions on states that fail to implement ratified Conventions; its supervisory system operates through expert review, public scrutiny, and the reputational consequences of non-compliance. The WHO cannot compel states to report, cannot conduct inspections without invitation, and cannot override sovereign public health decisions. The International Health Regulations 2005 are legally binding but enforcement depends on state cooperation. The COVID-19 pandemic exposed the structural gap between the WHO's coordinating mandate and its enforcement authority. The AG for Canada v AG for Ontario (Privy Council, 1937) case illustrated the domestic implementation gap: even where a state is internationally bound by a ratified ILO Convention, domestic implementation in a federal state requires legislative action in the appropriate jurisdiction, and international obligation does not automatically become enforceable domestic law.

[!example]- Case Laws

Attorney General for Canada v Attorney General for Ontario (Privy Council, 1937)
📋 Facts
The Government of Canada ratified several ILO Conventions on hours of work and weekly rest. The Canadian provinces refused to implement the Conventions by provincial legislation, arguing the subject matter fell within provincial rather than federal jurisdiction under the Constitution Act 1867. The question was whether the federal government could legislate to implement the Conventions over provincial competence.

🔨 Held
The Privy Council held that ratification of an ILO Convention binds Canada internationally but does not automatically give the federal parliament authority to legislate on matters of provincial competence; domestic implementation of international obligations is governed by the domestic constitutional distribution of powers.

💡 Principle
International obligations created by ILO Conventions bind the state party but domestic implementation requires legislation in the constitutionally competent legislature; in federal states this may require action by federated units; the gap between international obligation and domestic enforcement is a structural feature of the dualist model of international law reception.

Reparation for Injuries Suffered in the Service of the United Nations (ICJ Advisory Opinion, 1949)
📋 Facts
The ICJ was asked whether the United Nations possesses the international legal personality to bring a claim for reparation against a state responsible for injury to a UN agent. The reasoning required the Court to examine whether international organisations created by treaty could hold legal personality independently of their member states.

🔨 Held

The ICJ held the UN has objective international legal personality, possesses international rights and duties, and has the capacity to bring international claims. This reasoning applies with equal force to the specialised agencies: each has its own objective legal personality by virtue of its founding treaty, its international responsibilities, and the conduct of member states in treating it as an independent legal actor.

💡 Principle

Specialised agencies possess objective international legal personality enabling them to enter into treaties, hold property, and bring international claims; their legal capacity is independent of and not reducible to the aggregate personality of their member states; the Reparation for Injuries principle is the foundational authority for the legal status of all UN system organisations.

Specialised Agencies as the Operational Layer of the UN System

Specialised agencies implement the UN's social and economic mandate through independent treaty-based organisations coordinated through ECOSOC but not subordinate to it. The ILO's tripartite architecture and its binding fundamental labour standards through the 1998 Declaration, and the WHO's directing authority on international health and the binding International Health Regulations 2005, represent the deepest penetration of international law into domestic governance across the largest number of states in any functional field. Both face the structural constraint that governs all international law: they set standards, build capacity, and apply technical pressure; but enforcement depends on political will and state cooperation since neither possesses coercive authority over sovereign members.

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