TOPIC 1 : NATURE AND DEFINITION OF INTERNATIONAL LAW

UPSC 2000-2022

CLICK YEAR TO DIRECTLY READ THE QUESTION & ANSWER

UPSC 2022	UPSC 2021	UPSC 2020	UPSC 2019	UPSC 2018	UPSC 2017
UPSC 2016	UPSC 2015	UPSC 2014	UPSC 2013	UPSC 2012	UPSC 2011
UPSC 2010	UPSC 2009	UPSC 2008	UPSC 2007	UPSC 2006	UPSC 2005
UPSC 2004	UPSC 2003	UPSC 2002	UPSC 2001	UPSC 2000	

UPSC 2022	Keeping in view the growth of International Law in the contemporary era, do you think the classical definition of International Law has become redundant?
HOW TO ANSWER THIS QUESTION	**This Question has to be answered in 3 Parts.** • What are those Classical Definitions. • Why it has become redundant. • What are the Modern Definitions – so that we can trace the growth of contemporary era.

CLASSICAL DEFINITION OF INTERNATIONAL LAW : There are two important *classical definitions* of International law.

Oppenheim.—Law of nations or international law is the name for the body of *customary and treaty rules* which are considered legally binding by civilized States in their mutual intercourse with each other.	*J.L. Brierly.*—The law of nations, or international law, may be defined as the body of rules and principles of action which are binding upon civilised States in their relations with one another.

WHY THE CLASSICAL DEFINITIONS ARE REDUNDANT?

REASON 1 : International law is not just about customary rules and treaties.

- As *Lissitzyn* argues, even General Principles of Law of Muncipal law, for example, the principles of audi alteram partem, estoppel, res judicata, circumstantial evidence, etc. are followed in international law also.
- Further, judgments of international judicial tribunals are recognised as sources of IL.

REASON 2 : The classical exposition is considering state as ONLY subject of International law which is not true. Even International Organisations and Non-state entities are also NOW part of IL. In 1949, ICJ in *Jersalem case* held that UNO is subject of IL and capable of having international rights and duties.[1]

[1] In 1949 the International Court of Justice was asked by the General Assembly of the United Nations for its opinion on matters arising out of the assassination of a UN representative in Jerusalem.

REASON 3 : *Global Human rights movement* starting with UDHR has cemented the position of Individuals in Modern IL. The Nuremberg War Crimes Tribunal 1946 brought forth international obligations of individual.

REASON 4 : Use of the word '*Civilized states*' which has the effect of distinguishing '*uncivilized States*' for the application of International law is severely criticised.

MODERN DEFINITION OF INTERNATIONAL LAW

J.G. Starke.—International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other and which includes also

1. the rules of law relating to the *functioning of international institutions or organisations, their relations with each other, and their relations with States and individuals; and*

2. certain rules of law *relating to individuals and non-State entities* so far as the rights or duties of such individuals and non-State entities are the concern of the international community.

CONCLUSION | EXPANDED CONTOURS OF MODERN INTERNATIONAL LAW

- Since the League of Nations, ILO, and UN were founded, much has changed. These modern definitions have taken note of recent developments and, therefore, differs from the definitions of classical writers of international law.
- **The scope of international law today is immense. From the** regulation of space expeditions to the question of the division of the ocean floor, and from the protection of human rights to the management of the international financial system, its involvement has spread out

from the primary concern with the preservation of peace, to embrace all the interests of contemporary international life.

- Even the **OPPENHEIM definition** is now amended to reflect the contemporary times.[2]

[2] The ninth edition of OPPENHEIM(1992) has been edited by Sir Robert Jennings and Sir Arthur Watts.

UPSC 2021	Discuss the various efforts made towards the codification of International Law during the 20th century
HOW TO ANSWER THIS QUESTION	This is a simple Question if you know the factual background of codification under International law. One has to write on • INTRODUCTION : Meaning of Codification under IL • BODY OF THE ANSWER : Tracing various efforts of Codification of IL. • CONCLUSION : How Codification helped International law. [Merits and Demerits]

MEANING OF CODIFICATION

Article 15 of the statute of the International Law Commission (ILC) states that codification means "*the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine*".

VARIOUS EFFORTS ON CODIFICATION

HAGUE PEACE CONFERENCES 1899 & 1907 : Main work of codification of international law begins with the *First Hague Peace Conference 1899*, were three important Conventions were adopted on (1) Pacific Settlement of International Disputes;(2) Laws and Customs of War on Land; and (3) Geneva Convention to Naval Warfare.

The Second Hague Peace Conference was convened in 1907 which produced 13 Conventions. The three Conventions corresponded with the Conventions of 1899 and 10 Conventions were new.

LEAGUE OF NATIONS: The systematic codification of international law commenced with the initiative of the League of Nations. In 1924, the Council of the League constituted a committee of 16 jurists which, in 1927, reported seven topics for codification.

UNITED NATIONS : One of the functions of the General Assembly of the UN ,under article 13 (1) (a) of the Charter of the United Nations, is "encouraging the progressive development of international law and its codification".

The *Codification Division of the United Nations Office of Legal Affairs* helps in providing substantive secretariat services to relevant bodies established by the UN General Assembly, such as *the International Law Commission(ILC)*, as well as the *Assembly's Sixth (Legal) Committee,* and *to diplomatic conferences* of plenipotentiaries convened to negotiate multilateral treaties.

ILC : UNGA established the ILC in 1947 with a separate statute for development and codification of IL.

The work of the ILC has seen important Conventions which include the

- four Geneva Conventions on the Law of Sea, 1958;
- Vienna Convention on Diplomatic Relations, 1961;
- Convention on Consular Relations, 1963;
- Convention on the Law of Treaties, 1969;
- Vienna Convention on Succession of States in Respect of Treaties, 1978; and
- Convention on the Law of Treaties, 1986 to which international organisations are parties.
- Rome Treaty of the ICC, 2002.

The General Assembly in 1966 had set up the "core legal body" of governmental experts in the field of international trade law known as UN Commission for International Trade Law (UNCITRAL). It has codified the following conventions :

- Convention on the Carriage of Goods, 1974;
- Convention on the Carriage of Goods by Sea, 1978 and
- UN Convention on Contract for Sale of Goods, 1980.
- Model law on International Commercial Arbitration in 1985.

CONCLUSION | HOW CODIFICATION HELPED INTERNATIONAL LAW

MERITS OF CODIFICATIONS	DEMERITS OF CODIFICATIONS
• IL is made accessible, intelligible and simple. • It fills gaps in existing international law and also provide rules for new situations. • It developed IL in areas were divergent rules or there were no rules. Such as law of the sea, diplomatic agents and human rights may be cited as examples. • It facilitated the work of ICJ, ICC and international tribunals.	• Codification obstructs natural growth of law and introduces rigidity in it • It may result in uncertainty and ambiguity of certain terms until case-law clarifies it. • It may result in conflict between codified law and international custom.

UPSC 2020 UPSC 2006	**Do you agree with the view that International Law is merely a positive morality? Discuss the nature of International Law. UPSC 2020 & 2006.**
HOW TO ANSWER THIS QUESTION	**This is once again a simple question if you had gone through the approaches of International law.** **<u>INTRODUCTION :</u> Austin Definition of Law and International law. Elements of the definition.** **<u>BODY OF THE ANSWER: Austin view on International law</u>**

AUSTIN [IS INTERNATIONAL LAW A MERE POSITIVE MORALITY?]

DEFINITION GIVEN BY AUSTIN : According to Austin,

"International Law is not true law, but a Code of rules of conduct of moral force only"	*"Law is the command of the sovereign. Law is the aggregate of rules set by men as politically superior or sovereign, to mean as politically subject."*

TWO ELEMENTS OF HIS DEFINITION :

1. Law is a command enacted by the <u>sovereign legislative authority</u> i.e. any rule which is not enacted by sovereign or superior cannot be regarded as law, and

2. Command must be enforced by the sovereign authority, i.e. if laws are violated, there should be 'adequate sanction behind it' OR 'orders backed by threats'.

If these two elements are not there, such rule is not considered as a 'proper' Law.

AUSTIN VIEW ON INTERNATIONAL LAW

International Law cannot be called law proper in true sense, because, it lacks two elements of law i.e., it has neither *sovereign legislative authority to enact law* nor *there is an adequate sanction behind it.*

LAW	MORALITY
Law demands an absolute subjection to its rules and commands.	Morality demands that States should act from a sense of ethical duty.
Law has enforcing authority	Morality has no such enforcing authority.
Law is heteronomous (being imposed upon the outer life of men)	Morality is autonomous (coming from the inner life of men).
Law applies to all the subjects whether they want or not.	Morality defers in application from subject to subject.

In international law, there is no enforcement agency which can enforce it as a body of rules. These are the reasons for the Austin preferred to call International Law as *'positive international morality'.*

POSITIVE MORALITY :

- *Positive,* in jurisprudence parlance, means that rules presently enforceable. Since there is no sovereign authority and sanctions behind international law, it has been regarded by him as a rule of morality.

- Such rules or morality which are in existence with common consent of the community are different from rules of law which are enforced by external power.

CRITICISM ON AUSTIN VIEW : *Sir Pollock* argues that framers of states papers concerning foreign policy do not focus on moral argument or righteousness , rather focus on to precedents, treaties and opinions of specialists.[3]

1. UN Charter-law is based on the true legality of international law.
2. ICJ can decide in accordance with international law such disputes as are submitted to it vide Article 38 of the ICJ Statute.
3. In addition to customs, a substantial amount of international legislation in the form of treaties and conventions has come into existence through established means of law making in International law.
4. Since the States look upon international law as governing their relations inter se, and ipso facto binding upon them, it would be pedantic to consider such a body of rules as 'true law'.

CONCLUSION : Jurist Bryce considered the imperative theory of Austin is 'untrue as a matter of history. On consideration of the above-said criticism, Austin view that international law is not a law but merely a positive morality, does not appear to be correct.

[3] Sir Pollock rightly said, "If international law were only a kind of morality, the framers of States papers concerning foreign policy would throw all their strength on moral argument. But as a matter of fact this is what not they do. They appear not to the general feeling of moral rightness, but to precedents, to treaties and 10 opinions of specialists. They assume the existence among statesmen and publicists of a series of legalas distinguished from moral obligations in the affair of nations."

UPSC 2019	"International Law is the vanishing point of Jurisprudence." Explain.
UPSC 2007	"International Law is defined as 'Vanishing point of Jurisprudence'." (Holland). Examine this viewpoint with reference to the nature of International Law.
HOW TO ANSWER THIS QUESTION	**This question can be answered if one know the approaches of International law.** **One has to write on** • **INTRODUCTION : Definition of Holland** • **BODY OF THE ANSWER : His view** • **CONCLUSION : How Codification helped International law. [Merits and Demerits]**

HOLLAND: INTERNATIONAL LAW IS THE VANISHING POINT OF JURISPRUDENCE (INTERNATIONAL LAW IS A LAW BY COURTESY

Holland | International Law is the vanishing point of jurisprudence, since it lacks any arbiter of disputed questions, save public opinion, beyond and above the disputed parties themselves, and since, in proportion as it tends to become assimilated to true law by the aggregation of States into a larger society, it ceases to be itself, and is transmitted into the public law of a federal Government.

HOLLAND VIEW ON INTERNATIONAL LAW.

Holland states that

- *International Law "can indeed be described as law only by courtesy*, since the rights with which it is concerned cannot properly be described as legal."
- The law of nations is but private law 'writ large'.
- International law lacks in any powerful arbiter and law without an arbiter is contradiction in terms. It is nothing more than the moral Code of nations; it is the vanishing point of jurisprudence.

His conclusion is based on the facts that

- ✓ International law lacks *an arbiter above the parties themselves .*
- ✓ In proportion, International law tends to become *assimilated to true law by the aggregation of States into a larger society it ceases to be itself and is transmitted into the public law of a federal government.*
- ✓ According to Holland, the true test of law lies in the fact that *it must be obeyed; if not obeyed, there is sanction (punishment).* But international law has **neither any powerful machinery nor any sanction to punish its transgressors and the aggressor** - States make frequent violations of it and they go unpunished. Hence international law cannot maintain its existence due to its frequent violations with impunity.

CRITICISM OF HOLLAND VIEW

Holland's view of non-existence of sanctions behind international law is not correct.

REASON 1 : SANCTIONS ARE THERE : It can be only said that sanctions behind international law are much weaker than their counterparts in the municipal law, but saying no sanctions at all behind international law cannot be true.

For example,

- if there is a threat to international peace and security, under Chapter VII of the UN Charter, the Security Council can take necessary action to maintain or restore international peace and security.
- Besides this, the decisions of the International Court of Justice are final and binding upon the parties to the dispute (Article 59 of the Statute of the Court).

REASON 2 : INTERNATIONAL TRIBUNALS : It is not correct to say that international legal system is without a Court to decide international disputes.

- The establishment of the Permanent Court of International Justice established under the League of Nations, has rightly been reckoned as a landmark for the development of international law because through it international legal system was provided with a judicial organ to resolve international disputes through the judicial decision. Now it is called International Court of Justice.

It must be admitted that international law is weak law but it does not mean that it does not exist and has no future. Its future is certainly high. In fact, law and it is wrong to say that it is the vanishing point of jurisprudence.

UPSC

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UPSC 2018	Explain the distinctions between traditional and modern definitions of international law. Critically examine the growing scope and importance of international law in the present context. UPSC 2018.
HOW TO ANSWER THIS QUESTION	**PART 1 : Distinction on Traditional and Modern International Law can be understood from UPSC 2022 Question. Try to summarize it.** **PART 2 : Scope of International Law and Importance.**
UPSC 2010	"The fundamental principles of International law are passing through a serious crisis and this necessitates its reconstruction." Do you agree with this statement? Give reasons. UPSC 2010.
HOW TO ANSWER THIS QUESTION	• This question was asked based on https://www.icj-cij.org/public/files/case-related/3/003-19480528-ADV-01-01-EN.pdf • It is an Individual Opinion by M. Alvarez given on ICJ's conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) • This statement however cannot be understood in such narrow perspective. One has to explain the scope of International law.

PART 2 | SCOPE OF INTERNATIONAL LAW | The scope of international law today is immense.

EXPANSIVE AREA	EXPANDING COMPONENTS
From the regulation of space expeditions to the question of the division of the ocean floor, and from the protection of human rights to the management of the international financial system, its involvement has spread out from the primary concern with the preservation of peace, to embrace all the interests of contemporary international life. [4]	International law, is not restricted to "states" alone, but has extended itself to include individuals, groups and international organisations, both private and public, within its scope. It has also moved into new fields covering such issues as international trade, problems of environmental protection, human rights and outer space exploration.

SUBJECT 1 : STATE

International law is primarily concerned with the rights, duties and interests of States.

ESSENTIALS OF STATEHOOD	(a) permanent population; (b) defined territory; (c) a government; and (d) capacity to enter into relations with other States.

SUBJECT 2: INDIVIDUAL :

TRADITIONAL APPROACH : Traditionalist approach is that only States as the only subjects of international law.

MODERN APPROACH : The modern international law applies to several other entities including individuals.

[4] This is a statement taken from Malcolm Shah, International Law.

Criticism: Certain rules of international law apply to individuals, it cannot be agreed that individuals are only subject of International law, unless they are endowed with treaty-making power and the procedural capacity to be a party to international adjudication.

OBLIGATIONS IMPOSED ON INDIVIDUAL **: Treaties** concluded after the First World War, Treaty of Versailles, 1919 (Art. 297 and 304) and the Polish-German Convention of 1922 relating to Upper Silesin, the individual claimants were allowed access to various Mixed Arbitral Tribunals. The Nuremberg and Tokyo Tribunals setup by the victorious Allies to prosecute WAR CRIMINALS after the close of the Second World War were a vital in making Individual as a part of International law.

HUMAN RIGHTS :

- Similarly, the 1948 Genocide Convention provided for the punishment of offenders after conviction by national courts or by an international criminal tribunal.
- UDHR IN 1948 & Other human rights treaties have recognised individual rights in international plane.
- Within the European Union, individuals and corporations have certain rights of direct appeal to the European Court of Justice against decisions of the various Union institutions. In addition, individuals may appear before certain international tribunals.

SUBJECT 3 : INTERNATIONAL INSTITUTIONS AS A SUBJECT OF INTERNATIONAL LAW

International organisations & regional international organisations and communities have now been accepted as possessing rights and duties of their own and a distinctive legal personality. *The International Court of*

Justice in 1949 delivered an Advisory Opinion in which it stated that the United Nations was a subject of international law and could enforce its rights by bringing international claims.

CONCLUSION : ***Starke*** sum up the subjects of International Law thus: "To sum up, it may be said:

- That under modern practice, the number of exceptional instances of individuals or non-State entities enjoying rights or becoming subject to duties directly under international law, has grown.
- That the doctrinaire rigidity of the procedural convention precluding individuals from prosecuting a claim under international law except through the state of which they are nationals, has been to some extent tempered.
- That the interests of individuals, their fundamental rights and freedoms, have become a primary concern of international law."

2017 UPSC	THERE WAS NO QUESTION IN THIS AREA.
2016 UPSC	**Discuss the constituent elements of an international rule of customary law with the help of cases.**
2013 UPSC	**"The substance of customary law must be looked into primarily in actual practice and 'opinio juris' of the States." In the light of above statement and by referring to case law, explain the interplay between objective and subjective elements in acceptance of a particular custom as a source of international law.**

For these two questions,

- ✓ **INTRODUCTION : Meaning of Custom as Source of International law.**
- ✓ **BODY OF THE ANSWER : Elements of Custom.- Actual Practice + Opinio Juris.**

CUSTOM AS A SOURCE OF INTERNATIONAL LAW

ARTICLE 38(A) of ICJ Statute deals with "Custom" as a source of International law.

- ✓ Customs are authentic expression of the needs and values of the community at any given time.

- ✓ Under I.C.J. Statute Article 38(1)(b), "a general practice accepted as law" is an international custom. It is a dynamic source of law.

De Visscher analogy on how customs forms : A vacant land. One state takes a route. Others follows it. Vacant land becomes a road travelled.

In *North Sea Continental Shelf (Germany v. Denmark),* the ICJ recognised that there is no precise length of time during which a practice must exist. The essence is that it must be followed long enough to show that the other requirements of a custom are met.

TWO ELEMENTS OF CUSTOM

Can be deduced = *Libya/Malta* case, the substance of customary law must be 'looked for primarily in the actual practice and *opinio juris* of states'

1. **Overt action** *:Material facts/ actual behaviour of the states*.

This practice is shown by the acts of States in their mutual relations with each other. The observance and acceptance of a practice gives birth to a customary rule of international law. When more and more States endorse this practice, it acquires the status of universal custom.

In *S.S. Lotus case (France v. Turkey), the Permanent Court of International Justice (PCIJ), w*hile examining the French government's argument, observed: *States had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so, for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.*

The practice of States can be regional or general. It is not necessary that it be universal. The statute of the ICJ uses the expression "general practice accepted as law". The State claiming the custom has to prove that it is legally binding on other States.

In *Right of Passage over Indian Territory case (Portugal v. India),* the ICJ conceded that even a local custom between two States may exist, if there is a "long continued practice…accepted by them as regulating their relations".

2. ***Subjective Conviction*** *: Psychological/ Subjective belief that certain rule is a law : opinio juris sive necessitatis* = was first formulated by the French writer Francois Geny as an attempt to´ differentiate legal custom from mere social usage.

In the *North Sea Continental Shelf cases,* the ICJ pointed out that not only the acts concerned should amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief, i.e. the existence of a subjective element is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must, therefore, feel that they are conforming to what amounts to a legal obligation.

UPSC 2012	**It is often said that customary international law is easier to apply than to define. What are the inherent problems in defining 'custom' and how can a custom be considered as a source of international Law?**
HOW TO ANSWER THIS QUESTION	**INTRODUCTION : Why is it easier to apply than define.** **BODY :** ✓ **Problems in defining custom** ✓ **Elements of Customs.**

DEFINITION OF CUSTOM :

- ✓ There is no definition of custom.
- ✓ Custom is oldest source of international law and it means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. Obligatory denotes that there must be "sanction" if custom is departed. Custom is such a usage as has the force of law.

PROBLEM IN DEFINING ONE : The question, whether a particular usage has or has not crystallised into a custom and has become obligatory, has many difficulties, particularly when there is no agreement about its existence. It is for the courts to extract the rule from the mass of heterogeneous documents, State practices, municipal judicial decisions, etc. and accord it legal authority.

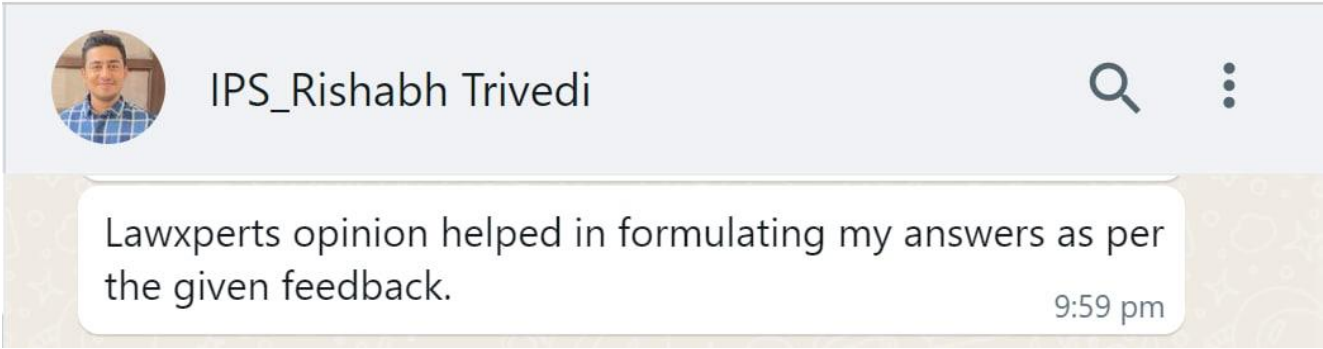
- ✓ In *Asylum (Colombia v. Peru),* the ICJ regarded custom as any "constant and uniform usage accepted as law". The word "usage" has been used for custom.
- ✓ In *North Sea Continental Shelf (Germany v. Denmark*), the ICJ recognised that there is no precise length of time during which a practice must exist. ……. custom is that the States concerned must feel that they are conforming to what amounts to a legal obligation. The court pointed out the distinction between custom and rules of courtesy, convenience or tradition.

CONCLUSION | IN DEFINING CUSTOM

1. Uncertainty will always exist without a formal source for customary rule creation. International law is also unclear.
2. The ICJ has repeatedly cited the traditional theory and stated that it looks "primarily in the actual practise and opinio juris of states" for customary law in a given situation. ICJ rulings have varied.

Depending on the issue, customary rules seem to be created differently. When an obligation is treaty-based, opinio juris seems to be enough to establish a customary rule without considering state practise.

3. The ICJ's increasing use of opinio juris to find customary rules highlights the fragmentation of traditional customary law. The ICJ seeks customary law “primarily in the actual practise and opinio juris of states”. It rarely investigates states' actual and quantitative behaviour, instead focusing on whether there is general belief in its existence, which determines opinio juris
4. In the Nicaragua case, the ICJ relied more on UN resolutions and international treaties than state practise, stating that "the text testifies to the existence and the acceptance by the United States, of customary principle which has universal application."



UPSC 2014	**It is impossible to fix a precise date or period in history to mark the beginning of International Law as it predates recorded history. Critically examine the history, nature, scope and relevance of International Law in Contemporary International Society**

This answer is only for History of International Law. Other areas have been explained before in UPSC 2016-2021.

This answer is based on *Malcolm Shah, International Law.*

HISTORICAL DEVELOPMENT: Foundations of International law can be traced to development of *Western culture and political organisation.* Though *International law/ law of nations* can be traced back some 400 years, certain of the basic concepts of international law can be discerned in political relationships **thousands of years ago.**

EXAMPLES DENOTING EMERGING OF VARIOUSPRINCIPLES/CONCEPTS OF INTERNATIONAL LAW

- **Boundary treaty – between** rulers of Lagash and Umma.
- **Peace treaty – between** Rameses II of Egypt and the king of the Hittites
- **Defensive alliance** of Kadesh, north of Damascus.
- Prophet Isaiah declared that sworn agreements, even where made with the enemy, must be performed.

However, it should be concluded that, the notion of a universal community with its ideal of world order was not in evidence.

CITY-STATES EMERGING: **In city-states such as Greece and Rome, d**evelopment of treaties between city-states, sanctity and protection of diplomatic envoys etc..**Corpus Juris Civilis**, a compilation of legal material by a series of **Byzantine philosophers** completed in **AD 534**.

THE MIDDLE AGES AND THE RENAISSANCE : This age marked the development of ***commercial and maritime law.***

- *Law Merchant,* a code of rules covering foreign traders, and this was declared to be of universal application.
- Rhodian Sea Law, a Byzantine work.

NATION-STATES : Thereafter, came the rise of the **nation-states** of England, France and Spain.

THE FOUNDERS OF MODERN INTERNATIONAL LAW :

Francisco Vitoria	**Suarez**	**Iberico Gentili**	**Hugo Grotius**
war could only be justified on the grounds of a just cause	obligatory character of international law was based upon Natural Law, while its substance derived from the Natural Law rule of carrying out agreements entered into.	His *De Jure Belli* was comprehensive discussion of the law of war and contains a valuable section on the law of treaties	He is father of international law. His primary work was the *De Jure Belli ac Pacis*, written during 1623 and 1624. His emphasised the proclamation of the freedom of the seas.

D) POSITIVISM AND NATURALISM: Positivism developed as the modern nation-state system emerged ,after the **Peace of Westphalia in 1648, from the religious wars.**

Samuel Pufendorf	*Richard Zouche*	*Bynkershoek*	*Vattel*
attempted to identify international law completely with the law of nature.	elevated the law of peace above a systematic consideration of the law of war and eschewed theoretical expositions.	developed theories of the rights and duties of neutrals in war and favoured of the freedom of the seas.	doctrine of the equality of states into international law.

E) THE NINETEENTH CENTURY :

- The **Industrial Revolution** mechanised Europe. The **development of trade and communications** necessitated greater international co-operation as a matter of practical need. In 1815, **the Final Act of the Congress of Vienna established the principle of freedom of navigation with regard to international waterways and set up a Central Commission of the Rhine to regulate its use**
- **In 1856** a commission for the Danube was created and a number of other European rivers also became the subject of **international agreements and arrangements.**
- **In 1865 the International Telegraphic Union was established and in 1874 the Universal Postal Union.**
- The **International Committee of the Red Cross, founded in 1863**, helped promote the series of Geneva Conventions beginning in 1864 dealing with the 'humanisation' of conflict, and the *Hague Conferences of 1899 and 1907 established the Permanent Court of Arbitration*.
- German thinker Hegel who first analysed and proposed the **doctrine of the will of the state**.

f) The twentieth century

- The most important legacy of the 1919 Peace Treaty and formation of **League of Nations**.
- The **Permanent Court of International Justic**e was set up in 1921 at The Hague and was succeeded in 1946 by the International Court of Justice.
- The **International Labour Organisation** was established.
- After the trauma of the Second World War the League was succeeded in 1946 by **the United Nations Organisation,** which tried to remedy many of the defects of its predecessor.

UPSC 2011	One extreme view is that International Law is a system without sanctions. However, it is not quite true that there are no forcible means of compelling a state to comply with International Law. Comment and state various sanctions for the observance of International Law.
UPSC 2009	Write short note on the Sanctions of International Law.

SANCTIONS IN GENERAL : International sanctions are political and economic decisions made by countries, multilateral, or regional organisations to protect national security interests, international law, and international peace and security.

SANCTIONS UNDER UN CHARTER

UN sanctions are adopted by the UN Security Council (UNSC) to pass resolutions short of war. Chapter VII of the UN Charter underpins such sanctions. UNSC sanctions are governed by Articles 39 and 41.

- ✓ **Article 39**: UNSC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
- ✓ **Article 41** provides a non-exhaustive list of measures, short of war, that the Security Council may take in response to a UN violation.
    - The Security Council may order UN Members to implement **non-military measures** to implement its decisions. These may include the *severance of diplomatic relations*, economic relations, rail, sea, air, postal, telegraphic, radio, and other forms of communication.

SANCTIONS:

TYPE 1: Sanctions that are designed to force cooperation with international law.

Example: After Iraq invaded Kuwait, Resolution 661 imposed sanctions on August 6, 1990. The UN embargoed the nation to prevent war. Resolutions 665 and 670 added naval and air blockades on Iraq. The initial sanctions forced Iraq to obey international law, including Kuwait's sovereignty.

TYPE 2 : Sanctions with the purpose to contain a threat to peace within a geographical boundary.

Contemporary examples include the 2010 Iran nuclear proliferation debate. On June 9, the current UN Security Council passed Resolution 1929, restricting missile and weaponry materials that could be used to make destructive weapons. Restriction prevents Iranian aggression in neighbouring countries.

Type 3: UNSC condemnation of a member/non-member nation's action or policy.

On November 11, 1965, the white minority declared Rhodesian independence. Rhodesia was condemned on military, economic, and oil and petroleum products by the General Assembly and UN 107 to 2. The international outcry forced economic sanctions on Rhodesia without a clear goal.

LEGALITY OF UNILATERAL SANCTIONS : Non-UN sanctions, countermeasures, or unilateral sanctions (Kelsen 1951) are imposed by a state without UNSC authorization. Developing nations argue that unilateral sanctions violate their right to economic and social development. The UN General Assembly has passed a resolution urging states to reject unilateral extraterritorial coercion.

The International Law Commission (ILC) calls unilateral sanctions as "countermeasures" (ILC 2001). The ILC describes circumstances that

allow such countermeasures, which would otherwise violate the state's international obligations.

UPSC 2008	"It is difficult to maintain the distinction between formal and material sources taking into account that material sources consist simply of quasi constitutional principles of inevitable but unhelpful generality. What matters is the variety of material sources, the all-important evidence of the existence of consensus among States concerning particular rules of practice." Critically examine the various sources of International Law in the development of Modern international Law, with the help of relevant case law.

FORMAL SOURCES V. MATERIAL SOURCES : Salmond explains the difference in the following terms: "A formal source is that from which a rule

of law derives its force and validity...The material sources, on the other hand, are those from which is derived the matter, not the validity of the law. The material source supplies the substance of the rule to which the formal source gives the force and nature of law."

The formal sources confer upon the *rules an obligatory character*, while the material sources comprise the *actual content of the rules.*

As per Brownlie,

- ✓ ***Formal sources*** are those methods for the creation of rules of general application which are legally binding on their addressees.
- ✓ ***The material sources*** provide evidence of the existence of rules which, when established, are binding and of general application.

The statute of the International Court of Justice (ICJ) [Art. 38] in its four fold enumeration to guide the court to decide disputes submitted to it by States parties.

1. international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;

2. international custom, as evidence of a general practice accepted as law;

3. the general principles of law recognised by civilised nations;

4. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

CUSTOM : Two Elements of Custom (1) a material fact consisting of the repetition of similar acts by States, and (2) a psychological element usually

called the *opinio juris sive necessitatis* the feeling on the part of the States that in acting as they do they are fulfilling a legal obligation.

In the *North Sea Continental Shelf cases*, the ICJ pointed out that not only the acts concerned should amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.

TREATIES : An international treaty is one of the modes to express the agreement of States. Treaties may be classified into following categories:

1. "Law-making treaties" which lay down rules of universal or general application.

2. "Treaty-contracts" for example, a treaty between two or only a few States, dealing with a special matter concerning these States exclusively.

GENERAL PRINCIPLES OF LAW OF CIVILISED NATIONS, for example, the principles of audi alteram partem, estoppel, res judicata, circumstantial evidence, etc. are followed in international law also.

Article 38(1)(d) of the statute of ICJ states that the court shall apply "subject to the provisions of Article 59, JUDICIAL DECISIONS AND TEACHINGS OF THE MOST HIGHLY QUALIFIED PUBLICISTS OF VARIOUS NATIONS, as subsidiary means for the determination of rules of law". The statute, thus, relegates judicial decisions and juristic opinion to the status of subsidiary sources of international law.

UPSC 2005	There was no Question from this topic.
UPSC 2004	"The controversy whether International law is law or not is meaningless because, in fact, it is law and is generally obeyed." Highlight the views of prominent writers about the above statement

APPROACH 1 : INTERNATIONAL LAW IS LAW IN THE TRUE SENSE OF THE TERM

The writers who consider the International Law is law in the true sense of the term are *Oppenheim, Lawrence, Starke, Salmond, Hall and other historical school jurists founded by Savigny and Maine,* regards International Law as true law on the following grounds:

- International Law is constantly recognized as law in practice, Governments of different States feel that they are morally bound to follow and observe International Law.
- Breaking of International Law by states, do not deny its legal existence rather than recognise its existence by justifying their conduct with proper interpretation.

Professor Starke :

- It has been established by modern historical jurisprudence that in many communities, a system of law existed and was being observed although those communities lacked formal legislative authority. Such law did not differ in its binding operation from the law of any State with a true legislative authority to frame them.

- Customary rules of International Law are diminishing and are being replaced by law making treaties and conventions. The rules laid down by these treaties are binding although they do not emanate from a sovereign political authority.

OTHER POINTS INDICATING INTERNATIONAL LAW AS TRUE LAW :

- United Nations established and is based on the true legality of international law. The decision and resolutions of the General Assembly and Security Council Constitute Law binding on the members of the UNO.
- In US, IL is treated as a part of their own law having the same force as the ordinary law binding their citizens.
- Sir Henry Maine : in primitive societies, there were no sovereign political authorities, yet there were laws to bind the members of the societies in their conduct.
- International law does not lack sanction such as the vigilant world public opinion, the sanction of the UN by collective security measures, intervention, violent self-help, defence and finally by war. The Security Council of United Nations imposes sanction upon the erring States.
- Law is also observed by the consideration of justice and convenience and mere existence of police force does not compel obedience to law.
- The element of fear is also not altogether absent in so far an international law is concerned.

CONCLUSION : No doubt International Law is less imperative and less explicit than the State law but nevertheless it is law.

UPSC 2003	"The term 'general principle of law recognised by civilized nations' is very wide and vague". Comment in the context of Article 38 (I) (c) of the Statute of the ICJ.

MEANING : The ICJ must apply "general principles of law recognised by civilised nations" under Article 38 of its statute. It refers to principles that apply to all comparable legal systems. General principles of law are used primarily as "gap fillers" when treaties or customary international law do not provide a rule of decision.

The *Guide to International Legal Research* states that "this traditional naturalist approach provides a basis for decision when other sources offer

no guidance, yet it is unclear what these general principles of law are. Thus, locating these general principles in the course of legal research is extremely difficult. They could be general principles of justice, natural law, analogies to private law, principles of comparative law, or general conceptions of international law."

PRINCIPLE 1: Nemo judex in causa sua : In the Chorzow Factory case, the PCIJ stated that a party cannot gain from its own wrong is "generally accepted in the jurisprudence of international arbitration as well as by municipal courts". "It is a general conception of law that every violation of an engagement involves an obligation to make reparation," the court added. The court then discussed restitution and damages.

PRINCIPLE 2: Subrogation (substitution or stepping into shoes of another) : In Mavrommatis Jerusalem Concession case, Subrogation (or substitution) was allowed the PCIJ. ICJ's advisory opinion on International Status of South-West Africa case supported subrogation.

PRINCIPLE 3: Prescription (a claim to a right founded upon enjoyment):In the Island of Palmas case, The US and Netherlands disputed sovereignty over the Island of Palmas. The US claimed that the island was part of the Philippine Archipelago ceded by Spain to the US in the Treaty of 1898 after the Spanish-American War. The Netherlands claimed long-term control over the island. Arbitrator ruled in favour of the Netherlands based on unchallenged peaceful displays of sovereignty from 1700 to 1906.

The ICJ applied prescription in Minquiers and Ecrehos case.

PRINCIPLE 4: Res judicata: A final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and bars a subsequent action involving the same claims, demands, or causes of action.

In the *UN Administrative Tribunal case*, the Secretary General fired some Secretariat members. The UN Administrative Tribunal heard their complaints of illegal discharge. The tribunal awarded officials when complaints were justified. The General Assembly debated whether the awards were binding. The court ruled that General Assembly must follow the tribunal's judgement as the Article 10 of the Tribunal Statute makes the tribunal's judgement final and unappealable.

PRINCIPLE 5 : Estoppel (preclusion)

In international law, a State party to litigation is bound by its past actions or attitudes if they contradict its claims. In his separate opinion in *Temple of Preah Vihear,* Alfaro J states: Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contrara non audiendus est).

PROBLEM WITH GENERAL PRINCIPLES OF LAW : There have been numerous practical and theoretical issues concerning general principles of law since the adoption of the Statute of the Permanent Court of International Justice in 1920. There are numerous literatures devoted to discussing general principles of law both at home and abroad, and different definitions and interpretations of general principles of law exist. However, the nature, character, and function of general legal principles remain unclear or ambiguous. There are two main reasons for this.

First, when analysing the expression of Article 38 (1)(4) of the Statute of the International Court of Justice, the description of the general legal principle is too vague, which makes application difficult.

Second, in contrast to treaties and international customs, the International Court of Justice rarely applies general legal principles, and there is no clear standard of international practise.

UPSC 2002	If we examine the 'opinions' on the definition of international Law, we are inclined to ask; 'What is so international into so-called international Law?'—Analysis. UPSC 2002.
UPSC 2000	International law is a 'weak law'. Do you agree with this statement? Give reasons. UPSC 2000.

APPROACH 2: INTERNATIONAL LAW IS NOT LAW IN THE TRUE SENSE OF THE TERM

GENERAL OVERVIEW | Hobbes, Pufendorf and Austin subscribed to the view that law 'properly so called' is a command of the sovereign, as there is no sovereign in International level, they deny legal character of International Law.

EXPONENTS : Holland, Jermy, Bentham, Hethro Brown, Lord Salisbury, etc. are other prominent jurists accepting this approach.

And then, TRY TO SUMMARIZE THE VIEWS OF AUSTIN AND HOLLAND. [It is discussed in 2006/2020 & 2017/2019]

CONCLUSIONS :

1. In municipal law, there is a determinate superior political authority which may compel the citizens to observe the law. No such political authority exists in international law. Thereby, International Law lacks sanction which is an essential element of law.
2. As compared to Municipal Law, International Law lacks an effective legislative machinery or executive agency.
3. International law further does not have a potent judiciary. ICJ & ICC jurisdiction and powers are limited, and too much dependant on the consent of the states.
4. International Law is considered by some writers as a quasi-law.

UPSC 2001	"International law has progressed by leaps and bounds; yet the theoretical controversy about the nature of international law is far, from over." Comment.

- ✓ Try to summarize the Approach 1 and Approach 2.
- ✓ Refer - UPSC 2004 – For Approach 1.
- ✓ Refer – UPSC 2000/2002 – For Approach 2 in Previous Page.

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