New Edition

Public International Law

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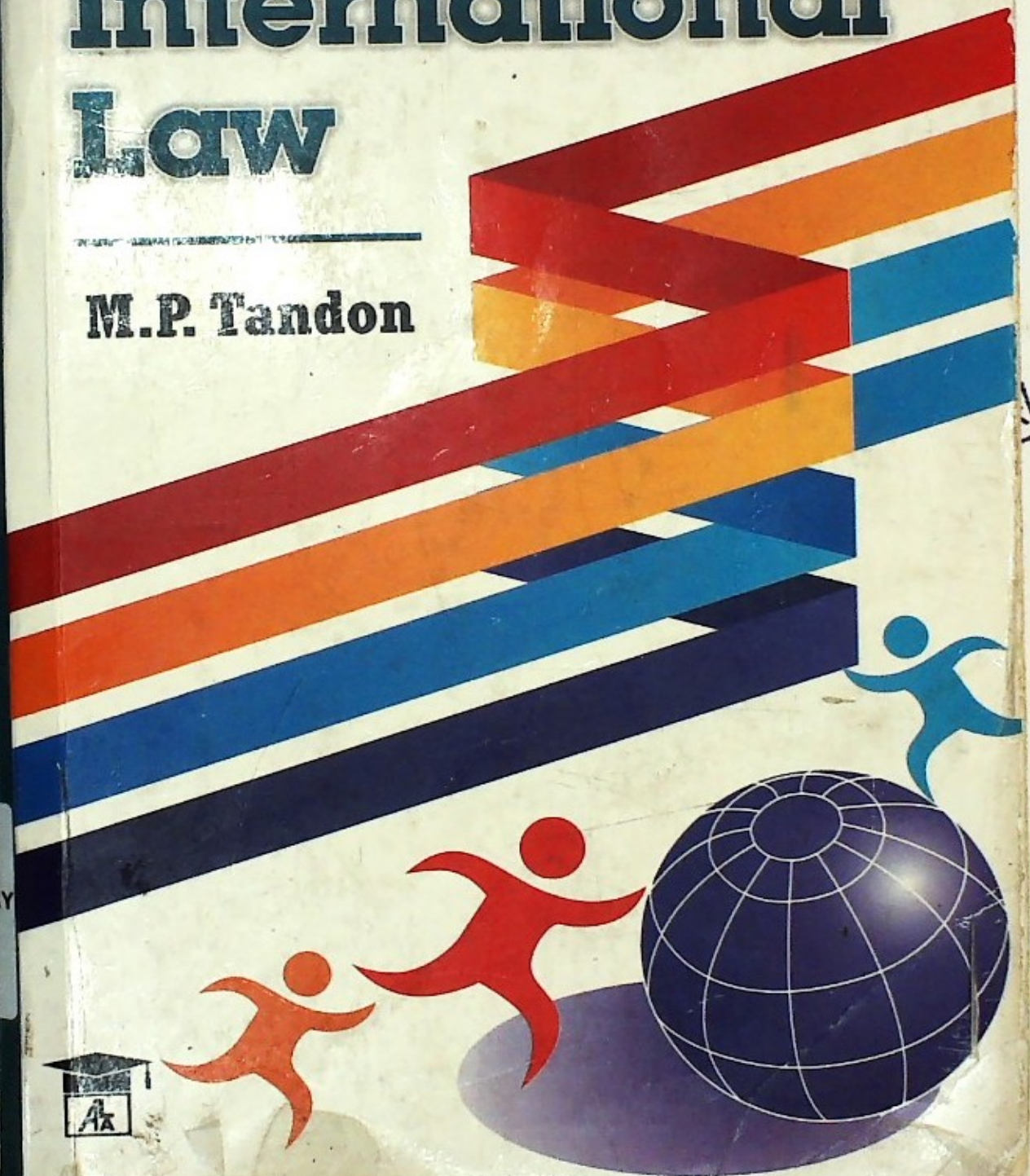

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PART I
INTRODUCTORY

CHAPTER I

NATURE, SCOPE AND BASIS OF INTERNATIONAL LAW

Its nature.—International law, in the puritan form as the term connotes, is the sum of the rules accepted by civilized States, either explicitly or tacitly, as determining their conduct towards each other, and towards each other's subjects. It is a body of rules regarded by the nations of the world as binding on them in their relations with each other, in peace and war, and comprises the rights and duties of sovereign States towards each other. In its broad sweep and expanding concept and horizon, it governs the relationship of the people of the world, unbounded by political and geographical constraints, and embraces mankind as a whole, irrespective of colour, creed, relation and political hue. As the events of each year rolled into history, it evolved and grew, assuming new shape and stature and is now a dynamic force—an embodiment of human efforts and human rights for peaceful co-existence.

Its Importance.—It is impossible today for a State or country, howsoever big, developed and rich, to insulate itself from the rest of the world and to pursue policies, social, political, economic or external affairs, including military, that can be said to be solely in its own national self-interest. "Indeed, perception of what is in one's national self-interest is beginning to change. After all, if there is a bad harvest in the Soviet Union, for example, the chances are that price of grain in the United States will go up." The result is that a State must face reactions and interaction of other States and the people of the world, which are often unsavoury, unpalatable, bitter and even disastrous. Following the logic, there is no place for the apartheid, black or discriminatory laws, financial aids with attached political strings. The very concept of racial supremacy, balance of power and the undeveloped third world is inhibiting. The nations of the world, rich and poor, must, therefore, learn to co-operate, scrupulously avoiding all policies of confrontation. Poverty, privations, miseries and wants of the third world must reduce, if not banish, by a new developing progressive social order, with full and equal opportunity for all in the real spirit of co-operation under the aegis of the league of States under international warranty. The nature and scope of International Law is wide and pervasive enough to bring within its orbit all activities of the States and its subjects.

"International life is passing through the throes of a great re-birth, brought about by an unprecedented expansion of knowledge and scientific research in all the known areas of human intellectual activity. Man has pushed the frontiers of human experience beyond his wildest dreams, almost literally into the limitless expanse of space itself and the stars.....In the vortex of that change international law is passing through several phases of far-reaching development,

with a pace accentuated by the fact of a large and growing family of nations closed into a more intimate interdependence."

According to Friedman, "International law is today actively and continuously concerned with such divergent and vital matters as human rights and crimes against humanity, the international control of nuclear energy, trade organisation, labour conventions, transport control or health regulations."

Its Origin.—The term 'International Law' was first coined by Jeremy Bentham in 1780. It is synonymous with the law of nations which corresponds to the French and German equivalents *droit international or driot des gens; internationales Recht or Volkerecht*; and to the Italian and Spanish equivalents, *viz.*, *diritto internazionale and derecho international*, respectively.

Bynkershoek ascribes the origin of the law of nations to reason and usage (*exratione et usu*) basing usage on the evidence of treaties and ordinances (*pacta et edicta*). He observes : "Reason commands me to be equally friendly to two of my friends who are enemies to each other; and hence it follows that I am not to prefer either in war."

Definitions of International Law.—Lawrence, the well-known English jurist, defines International Law as "the rules which determine the conduct of the general body of civilized States in their mutual dealings." Disharmony in mutual relations among independent sovereign States causes rupture in their dealings. International Law, therefore, regulates the conduct of States in their mutual dealings, hostile as well as pacific.

Oppenheim.—"Law of Nations or International Law (*Droit des gens, Volkerrecht*) is the name for the body of customary and treaty rules which are considered legally binding by civilized States in their intercourse with each other."

Hall.—"International Law consists in certain rules of conduct which modern civilized States regard as binding on them in their relations with one another."

Hughes.—"International Law is the body of principles and rules which civilized States consider as binding upon them in their mutual relations. It rests upon the consent of sovereign States."

Brierly.—The Law of Nations, International Law, may be defined as "the body of rules and principles of action which are binding upon civilized States in their relations with one another."

The latest trend is to treat International Law as a social process involving complex patterns of interaction and amenable to newly developed behavioural and contextual tools of social and legal analysis.

The most unorthodox definition of International Law by Marel St. Korowicz states :

> "International Law is the body of legal rules which govern mutual relations of sovereign States, and also the situations of other legal persons and of individuals, which are not subject to the internal law of any particular State."

The American Law Institute's "Restatement of the Law : The Foreign Relations Law of the United States" defines international law as that law concerned with the conduct of States and international organisations, and with their relations *inter se*, as well as some of their relations with persons, whether

natural or personal.

In *R. Keyn (The Fraconia)*, Lord Coleridge, C.J., observed that the law of nations is that collection of usages which civilised States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence.

In the famous case of *West Rand Central Gold Mining Co. Ltd.* v. *The King*, Lord Alverstone, C.J. adopted the definition given by Lord Russell of Killowen in his address at Saratoga in 1896 by saying that he knew no better definition of International Law than that it is the sum of the rules or usages which civilised States have agreed shall be binding upon them in their dealings with one another.

In the *S.S. Lotus case* between France and Turkey, International Law was defined by the Permanent Court of International Justice "as meaning the principles which are in force between all independent nations." This definition embraces two essential features of International Law, *viz.*, its universality and its exclusiveness. The emphasis is laid on the words "independent nations", inasmuch as according to the Permanent Court of International Justice, the principles in force relate not to all nations, but to all independent nations.

Starke.—According to 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 :

(a) 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

(b) 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.

The above definition by Starke, which is an adaptation of the definition of International law by the American authority Professor Charles Cheney Hyde, makes a departure from the traditional definition of International Law as a system composed solely of rules governing the relations between States only. Such traditional definition of the subject, with its restriction to the conduct of States *inter se*, will be found set out in the majority of the older standard works of International Law, but in view of the developments during the last five decades (*e.g.*, the present movement to protect human rights and fundamental freedoms of individuals, the creation of new rules for the punishment of persons committing the international crime of genocide or race destruction, etc.) it cannot stand as a comprehensive description of all the rules now acknowledged to form part of the subject. Nevertheless, from the practical point of view, it is well to remember that International Law is primarily a system regulating the rights and duties of States *inter se* and that is why it is also termed as the law of nations, although strictly speaking the word 'nation' is only in a crude way a synonym for the word 'State.'

The learned author further states : "These developments are principally : (i) the establishment of a large number of permanent international institutions or organisations, such as, for example, the United Nations and the World Health Organisation, regarded as possessing international legal personality, and

entering into relations with each other and with States; and (ii) the present movement (sponsored by the United Nations and the Council of Europe) to protect human rights and fundamental freedoms of individuals, the creation of new rules for the punishment of persons committing the international crime of genocide or race destruction, and the imposition of duties on individuals under the historic judgment in 1946 of the International Military Tribunal of Nuremberg, by which certain acts were declared to be international crimes, namely, crimes against peace, crimes against humanity, and conspiracy to commit these crimes. Both categories of developments have given rise to new rules of international law, and may be expected to influence the growth of new rules in the future. The definition given above is intended to cover such new rules under heads (a) and (b)."[1]

RECENT DEFINITIONS

International law is the term commonly used for referring to laws that govern the conduct of independent nations in their relationships with one another. It differs from other *legal systems* in that it primarily concerns provinces rather than private citizens. In other words, it is 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 :

The rules of law relating to the function of international institutions or organizations, their relations with each other and their relations with States and individuals; and

Certain rules of law relating to individuals and non-state entities so far as the rights and duties of such individuals and non-state entities are the concern of the international community. However, the term "international law" can refer to three distinct legal disciplines :

Public international law, which governs the relationship between provinces and international entities, either as an individual or as a group. It includes the following specific legal field such as the *treaty law, law of sea, international criminal law* and the *international humanitarian law.*

Private international law, or conflict of laws, which addresses the questions of (1) in which legal jurisdiction may a case be heard; and (2) the law concerning which jurisdiction(s) apply to the issues in the case.

Supranational law or the law of supranational organizations, which concerns at present regional agreements where the special distinguishing quality is that laws of nation states are held inapplicable when conflicting with a supranational legal system.

The two traditional branches of the field are :

jus gentium—law of nations

jus inter gentes—agreements among nations

Britannica Concise Encyclopedia defines international law as a body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors. The term was coined by the English philosopher *Jeremy Bentham*. Important elements of international law include *sovereignty*, recognition (which allows a country to honour the

1. J.G. Starke; Introduction to International Law; pp. 3 & 4 Eleventh edition (1994).

claims of another), consent (which allows for modifications in international agreements to fit the customs of a country), freedom of the *high seas*, self-defense (which ensures that measures may be taken against illegal acts committed against a sovereign country), freedom of commerce, and protection of nationals abroad. International courts, such as the *International Court of Justice*, resolve disputes on these and other matters, including *war crimes*.

Barron's Banking Dictionary defines International Law as law governing relations of nations with one another. It arises principally from international agreements or from customs that nations adopt. In a broader sense, international law includes both public law and private law. The public law regulates political relations between nations. The private law is the comity nations grant to each other's laws in enforcing rights arising under foreign law.

Oxford Dictionary of Politics defines international law as a set of rules generally recognized by civilized nations as governing their conduct towards each other and towards each other's citizens. How far international law may be thought to differ from municipal (national) law depends on whether one takes a positivist or a naturalist view. For positivists, law is the command of a sovereign backed by force. Since the international system is an *anarchy*, with no supreme authority, international law is necessarily deficient. Naturalists take a different view, believing that positive law consists in the recognition and codification of other sources of law, such as custom, which do not rely upon a sovereign for their authority.

Gale Encyclopedia of US History said : International Law is traditionally understood to be the law governing the relations among sovereign states, the primary "subjects" of international law. Strictly speaking, this definition refers to public international law, to be contrasted with private international law, which concerns non-state actors such as individuals and corporations. Public international law originates from a number of sources, which are both created by and govern the behavior of states. Treaties or international agreements are a familiar source of international law, and are the counterpart of domestic contracts, which create rules for the states that accept them. Customary international law, which has fewer analogues in domestic law but which is binding as a matter of international law, originates from a pattern of state practice motivated by a sense of legal right or obligation. Particularly since World War II, international institutions and intergovernmental organizations whose members are states, most notably the United Nations (UN), have become a principal vehicle for making, applying, implementing and enforcing public international law.

Conclusion

In view of the above definitions, it may be concluded that International Law is a body of rules and principles which regulate the conduct and relations of the members of the world community. The contention that States alone are subjects of International Law is not only inconsistent with the changing character of International Law, but has become completely inadequate rather obsolete. International Law has now become the law of inter-dependence of States. While deciding *Re Piracy Jure Gentium* case, Lord Chancellor Sankey had remarked that "International Law is a living and expanding code." In view of the changing character and expanding scope of international law, international

institutions, non-State entities and individuals have also become subjects of international law. Prof. Starke has aptly pointed out that "International Law 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...." Edward Collins has correctly observed that "International Law is constantly evolving body of norms that are constantly observed by the members of international community in their relations with each other. These norms confer rights and impose obligations upon States and, to a lesser extent, upon international organisations and individuals."

Public International Law and Private International Law.—"Private International Law is a body of principles for determining questions of jurisdiction, and questions as to the selection of the appropriate law, in civil cases which present themselves for decision before the Court of one State or country, but which involve a 'foreign element', *i.e.*, which affect foreign persons or foreign things, or transactions that have been entered into wholly or partly in a foreign country, or with reference to some foreign system of law."

"The objects of private International Law are, first, to prescribe the conditions under which the court is competent to entertain a suit; secondly, to determine for each class of cases the particular territorial system of law by reference to which the rights of the parties must be ascertained and, thirdly, to specify the circumstances in which : (a) a foreign judgment can be recognized as decisive of the question in dispute; and (b) the right vested in the creditor by a foreign judgment can be enforced by action in England."

According to Michael Akehurst, there appears to be little connection between Public International Law and the various municipal systems of Private International Law. Private International is different in each country; there is consequently no affinity between Private and Public International Law. Private International Law is essentially part of municipal law. Dicey calls it as Conflict of Laws since it deals with rules regulating cases in which municipal laws of different States come into conflict. Such conflicts may arise in connection with domicile, marriage, divorce, wills, validity of contracts, etc. It is also known as inter-municipal law, international comity, etc. "Only in exceptional circumstances do rules of conflict of laws become rules of International Law proper, as for instance when they are incorporated in international treaties."

The Permanent Court of International Justice observed in the *Serbian Loans Case*, that the rules of Private International may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true International Law governing the relations between States. But apart from this it has to be considered that these rules form part of municipal law.

According to Sir Robert Phillimore, rights arising under Public International Law are called absolute, or rights *stricti juris*, and their breach constitutes a *casus belli*, and justifies in the last resort a recourse to war, whereas Private International Law—the rules of which are founded upon convenience, and intended to facilitate the intercourse between the subjects of different States—confers no absolute rights.

Private International Law is a distinct branch of Jurisprudence which has as its major topic the body of rules determining which territorial system of law controls private law cases that have roots in more than one country or, in a

federation, in more than one State, canton or province. Violations of Private International Law by a State may also constitute violations of Public International Law if they are also breaches of treaties agreeing to follow certain practices in relation to the former. Public International Law is a product not of the relations of private persons but of the relations of States to each other and to public international organizations.

Is International Law True Law ?—Almost from the early stages of the development of the science of the Law of Nations, the question whether International Law is law in the true sense has been a subject of much speculation. Has it any binding force ? International lawyers have themselves engaged in doctrinal disputes regarding the binding nature of International Law. Opinion has sharply been divided on this vexed question. The leading English writer on jurisprudence, John Austin, maintained during the nineteenth century that International Law is not true law, but a code of rules of conduct of moral force only. Hobbes and Pufendorff, who preceded Austin, also answered the question in the negative by observing that there is no positive law of nations properly invested with a true and legal force, and binding as the command of a superior. According to Vattel, the Law of Nations, in its origin, is nothing but the Law of Nature applied to nations. Holland maintained that International Law differed from ordinary law in being unsupported by the authority of a State. According to him, the Law of Nations is but private law 'writ large.' In this view of the matter, he called International Law as the vanishing point of Jurisprudence. Bentham also criticised International Law as the law proper. On the other hand, eminent authorities like Hall and Lawrence maintain that International Law not only operates as law but is distinct from international morality by a radical difference both in the nature of its rules and sanctions. The former observes that International Law is habitually treated as law and that a certain part of what is at present acknowledged to be law is indistinguishable in character from it; the latter emphasises that International Law is generally observed by States, though here and there like other law some of its commands are disregarded. But it is no more reduced to a nullity by being sometimes broken, than are the laws of the land, because the habitual criminal disregards them with impunity.

It is thus clear that the solution of the above question depends on the definitions of law which one may choose to adopt.

Austin holds that International Law is no law as it does not emanate from a law-giving authority and has no sanction behind it. He observes that the law obtaining between nations is not a positive law for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. The law obtaining between nations is, according to him, only law set by general opinion and the duties which it imposes are enforced by moral sanction. There is no compelling sanction derived from superior authority inasmuch as there is no sovereign power over and above the disputant States. He describes International Law as "positive international morality" consisting of "opinion or sentiments current among nations generally."

Holland, as stated above, subscribes to the view taken by Austin. According to him, "such rules as are voluntarily, though habitually, observed by every State in its dealings with the rest can be called law only by courtesy." It is not supported by the authority of a State. It is the vanishing point of

jurisprudence, since it lacks any arbiter of disputed questions save public opinion, beyond and above the disputant parties themselves and since in proportion as it tends to become assimilated to true law by the aggregation of States into a large society, it ceases to be itself, and is transmuted into the public law of a federal government.

According to Lord Salisbury, International Law cannot be enforced by any tribunal and, therefore, to apply to it the phrase 'law' is to some extent misleading.

According to Jethro Brown, International Law is the law in the making, law struggling for existence. It is struggling to make itself good in contradistinction from international morality.

No doubt, International Law is less imperative and less explicit than the State Law but nevertheless it is law inasmuch as it is enforced partly by the conviction that it is good and partly by those subtle influences which make it difficult for a man or body of men to act in defiance of strongly held views of those with whom they associate. Compulsion alone is not the sanction behind law. It is enforced by the consideration of justice as much as of force. The element of fear is also not absent. Like ordinary law, International Law is also sometimes evaded, but that does not mean that the law does not exist. As Mr. Roosevelt said in his last Annual Message to Congress : "It would be preposterous to think that international relations are governed exclusively by force, and that statesmen are not moved by considerations of right and law and justice." In the words of Brierly, "It is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organised."

The objection as to International Law being treated as law proper comes in the main from the followers of writers such as Hobbes and Austin who regard nothing as law which is not the will of a political superior. "But", observes Brierly, "this is a misleading and inadequate analysis even of the law of a modern State; it cannot, for instance, unless we distort the facts so as to fit them into the definition, account for the existence of the English Common Law. Most of the characteristics which differentiate International Law from the law of the State and are often thought to throw doubt on its legal character, such as, for instance, as its basis in custom, the fact that the submission of parties to the jurisdiction of courts is voluntary, the absence of regular processes either for creating or enforcing it, are familiar features of early legal system. If, as Sir Frederick Pollock writes..... "the only essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity, International Law seems on the whole to satisfy these conditions."

Sir Henry Maine, while criticising the Austinian conception of law observes that men do sometimes obey rules for fear of punishment but compared with the mass of men in each community this class is but small, probably it is confined to what are called the criminal classes. The largest number of rules which men obey are observed unconsciously from a mere habit of mind.

Modern writers like Hall and Lawrence treat International Law as law in the proper sense. According to them, International Law is habitually treated and enforced as law; like certain kind of positive law, it is derived from custom;

precedent forms a source of International Law also as it does of positive law and the observance of its rules is compulsory. Pitt Cobbett observes that International Law must rank with law and not with morality.

Basis of International Law as True Law

Modern jurists hold the view that International Law is true law. So far as the question of sanction behind International Law is concerned, it may be said that it is not an essential element of law. Even if sanction is regarded as an essential element of law, there are sanctions behind International Law. The Common Law of England is the glaring example of its sanction as England regards International Law to be part of its Common Law. The Constitution of United States of America provides sanction to International Law, as it is part of their law. Further the Charter of United Nations proclaims sanction behind International Law.

Prof. Starke has criticised the Austinian concept of law, and holds the view that International Law is true law. In this context, Prof. Starke has described following arguments :—

Firstly, 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.

Secondly, Austin's views on International Law, might have been correct in his time, but they are not true in the present scenario. Customary rules of International Law are diminishing and are being replaced by law making treaties and conventions. International Conventions on various subjects have become international legislations, so it cannot be said that there is no legislation under international system.

Thirdly, the authoritative machinery responsible for maintenance of international intercourse between States, do not consider International Law—as merely a moral code.

Lastly, U.N. has been established and is based on the true legality of international law.

Prof. Oppenheim also regards International Law as true law on the following grounds. In the first place, International Law is constantly recognised as law in practice. Governments of different States feel that they are legally and morally bound to follow and observe International Law. In the second place, while breaking the rules of International Law, States do not deny its legal existence, rather they recognise its existence and try to interpret International Law by justifying their conduct. Hence, International Law may be properly interpreted to be a complete legal system.

Frequent violations of International Law do not prove that the law does not exist. Even municipal or State laws are also frequently violated. Even when States violate rules of International Law, they do not deny the existence of law but they try to justify their conduct and affirm the binding nature of the international rules. This affirmation is significant for it lends to the strength of International Law and its systems.

Prof. H.A.L. Hart has observed in this context that "It is clear that in the practice of States certain rules are regularly respected even at the cost of certain

sacrifices, claims are formulated by reference to them, breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation and relation. There are, surely, all elements required to support the elements that there exist among States rules imposing obligations upon them."

Thus, following arguments of jurists are summed up to state that International Law is true law :—

(1) Sir Henry Maine has firmly established that in primitive societies, there were no sovereign political authorities, yet there were laws to bind the members of the societies in their conduct.

(2) Austin's concept of law has failed in the context of present scenario, because if we accept the Austinian definition of law, the Common Law of England will lose its legal validity.

(3) Now the customary rules of International Law are diminishing and are being replaced by international law-making treaties and conventions. The bulk of International Law can be traced in law making-treaties like Hague Conventions and Geneva Conventions. The U.N. Charter and many treaties held under it, comprise of rules laid down under them, which are parts of International Law. The rules laid down under them are binding upon States although they do not emanate from a sovereign political authority.

(4) In practice, States do not deny the existence of International Law. But they interpret International Law so as to justify their conduct in their international intercourse.

(5) Certain developed States like U.K. & U.S.A., regard International Law as part of their own laws. In Paquete Havana case, Justice Gray of United States Supreme Court has observed, "International Law is a part of our law and must be ascertained and administered by Courts of Justice of appropriate jurisdiction."

(6) The International Court of Justice decides disputes as submitted to it, in accordance with the rules of International Law. It has been provided as such by the statute of International Court of Justice.

(7) International Conventions and Conferences treat International Law as true law in real sense of the term.

(8) The United Nations has been established and is based on the true legality of International Law.

(9) International Law does not completely lack sanction, as for non-observance of international rules, the Security Council of United Nations imposes sanction upon the erring States.

(10) Frequent violation of International Law does not mean that there are no legal rules under it, rather it means that there is weakness in the enforcement machinery of international system.

(11) The decisions of International Court of Justice are binding upon the parties to the dispute and only in respect of that dispute. Article 94 of the U.N. Charter provides that each member of the United Nations undertakes to comply with the decision of the International Court of Justice. It further provides that if any party to a case fails to perform the obligation incumbent upon it, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations to decide upon the measures to be undertaken to give effect to the judgment.

Defects of International Law.—There is no doubt that International Law is a weak law inasmuch as the international legislative machinery is not comparable in efficiency to State legislative machinery. In the strict sense, International Law has no legislature and no executive. Its judiciary as represented by the International Court of Justice has no universal compelling jurisdiction; its decisions are not conclusive so as to finally settle legal disputes between States. There are hardly few areas where nations are subjected to compulsory jurisdiction in an impartial tribunal and as such there is little law. In the words of Pitt Cobbett : "It is not only less explicit than State law, but it also lacks the coercive force of State law." There is no sanction for violation of International Law. As Paton observes : International Law "is very weak on the institutional side—there is no legislature, and, while a court exists, it can act only with the consent of the parties and has no real power to enforce its decisions.....It is true that the international Law of Peace is seldom broken, but once grave issues arise, we see flagrant disregard of accepted rules.....It is harder to deal with a nation that is a law-breaker than to expel a primitive man from his community—hence while primitive and international law both back institutional machinery, the sanctions of the former are really more effective since they are brought to bear on the individual and not on the nation."

> ".....There is no World Congress, World Parliament, Reichstag, or Diet today making International Law, and no world executive branch or world government with its own police and super-military force with power to force all nations to submit their disputes to the World Court, or to compel all nations to submit to its decisions. Sovereignty and nationalism are still potent."
>
> "The reality of the law is to a large extent dependent upon the existence of institutions with which and through which it operates. Of these institutions the State is in the relations of the individual, the normal and typical manifestation..... International Law will not achieve a full measure of reality until its is originally woven into the fabric of a supranational entity. But in the meantime it may be able to fulfil the primary purpose of statehood, namely to render secure the life and independence of the members of the community by the prohibition and collective suppression of violence and war."

The Charter no doubt provides measures against the aggressors, which include economic measures, military measures, suspension of membership and expulsion from members of the U.N. But under the Charter, enforcement action can be taken only by the Security Council, where the Big Five have the veto right, and consequently such action against a great power seems to be totally excluded.

The weakness of International Law was also noticed by Lord Coleridge, C.J. in *R.* v. *Keyn* (The Franconia).

Strictly speaking, International Law is an exact expression and it is apt to mislead if its inexactness is not kept in mind. It is vague and indeterminate. Law implies a lawgiver, and a tribunal capable of enforcing it and coercing the transgressors. But there is no common law-giver to sovereign States; and no

tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilised States have agreed to observe in their dealings with one another. Treaties and acts of State are but evidence of the agreement of nations, and do not in this country at least *per se* bind the tribunals.

In addition to the above, the weakness of International Law is also perceptible in another direction, *viz.*, that it does not authorise the Family of Nations or, for that matter, an international organization to intervene in matters which are essentially within the domestic jurisdiction of a State, and this limits its jurisdiction and influence. This has been termed by Brierly as the *laissez-faire* State of legal development of International Law.

A more serious limitation on the state of International Law is that international economic relations fall within the sphere of domestic jurisdiction. Many matters like tariffs, bounties, trade, markets, etc., although falling outside the ambit of International Law yet prove to be the rivalries of modern State and provide the cause of their disputes.

It is a natural consequence of the absence of authoritative law-declaring machinery, observes Brierly, that many of the principles of International Law, and even more the detailed application of accepted principles, are uncertain. It is not in the nature of any law to provide mathematically certain solutions of problems which may be presented to it; for uncertainty cannot be eliminated from law so long as the possible conjunctions of facts remain infinitely various.

As observed by John Norton Moore,".....though there is no central legislature in the international system there is an effectively functioning 'constitutive process' that makes binding prescriptions in as real a sense as the legislature of New York. This process includes treaty conferences, certain international institutions, and a more diffuse but no less real development of customary international law through State practice."

Basis of International Law.—Traditionally, there are two rival theories which explain the basis of International Law, these being the theory of fundamental rights and the theory of consent. Apart from these two, there are three other theories, *viz.*, the Positivist Theory, the Auto-Limitation theory and the doctrine of *Pacta Sunt Servanda*.

(a) Theory of Fundamental Rights.—The doctrine of 'fundamental rights' observes Brierly, is a corollary of the doctrine of 'state of nature' in which men are supposed to have lived before they formed themselves into political communities or States, for States, not having formed themselves into a super State, are still supposed by the adherents of this doctrine to be living in such a condition. Brierly assails this doctrine on the following grounds :

(1) The doctrine implies that men or States bring with them into society certain primordial rights not derived from their membership of society, but inherent in their personality as individuals and that of these rights a system is formed; whereas the truth is that a legal right is a meaningless phrase unless we first assume the existence of a legal system from which it gets its validity.

(2) It is misleading to apply the atomistic view of the social bond to States, for in the society of States the need is not greater liberty for the individual States, but for a strengthening of the bond between them.

Finally, the doctrine is really a denial of the possibility of development in international relations; when it asserts that such qualities as independence and equality are inherent in the very nature of States, it overlooks the fact that her attribution to States is merely a stage in an historical process.

(b) Consent Theory.—Oppenheim in consonance with the views of some other jurists is of the opinion that the customary rules of International Law have grown by common consent of the States, that is, the different States have acted in such a manner as to imply their tacit consent to those rules. The consent may be given expressly, as in treaty, or may be implied, as acquiescence of a State in a customary rule. The positivists regard International Law as consisting of those rules which the various States have accepted by a process of voluntary self-restriction, or as Jellinck terms it 'auto limitation'. Anzilotti and Triepel support the positivist theory. According to the former, customary rules are based on the implied consent of States, while, according to the latter, the obligatory force of International Law arises from an agreement of States to become bound by common consent. Positivists hold that International Law comprises a system of rules depending for their validity on the consent of States.

The formality of a treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof, and more especially in transactions with Oriental States. Consent may be expressed in various ways—by constant usage, permitted and acquiesced in by the authorities of the State, active assent or silent acquiescence where there must be full knowledge.

The basis of International Law on the theory of a common consent of the States or the positivist theory can be assailed on grounds more than one. In the first place, Fenwick observes that, taken in the sense of their individual consent, this theory "is simply inadequate to explain the assumption upon which Governments appear to have acted from the beginning of International Law. Whatever the position taken by writers, governments have always looked upon International Law as having an objective character, as being binding because it was 'the law' not because States found it to their convenience to observe it. If governments have not undertaken to formulate any logical justification of the law, it has been because none seemed to be needed. Law was the alternative to anarchy; that was justification enough for it."

In the second place, the theory of a common consent rests on some sort of a fiction of implied consent. Implied consent is not a correct explanation of international customary law, for a customary rule is observed because it is believed to be binding and not because it has been consented to or received approval of the States.

In the third place, the argument that a State admitted to the family of nations through express or tacit recognition implies a consent on the part of the recognized State to submit to all the rules in force is fallacious for the simple reason that "the act of recognition is the act of the other States—not the act of the States to be recognized. Recognition is dictated more on the ground of policy and political expediency than any other consideration, and consent on the part of the recognised State cannot be implied by a formal acknowledgment on the part of other States of its international personality.

In the fourth place, as Starke observes, "It is never necessary in practice when invoking a particular rule of International Law against a particular State

to show that the State has assented to it diplomatically. The test applied is whether the rule is one generally recognised by the society of States." In the words of Smith, "International Law as a whole is binding upon all civilised States irrespective of their individual consent. No State can by its own act release itself from the obligation either of the general law or of any well-established rule."

Finally, as Brierly observes, even if the theory did not involve a distortion of facts, it would fail as an explanation. For consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting.

(c) Theory of Positivism.—The theory of positivism denotes the part of the law which consists of rules and regulations concerning international relations imposed by sovereigns on themselves. In the eighteenth century, Bynkershoek, as a positivist, attached primary importance to customary and treaty rules. According to Starke, "the 'positivists' hold that the rules of International Law are in final analysis of the same character as 'positive' municipal law (i.e., State law), inasmuch as they also issue from the will of the State. They believe that International Law can in logic be reduced to a system of rules depending for their validity only on the fact that States have consented to them.

According to Brierly, "the doctrine of positivism.....teaches that International Law is the sum of the rules by which States have *consented* to be bound, and that nothing can be law to which they have not consented. This consent may be given expressly, as in a treaty, or it may be implied by a State acquiescing in a customary rule."

The positivists have manifested themselves by following the conception of Auto-Limitation theory and *pacta sunt servanda* discussed below. The Italian jurist, Anzilotti, extended his point of view of pioneering the positivist theory through the principle *pacta sunt servanda*.

(d) Auto-Limitation Theory.—In accordance with this theory, States are independent entities and the actual behaviour of States based on positivism forms the basis of International Law. According to Emerich de Vattel, independent States have their inherent rights derived from natural law, but they were accountable only to their own consciences for the observance of the duties imposed by natural law, unless they had expressly agreed to treat those duties as part of positive law. Based on positivism, there is the extension of the theory of auto-limitation, propounded by Jellinck under which States abide by international law and feel bound by it because they have, through the process of auto-limitation, restricted their powers. These rules of International Law are binding on them because they consider them binding in their mutual relations.

The theory is inaccurate, inasmuch as if the States were free to observe the mutual obligations at their discretion, International Law will be a very slippery law. The concept of the behaviour of States or that based on their will, as emphasized by the positivist, is metaphorical, conveying a dubious meaning.

(e) *Pacta Sunt Servanda*.—It is a doctrine borrowed from the Roman law and has been adopted as a principle governing treaties in International Law. According to this doctrine, the parties to a treaty are bound to observe its terms in good faith. According to Fenwick : Philosophers, theologians and jurists have

recognised with unanimity that unless the pledged word of a State could be relied upon, the relations of the entire international community would be imperilled and law itself would disappear." Anzilotti regards the doctrine of *pacta sunt servanda* as the basis of the binding force of International Law.

The theory is one-sided for many usages and customary rules of International Law are binding on States apart from any agreements. Much of the code of rights and duties are not prescribed but are followed by States in their intercourse with each other.

According to Max Sorensen, that the rule *pacta sunt servanda* has moral basis is unquestionable. Many writers classify the maxim *pacta sunt servanda* as a general principle of law, but it is in any event not to be doubted that the rule has all the characteristics of a customary rule.

True Basis.—The true basis of International Law, as indicated above, is that a modern State cannot lead an isolated life in the present context of world affairs on account of enormous development in political ideas, art and literature and scientific discoveries. With the highly improved means of communications and establishment of permanent international institutions, the whole world is knit together into a family of nations and any event occurring in any part of the globe has its repercussion on the rest of the world. "The result is", as Sir Cecil Hurst observes, "that a State cannot escape from subjection to International Law, or, to put it slightly differently, International Law is the necessary concomitant of statehood. International Law is in fact binding on States because they are States. This is not perhaps a very surprising position to attain, because it must be remembered that our modern conception of a State is itself the creation of International Law, and it is by the canons of International Law that the rights and duties of a State are defined."

Fenwick, is also of the same opinion. He observes that "the prevention of war, the regulation of conflicting claims, the promotion of the general welfare of the group are conditions which create a moral and material unity among the nations in the same manner that they create a moral and material unity between individuals within the State. The fact that nations have these common interests constitutes an actual community of States, and at the same time imperatively demands a rule of law; so that International Law may be said to be based upon the very necessity for its existence, upon the very human beings in constant contact with one another under the conditions of the present day."

Brierly, sharing the same opinion observes : "The ultimate explanation of the binding force of all law is that man whether he is a single individual or whether he is associated with other men in a State, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live."

The practice of States, observes Werner, shows that more than any of these factors [*viz.*, States recognise the need for law; they prefer order over disorder; obedience is cheaper than disobedience; all men have a legal consciousness which States cannot afford to flout; self-preservation of the international system leads to recognition of its law; the social will enforces obedience; a sense of justice leads States to obey the law; habit and custom make States obedient] "reciprocity contributes to the effectiveness of international law."

CHAPTER II

SOURCES OF INTERNATIONAL LAW

According to Lawrence, if we take the source of a law to mean its beginning as law, clothed with all the authority required to give it binding force, then in regard to international affairs there is but one source of law, and that is the consent of nations. This consent may be either tacit or express. The first is shown by custom, that is to say, the habitual observance of certain rules of conduct by States in their mutual dealings though they have not solemnly bound themselves in words to do so. It is expressed by long usage, practice and custom. Express consent is given by means of treaties, or international documents having the force of treaties.

Oppenheim also shares the opinion of Lawrence and states that a State, just as an individual, may give its consent either directly by an express declaration or tacitly by conduct which it would not follow in case it did not consent. The sources of International Law are therefore twofold, namely, (1) *express* consent which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, that is implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom, must, according to him, be regarded as the exclusive sources of the Law of Nations.

Professor Brierly ascribes the main sources of International Law to custom and reason. Westlake says that custom and reason are the two sources of International Law, and adds Roman law as a subsidiary source. Custom being the primary evidence of what International Law is, is a source of International Law.

Article 38(1) of the Statute of the International Court of Justice (established by the Charter of the United Nations) defines the sources of International Law as under :

(a) International conventions, whether general or particular, establishing rules expressly recognised by contesting States. (They conform to international treaties proper).

(b) International custom, as evidence of a general practice accepted as law. [The evidence of international custom is to be sought primarily in State practice].

(c) The general principles of law recognised by civilized nations.

(d) Subject to the provisions of Article 59, judicial decision and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Article 38(2), however, adds that the aforesaid provision shall not prejudice the power of the Court to decide a case *ex aeqo et bono* (in justice and good faith), if the parties agree thereto.

Besides the above, the other sources of International Law which may be mentioned are International Comity, State papers other than treaties, State instructions for the guidance of their own officers and tribunals, resolutions of international conferences, municipal Acts of Parliaments and the decisions of municipal courts and opinions of juris-consults or text-book writers. Lastly, the decisions and determinations of the various organs of the United Nations and other international bodies form an important source of International Law.

International Conventions or Treaties.—They form the most important source of International Law. There is no legislative organ in the field of International Law comparable to legislatures within the State, the enactments of which could bind all the States. The contracting parties may, however, establish an international organization by means of treaty with authority to bind them by its resolutions or may even lay down rules for their mutual conduct. In this sense multilateral treaties are a feeble approach to international legislation.

Treaties may be divided into two groups, *viz.*, (1) law-making treaties which lay down general rules binding on the States or enunciate new general rules for the guidance of States in future or for their future international conduct, and (2) treaty contracts which deal with a special matter between the contracting States only. A law-making treaty is a multilateral arrangement, or *traitelai* having the effect of establishing certain legal norms for the conduct of States in their mutual intercourse. Only the law-making treaties form the source of International Law and not ordinary bilateral treaties which bind only two or more States for some special object, or which are of special interest to the participating powers. The law-making treaty involves two distinct operations : (a) a legislative operation whereby rules are laid down; and (b) the undertaking of the contracting parties to conform to the rules."

There is no doubt about the fact that treaty stipulations override rules of international customary law which are incompatible with them. This proposition received approbation in the case of *S.S. Wimbledon* (1923) where the Permanent Court of International Justice held that treaty law takes priority over international customary law.

Custom.—It is the older and original source of law. It is as such second important source of International Law to the extent to which it is evidence of a general practice accepted as law. Even in the interpretation of treaties reference is frequently made to customs in case of doubt. International custom has developed by spontaneous practice and reflects a deeply felt community of law. "Its rules are regarded as possessing density and stability and it is the repository of the general or common law of the nations." "Custom in its legal sense involves something more than habit or usage"—a usage left by those who follow it to be an obligatory on. "Custom is that line of conduct which the society has consented to regard as obligatory." The extra-territorial rights and privileges afforded to foreign diplomats by all civilized States in their territory furnish an example of the force of custom as a basis for International Law.

Custom and Usage.—The terms "custom" and "usage" are often used interchangeably. According to Starke, there is a clear technical distinction between the two. Usage represents the twilight stage of custom. Custom begins where usage ends. Usage is an international habit of action that has not yet received full legal attestation. Usages may be conflicting, custom must be unified and self-consistent. A custom, in the intendment of law, is such a usage

as hath obtained the force of law. (Viner's abridgement). Oppenheim also distinguishes between custom and usage in the same terms. He says : "International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right. On the other hand, they speak of a usage when a habit of doing certain actions has grown up without there being the conviction that these actions are, according to International Law, obligatory or right." Thus, the term 'custom' is in the language of international jurisprudence, a narrower conception than the term 'usage' as a given course of conduct may be usual without being customary.

In the *Columbian Peruvian Asylum Case*, the International Court of Justice observed that the party relying on custom must prove that the custom was established in such a manner that it had become binding on the other party, that the rule invoked was in accordance with a constant and uniform usage practised by the State in question, and that this usage was the expression of a right apertaining to the State granting asylum and a duty incumbent on the territorial State.

In the *Right of Passage over Indian Territory (Merits)*, the International Court of Justice observed that where the Court finds a practice clearly established between two States which was accepted by the parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.

The General Principles of Law.—The Statute of the International Court of Justice authorises the Court to apply the general principles of law recognized by civilized nations in addition to international conventions and custom, which are the two main sources of International Law. It makes national legal systems as a source of law for the creation of International Law. As Sir Hersh Lauterpacht has pointed out, general principles of law may be a necessary and inevitable way of filling a lacuna in the interpretation of a specific question. The phrase "the general principles of law recognised by civilized nations" also embraces the principles of private law administered in national courts and as applicable to international relations.

The incorporation of this clause in the Statute of the Court discards the positivist view which regards treaties and custom as the only sources of International Law upon which international courts can base their decisions. Professor Gutteridge is of the view that the object of the invocation of the 'general principles' is with a view to providing the judge, on the one hand, with a guide to the exercise of his 'choice of a new principle' and, on the other hand, to prevent him from 'blindly following the teaching' of the jurists with which he is most familiar without first carefully weighing the merits and considering whether a principle of private law does in fact satisfy the demands of justice.

It was observed by Sir Robert Phillimore in *Reg* v. *Keyn* that "the law of nations is said to be founded upon justice, equity, convenience and the reason of the thing, and confirmed by long usage."

The Special Arbitral Tribunal between Germany and Portugal also applied the general principles of law in the *Maziua and Naulilaa Cases* where the arbitrators observed that in the absence of rules of International Law applicable to the facts in dispute, they were of the opinion that it was their duty to fill the

gap by applying principles of equity fully taking into account the spirit of International Law, which is applied by way of analogy and its evolution.

Story, J., while examining the history of slavery in *U.S.* v. *The Schooner Law Jeune Uagenie* observed that the Law of Nations may be deduced, first from the general principles of right and justice, applied to the concerns of individuals.....

The Permanent Court of International Justice in consonance with the general principles of law applied the rule of *res judicata* in the *Chorzow Factory (1927) and that of estoppel in the case of Diversion of Water from the Meuse (1937).*

Judicial Decisions—Tribunal and Prize Courts.—Article 38 of the Statute of the International Court of Justice refers to judicial decisions as a subsidiary means for the determination of rules of law, and those words correctly state their function. Greater weight is attached to the judgment of mixed tribunals appointed by the joint consent of the two contending States than to Admiralty Courts appointed by one State alone.

Article 59 of the Statute of the International Court of Justice expressly provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. Under the provisions of this article the Court is specifically required not to apply precedent or the doctrine of *stare decisis* in its decisions. In view, however, of the wide representation of the world's main legal systems first on the Permanent Court of International Justice and then on the International Court of Justice and of the high reputation and impartiality of the judges of the Courts, their decisions have frequently been referred to as manifestation of the intrinsic merits of judicial precedent.

Decisions of Municipal Courts.—As a source of law the decisions of municipal courts are not accorded the same sanctity as is attached to those of international courts and tribunals and they have seldom been cited by the two World Courts. Such courts will normally not apply International Law which runs counter to the explicit provisions of the written constitution. It is the practice of the British courts not to apply automatically treaties concluded between the Crown and foreign States unless recognised by Parliament, if they involve any modification of the common or statute law. The executive has a considerable influence in several countries where courts are confronted with questions affecting matters of policy. In many States the courts apply local legislation or domestic law in priority to International Law. Schwarzenberger observes that it is true to say that only on the lowest level are judgments of municipal courts merely evidence of national attitudes to International Law. Positivist writers of the continental school do not ascribe any law creating faculty to municipal decisions, they are only evidence of pre-existing customary law or have an influence on the development of subsequent customary International Law.

It was observed in the case of *Thirty Hogsheads* v. *Boyle* by Marshal, C.J., that "the decisions of the courts of every country so far as they are founded upon a law common to every country, will be received, not as authority but with respect."

Prize Courts.—With regard to Prize Courts, which are tribunals set up by belligerent States for the purpose of deciding upon the validity of the captures made by their crusiers, they administer International Law and give effect to it

as the law not laid down by any particular State, but which originates in the practice and usage long observed by civilised nations in their relations towards each other, or in express international agreements. They are no doubt bound by Acts of Parliament, but if they are inconsistent with the Law of Nations, the Prize Courts in giving effect to such provisions would no longer be administering International Law. They would in the field covered by such provisions be deprived of their proper functions as a Prize Court. Lawrence observes that such interference by States is fortunately rare; and accordingly it happens that the decisions of Prize Courts are respected in proportion to the reputation for learning, ability and impartiality enjoyed by their judges. The English and American Law Reports bear eloquent testimony to the highly valuable judgments delivered by eminent judges like Lord Stowell (*The Maria, The Recovery and The Fox*), Dr. Lushington, Kent and Story.

Text-writers, Works of Jurists and Commentators.—Article 38 of the Statute of the International Court of Justice authorises the Court to apply the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law. In the first place, the work of writers plays "a part in proportion to its intrinsic scientific value, its impartiality and its determination to scrutinise critically the practice of States by reference to legal principle." In the second place, writings of authors are not an independent source of law, though they may lead in course of time to form International Law by providing useful evidence of what the law is.

Their Lordships of the Judicial Committee also in the case of *Re Piracy Jure Gentium* laid down that opinions of text-books writers were last but not the least among the sources of International Law.

In America also, the opinions of writers of known wisdom are regarded as one of the sources of International Law.

The importance of juristic writings was well emphasised by Mr. Justice Gray of the United States Supreme Court in *The Paquete Habana* in these words :

"Where there is treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators, who, by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."

The writings of Ayala, Gentilis, Grotius, Vattel, Kent, Zouche, etc. have tended to transform the transitory state of usage into custom, and represented a strong element to consolidate the customary law.

Lawrence is of the view that a writer on International Law in a sense himself legislates for he creates the opinion that is really supreme.

International Comity.—Oppenheim observes that a factor of a special kind which also influences the growth of International Law is the so-called binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill. Such rules of international conduct are not rules of law, but of Comity. The Comity of Nations is not a source of International Law, but many a former rule of international comity is nowadays a rule of International Law.

Comity may be defined in the words of Andrews, J., in *The Russian Socialist Federated Soviet Republic* v. *Cibrario*, "as that reciprocal courtesy which one

member of the family of nations owes to the others. It presupposes friendship. It assumes the prevalence of equity and justice. Experience points to the expediency of recognizing the legislative, executive and judicial acts of other powers. We do justice that justice may be done in return."

International State papers other than Treaties.—"Occasionally an international controversy clears up a disputed legal point or advances the application of principles that have before received little more than an otiose assent." The archives of the foreign affairs department of every country contain a mass of valuable expert opinion which, if published, would add considerably to the literature on International Law.

State Instructions for the guidance of their own Officers.—The acts or declarations by statesmen, opinions of legal advisers to State Governments or official jurists given in relation to particular matters referred to them by their own Governments, or other State papers of international import all furnish evidence of usages which grow into international customs in course of time as they are adopted by other States.

Place of 'Reason' in the modern system.—Judicial reasoning based on "consideration of precedents, the finding of analogies, the disengagement from accidental circumstances of the principles underlying rules of law already established" is accepted "as valid and is constantly resorted to in the practice of States, both in the decisions of International tribunals and in the legal arguments conducted by foreign offices with one another." In the absence of a universally recognized rule governing a particular case, it is the function of jurisprudence to resolve conflict of opposing rights and interest by applying the corollaries of general principles and the reason of the thing.

The United Nations.—Besides the above, as observed by Manfred Lacks, President of the International Court of Justice, the United Nations has made an indirect impact on the development of International Law. That is its invisible contribution. By the interpretation of existing rules, by fostering better understanding, the Assembly debates may pave the way to a possible agreement in the future. The General Assembly resolutions are a stepping stone, a stage in the political and legal processes, a factor in the development of international law. We can thus affirm that general International Law has been built in the United Nations and by the United Nations.

CHAPTER III

HISTORY, DEVELOPMENT AND SCHOOLS OF INTERNATIONAL LAW

History of International Law

International Law in one shape or another has existed in almost all climes and ages. It is true that the conception of a Family of Nations or "one world" was foreign to the ancient world, but nevertheless nations came into contact with one another and as a result of the contact there sprang up international trade, rules regarding the declaration and conduct of war, treaties and diplomatic privileges. The history of the Indians, Jews, Greeks and Romans is replete with such instances. "Even in antiquity there was a Greek, a Mediterranean, a Hindu, and a Chinese International Law."

With the advance of civilization, the rules regulating the dealings of civilized States with one another have become very articulate so much so that it has now become impossible for nations, big or small, to live in isolation.

Hindus.—Traces of International law in the form of privilege of ambassadors, treaties and the rules governing the declaration and conduct of war are to be found even in the history of ancient India. The epics of Ramayan and Mahabharata, although preaching in the main, religious discourses, make pointed references to rules and usages governing war, peace and neutrality based on Dharma. They attach due importance to the inviolability of a *duta* or ambassador and also heralds in battle. *The Bhagavadgita*—a book of Hindu scripture whose teachings have gained appreciation far beyond the borders of India—deals in full measure with just and unjust wars. Lord Sri Krishna thus addresses Arjuna who was overwhelmed with pity : "There is nothing more welcome for a man of the warrior class than a righteous war and it is only the lucky among the Kshatriyas, who gets such an unsolicited opportunity for war, which is an open door to heaven. If you will not wage such a righteous war, then, abandoning your duty and losing your reputation, you will incur sin." (Ch. II, verses 31 to 33). The need for a prior declaration of war by blowing of conches by the warriors on both sides has also been emphasized there.

Elaborate rules were laid down in the Arthashastra of Kautilya and Nitishastra of Kamandaka for the conduct of government and foreign affairs. Kautilya advocated the abandonment of the principles of morality for the application of Dharma in the war. He advocated adoption of all means, whether fair or foul, during war.

Manu distinguishes between righteous and unrighteous wars and observes that it is the highest merit of a valorous Kshatriya to die in a righteous war. It was forbidden to kill or wound enemy persons who had surrendered. Inviolability of temples was recognized by him; and he granted immunity to prisoners of war and non-combatants. Hindus had great regard for treaties.

Mohammedans.—The Mohammedan rulers in India had also developed

relations with some of the foreign States. They received ambassadors from European countries and also entered into treaties.

The Muslim rule is full of instances where war—known as Jehad—was waged for the protection of Islam against an alien or hostile non-Muslim State.

The Muslim rules governing war recognized the distinction between combatants and non-combatants and gave protection to women, children, the aged and the infirm during the *Jehad*. Prisoners of war remained at the mercy of the Imam who either enslaved or killed them. Respect was paid to treaties as well.

Jews.—The Jews had the same laws for foreigners residing on Jewish territory as for themselves. "Love the stranger : for ye were strangers in the land of Egypt." (Deuteronomy, Ch. X, verse 19). A reading of the Bible, however, illustrates that on account of their monotheism, the Jews did not recognise other nations who professed faith in polytheism as their equals. With friendly nations the Jews had international relations. They faithfully observed treaties and considered ambassadors as sacrosanct.

Greeks.—The Greeks were more civilised than their neighbours whom they regarded as barbarians. Their notion of superiority prevented them from developing mutual relations with their neighbouring nations. The Greeks lived in numerous small city States which were independent of one another. The inhabitants of these States belonged to the same race, blood and religion. This close affinity in course of time united these independent fragments into a community of States which observed certain rules *inter se* in times of war and peace. They frequently resorted to arbitration for settlement of their disputes; treated heralds and priests who carried the holy fire as inviolable; commenced no war without a previous declaration; gave burial to warriors dying in the battlefield; exchanged prisoners of war or let them off on payment of ransom; regarded the temple of the good Apollo as permanently inviolable and gave special privileges to ambassadors who were ceremoniously received and their persons treated as invoilable.

The Greeks developed theories concerning proper conduct of war. Their expositions of these theories and the surviving records of Greek practice in war furnished authority to early writers on International Law for propounding their rules.

Oppenheim observes that the Greeks left to history the example that independent sovereign States can live in a community which provides a law for the international relations of the member States provided that there exist some common interests and aims which bind these States together.

Romans.—The Romans had an advanced notion of International Law. "Even though the present system of International Law is generally regarded as having had its origin with the rise of the modern State in the sixteenth and seventeenth centuries, its earlier foundations are to be found in the ancient world. In this respect, the influence of Roman Law is of special significance. It is a tribute to the legal genius of Rome that the primitive law of city-State was capable of such expansion and refinement as the great world empire should in time require."

The Romans had a set of 20 priests, termed *fetiales* who managed relations with foreign States by the laws called *jus fetiales* or *jus sacrale*. The Romans had

one set of laws which were applicable exclusively to themselves, *viz.*, *jus civile*, the law applicable to Romans, and another set for foreigners, *viz.*, *jus gentium*, the law which they had in common with other nations. The original *jus civile* was an archaic system of law and provided no legal remedies in cases involving foreigners. New and liberal rules were subsequently evolved by *praetor pregrinus*, a special magistrate. Later this new branch of the law came to be applied equally to Roman citizens.

The *jus gentium*—a Latin term from which the phrase law of nations has been derived—was later on strenghtened by the development of *jus naturale* which was the law that was constituted by right reason, common to nature and to man. It was ultimately this law or *jus fetiales* that governed the relations of Romans with foreign countries in times of peace and war, and also when they entered into treaties of friendship with them.

With the introduction of the general principles of law and justice having a universal application in *jus gentium*, it later on identified itself with *jus naturale* and the two terms became synonymous in Roman law.

Roman law recognized four just reasons for war, *viz.*, (a) violation of the Roman dominions, (b) violation of ambassadorial privileges, (c) violation of treaties, and (d) support given during war to an opponent by a hitherto friendly State. War could be ended according to Romans (i) through a treaty of peace, (ii) by surrender (*deditio*) or (iii) through conquest of the enemy's country (*occupatio*).

Treaties were divided into three kinds, viz., (i) Treaty of friendship (*amicitia*), (ii) Treaty of alliance (*foedus*), and (iii) Treaty of hospitality (*hospitium*). The Romans had great respect for treaties, which could be terminated by notice.

From the above brief survey of the set of rules followed by the Romans, it appears that they followed legal rules—which were essentially municipal—for their foreign relations. Oppenheim observes that though this legal treatment can in no way be compared to modern International Law, yet it constitutes contribution to the law of nations of the future in so far as its example furnished many arguments to those to whose efforts we owe the existence of our modern law of nations.

Division of the History of International Law into Three Periods

First Period.—Lawrence divides the History of International Law into three periods. The first period extends from the earliest times to the establishment of the dominion of Rome under the Caesars. Its distinguishing mark is the belief that nations owed duties to one another if they were of the same race, but not otherwise. The fundamentals of International Law, viz., unity by bonds existed among the Greeks, inasmuch as all Hellenic peoples of the same race and religion were united together by bonds which did not subsist between them and the rest of the world. This period is marked by the development of a maritime code of the Rhodians, which governed Greek commerce and was the basis upon which the great maritime code of Middle Ages, viz., the Consolato del Mare, is founded. Piracy and robbery were not regarded as dishonourable professions during that time. There existed almost no distinction between a state of war and a state of peace, although the persons of heralds were respected.

Second Period.—The second period dates from the establishment of the dominion of Rome under the Caesars to the Reformation. Lawrence points out that this period is characterised by the conception that there was to be found somewhere a common superior who regulated the dealings of ordinary political communities with each other. The Roman Empire extended over the settled part of Europe and much of Asia and Africa. Caesar was the political superior of a large number of subordinate rulers whose disputes were settled by appeals to him. He imposed perfect obligations upon people of the Empire, who believed in the existence of a common superior over all States as part of the natural order of the universe. International Law was really based on the commands of a superior in the Austinian sense of the term.

The Roman Law guaranteed protection to goods and persons of a foreign State when there was a treaty of friendship between Rome and that foreign State, but the goods could be captured and persons enslaved if there existed no treaty of friendship.

Fifteenth and Sixteenth Centuries.—The Roman empire embraced nearly the whole civilised ancient world and the personal character of each emperor determined the nature of the influence on the empire. The Emperor and the Pope claimed universal authority as the temporal and spiritual heads. There was consequently no need for a law of nations during the Middle Ages till we find that multitude of independent States had come into being and the rivalry between the Pope and the Emperor had cropped up as to the extent of their respective authority. This process started from the treaty of Verdun of 843 and reached its climax with the reign of Frederic III, Emperor of the Germans from 1440 to 1493.

The diminution of the Roman Empire and the rising feeling of nationalism greatly diminished the notion of a common superior governing the relations of States *inter se*. The common supremacy finally ended with the storm of the Reformation. Protestant jurists challenged the imperial authority while the Protestant princes of the German empire fought against the Emperor.

Another factor that contributed to the development of modern International Law, according to Schwarzenberger, was that under the impact of political, spiritual, economic and technical revolutions, by which the medieval community was transformed into the modern capitalist world, strong incentives were created towards greater *centralisation and expansion* of the original European inter-State system.

Third Period.—We then come to the third period, extending from the Reformation to the present time. Lawrence points out that here we obtain a true International Law, based on the principle that States are separate and independent members in a great society controlled by no common superior yet nevertheless not lawless, but governed by rule of conduct binding on all its members.

Development of International Law in modern sense : Seventeenth and Eighteenth Centuries

International Law in its modern sense may, however, be regarded to begin from Grotius (1583-1645), who published his work *De Jure Belli ac Pacis*, in Paris in 1625.

The forerunners of Grotius were : (1) Balthazar Ayala, (2) Albericus Gentilis, and (3) Francisco Suarez.

Three Schools.—The seventeenth and eighteenth centuries gave birth to three different schools of writers on the law of nations, *viz.*, the Naturalists, the Positivists and the Grotians. The naturalists are also known as the "pure law of nature school", the positivists the "historical school" and the Grotians as "electics."

The *Naturalists* denied that there was any positive law of nations based on custom or treaties, but maintained that it was only a part of the law of nature. Samuel Pufendorf (1632-1694) led this school. He maintained that States were bound to regulate their conduct towards one another by the law of nature as they had no common superior. He could justify resort to war when all means to a peaceful settlement had been exhausted, and advocated that there should be no laws of war, as any mercy shown in the prosecution of the war would only retard the early return of the natural state of peace. In this view, Professor Brierly observes that he advocated "a natural law in a new and debased form of a law supposed to be binding upon men in an imaginary state of nature."

The German philosopher, Christian Thomasius (1655-1728) was a great follower of Pufendorf. He distinguished between natural and positive law and the science of law and morals. His other followers were the English philosophers, Francis Hutchenson and Thomas Rutherford, the French philosopher, Jean Barbeyrac (1674-1744), Genevan philosopher, Jean Jacques Burlamaqui and the French diplomatist De Rayneval.

The *Positivists* differ fundamentally from the naturalists and ascribe the growth of International Law to custom and international treaties. They regard the practice of the States in their mutual relations as the true source of International Law. They do not consider natural law as of any importance but regard customary law based on treaties and custom to be positive International Law and of highest importance. They gained prominence in the eighteenth century. The Dutch jurist, Bynkershoek (1673-1743), the German writer, John Jacob Moser (1701-1785) and George Friedrich de Martens (1756-1821) were the leading exponents of this school. This school represents the modern view of International Law.

Bynkershoek evolved the principle that the marine league was the measure of territorial water of States. He observed that the sea should belong to the State it borders as far as a cannon shot will reach from the shore, and it appeared that the range of cannon was about three miles in the eighteenth century. He regarded custom and treaties as the basis of International Law and pointed out that with the change of customs the law of nations also changed.

Moser, like Bynkershoek, also attributed custom and treaties as the sources of International Law.

Martens also made a valuable contribution to the positive law of nations and referred to natural law to fill up gaps or lapses into positive law of nations.

The *Grotians* occupied a position midway between the naturalists and positivists. They maintained the distinction between natural and voluntary law of nations as propounded by Grotius and kept both as the bases of the law, but unlike Grotius they considered the positive or voluntary law of nations as important as the natural law of nations. They gained enormous influence during the seventeenth and eighteenth centuries. Two important exponents of this school were Christian Wolff (1679-1754) and Emerich de Vattel (1714-1867).

Wolff was a German philosopher and envisaged in the international community a *civitas maxima* or a superstate standing above the component member States.

Vattel was a Swiss jurist, who published in 1758 his great work *Le droit des gens*, maintaining that the law of nations was the law of nature applied to nations. He made two divisions of law, voluntary and the necessary law. He did not agree with the fiction of *civitas maxima* as a foundation for International Law, as propounded by Wolff, but advocated the doctrine of the state of nature. He enunciated the doctrine of the equality of States and observed that strength and weakness produced in this regard no distinction. "A dwarf is as much a man as a giant is; a small republic is no less a sovereign State than the most powerful kingdom." Vattel's influence on the development of International Law is second only to that of Grotius.

Nineteenth and Twentieth Centuries

The development of International Law during the nineteenth and twentieth centuries is attributable to several factors. First, there was an endeavour on the part of nations after the Congress of Vienna (1815) to abide by the rule of the law of nations. That Congress was the first European international assembly which made rules for navigation in international rivers and prescribed ranks and precedence of envoys. Secondly, this period is marked by the conclusion of several law-making treaties, *e.g.*, the Declaration of Paris (1856) embodying the rules for the guidance of States when engaged in warfare at sea, the Geneva Convention (1864) for the amelioration of the condition of the sick and wounded in warfare on land, the Declaration of St. Petersburg (1868) prohibiting the use of explosive bullets in war, the Geneva convention of 1906 extending the provisions as to sick and wounded in land warfare to maritime warfare, etc. And, lastly, greater emphasis was put on the positive theory of International Law by writers, such as De Martens, Manning (Commentaries on the Law of Nations, 1839), Phillimore (Commentaries on International Law, 1854), Maine and Westlake. Other authors like Hall, Walker (Science of International Law, 1893). Oppenheim, Lawrence and Hyde, also helped largely in the development of International Law by their contributions as declaratory authors.

In the United States, several writers contributed to the development of International Law by their writings, e.g., James Kent (Commentaries on American Law, 1826) and Wheaton (Elements of International Law, 1836). Lieber codified the laws of war and the rules with regard to the rights and duties of neutral States.

The continental writers also exercised a great influence on the development of the science of International Law. The names of Klubers, Heffter, Bluntschli, Jellinek, Ihering, Triepel and Kaufamann rank high as continental jurists.

The Hague Conferences of 1899 and 1907—the work of great international assemblies for the pacific settlement of international disputes—tried to evolve laws for the family of nations as a whole. The First Hague Conference of 1899 evolved a code for land warfare. The second Hague Conference of 1907 adopted conventions dealing with bombardment—the prohibition to bombard undefended habitations—the laying of contact mines, rights and duties of neutrals in naval warfare, conversion of merchant ships into warship, maritime

warfare, military hospital ships, flags of truce, etc. The Permanent Court of Arbitration was established as a result of these conferences.

First World War—Covenants of the League of Nations, 1919

The Treaty of Versailles concluded between the Allied and Associated Powers and Germany on June 28, 1919, after the First World War laid the foundation of the League of Nations for the purpose of maintaining international peace and security and the promotion of international co-operation.

The Permanent Court of International Justice was established in 1921 in accordance with the provisions of Article 14 of the Covenant of the League of Nations.

Treaty of Locarno, 1925.—It was concluded on November 16, 1925, between France, Britain, Germany, Italy and Belgium whereby Germany, France and Belgium undertook to maintain their present mutual frontiers and to abstain from the use of force against each other. Britain and Italy guaranteed the Pact assuring mutual assistance in the event of violation. In 1936 Germany renounced this treaty alleging that the mutual assistance pact between France and Soviet Russia was incompatible with the Locarno Pact.

Kellogg-Briand Pact, 1928.—Close on the heels of the treaty of Locarno, an international agreement was signed in 1928 on the initiative of Frank B. Kellogg, U.S. Secretary of State, and Aristide Briand, French Foreign Minister, by which almost all the nations of the world condemned war as an instrument of settling international disputes and pledged to settle their differences by peaceful methods. The pact prohibited war as an instrument of national policy, and later became one of the legal underpinnings of the Nuremberg trials.

The Geneva Conventions, 1929.—Representatives of 47 governments adopted at the instance of the Swiss Government at Geneva Conventions on the Treatment of Prisoners of War and Amelioration of the Condition of the Wounded and Sick in Armies in the Field. The Convention on Treatment of Prisoners of War prohibited reprisals, cruel treatment of prisoners and collective penalties for acts of individuals. The other Conventions granted immunities to medical units and persons engaged in the care of the sick and the wounded.

Codification of International Law.—The end of the First World War and the establishment of the League of Nations also witnessed sincere attempts at codifications of International Law, which have been discussed in detail in a subsequent chapter on codification.

Second World War

The end of the Second World War witnessed the birth of another international organization, viz., the United Nations. Its Charter was signed by fifty-one States at San Francisco on 26th June, 1945. The United Nations came into existence on 24th October, 1945, when the Charter was ratified by the five original members and a majority of other signatories.

The establishment of the United Nations is another important landmark in the development of International Law regulating the dealings of civilized States with one another.

The setting up of International Military Tribunals at Nuremburg and Tokyo and their judgments have laid the foundations of international criminal laws.

The Universal Declaration of Human Rights (1948), The European Convention of the Protection of Human Rights and Fundamental Freedoms (1950), the Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960, the Declaration of the Elimination of all Forms of Racial Discrimination, 1963, and the various Conventions on Genocide, on the Status of Refugees and against the Taking of Hostages, 1979, adopted by the U.N. are, in effect, treaties which add to the body of international conduct regulated by law.

CHAPTER IV

LAW OF NATURE AND ITS INFLUENCE ON THE DEVELOPMENT OF INTERNATIONAL LAW

Law of Nature defined

The law of nature is that portion of morality which supplies the more important and universal rule for governance of the outward acts of mankind. It is written by the fingers of nature in the hearts of mankind. It consists of the rules which nature personified as a guiding power, is deemed to have evolved and prescribed. Greek philosophers thought the material and moral phenomena of the world be resolved into some simple and general rules and they called them the law of nature.

Natural law is also known as Divine Law (being the command of God imposed upon men), unwritten law (not written on brazen tablets or on pillars), universal or common law (being of universal validity), law of reason (being established by that Reason which governs the world) and eternal law (being uncreated and immutable).

Justinian.—"Natural law (*jure naturalia*) which is observed equally in all nations, being established by divine providence, remains for ever settled and immutable; but that law which each State has established for itself is often changed either by legislation or by the tacit consent of the people."

Hooker.—"The law of reason for human nature is that which men by discourse of natural reason have rightly found out themselves to be all for ever bound unto in their actions."

Christian Thomasius.—"Natural law is a divine law written in the hearts of all men, obliging them to do those things which are necessarily consonant to the rational nature of mankind, and to refrain from those things which are repugnant to it.

The Greeks.—The Greeks drew a distinction between the Hellenic circle and the States falling outside it. Non-Hellenics were destined by nature to be the slaves of the Greeks : the laws of the Hellenes were derived from the law of reason or divine law, obliging them to act in consonance with the rational nature of mankind. They developed the idea of *jus naturale*, looking upon universe as being guided by a fundamental principle which they called the law of nature.

The Stoic philosophers towards the end of the Republican era developed this conception of nature by giving it an ethical colouring and saying : "The guiding principle immanent in the universe is Divine Reason, and Natural or Universal Law is its expression.....The Law of Nature thus virtually comes to mean the Law of Reason—the law which is implanted by Nature in the breast of each individual and which does not depend for its obligation on the sanctions of any external authority."

Fenwick observes that "it is to the Greek city States and to their great philosophers that we must look for the earliest affirmation of this 'higher law'

and for the most emphatic recognition of its authority."

The Romans.—The Romans had an advanced notion of International Law which they evolved with the help of natural law. They had two sets of law :

(i) *Jue civile* or the civil law being the law and customs applicable to the Romans; and

(ii) *Jus gentium* or the law of nations being the law which they had in common with other nations. It was the law based on natural reason designed for all mankind. The *jus gentium* came later to be known as the *jus naturale.*

The Roman jurists had at first little respect for *jus gentium*, which was evolved out of sheer political necessity. The Romans had as little regard for *jus gentium* as for the foreigners from whose institutions and from whose customs and usages it was derived and to whom they were disinclined to lend the advantages of their own indigenous law, *viz., jus civile.* The Romans looked upon *jus gentium* as a concrete embodiment of the Law of Nature and identified *jus gentium* with *jus naturale* as it agreed well enough with the rule of Natural Law, so far as these could be observed in practice.

Cicero, therefore, rightly observed that there is indeed a true law (lex), right reason agreeing with nature, diffused among all men unchanging, everlasting. It is not allowable to alter this law, nor to derogate from it, nor can it be repealed.

Maine on Law of Nature

Sir Henry Maine observes in his "Ancient Law" that the grandest function of the Law of Nature was discharged in giving birth to modern International Law and the modern law of war. Among the postulates which form the foundation of International Law, as laid down by its original architects, there are three of pre-eminent importance. The first of the postulates which form the foundation of International Law, is that there is a determinable law of nature. Grotius, the founder of modern International Law, and his successors borrowed this assumption directly from the Romans, but they took an altogether different view from the Roman jurisconsults, and from each other, in their ideas as to the mode determining it.

The second of the postulates is that natural law is binding on States *inter se.* Commonwealths are relative to each other in a state of nature and natural law is consequently binding on States amongst themselves.

The third postulate is that sovereignty is territorial and sovereigns *inter se* are to be deemed not paramount, but absolute, owners of the State's territory.

The Medieval Conception

During the Middle Ages, the conception of law of nature was identified with divine law. The Church gave it a place in the doctrinal system. By virtue of being identified with the law of God, the law of nature acquired a far superior authority than man-made laws. Much of what medieval writers spoke was closely related to theology and ethics, though they also dealt with topics falling within the domain of International Law.

"The medieval conception of a law of the nature", observes Brierly, "is open to certain criticisms. In the first place, when all allowances have been made for the aid afforded by Roman law, it has to be admitted that it implied a belief in

the rationality of the universe which seems to us to be exaggerated. It is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the best human reasoning could discover it and not, of course, that the result to which any and every individual's reasoning led him was natural law. The foolish criticism of Jeremy Bentham : 'a great multitude of people are continually talking of the law of nature; and then they go on giving you their sentiments about what is right and what is wrong; and these sentiments you are to understand, are so many chapters and sections of the law of nature', merely showed a contempt for a great concept which Bentham had not taken the trouble to understand.....In the second place, when medieval writers spoke of natural law as able to overrule positive law in a case of conflict, they were introducing an anarchical principle which we must reject. But this was a principle which died hard, and even in the eighteenth century Blackstone could write : "The law of nature being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe in all countries and at all times; no human laws are of any validity, if contrary to this. In Blackstone, however, such words were mere lipservice to a tradition, and had no effect on his exposition of the law."

Brierly further observes that these valid criticims do not, however, affect the permanent truths in the conception of a law of nature, and the validity of those truths is recognized as fully as ever.

Law of Nature before Grotius

The disintegration of the Holy Roman Empire and the diminishing influence of the Popes as a body no doubt greatly affected the influence of the Law of Nature, but the rudiments of the law which had gained ground earlier did not altogether wither away. The 15th century, however, witnesses the revival of arts and letters, marking the transition from the Middle Ages to the modern world. The New World was also discovered. And these factors widened the scope of International Law and the need for mutual intercourse between nations. The Spanish theologian Vitoria (1480-1546) enunciated in clear terms the principle that the nations of the world constituted a community, based upon natural reason and social intercourse. In 1582 Balthazar Ayala (1548-1584) published at Douai his *De Jure et Officis Bellicis* and advocated the doctrine of *jus naturale* and *jus gentium* established by common consent. Then follows Albericus Gentilis (1552-1608), an Italian Protestant, who had to flee to England on account of his Protestant views. He published his work *De Jure Belli libri tres* in 1598 and emphasized the existence of the law of war based on natural reason and consent. He separated International Law from ethics and theology and treated it as a branch of jurisprudence. Last of all comes the Spanish Jesuit Francisco Suraez (1548-1617) who published his work *Tractatus de Legibus et Deo Legislatore* in 1612. He laid emphasis on the moral obligation of the *jus gentium* and observed that the various States although independent were nevertheless members of the human race bound by a law of conduct based upon natural reason and custom.

Grotius (1583-1645)

Huig van Groot, popularly known as Hugo Grotius, has been acclaimed as "Father of the Law of Nations". His most important work, *De Jure Belliac Pacis*, was published in France. His main plank was to find rules of Law of Nations

which were eternal, unchangeable and independent of the consent of the States. "The leading object of Grotius, and of his immediate disciples and successors, in the science of which he was the founder", observes Wheaton, "seems to have been, first, to lay down those rules of justice which would be binding on men living in a social state, independently of any positive laws of human institution; or as is commonly expressed, living together in a *state of nature*; and, secondly, to apply those rules, under the name of Natural Laws, to the mutual relations of separate communities living in a similar state with respect to each other."

Grotius observed : "Natural law is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of Nature. Actions, which are the subject of this exertion of reason, are in themselves unlawful and are, therefore, as such necessarily commanded or prohibited by God."

Grotius started with the position that there is a universal and immutable law of nature which constitutes a large part of the law of nations.

Grotius opined that rights common to all were conferred not by statutes and ordinances of a particular State, but were derived from natural law, which is "the dictate of right reason indicating any act, from its agreement or disagreement with the rational nature, has in it a moral turpitude or a moral necessity."

Grotius differentiated between the law of nations and natural law by their origin and attributed to the former the general consent of nations.

Grotius did not identify justice with morality. Justice, according to him, was the highest utility, "and merely on that ground neither a State nor the community of States can be preserved without it. But it is also more than utility, because it is part of the true social nature of man, and that is its real title to observance by him."

Applying the above principles to war, he observed : "It is so far from being right to admit, as some imagine, that in war rights cease, that war ought never to be undertaken except to obtain a right, nor, when undertaken, ought it to be carried on except within the bounds of right and good faith.....Between enemies, those laws which nature dictates or the consent of nations institutes are binding."

Grotius has been criticised for his vain attempt to devise a complete system of *'droit naturel'*. The criticism is not sound for he only wanted to establish principles which applied to the communities of people, and in this he neither leaned entirely on Roman jurisprudence, nor on a system of morals.

Rousseau, the author of 'Contract Social' levelled another criticism against Grotius in confounding fact with law and the duties (devoirs) of nations with their practice. The criticism is also unfounded in view of the fact that social and political ferments of the period in which he lived—and it was also a period of civil war in France—played a dominant role in evolving his principles. In fact, Grotius believed in divine truth, which was a characteristic of the 17th century.

Richard Zouche (1590-1660)

There is yet an Englishman, Richard Zouche, who gained the title of "Second Founder of the Law of Nations." He advocated the customary Law of

Nations and in that he differed vitally from Grotius; but he did not discard the natural law of nations altogether as one of the bases of International Law.

Hobbes and Pufendorf.—Hobbes divided the natural law into natural law of men and natural law of States, commonly called the Law of Nations. He observed that "the precepts of both are the same but since States, when they are once instituted, assume the personal qualities of individual men, that law, which when speaking of individual men we call the Law of Nature, is called the Law of Nations when applied to whole States, nations or people."

Samuel Pufendorf (1632-1694) subscribed to the views of Hobbes and added that "there is no other voluntary or positive law of nations properly invested with a true and legal force, and binding as the command of a superior power." He denied any binding force to the practice of nations.

Vattel.—He observes that the Law of Nations, in its origin, was nothing more than the law of nature applied to nations. He accepted the doctrine of the state of nature and observed : "Nations being composed of men naturally free and independent, and who before the establishment of civil societies lived together in the state of nature; nations or sovereign States must be regarded as so many free persons living together in the state of nature."

Spinoza (1632-1677)

According to Spinoza, the mutual condition of States is that of the state of nature with all its implications. The right of the Supreme Court is nothing else than the right of nature, which is determined not by the power of each individual but by that of the multitude, guided, as it were, by one mind; that is as each individual in the state of nature, so likewise the body and mind of the commonwealth have just so much right as they have power. According to him, a treaty lasts so long as the cause which produced it.

Three different schools.—The 17th and 18th centuries witnessed the birth of three different schools of writers mainly on account of the distinction between the Natural Law of Nations, advocated by Grotius, and the Customary or Voluntary Law of Nations. They were the 'Naturalists'; the 'Positivists' and the 'Grotians.'

Law of Nature in Modern Times

Oppenheim aptly remarks : "The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. The modern Law of Nations in particular owes its very existence to the theory of Law of Nature. Grotius took the decisive step of secularising the Law of Nature and emancipating it from purely theological doctrine."

According to Sir Henry Maine, "The grandest function of the Law of Nature was discharged in giving birth to modern International Law."

It must, however, be clearly understood that the Law of Nature although wielding a great influence in the development of International Law cannot be said to be altogether free from criticism. Grotius confused himself by blending the ideal notion of what ought to be with what it was. "If his view were correct", observes Lawrence, "there would always have been a general agreement as to the fundamental principles and more important precepts of the law of nature. But nothing of the kind has ever existed. Jurists and philosophers have differed

hopelessly among themselves, while the great mass of mankind have not even pretended to understand the matter."

The Scotch jurist, Lorimer, was the last representative of the 'naturalistic' school. His conception that International Law was the law of nature realised in the relations of separate States and that there was no positive International Law at all has hardly any adherent today. But as Garner observes : "Traces of the influence of the so-called law of nature are, however, not entirely lacking, and there are still a few who maintain that while you may drive it out of front door it will manage to gain fresh entrance through the back door or the windows."

CHAPTER V

CODIFICATION OF INTERNATIONAL LAW

Definition.—Code is a consolidation of the statute law, or a statute collecting all the law relating to a particular subject. Codification is the process of translating into statutes or conventions, customary law and the rules arising from the decisions of tribunals, with little or no alteration of the law. It secures, by means of general conventions, agreement among the States upon certain topics of International Law and acts as a check whereby the determination of particular law is not left to the caprices of Judges. It also tends to reconcile conflicting views and renders agreement possible among different States.

Different Meanings of Codification.—The term "codification of International Law" has been employed in three different senses, *viz.*, (i) the harmonizing of municipal law of various countries by the preparation and enactment of uniform statutes; (ii) a systematic re-statement of existing customary International Law, i.e., ascertaining and declaring the existing rules of International Law; and (iii) developing, amending and improving the law as it is re-stated. The Committee on the Progressive Development of International Law and its Codification, set up by the U.N. General Assembly, resolved the controversy between the second and third meanings of codification. Article 15 of the Statute of the International Law Commission distinguishes between the 'progressive development of International Law' and its 'codification'. The latter expression is used to denote more precise formulation and systematization of rules of International Law in the fields where there has already been extensive State practice, precedent and doctrine; while the former expression is used to mean the preparation of draft conventions on subjects which have not yet been regulated by International Law or in regard to which the law has not yet been sufficiently developed in the practice of States. The Committee recognized that the two terms were not mutually exclusive and it was the task of the Commission to provide both these purposes.

According to Professor Woolsey, codification of International Law must entail two processes—(a) the scientific determination of the law, and (b) the achievement of the universal acceptance of the law so defined by means of a multilateral conventions generally accepted. He admitted that in character the second process was legislative and political. The two processes, that of scientific determination of the law and the other of achieving the adoption of machinery for rendering the law so defined and determined binding on States, observes Sir Cecil Hurst, get mixed up together. That is precisely what happened at the Codification Conference of 1930.

Codification basically involves a process of legislation and consolidation.

Difficulties of Codification.—The chief difficulty, however, in the way of codification is, as Sir Cecil Hurst aptly remarks, "If it is left to governments to meet in conference for the purpose of deciding what are the rules of International Law, it is inevitable that their efforts will be directed to agreeing

or trying to agree on the rules of International Law as they ought to be, i.e., the rules which would be appropriate to their present day requirements; and delegates will find that the requirements of the government are so diversified, so contrary, that agreement is impossible."

The difficulty of codification of International Law is further enhanced on account of the fact that the existing law is not well settled in the form of customary rules generally accepted of judicial precedents or of enactments to enable the draftsman to make an orderly arrangement of the law by devoting himself not to the substance or policy of the law but with the form of its presentation. The international codifier is, however, not required to confine his attention to the form of the law but to its substance, to fill up gaps where the law is uncertain "and to give precision to abstract general principles of which the practical application is unsettled." "In circumstances such as these", observes Brierly, "codification has ceased to be a technical task which can be entrusted to lawyers; it has become a political matter, a task of law creation, and in the absence of any international organ of legislative powers the contents of the code can be settled only if the representatives of governments can agree upon them."

Short History.—The idea of codification of the Law of Nations was first mooted by Bentham at the end of the eighteenth century. He suggested a utopian International Law which could be the basis of an everlasting peace between the civilized States.

The National Convention of France resolved in the year 1972 to proclaim a Declaration of the Rights of Nations. Abbe Gregoire, who had been charged with the duty of drafting a declaration by the Convention, produced in the year 1975 a draft of 21 articles, which was eventually rejected by the Convention.

Declaration of Paris.—Real codification was aimed under the Declaration of Paris in 1856, which was signed by Great Britain, France, Austria, Russia, Prussia, Sardina and Turkey at the end of the Crimean War. It laid down four principles :

(1) Privateering is to be abolished;

(2) Neutral flag covers enemy goods with the exception of contraband of war;

(3) Neutral goods under enemy flag are not liable to capture except the contraband of war; and

(4) Blockade, in order to be real and binding, must be effective.

Codification by individual writers.—Real attempt at codification was made in 1861 by an Austrian jurist, Alfons von Domin Petrushevecz who published at Leipzig his code entitled *Precis d'un code de droit international* showing the possibility of codification of International Law.

In 1863, Professor Francis Liber of the Columbia University Law School, New York, drafted the Laws of War in a body of rules, which the United States published as "Instructions for the Government of Armies of the United States on the Field". These rules were applied in the U.S. Civil War and also formed the basis of the Hague Regulations.

In 1868, Bluntschli, the celebrated Swiss interpreter of the Law of Nations, published a well known draft code *Das moderne Velkerrecht de civilisirten Staaten als Rechtbuch dargestellt*, which received publicity and was translated into several languages.

The Treaty of Washington concluded on May 8, 1871, between U.S.A. and Her Britanic Majesty, besides providing for a settlement of their differences, also laid down obligation of a neutral government as to fitting out vessels on its waters as to the use of its ports.

In the year 1872, Dudley Feild, published at New York "Draft Outlines of an International Code."

In 1873, the Institute of International Law comprising jurists of all nations was founded at Ghent in Belgium, which has produced a number of drafts concerning various parts of International Law. In the same year was also founded the Association for the Reform and Codification of the Law of Nations, now termed as the International Law Association.

In 1874, at the initiative of the Emperor Alexander II of Russia, the Brussels Conference drafted a body of sixty articles under the name of the Declaration of Brussels, but those articles were not ratified by the powers.

In 1880, the Institute of International Law, published its *Manuel des lois de la guerre sur terre.*

In 1887, Leon Levi, published his International Law with Materials for a Code of International Law.

In 1890, the Italian jurist, Pasquale Fiore, published his Code of International Law. Its fifth edition appeared in 1915.

In 1906, E. Duplexis, published his Code of International Law.

In 1911, Jerome Internoscia, published his New Code of International Law in English, French and Italian. Epitaciou Pessoa also published his Code in the same year.

The Hague Conferences.—In the year 1899, the Hague Conference, convened on the initiative of the Emperor Nicholas II of Russia, produced two important Conventions, in the form of a code, *viz.*

(a) Convention for the Pacific Settlement of International Disputes, and

(b) Convention with respect to the Laws and Customs of War on Land.

The conference was attended by 26 powers. Its conventions are landmarks in the codification of International Law.

The Second Hague Conference, 1907, produced thirteen conventions, some of which are codifications of parts of maritime law. They also dealt with regulations concerning warfare and neutrality in war on land and sea, the status of enemy merchantmen at the outbreak of hostilities, conversion of merchantmen into men-of-war, bombardment by naval forces, and laying of automatic submarine contact mines. Three of the thirteen conventions were a reproduction of three corresponding conventions of the First Hague Peace Conference; these being convention for the pacific settlement of international disputes, that concerning laws and customs of war on land and the other concerning the adaptation of the principles of the Geneva Convention to maritime war. The conference was attended by 44 independent sovereign States.

Declaration of London.—An attempt was made at the London Naval Conference of 1909 to draw up agreed lists of goods for contraband purposes. Its decisions were incorporated in the Declaration of London (1909), but the Declaration did not come into force for want of ratification. The impact of total war at first in 1914 and then in 1939 reduced the Declaration of London as

devoid of any vestige of authority.

In 1913 the Institute of International Law published its *Manuel de la guerre maritime.*

Codification by Regional Groups.—As a result of the composition of a committee of international jurists to carry on the work of codification in furtherance of the aims of a conference of American States at Mexico in 1901-1902, the American Institute of International Law, which was founded in 1915, submitted a number of codification proposals to the American Conference in 1924. In 1928, the American Conference adopted the following seven conventions on : (i) status of aliens, (ii) duties of neutral States in the event of civil strife, (iii) treaties, (iv) diplomatic functionaries, (v) consular agents, (vi) maritime neutrality, and (vii) asylum.

The League of Nations.—The League of Nations took a keen interest in the codification of International Law. The Consultative Committee of jurists set up by the Council of the League in pursuance of Article 14 of the Covenant to prepare the constituent Statute of a Permanent Court of International Justice adopted a resolution recommending the meeting of a Conference to carry on the work of the First and Second Peace Conferences at the Hague. It required the Conference to devote itself to the task of re-establishing the existing rules of the Law of Nations, particularly those affected by the events of the war. In September, 1924, the Council of the League on the recommendation of the fifth Assembly appointed a committee of experts to report on the codification of International Law and to select topics ripe for codification. In its report in 1927 the Committee submitted the following topics as fit for codification : (1) Nationality; (2) Territorial Waters; (3) Responsibility of a State for damages done in its territory to the person or property of foreigners; (4) Diplomatic privileges and immunities; (5) Procedure of international conferences and procedure for the conclusion and drafting of treaties; (6) Piracy; and (7) Exploitation of the products of the sea.

In September 1927, the Assembly examined the Committee's report to the Council and the Council's observations thereon and convened a conference at the Hague for the purpose of codifying the law on the following three topics, viz.,

1. Nationality;
2. Territorial Waters; and
3. Responsibility of a State for damages done on its territory to the person or property of foreigners.

U.N. Charter and Codification.—Article 13 of the Charter of the United Nations gives ample scope for the codification of International Law. It reads :

> "1. The General Assembly shall initiate studies and make recommendations for the purpose of—
>
> (a) Promoting international co-operation in the political field and encouraging the progressive development of International Law and its codification;
>
> ....."

The International Law Commission.—The International Law Commission of the United Nations was set up by a resolution of the General Assembly, dated November 21, 1947, in order to implement Article 13(1)(a) of the Charter,

whereby the General Assembly is charged with the initiation of studies and the making of recommendations for the purpose of encouraging the progressive development of International Law and its codification. It is composed of 34 experts representing the world's main legal systems. The activities of the Commission are regulated by a Statute annexed to the resolution. The first session of the commission took place in 1949 and since then it has been meeting in annual sessions.

The Statute of the International Law Commission provides in Article 1 that the Commission shall have for its object the promotion of the progressive development of International Law and its codification. It is concerned primarily with Public International Law, but is not precluded from entering upon the field of Private International Law.

Article 15 of the Statute of the Commission makes a distinction between its functions relating to "progressive development of International Law" and "codification of International Law." The former deals with the preparation of draft conventions on subjects which have not yet been regulated by International Law or in regard to which the law has not been sufficiently developed in the practice of States, while the latter means the more precise formulation and systematization of rules of International Law in fields where there has already been extensive State practice, precedent and doctrine. Much of the work of the Commission is in the field of codification, and progressive development of International Law being a juridico-political function is entrusted to representatives of States.

Formulation of the Nuremberg Principles.—At its second session (June 5-July 29, 1950), the Commission formulated a set of seven Principles of International Law recognized in the Charter and in the judgment of the Nuremberg Tribunal. These are :

(1) Any person who commits an act which constitutes a crime under International Law is responsible thereof and liable to punishment.

(2) The fact that internal law does not impose a penalty for an act which constitutes a crime under International Law does not relieve the person who committed the act from responsibility under International Law.

(3) The fact that a person who committed an act which constitutes a crime under International Law acted as Head of State or responsible Government official does not relieve him from responsibility under International Law.

(4) The fact that a person acted pursuant to the order of his Government or of his superior does not relieve him from responsibility under International Law, provided a moral choice was in fact possible to him.

(5) Any person charged with a crime under International Law has the right to a fair trial on the facts and law.

(6) The crimes hereinafter set out are punishable as crimes under International Law : (a) Crimes against peace; (b) War Crimes; and (c) Crimes against humanity.

(7) Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle (6) is crime under International Law.

The Assembly at its 1950 session sent the Commission's formulation to member-governments for their comment. The Assembly requested the Commission, in preparing a draft code of offences against peace and security of mankind, to take account of observations on the Nuremberg Principles made during the session or subsequently received from governments.

Customary International Law.—At its second session, the Commission reported that the widest possible distribution be made of publications relating to International Law issued by the organs of the United Nations; that the Assembly might authorize the Secretariat to prepare and widely distribute eight groups of publications which would make the evidence of customary International Law more readily available and that the Assembly might call to the attention of governments the desirability of their publishing digests of their diplomatic correspondence.

On the basis of that report, the Assembly at its sixth session noted with satisfaction that a *repertoire* relating to interpretation of the Charter was already under way, and requested the Secretary-General to submit a report as to possible publications of a United Nations juridical year book, a consolidated index to the League of Nations Treaty Series, a supplementary list of treaty collections, and a *repertoire* of the practice of the Security Council. At its eleventh session, the Assembly authorized the Secretary-General to undertake the publication : (a) of a list of treaty collections, and (b) of a *repertoire* of the practice of the Security Council. A *repertoire* of the practice of the Security Council 1946-1951 was published in 1954 with supplements covering the years 1952-1958. A list of treaty collections was published in November, 1955.

Under Article 24 of its Statute, the Commission has from time to time made recommendations on making the evidence of customary International Law more readily available, and in pursuance of these recommendations, the United Nations Juridical Year Book (published since 1963) and Reports of International Arbitration Awards and U.N. Legislative Series are being published. These publications along with the Year Book of the International Law Commission afford useful rich material on the subject.

Definition of Aggression.—Although the Commission was at first averse to defining aggression at its third session held in Geneva from May 16 to July 27, 1951, due to the difficulty of its enumeration, it decided on reconsideration to embody a general definition of aggression in the draft code of offences against peace and security of mankind. It further included in the term "aggression" any act of aggression, including employment by the authority of a State, of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

After sweating at it for years, a United Nations Committee of Legal Experts consisting of 35 member nations, representing a cross section of U.N. membership and all the major powers except China, reached seeming agreement on April 12, 1974, on a definition of 'aggression', although several nations accepted a consensus under reservations. The General Assembly adopted a resolution titled "Definition of Aggression" on December 14, 1974.

The eight-article document approved defines aggression as the use of

armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. (Art. 1).

The resolution also lists a series of acts which qualify to be termed 'aggression' and these include invasion or attack by the armed forces of a State against the territory of another State; military occupations, annexations, bombardment or use of any weapons by a State against the territory of another; blockade of ports or coasts; attacks on land, sea or air forces and sending by air on behalf of a State of armed bands, ground, irregulars and mercenaries. The document pleaded inability to exhaust the list and gave the Security Council the right to determine what other acts constituted aggression.

A key issue in defining aggression was resolved by declaring that the first use of force in a conflict is '*prima facie evidence*'—evidence on its face—of an act of aggression (Art. 2), but that the Security Council could find otherwise. The U.S. and other western countries opposed declaring that the first use of force was automatically aggression.

The resolution added that the definition could not in any way prejudice the right to self-determination, freedom and independence of peoples forcibly deprived of that right particularly peoples under colonial and racist regimes or other forms of alien domination.

Regime of the High Seas.—At its third session, the Commission defined the "continental shelf" as that part of the sea-bed contiguous to the coast, but outside the areas of marginal seas, where the depth of the superjacent waters admitted of the exploitation of natural resources of the sea-bed and subsoil. The coastal State might exercise control and jurisdiction for the purpose of exploiting the natural resources of the shelf but the legal status of the superjacent waters and of the air space above might not be affected thereby. In particular there should be no substantial interference with navigation or fishing, though safety zones might be established around installations construed on the shelf.

The Commission also considered various other topics falling within the regime of the high seas like nationality of ships, penal jurisdiction on matters of collision, safety of life at sea, right of warships to approach foreign vessels suspected of piracy or slave trade, submarine telegraph cables, hot pursuit, etc., and the rules framed by the special rapporteur were communicated to governments for their comments.

The Geneva Conference on the Law of the Sea adopted four Conventions in 1958, *viz.*, Conventions on : (1) the Territorial Sea and the Contiguous Zone, (2) High Seas, (3) Fishing and the Conservation of the Living Resources of the High Seas, and (4) the Continental Shelf. The Law of the Sea Conventions are of primary interest to international community, though they are concerned with special regimes.

The Convention on the Territorial Sea and the Contiguous Zone deals with the base lines from which the territorial sea is measured both in normal cases and in the cases of bays, roadsteads and islands. It contains a section on the right of innocent passage, both of merchant vessels and warships, and it furthermore defines the right of control to be exercised by the coastal state in the contiguous zone. The Convention does not include any provision defining the breadth of the territorial sea, for on this question no agreement could be

reached.

The Convention on the High Seas sets out in general the conditions under which freedom of the high seas may be exercised. In deals, *inter alia*, with such matters as freedom of access to the high seas, nationality of ships, safety at sea, jurisdiction in the event of collision, slave-trading, piracy, hot pursuit, pollution by oil and radioactive waste, and the laying of submarine cables and pipelines.

The Convention on Fishing and Conservation of Living Resources of the High Seas sets up a regime to ensure conservation which includes a procedure for the settlement of disputes by a special commission whose decisions shall be binding.

The Convention on the Continental Shelf defines the rights that the coastal state may exercise over the continental shelf.

The Conference also adopted nine resolutions on the following subjects : nuclear tests on the high seas; pollution of the high seas by radioactive materials; international fishery conservation conventions; co-operation in conservation measures; humane killing of marine life; special situations relating to coastal fisheries; regime of historic waters; convening of a second United Nations Conference on the Law of Seas; and a tribute to the International Law Commission. The Final Act of the conference was signed on April 21, 1958.

From 1968 to 1973, the entire law of the sea and the seabed had been under review by the U.N. Seabed Committee and since December, 1973 it was being considered by the U.N. Conference on the Law of the Sea. After nine years of deliberations, the United Nations Law of the Sea Conference adopted by an overwhelming majority on April 30, 1982, a draft convention on exploitation of ocean resources, which was signed at Montego in Jamaica on December 10, 1982.

Attempts at Codification of Space Law.—The United Nations General Assembly by its resolution adopted on December 13, 1958, recognised the common interest of mankind in outer space which should be used for peaceful purposes only and established an *ad hoc* committee on the Peaceful Uses of Outer Space. On December 12, 1959, it adopted another resolution on international co-operation in the peaceful uses of outer space. By a resolution dated December 20, 1961, the United Nations General Assembly commended to States for their guidance in the exploration and use of outer space the principles that International Law, including the Charter of the United Nations, applies to outer space and celestial bodies and that outer space and celestial bodies are free for exploration and use by all States in conformity with International Law and are not subject to national appropriation. By another resolution of December 14, 1962, the U.N. General Assembly stressed the necessity of the progressive development of International Law pertaining to the further elaboration of basic legal principles governing the activities of States in the exploration and use of outer space and to liability for space vehicle accidents and to assistance to and return of astronauts and space vehicles and other legal problems. On December 13, 1963, the General Assembly unanimously adopted a resolution on the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer space containing nine legal principles initially framed by the Committee on Peaceful Uses of Outer Space. The nine principles, *inter alia*, related to the exploration and use of outer space for the benefit, and in the interests, of all mankind; freedom of exploration and use by all States on

a basis of equality and in accordance with international law of outer space and celestial bodies; outer space celestial bodies to be not subject to national appropriation by claim of sovereignty, by means of use or occupation or by any other means; international responsibility of States for national activities in outer space; and rendering all assistance to astronauts in the event of accident, distress or emergency landing.

After the adoption of the Declaration of Legal Principles, the Treaty on Principles Governing the Activities of States in the exploration and use of outer space, including the moon and other celestial bodies was signed at Washington, London and Moscow on January 27, 1967. The treaty embodies almost all the essential legal principles contained in the Declaration of 1963. The treaty although not strictly embodying the principle for regulation of the uses of space or including all space law, has yet prepared the framework of the legal regime in outer space.

Another agreement was also drawn on the rescue of astronauts and the return of objects launched into outer space.

Finally, the General Assembly adopted on November 29, 1971, a Convention on International Liability for Damage caused by Space Objects. The Convention lays down that a launching State shall be absolutely liable to pay compensation for damages caused by its space object on the surface of the earth or to aircraft in flight. It also includes an important provision to the effect that if a space object causes damage posing a large scale threat to human life or seriously affecting normal conditions of the people, the participating States, in particular the launching States, should study the possibility of immediate relief to the State which has been the victim of damage.

The convention establishing the European Space Agency was initialled on May 30, 1975. By this agreement, the ten member nations comprising Belgium, Denmark, France, the Federal Republic of Germany, Italy, Netherlands, Spain, Sweden, Switzerland and the United Kingdom, have formed a single civilian space agency which will take the place of the European Launcher Development Organization (ELDO) and the European Space Research Organisation (ESRO). The space programmes of the individual nations will also be replaced by the new agency. The convention envisages that Europe assumes its role on the space application market through the development of appropriate systems.

In 1975, the U.N. finalized and opened for signature the Convention of Registration of Objects launched into Outer Space. The convention became effective on September 15, 1976. It envisages obligatory registration of space objects with the U.N. and entering relevant information in the special register of the U.N. Secretary-General.

On September 3, 1976, a convention was signed in London to set up an International Maritime Satellite Organisation (INMARSAT). It is a new form of co-operation whereby satellites and ground stations will be the collective property of all the participants.

On May 11, 1977, the Soviet Union and the United States signed a new Agreement in Geneva, concerning co-operation in the Exploration and Use of Outer Space for Peaceful Purposes.

In July, 1979, the United Nations Outer Space Committee reached an agreement on a draft treaty on the Moon, proclaiming that its unexplored

natural resources shall be the common heritage of mankind.

Nationality, including Statelessness.—The Commission selected at its first session nationality, including statelessness as a topic for codification. The subject related to two problems, *viz.*, the nationality of married women and the elimination of statelessness. At its session in 1950, the Commission was asked by the Economic and Social Council to draft a convention regarding the nationality of married women, embodying certain principles which had been recommended by the Commission on the Status of Women, these principles being : (a) that there should be no distinction based on sex as regards nationality, and (b) that neither marriage nor its dissolution should affect the nationality of either spouse. A draft of a convention on the nationality of married women was submitted to the Commission at its fourth session in 1952, which however decided that the question of the nationality of married women could not suitably be considered by it separately but only in the context, and as an integral part of the whole subject of nationality. The Commission therefore did not take further action with respect to the draft.

In pursuance of a request made by the Economic and Social Council, the Commission at its fifth session in 1953 prepared two drafts for the elimination of statelessness, *viz.*, a draft convention on the elimination of future statelessness, which were transmitted to governments for comment. The draft conventions aimed at facilitating the acquisition of the nationality of a country by birth within its borders and at avoiding the loss of nationality except when another nationality was acquired.

In 1959, an International Conference of Plenipotentiaries was held at Geneva, and subsequently in New York where the United Nations Convention on the Reduction of Statelessness was adopted on August 30, 1961. The Convention required both *jus sanguinis* and *jus soli* countries to grant nationality under certain circumstances to persons who would otherwise be stateless; "and special provisions were adopted for persons who might lose their nationality of a change in personal status."

Other works of the International Law Commission.—In its report on the work of the thirty-first session of the International Law Commission, held at Geneva from May 14 to August 3, 1979, forwarded to the General Assembly at its thirty-fourth session, the draft articles adopted by the Commission comprised the following topics, *viz.*, (i) Succession of States in respect of matters other than treaties; (ii) State responsibility; and (iii) Treaties concluded between States and international organisations or between international organisations.

Meeting in Geneva, the Internaional Law Commission adopted a draft proposal in July, 1994 that would empower an international criminal court to judge crimes against the peace and security of mankind. The proposed court would have jurisdiction over cases of aggression, crimes against humanity, and serious violations of International humanitarian law during armed conflicts. It would have extensive powers concerning genocide, as the 1948 Genocide Convention provides that persons can be tried in the territory where the crime was committed or by an International Tribunal. The Security Council, which is responsible for the maintenance of international peace and security, would be able to refer specific cases to the court under the United Nations Charter.

The present recommendation of the International Law Commission was to be referred to the General Assembly later in 1994.

Vienna Convention on Diplomatic Relations, 1961.—The General Assembly resolution adopted on December 7, 1959, *inter alia*, decided that an international conference of plenipotentiaries shall be convoked to consider the question of diplomatic intercourse and immunities and to embody the result of its work in an international convention, together with such ancillary documents as may be necessary and requested the Secretary-General to convoke the conference at Vienna, not later than the spring of 1961. The conference accordingly met in Vienna, Austria, from March 2 to April 14, 1961, in which 81 States participated. The Vienna Convention on Diplomatic Relations was signed on April 8, 1961.

Vienna Convention on Consular Relations, 1963.—In order to supplement the work of the Vienna Conference on Diplomatic Intercourse and Immunities in 1961, a Conference on Consular Relations met at Vienna in 1963 and adopted a Convention on Consular Relations, which codifies the limited privileges and immunities to which the members of a consular post are entitled, especially regarding acts performed in an official capacity, their archives and correspondence with their home governments, liability to taxation, their obligation to appear in person as witnesses in court and their amenability to criminal jurisdiction.

Vienna Convention on Special Missions, 1969.—The Convention on Special Missions, 1969, was adopted by the General Assembly by a resolution on 8th December, 1969. The special missions are of a temporary nature, which are sent by one State to another for specific functions. The Convention has not yet entered into force.

Vienna Convention on the Representation of States in their relations with International Organisation, 1975.—The United Nations Conference on the Representation of States in their relations with International Organisations was held in Vienna from February 4 to March 14, 1975. It adopted by a vote of 57 in favour to one against, with fifteen abstentions, a new international convention governing the status and functions of missions and delegations of States to international organization and conferences. The convention also deals with the composition and size of the mission, general facilities, inviolability of archives and documents, freedom of movement and communication, personal inviolability, inviolability of residence and property and from jurisdiction, exemption from dues and taxes, duration of privileges and immunities, etc.

The 1975 Vienna Convention is the latest in a series of treaties formulated by the International Law Commission in an effort to codify and develop the principle of diplomatic relations.

Vienna Convention on the Law of Treaties.—The topic was selected for codification at the first session of the International Law Commission. The United Nations Conference on the Law of Treaties held in Vienna from April 9 to May 22, 1969, at which 110 States were represented, adopted the Vienna Convention on the Law of Treaties, consisting of 85 articles covering such topics as the conclusion and entry into force of treaties, reservations, application and interpretation and invalidity and termination. The opening of the Convention for signature and ratification was the culmination of twenty years of work on the subject in the International Law Commission, the General Assembly and the Conference, which held its first session in 1968. As treaties now provide most of the legal framework of international relations, and as the customary rules

governing them were frequently unclear and subject to dispute, the clarification of those rules in a convention is a contribution to the object laid down in the United Nations Charter "to establish conditions under which justice and respect for the obligations arising from treaties can be maintained."

The Vienna Convention on the Law of Treaties (1969) is the first essential element of infrastructure that has been worked out in the enormous task of codifying international law pursuant to Article 13 of the United Nations Charter. The previous codification treaties, the four Conventions on the Law of the Sea, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on the Reduction of the Statelessness, did not, despite their intrinsic importance, grapple with the fundamentals of constructing a world legal order.

The Commission also completed its work on the topic of succession of States in respect of treaties, and it was adopted by a plenipotentiary conference after its work in Vienna in 1977 and 1978. The Vienna Convention on the Succession of States in respect of Treaties was adopted on August 23, 1978, by a vote of 82 in favour with two abstentions at the U.N. Conference on Succession of States in respect of Treaties, Vienna.

Other international instruments which have emerged as a result of the Commission's work are : The Convention on Special Mission (1969); the Convention on the Prevention and Punishment of Crime against Internationally Protected Persons, including Diplomatic Agents (1973); and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975).

The Commission is at present engaged in topics such as State responsibility dealing with the reparative and punitive consequences of an internationally wrongful act of a State, international crimes, jurisdictional immunities of States and their property, non-immunity in respect of proceedings relating to any trading or commercial activity of a State, status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, Draft Code of Offences against Peace and Security of Mankind, non-navigational uses of International Watercourses, International Liability for injurious consequences arising out of acts not prohibited by International Law, and relations between States and international organizations.

Universal Declaration of Human Rights.—In 1948, the United Nations proclaimed the first international statement of the Rights of Man, the Universal Declaration of Human Rights. On April 6, 1950, the Human Rights Commission approved the principle of the protection by law of every one's rights and its incorporation in an international convention.

Other conventions.—The General Assembly unanimously affirmed on the 18th December, 1946, genocide, the killing of a group of human beings, as a crime under International Law which the civilized world condemns. It unanimously adopted on 9th December, 1948, the Convention on Genocide, which makes the international crime of acts aimed at destroying a national, ethnical or racial group as such punishable whether those responsible are rulers of States, public officials or private individuals. Five kinds of acts aimed at destroying "a national, ethnical, racial or religions group causing them serious bodily or mental harm, deliberately inflicting conditions on the group to bring about its physical destruction, imposing measures to prevent births within the

group, and forcibly transferring children from it to another group." Not only genocide itself but also conspiracy or incitement to commit it, as well as attempts to commit genocide and complicity in the crime, are punishable under the convention. Whether they are constitutionally responsible rulers, public officials, or private individuals, those guilty of genocide shall be punished, according to the convention. The convention came into force on 12th January, 1951.

A draft convention on freedom of information and international transmission of news has been drawn up and was discussed by the Social Committee of the General Assembly. An expert group under United Nations auspices has prepared a draft Code of ethics.

The various United Nations bodies are also at work on world social problems, which include forced labour, slavery, the protection of trade union rights, population studies, etc.

Refugees.—In July, 1951, a Convention on the Status of Refugees was adopted under United Nations auspices which is the most comprehensive charter ever written on the rights of refugees.

The conventions such as the Convention on Genocide, 1984, the Convention on the Status of Refugees, 1951, the Geneva Convention on the Law of the Sea, 1958, the Convention on the Reduction of Statelessness, 1961, the Vienna Convention on Diplomatic Relations, 1961, the Vienna Convention on Consular Relations, 1963, and the Vienna Convention on the Law of Treaties, 1969, are, in effect, treaties which add to the body of international conduct regulated by law. The United Nations work on these conventions and on the others yet to be completed such as those on human rights, freedom of information, the political rights of women, and narcotic drugs, adds continually to International Law. A United Nations commission of eminent legal authorities is at work on the codification and development of International Law.

In 1969, the General Assembly recommended that the International Commission continue work on relations between States and International organizations. It also recommended that the United Nations Commission on International Trade Law continue work on four priority topics : international sale of goods, international payments, international commercial arbitration and international legislation on shipping.

In 1969, the General Assembly also adopted the Convention on Special Missions and the Optional Protocol concerning Compulsory Settlement of Disputes arising under the Convention. The 55-article Convention sets out rules of law applying to forms of *ad hoc* diplomacy carried out by means other than through embassies consulates.

The Assembly requested its Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States to meet in the first half of 1970 to complete work on a draft of seven principles.

The Tokyo Convention on Offences and certain other acts committed on Board Aircraft, 1963, and the Montreal Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, and the Montreal Convention for the Suppression of Acts against the Safety of Civil Aviation, 1971, are important landmarks in the legal campaign against hijackings. The United Nations General Assembly by its resolution adopted on November 25, 1970, called upon States

to provide for the prosecution and punishment of persons who perpetrate such acts, in a manner commensurate with the gravity of those crimes. It called on States to ensure that their national legislation provided effective legal measures against hijacking of civil aircraft in flight; urged them to ensure prosecution of hijackers; and urged full support for the efforts of the International Civil Aviation Organization to prepare and implement a convention to make unlawful seizure of aircraft a punishable offence.

The seabed treaty, *viz.*, the treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof adopted by the U.N. General Assembly on December 17, 1970, and Convention on the Prohibition of Bacteriological and other Toxic Arms adopted by the U.N. 26th General Assembly in April, 1972, constitute positive steps on codification of the law relating to general disarmament.

International Convention on the Suppression and Punishment of the Crime of Apartheid.—On November 30, 1973, the General Assembly by a vote of 91 in favour, 4 against, with 26 abstentions (Portugal, South Africa, the United Kingdom and the United States voted against the resolution), adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid. Under the provisions of the Convention, persons charged with the acts constituting the crime of *apartheid* may be tried by a competent tribunal of any State party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States parties which shall have accepted its jurisdiction. The Convention came into force on 18th July, 1976. By August 1, 1979, 51 States, including India, had expressed their consent to be bound by the Convention.

Declaration on the protection of all persons from torture and other cruel, inhuman or degrading treatment or punishment.—The United Nations General Assembly adopted on December 9, 1975, a Declaration condemning any act of torture or other cruel, inhuman or degrading treatment as an offence to human dignity. Under its terms, no State may permit or tolerate torture or other inhuman or degrading treatment, and each State is requested to take effective measures to prevent such treatment from being practised within its jurisdiction. In adopting the Declaration without a vote, the Assembly noted that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Assembly recommended that the Declaration serves as guideline for all States and other entities exercising effective power.

The United Nations General Assembly adopted on December 10, 1984, a new treaty officially called the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, a product of seven years of discussion and drafting by the Commission on Human Rights.

In December, 1977 the General Assembly adopted an International Declaration against *Apartheid* in Sports.

Declaration on the Elimination of all Intolerance and of Discrimination based on Religion or Belief.—At its 1981 session, the United Nations General Assembly adopted a declaration on religious freedom the document which had taken nearly twenty years to be drafted, although not bringing any immediate

relief, sets standards by which Governments can be judged and also paves the way for the eventual framing of a convention, or international treaty that would be binding on all States which had signed and ratified it. The document which the General Assembly finally approved is titled : "Declaration on the Elimination of all forms of Intolerance and of Discrimination based on the Religion or Belief." The declaration consisting of eight articles states : "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." It also states that no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice. Looking towards practical implementation of all these rights, the declaration calls for appropriate national legislation.

Non-Proliferation of N. Weapons and Antarctica Treaties.—In the field of arms control, however, individual States have preferred to directly conclude treaties through conferences instead of taking recourse to the arduous procedure contemplated under the International Law Commission. The Test Ban Treaty prohibiting nuclear weapons tests or other nuclear explosions in the atmosphere, outer space, under water, etc. signed on August 5, 1963, and the Antarctica Treaty of December 1, 1959 (having 22 signatories), providng for demilitarization of a continent and a ban on explosions and the dumping of the radioactive waste in the Antarctica are examples of treaties entered into between States at the various conferences outside the United Nations, guided largely by political self-interest. The Antarctica treaty lays down that the continent be reserved for peaceful scientific investigations. It had initially 12 original signatories, *viz.*, Argentina, Australia, Belgium, Chile, France, Great Britain, Japan, New Zealand, Norway, South Africa, USSR and the U.S. Later, six more countries acceded to the treaty. The signatories froze territorial claims and forbade new claims. A country may apply for membership of the consultative organ of the treaty if it can show that it has conducted substantial research activity in the Antarctica, such as the establishment of a scientific station or desptach of a scientific expedition. India successfully landed the second Indian expedition to Antarctica on December 28, 1982. The treaty as it now stands is weighted too heavily in favour of the more advanced countries. In September, 1983, India and Brazil were admitted as consultative members of the Antarctic Treaty at a special meeting of the treaty member countries held at Canberra.

CHAPTER VI

RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

Conflict between International Law and Municipal Law.— International Law governs the relations of sovereign independent States *inter se* and "constitutes a legal system the rules of which it is incumbent upon all States to observe." Municipal Law, State Law or National law is the law of a State or a country and in that respect is opposed to International Law, which, as said above, consists of rules which civilized States consider as binding upon them in their mutual relations. Kelsen observes that national law regulates the behaviour of individuals, International Law the behaviour of States or, as it is also put, whereas national law is concerned with the "internal" relations, the so-called "domestic affairs" of the State, International Law is concerned with the "external" relations of the State, its "foreign affairs". Municipal law is the law of the sovereign over individuals subject to the sovereign rule. International Law is not law above but between States and is, therefore, weaker than Municipal law.

Juristic theories.—A lot of literature has developed on the question as to whether International Law and Municipal Law or the various national laws can be said to form a unity being manifestations of a single conception of law or whether International Law constitutes an independent system of law essentially different from the Municipal Law. The former theory is called monistic and the latter dualistic.

Monistic theory.—The monistic theory maintains that the subjects of two systems of law, viz., International Law and Municipal Law are essentially one, inasmuch as the former law is essentially a command binding upon the subjects of the law independent of their will, which in one case is the States and in the other individuals. According to it, International Law and Municipal Law are two phases of one and the same thing. Kelsen (of the Vienna School) holds that there is unity of law between the legal character of International Law. Duguit carried a step further and held that the subjects of International Law were not States but the individual members of States. The monistic theory asserts that International Law and Municipal Law are of the same fundamental nature, and arise from the same unity of the science of law, being manifestations of a single conception of law. Both the systems have their origin in a 'higher law' founded on the principles of right and wrong.

According to Hans Kelsen, like all law, International Law is a regulation of human conduct and it is men to whom International Law entrusts the responsibilities for order. It is also maintained that International Law "is not without commanding authority, and that far from being essentially different from municipal law, it must be regarded as a part of the same juristic conception."

This theory has gained prominence after the First World War and is advocated by modern writers. Monism finds its most direct antecedents in the

writings of Emile Durkheim and Leon Duguit; its recent expositors being Krobbe, Kelsen, Kunz, Scelle, Verdross and Wright.

Dualistic theory.—According to the dualist view, "the system of International Law and of Municipal Law are separate and self-contained to the extent to which rules of the one are not expressly or tacitly received into the other system. The two are separate bodies of legal norms, emerging, in part, from different sources comprising different subjects, and having application to different objects." According to the dualists, "municipal law originates in customs and laws within the State, while international law originates in customs and treaties between States." Oppenheim observes that according to this view, the law of nations and the Municipal Law of the several States are essentially different from each other. In the first place, they differ as regards their sources. The sources of Municipal Law are custom grown up within the boundaries of the State concerned and statutes enacted therein, while the sources of International Law are customs grown up within the Family of Nations and law-making treaties concluded by the members. In the second place, Municipal Law regulates relations between the individuals under the sway of a State or between the individuals and the State, while International Law regulates relations between the member-States of the Family of Nations. Lastly, there is a difference with regard to the substance of the law inasmuch as Municipal Law is a law of a sovereign over individuals, while International Law is a law between sovereign States, which is arrived at by agreement among them. The latter is, therefore, a weak law. In Municipal Law, individual citizens are subjected by the power of the State; but there is no central executive authority to compel observance of its norms in International Law.

The dualists, therefore, maintain that International Law can never operate as the law of land unless adopted by municipal custom or statutory enactment.

The dualistic theory has mainly been advocated by Triepel (German), Anziloti (Italian) and Oppenheim. Heinrich Triepel referring to the two fundamental differences between the two systems observes that the subjects of State law are individuals, while the subjects of International Law are States solely and exclusively and their juridical origins are different inasmuch as the source of State Law is the will of the State itself, the source of International Law is the "common will" (*vereinbarung*) of the States.

Pluralistic Theory according to Kelsen.—Kelsen calls the above two theories as the Monistic and Pluralistic theories. He does not prefer the word 'dualism' as it takes into account the existence of numerous legal orders, since International Law itself establishes a relation between its norms and the norms of the different national legal orders. According to him, the pluralistic theory is contradiction to positive law, provided International Law is considered to be a valid legal order. International Law and National law cannot be different and mutually independent systems of norms if the norms of both systems are considered to be valid for the same space and at the same time. It is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems.

Kelsen also repels the view that International Law and National law are not parts of one normative system, because they can, and in fact do, contradict each other. He observes that the conflict between an established norm of International Law and one of National law is a conflict between a higher and a

lower norm. Such conflicts occur within the national legal order without the unity of this order thereby being endangered. A so-called 'unconstitutional State' is a typical example. That a statute is 'unconstitutional' does not mean that it is null and void *ab initio*. General International Law does not provide any procedure by which norms of national law that are illegal (from the standpoint of International Law) can be abolished. Such a procedure may be established by particular International Law or by National Law.

Transformation Theory.—Besides the above two theories, Starke makes reference to two other theories, *viz.*, the transformation and Specific Adoption Theories concerning the application of International Law within the municipal sphere and the Delegation Theory.

According to the transformation theory : "It is the transformation of the treaty into national legislation which alone validates the extension to individuals of the rules set out in international agreements. The transformation is not merely a formal but a substantial requirement. In order to be so applied, such rules must undergo a process of specific adoption by, or specific incorporation into, municipal law." International Law, according to the transformation theory, cannot find place in the National or Municipal Law unlesss the latter allows its machinery to be used for that purpose. An example of the transformation of international treaty into national legislation is furnished by extradition treaties made by Great Britain. In English law, there is no power to surrender fugitive criminals in extradition proceedings to a foreign country without express statutory authority. Such authority is given by Orders-in-Council made under the Extradition Act and relates only to offences therein specified. Similarly, other treaties and conventions also require national legislation for their enforcement.

This theory is fallacious in several respects. In the first place, its premise that International Law and Municipal Law are two distinct systems is incorrect. In the second place, the second premise that International Law binds States only, whereas Municipal Law applies to individuals is also incorrect for the reasons stated above. In the third place, the theory regards the transformation of treaties into national law for their enforcement. This is not true in all cases for the practice of transforming treaties into national legislation is not uniform in all the countries. And this is certainly not true in the case of law-making treaties. Further, as Kelsen observes, "If a treaty imposes upon a State an obligation which can be fulfilled only by a legislative act, this act is.....no transformation of international into national law undertaken for the purpose of making the application of the treaty possible, but the direct application of the treaty by the competent organ."

Delegation Theory.—According to this theory, there is the delegation of a right to every State to decide for itself when the provisions of a treaty or convention are to come into force and in what manner they are to be embodied in State Law. There is no need of transformation of a treaty into national law, but the act is merely an extension of one single act. The delegation theory is incomplete for it does not satisfactorily meet the main argument of the transformation theory. It assumes the primacy of international legal order, but fails to explain the relations existing between municipal and International Law.

Practice of States with regard to application of International Law in Municipal Sphere

Great Britain.—The British practice draws a distinction between the customary rules of International Law and the law laid down by treaties with regard to their operation in municipal sphere. Such rules of customary International Law which are universally recognized and have received the assent of the country are deemed to be part of the law of the land. To this extent the view of the English Judge, Blackstone, asserting in 1765 that the Law of Nations "is here adopted in its full extent by the common law and is held to be part of the Law of the Land" holds good even today. Earlier in 1764 in *Triquet* v. *Bath*, Lord Mansfield quoting with approval the opinion of Lord Chancellor Talbot from an earlier case known as *Barbuit's* case observed "that the law of nations, in its full extent, is and forms part of the law of England." This statement was affirmed in a number of decisions during the 19th century, e.g., *Dolder* v. *Huntingfield*, *Wolf* v. *Oxholm* and *Emperor of Austria* v. *Day*. A departure was made from this traditional view in the case of *R.* v. *Keyn (The Franconia)* where Chief Justice Cockburn held that English Courts had no jurisdiction over a foreigner for criminal acts done within three-mile maritime belt of the English coast, and no concurrent assent of nations that a portion of what before was treated as the high sea, and as such common to all the world, shall now be treated as the territory of the local State, can of itself without the authority of Parliament convert that which before was in the eye of the law high sea into British territory and so change the law or give to the Courts of this country, independent of legislation, a jurisdiction over the foreigner where they had it not before. This decision caused the passing of the Territorial Waters Jurisdiction Act, 1878, which gave the English Courts jurisdiction over offences committed in territorial waters.

The traditional view was affirmed in the case of the *West Rand Central Gold Mining Co. Ltd.* v. *The King* where it was held by Lord Alverstone, C.J. : "Whatever had received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called International Law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of International Law may be relevant."

In the well known case of the *Zamora*, Lord Parker observed that it was the primary duty and function of a Prize Court in England to administer International Law; it would certainly be bound by Acts of the Imperial Legislature. But it was nonetheless true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering International Law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court.

In the case of *Chung Chi Cheung* v. *The King*, Lord Atkin observed that the courts acknolwedge the existence of a body of rules which nations accepted among themselves. On any judicial issue they sought to ascertain what the relevant rule was, and, having found it, they would treat it as incorporated into the domestic law, so far as it was not inconsistent with rules enacted by statutes or finally declared by their tribunals.

Under the British Constitution, an Act of Parliament is supreme. International law although a part of the Common Law must yield before an Act of Parliament. In the Scottish case of *Mortensen* v. *Peters*, Lord Dunedin observed : "For us an Act of Parliament is supreme and we are bound to follow its terms.....It is a trite observation that there is no such thing as a standard of International Law extraneous to the domestic law of a kingdom to which appeal may be made.....International Law, so far as this Court is concerned, is the body of doctrine regarding international rights and duties of States which has been adopted and made part of the law of Scotland."

It is clear, therefore, that the doctrine of incorporation implies that "the national law governing matters of international concern is to be derived, in the absence of a controlling statute, executive decision, or judicial precedent, from such relevant principles of the law of nations as can be shown to have received the nation's implied or express assent."

Doctrine of Incorporation.—A study of the British practice, therefore, reveals that the following qualifications are pre-requisite for incorporating the customary international rule or treaty into the domestic law :

1. The customary rule must be one generally accepted by the international community. It was observed by Lord Macmillan in *Compania Naviera Vascongado* v. *Cristina* already referred to : "It is a recognised pre-requisite to the adoption in our municipal law of a doctrine of Public International Law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice and judicial decisions."

2. The customary international rule must not be inconsistent with statutes or prior decisions.

3. Acts of the executive of the State, *e.g.*, declaration of war, cannot be questioned by British Courts, although such acts may be contrary to the established practice of International Law : *Crooke* v. *Sprigg*.

4. Information from the executive on certain matters falling within the Crown's prerogative powers, such as the recognition of States, diplomatic status of persons claiming immunity is conclusive and taking of evidence to establish the same is not permissible; *Civil Air Transport Incorporated* v. *Central Transport Corporation; Arantzazu Mendi* and *Engelke* v. *Musmann*.

5. A national court will apply its own version of what the rule of International Law is; *Mortensen* v. *Peters*.

6. A treaty, though internationally binding, becomes part of the law of the land under the British Constitution when it receives parliamentary assent of its enforcement.

America.—The United States has unambiguously applied the doctrine that "International Law is part of the law of the land." All international conventions ratified by U.S.A. and such customary International Law as has received the assent of the United States are binding upon American Courts, even if they may be contrary to the statutory provisions. There is a presumption in cases of conflict that the United States Congress did not intend to overrule International Law. There is, therefore, close similarity between the practice followed by America and Britain in this respect.

It was observed by Mr. Justice Gray in *Paquete Habana* and the *Lola* that

"International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

To the same effect are the observations of the Surpeme Court of the United States in *Hilton* v. *Gruyot* : "International Law in its widest and most comprehensive sense is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted in their determination...."

The Constitution of the United States gives supreme importance to treaties. Article VI of the Constitution of the United States of America specifically provides : "All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The result is that as soon as the President ratifies a treaty, it is transformed into American law. If the treaties are self-executing, they are binding on the Courts as part of the law of the country. The treaties which, however, require enabling legislation for their enforcement do not become law of the land till they are executed by the necessary legislation.

France.—In France, the customary rules of International Law are treated as a part of Municipal Law unless they are in conflict with the statute or the constitution of the country. With regard to treaties, there is no uniformity in the decisions of French Courts. Sometimes courts have allowed treaty to prevail over statute law; while often they have taken a contrary view. With regard to the enforcement of treaties, the position in France is also fluid. Some treaties require proclamation as laws, while others are simply published.

Constitution of India.—Under Article 51 of the Indian Constitution, it is a directive of State Policy to endeavour to—

(a) promote international peace and security;
(b) maintain just and honourable relations between nations;
(c) foster respect for International Law and treaty obligations in the dealings of organized people with one another; and
(d) encourage settlement of international disputes by arbitration.

Although the Directive Principles of State Policy in this regard may not be justiciable under the Indian Constitution, its principle is fundamental in the making of laws. The Indian Constitution ensures that in the entire Indian administration, high regard shall be given to International Law and also to international morality.

Doctrine of incorporation of International Law into National Law—National Law to prevail in case of conflict with International Law.—The doctrine of incorporation of International Law into national law has exhaustively been discussed by the Supreme Court of India in *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey & Ors.* On the question whether international law is, of its own force, drawn into the law of the land without the aid of municipal statute and whether, so drawn, it overrides municipal law in case of conflict, it has been said in England that there are two schools of thought, one school of thought propounding the doctrine of incorporation and the other, the doctrine of transformation. According to the one, rules of international law are incorporated into the law of the land automatically and

considered to be part of the law of the land unless in conflict with an Act of Parliament. According to the other, rules of International Law are not part of the law of the land, unless already so by an Act of Parliament, judicial decision or long established custom. According to the one, whenever the rules of International Law changed, they would result in a change of the law of the land along with them "without the aid of an Act of Parliament." According to the other, no such change would occur unless those principles are "accepted and adopted by the domestic law." Lord Denning, who had once accepted the transformation doctrine without question, later veered round to express a preference for the doctrine of incorporation and explained how courts were justified in applying modern rules of international law when old rules of international law changed. In fact, the doctrine of incorporation, it appeared, was accepted in England long before Lord Denning did so. Lord Denning himself referred to some old cases. Apart from these, it was so held in *West Rand Central Gold Mining Co.* v. *King.*

The Supreme Court of India has observed in *Tractoroexport, Moscow* v. *M/s. Tarapore & Co.* :

> "Now, as stated in Halsbury's Law of England, Vol. 36, page 414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of international law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or international law."

Soviet view.—The monistic theoretisations do not find favour with Marxist-Leninist conceptions as to theories of State and law. The 'solidarity' principle figuring prominently in the monistic theories of Duguit and Scelle, which overlooks the fundamental contradictions between bourgeois and proletariat, is foreign to Communist theory. It is quite plain that the monistic theory is not an acceptable theory to Communist jurisprudential thought. Judge Krylov asserts that the norms of International Law and those of internal law "co-exist" without uniting. He, however, concedes that a significant interplay between International and Municipal Law takes place and is one of the historical means for the progressive development of International Law.

Article 29 of the Constitution of the Union of Soviet Socialist Republics lays down that the U.S.S.R.'s relations with other States are based, *inter alia*, on observance of the following principles, *viz.*, fulfilment in good faith of obligations arising from the generally recognised principles and rules of International Law and from the international treaties signed by the U.S.S.R.

The Soviet view strongly repudiates the subordination of internal law to International Law, although in actual practice it is true that it may not be possible to enact provisions of municipal law which would be contrary to international treaties signed by the U.S.S.R.

"Like any other law, International Law reflects the will of the ruling classes. The reality of International Law, however, is not obviated by the fact that for the time being there are on the international stage bourgeois States as feudal and

socialistic ones. Each of them, implementing its own approach and directed by its own motives, may be interested in supporting and preserving a certain portion of generally binding legal norms in international relations."

The People's Republic of China.—The 1982-constitution of the People's Republic of China retains the totality of the previous constitution. The Revolutionary Committees remain the organs of political power from the provincial level down to the commune level. It sets out the fundamental rights and duties of citizens. Citizens enjoy freedom of speech, freedom of religious belief, the inviolability and freedom of person of citizens of the Peoples' Republic of China, freedom and privacy of citizens, freedom of the press, assembly, association, procession, demonstration and the freedom to strike, and have the right to speak out freely, air their views fully, hold great debates and write big-character posters. The constitution is a self-centred constitution—it does not embody any specific provision with regard to the country's relations with other countries beyond what is contained in its preamble. Its avowed aim is to continue the revolution and make China a great, powerful socialist country with modern agriculture, modern industry, modern national defence and modern science and technology by the end of the century.

To a great extent, China adheres to the view of the USSR and treats International Law as a political instrument for the purpose of utilising it in the implementation of its foreign policy so long as it is not in conflict with its own national interests.

PART II

THE LAW OF PEACE

CHAPTER VII

STATES IN GENERAL

Definition of State.—A State has been defined in various ways according to the manner of thinking of the writers concerned.

Lawrence, defines a State as a political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey.

According to Salmond, a State is a society of men established for the maintenance of order and justice within a determined territory by way of force.

A State is a numerous assemblage of human beings organized by law, generally occupying a certain territory. To quote the language of Holland, a 'State' is a numerous assemblage of human beings, generally occupying a certain territory, amongst whom the will of the majority, or of ascertainable class of persons, is by the strength of such a majority, or class, made to prevail against any of their number who oppose it.

According to Oppenheim, a State proper—in contradistinction to colonies—is in existence when the people is settled in a country under its own sovereign Government. The four conditions which must prevail for the existence of a State are :

There must, first, be a *people*. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.

There must, secondly, be a *country* in which the people have settled down. A wandering people is not a State. But it matters not whether the country is small or large; it may consist, as in the case of city States, of one town only.

There must, thirdly, be a *Government*—that is, one or more persons who are the representatives of the people and rule according to the law of the land. An anarchistic community is not a State.

There must, fourthly and lastly, be a *sovereign* Government. Sovereignty is supreme authority, an authority which is independent of any other earthly authority.

In *international law and international relations*, a **state** is a geographic political entity possessing politicial *sovereignty, i.e.* not being subject to any higher political authority.

In casual language, the idea of a "state" and a "*country*" are usually regarded as synonymous, although some speakers, notably in the United States, make efforts to only use the terms "country" or "nation" to refer to sovereign entities.

Others would primarily understand "the State" as a synonym for "the

Government", or be careful to distinguish between a **territorial** "*country*" and a "*nation*" of **people.** Confusingly, the terms "national" and "international" are both used as technical terms applying to *states.*

The "*state*" can thus also be defined in terms of domestic conditions, specifically the role of the monopolization of the legitimate use of force within a country. Of course, different political philosophies differ in their interpretation of the actual and ideal roles of the state.

The definition of "*state*" in the meaning of *political subdivisions of some countries,* is related as it emphasizes the intention of a *confederation* where these state governments are seen as possessing some powers independently of the *federal* government. Often these states existed before their creation of a federal *regime.*

Sovereignty and Independence of States.—Sovereignty is a legal term signifying the supreme power by which any State is governed. It denotes in ordinary parlance the unrestricted power of self-determination by the individual State of its external and domestic affairs. Austin termed sovereignty as essential, indivisible and illimitable. As a result of the exercise of sovereignty, there emerge two legal assumptions in the domain of International Law, *viz.*, the independence and equality before the law of each sovereign State and prohibition to interfere with the external and internal sovereignty of each independent State. "External sovereignty is independent of control from without; internal sovereignty is paramount power over all action within." (Holland).

"Sovereignty.....in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State."

Independence is a fundamental principle of International Law, inasmuch as no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.

Every State has the right to its own independence in the sense that it is free to provide for its own well being and to develop materially and physically without being subjected to the domination of other States, provided always that in doing so it shall not impair or violate the legitimate rights of other States.

The traditional concept of sovereignty has undergone revolutionary changes. It is one of the prerogatives of a sovereign State to enter into treaties with other States for their mutual benefit and common interest. But conclusion of the treaties of unequal alliance or guarantee in a sense limits the exercise of the sovereignty by the imposition of unilateral burden on the weaker party. The establishment of the United Nations, although based on the principle of the sovereign equality of all its members, has shifted the emphasis from independence to interdependence of States. All the signatories to the U.N. Charter have united their strength to maintain international peace and security and to employ international machinery for the promotion of economic and social advancement of all peoples.

As Oppenheim observes, "It is being increasingly realised that progress in International Law, the maintainance of international peace, and, with it, of independent national States are in the long run conditioned by a partial surrender of their sovereignty so as to render possible, within a limited sphere, the process of international legislation and within a necessarily unlimited

sphere, the securing of the rule of law as ascertained by international tribunals endowed with obligatory jurisdiction."

"At the present time there is hardly a State which, in the interests of the international community, has not accepted restrictions on its liberty to action. Thus, most States are members of the United Nations and the International Labour Organization (I.L.O.), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a State means the *residuum* of power which it possesses within the confines laid down by International law." (Starke)

Equality of States.—States, although unequal in size, population power, degree, of civilization, wealth and other qualities, are nevertheless equals as International Persons in the Family of Nations. This legal equality, Oppenheim observes, has four important consequences :

The first is that, whenever a question arises which has to be settled by consent, every State has a right to one vote only.

The second consequence is that legally although not politically the vote of the weakest and smallest State has as much weight as the vote of the largest and most powerful one.

The third consequence of State equality is that no State can claim jurisdiction over another. Therefore, although States can sue in foreign courts, they cannot as a rule be sued there, unless they voluntarily submit to the jurisdiction of the foreign court concerned. (*Mighell* v. *Sultan of Johore, The Parlement Belge* and *Duff Development Co. Ltd.* v. *Government of Kelantan*).

The fourth consequence of equality of States is that the Courts of one State do not, as a rule, question the validity or legality of the official acts of another sovereign State or the official or officially avowed acts of its agents, at any rate in so far as those acts purport to take effect within the sphere of the latter State's own jurisdiction.

Although in theory, States enjoy equal rights and have one vote each, nevertheless in actual operation, it is the votes of the powers that ultimately count. It is they who swing the balance. Under the Covenant of the League of Nations, the great powers enjoyed a legal superiority over the smaller States. The glaring inequality of the States in actual practice is also apparent from the fact that the Big Five, *viz.*, China, France, the Union of Soviet Socialist Republics, Great Britain and the United States of America, are permanent members of the Security Council and possess rights of vetoing any decision of the Security Council in matters of substance. This power of veto has, however, been circumscribed by the new machinery adopted by the General Assembly whereby it has power to take positive action against aggression on which the Security Council is unable to act because of the 'veto'.

According to Sir Cecil Hurst, literally nothing could be further from the truth than the idea that all States are equal. One has to look around the world to see that in respect of the size of their territory, the numbers of their population, their material resources and the degree of prosperity to which they have attained, States are most unequal. It is only in respect of the right to manage their own affairs that all States are equal—a principle that may be adequately summarised as equality before the law.

Classification of States.—For the purposes of International Law, States may be divided into two parts : (1) full sovereign or independent States, and (2) not full sovereign or dependent States. They are, in other words, perfect and imperfect international persons.

Independent States.—Independent States are fully sovereign members of the Family of Nations. They are termed in International Law as sovereign States. They are the normal type of subjects of International Law, and exercise undivided authority over all persons and property within their borders and are independent of direct control by the other power. Sovereign States are by international usage entitled to certain privileges and immunities. They are entitled to the privilege of sending diplomatic ministers to other States and of receiving representatives from them in return. They conclude in their own names treaties with other States. They meet at international conferences on the basis of perfect equality. In short, there is no party to intermeddle in their relations with other States. "Independence means freedom from control, and a State like United Kingdom or France is independent because it is free from all control either over its internal Government or over its foreign relations."

Dependent States.—The idea of dependence necessarily implies a relation between a superior State (suzerain, protector, etc.) and an inferior or subject State (vassal, *protege*, etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of International Law : *Austrian-German Customs Union.*

Dependent States undoubtedly have only a limited capacity for foreign relations and are imperfect subjects of International Law. They are subject to the authority of one or more other States. As observed by Judge Anzilotti in a dissenting opinion in the Permanent Court of International Justice on the Custom Regime between *Germany and Austria case*, the idea of dependence, therefore, necessarily implies a relation between a superior State and an inferior or subject State; the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Their exact position can only be determined by reference to treaties and to the extent their subordinate position has been recognised by other States. In other words, they are subjects of International Law within the range of their self-government. The outside control, although impairing the independence of the State, does not preclude it from membership of the Family of Nations, for, as Westlake observes, "It is not necessary for a State to be independent in order to be a State of International Law."

Statehood alone does not imply membership of the Family of Nations and the lack of such a qualification does not necessarily place a State outside the sphere of International Law. The essential characteristics of a State have been discussed at the very outset. To recapitulate them there must be a permanent population, a defined territory, a Government and a capacity to enter into relations with other States. Besides these, the State, represented by a Government, must receive a *de facto* allegiance from its subjects; it must exhibit reasonable promise of durability; it must have its own military and naval forces; and it must possess a separate flag which is the main symbol of freedom. Above all these, Oppenheim emphasizes that a State is, and becomes an Internatioanl

Person through recognition only and exclusively. This has been discussed in a subsequent chapter.

Composite Communities.—Having discussed the main characteristics of sovereign States, we now pass on to a certain special class of State, which, although not fully sovereign, are yet possessed of many characteristics of an International Person.

A State is generally a single International Person where there is one central political authority as government representing the State. In addition there may be composite International Persons.

Sovereign States permanently united together by a federal compact may either assume the form of a confederation or a supreme federal Government often termed as a composite State. There are two kinds of composite International Persons, *viz.*, Real Unions and Federal States. In contradistinction to Real Unions and Federal States, observes Oppenheim, a so-called Personal Union and a Union of so-called Confederated States are not International Persons.

Real Union.—A "real union" is in existence when two or more sovereign States have, by an international treaty, the same monarch and for International purposes and external relations act as one State although the constituent elements retain their separateness in domestic matters. A real union is not itself a State, but merely a union of two full sovereign States, which together make one single but composite International Person. At present, there is no real union in existence. The real union of Austria-Hungary formed in 1867 was dissolved under stress of defeating war in 1918. The union between Denmark and Iceland formed in 1918 also came to an end in 1944. Another example of it is Norway and Sweden between 1814 and 1905, which was dissolved by the Treaty of Karlstad.

Personal Union.—A personal union is in existence when two sovereign States and separate international persons are linked together through accidental fact that they have the same individual as monarch. These States retain their separate identities for external purposes. Such a personal union existed from 1714 to 1837 between Great Britain and Hanover, from 1815 to 1890 between the Netherlands and Luxemburg and from 1885 to 1908 between Belgium and the Congo Free State. A Personal Union is not an International Person, the two sovereign member-States retaining their separate international entities.

Confederation.—A confederation or *staternbund* is constituted by a number of full sovereign States linking together by an international treaty into a union with organs of Government extending over the member States but not over the subjects of those States. They unite by means of a compact for the purposes of mutual co-operation or defence, each constituent member retaining its sovereignty and separate identity. Such a confederation is not a State. It is more or less a society of an international character and the member-States remain full sovereign States and maintain their international position. Each confederating State retains the power to revoke the treaty which has united them. The organs of the confederation fall short of being legislative and governmental. A confederation has not proved a success, and the three important unions of confederated States of modern times, *viz.*, the U.S.A., the German and the Swiss Confederation turned into unions of federal States. Examples of confederation are provided by the Netherlands from 1580 to 1795, the United States of America

from 1778 to 1787, Switzerland from 1291 to 1798 and again from 1815 to 1848 and Germany from 1815 to 1866. Confederated States do not exist at the present time.

Federal State.—A Federal State or *Bundesstaat* is a perpetual union of several sovereign States which has organs of its own and is invested with power, not only over the members States, but also over their citizens. "A *Bundesstaat*", observes Lawrence, "comprises those unions in which the central authority alone can deal with foreign powers and settle external affairs, the various members having control over the internal affairs only." The ordinary powers of sovereignty are partly vested in the federal government and partly in the separate States, both the authorities being co-ordinate within their respective spheres. It is a real and sovereign State within the sphere of the powers granted to it and has unlike a confederation direct power not only over the member-States, but also over the citizens of those States. Sovereignty, as said above, is divided between member-States and the Federal States. The Federal State has the power to declare war, make peace or conclude treaties and the members States exercise power and control within their competence and retain a considerable measure of autonomy. Oppenheim observes that member-States of a federal State can be International Persons in a degree. They are not full subjects of International Law. Their position, if any, within this circle is overshadowed by their federal State; they are partly sovereign States and they are, consequently, international persons for some purposes only.

The principal Federal States in existence are the United States of America since 1787, Switzerland since 1848, Mexico, Argentina, Canada, Brazil, Venezuela, Australia, the Union of Soviet Republics, Federal Republic of Germany, India, Pakistan and Indonesia since 1949.

The Indian Constitution is federal in all its general features, although it permits the federal government, *viz.*, the Union Government at the Centre, to convert itself into a unitary one in times of emergency by the issue of a proclamation by the President under Article 352 of the Constitution.

Condominium.—It is a common rule of two or more States in a territory. In it although there is a joint sovereignty over the population, each of the jointly governing States has separate jurisdiction over its own respective subjects. The Anglo-Egyptian Sudan, the Phoenix Islands in the South Seas under the common Anglo-American administration and the New Herbides under the common Anglo-French administration furnish examples of a condominium. In 1939, the islands of Canton and Edenbury were placed under the joint control of Great Britain and the United States for a period of 50 years.

Vassal States and Protectorates

Vassal State.—A vassal State is one which is completely under the suzerainty of another State. It has no position in International Law. The suzerain absorbs all the functions of the Vassal State. A vassal has no right of declaring war nor of making alliances with foreign powers, for these acts impair its allegiance to the suzerain. According to Hall, "A State under the suzerainty of another being confessedly part of another State has those rights only which have been expressly granted to it and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign."

There are, however, instances where vassal States have maintained certain international relations, and in such cases they have a limited international pesonality. The examples of vassal States are Rumania and Serbia before 1878, Bulgaria between 1878 and 1908, Egypt till October, 1951 when she abrogated the 1936-Treaty by ending the privileges enjoyed by the British troops in the Suez Canal, The Transvaal, the Orange Free State, Tibet and Outer Mongolia.

Protectorate.—In the case of a protectorate, a weak State seeks the protection of a strong State by the conclusion of a treaty, with the result that the important international business is left to the protecting State. The protecting State exercises a varying measure of control over the external relations and sometimes over internal affairs of the weak State depending upon the provisions of the treaty. Oppenheim calls the relationship a kind of international guardianship.

A State deprived of the possibility of conducting its own foreign relations, cut off from contact with its sister nations and almost necessarily incorporated (internationally speaking) in the protecting State represents a denaturalised conception of a protected State. A protected State is, in fact, not a State at all.

It was observed by Lord Haldane in *Sobhzua II* v. *Miller* that in the general case of a British protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power nor a foreign power with its Government. The protected State becomes only semi-sovereign, for the protector may have to interfere, at least to limited extent, with its administration in order to fulfil the obligations, which International Law imposes on him to protect within it the subjects of foreign powers.

In *Parounak* v. *Turkey*, the Anglo-Turkish Mixed Arbitral Tribunal observed in regard to the British protectorate in Cyprus in 1914 : "It is generally recognised in International Law that there is no single and uniform type of protectorate and that must be taken by itself. In every case, however, the protectorate involves in general a certain change in the sovereign rights of the protected State, inasmuch as it confers upon the protecting State not only the conduct of international relations but also various rights concerning the regulation of domestic affairs of the protected State, such as military command, administration of justice, levying of taxes, etc.....It is typical of agreements establishing protectorates that they often allow to subsist the more or less nominal sovereignty of the protected State, while transferring the real power into the hands of the protecting State."

Sikkim.—Sikkim, which is a small State embedded in the Himalayas lying between India and Tibet, was brought under the direct control of the Government of India in 1905 and she continued to be a British protectorate since then.

On December 5, 1950, the Government of India entered into a treaty with Sikkim whereby the latter would continue as a protectorate of India, enjoying autonomy in regard to internal affairs excepting defence, external affairs and communication. India was responsible for the defence of territorial integrity of Sikkim. Its external relations were controlled by the Indian Government. In April, 1973, on the request of the head of the State of Sikkim, the Chogyal of Sikkim, India sent her army to take over control of Gangtok with a view to

restoring law and order in the Kingdom.

On July 4, 1974, the Chogyal set the Himalayan kingdom Sikkim into a new era as a full-fledged democracy when he signed the Government of Sikkim Bill, 1974, which transferred much of his powers to the elected representatives of the people.

The Sikkim Assembly subsequently passed a resolution demanding that the people of Sikkim should be given representation in the Indian Parliament. On September 4, the Indian Parliament passed the (36th) Constitution Amendment Bill upgrading the status of Sikkim from a protectorate to an associate of the Indian Union.

On April 10, 1975, the Sikkim Assembly passed unanimously a resolution seeking to abolish the institution of Chogyal and henceforth to be a constituent unit of India. That decision was overwhelmingly ratified subsequently at the state-wide referendum. On April 23, 1975, the Constitution Amendment Bill, which sought to give Sikkim full-fledged statehood in the Indian Union and its transformation as the 22nd State of the Indian Union, was approved by both the Houses of Parliament and finally with the President's approval, the process of Sikkim's total integration with India, as demanded by the people of Sikkim, became complete.

Bhutan.—Bhutan is of strategic importance to the Union of India, lying on the latter's north-eastern frontier and is surrounded by Sikkim, Tibet and North-East Frontier Agency on its three sides. Under the treaty of 1865 concluded between the Government of India and Bhutan, she was to enjoy the status of an Indian State. Presently, Bhutan is a protectorate of the Union of India by virtue of the treaty concluded between the two States in 1949, and the latter is to advise, govern control and regulate the former's foreign relations and external affairs. Bhutan enjoys complete internal autonomy. In September, 1971 the semi-independent Himalayan kingdom, Bhutan, having an area of 25,000 square kilometres and 7,50,000 inhabitants, was admitted as a member of the United Nations. Even after admission to the United Nations, under the 1949-treaty, Bhutanese external affairs are to be conducted with the guidance of the Government of India.

British Protectorates.—Basutoland, Bechaunaland and Swaziland are the three British protectorates in South Africa. South Africa has been claiming their transfer since almost 40 years. The British, however, claim that the protectorates could not be transferred to the Union except with the consent of the African population of the protectorates and the consent of the British parliament.

The Malaya Federation consisting of Malaya States, Penang and Malacca has been another British protectorate. In 1957, the Federation of Malaya acquired independence and was admitted to the U.N.

The Ionion Islands were made a protectorate of Great Britain by a treaty between Great Britain, Austria, Prussia and Russia in 1815. The Islands became a part of Greece in 1893 when the protectorate came to an end.

The Island of Samons, which has been protected under the joint guarantee of Great Britain, France and Russia, was annexed by Greece in 1914 when the protectorate came to an end.

On 8th October, 1962, Great Britain handed over constitutional instruments by which she surrendered her 63-year old protectorate over Uganda and

recognised the independence of Uganda, which became Africa's 33rd independent nation.

In January, 1979 the tiny oil-rich British protectorate of Brunei on Borneo Island signed a treaty with Great Britain that gave it full independence on January 1, 1984.

French Protectorates.—Tunisia and French Morocco in North Africa, and Annam, Tonkin and Combodia in South East Asia constituted the French protectorates. By the Versailles Treaty, Morocco was split into three parts, one part falling under the French Protectorate, the second under the protection of Spain and the third constituted the neutralised zone of Tangier. The French Government maintained that the protectorates owed their progress to French and as such they regarded any outside interference in the administration of territories and their guardianship as an insult. The Tunisians and Moroccans clamoured for their inalienable right to end the colonial rule. Tunisia became independent on March 20, 1956, and was admitted to the United Nations on November 12, 1956. On March 2, 1956, France recognised the independence of Morocco, and Morocco was admitted to the United Nations on November 12, 1956.

Mandated and Trust territories

Mandated Areas.—The experiment of mandated territories was tried for the first time in 1919-1920 under the League of Nations. These were former enemy territories and were alleged to be inhabited by backward communities who were not able to stand by themselves under the strenuous conditions of the modern world. By Article 22 of the Covenant of the League of Nations such ex-enemy territories which were surrendered by Germany and Turkey to the Allies were subjected to a tutelary regime under the ultimate responsibility of the League. The League handed over these territories for administration under "mandate" to advanced nations who by reason of their resources, their experience or their geographical position could best undertake this responsibility and who were willing to accept it. Such nations administered these territories subject to the supervision and ultimate authority of the League of Nations.

It was further provided in Article 22 that the charter of the mandate was to differ according to the stage of the development of the people, the geographical situation of the territory, its economic condition and other circumstances.

There were three types of mandates, viz., :

A. Certain communities formerly belonging to the Turkish Empire which had reached a fairly advanced stage of development where the mandatory merely rendered administrative advice and assistance till such time as they were able to stand alone. Examples of this type were : Iraq administered by Great Britain; Palestine (and Transjordan) administered by Great Britain; and Syria and Lebanon administered by France.

B. Other peoples, especially those of Central Africa, who were at such a stage that the mandatory must be responsible for the administration of the territory under conditions guaranteeing freedom of conscience and religion, subject to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, etc. Its examples

were British Cameroons, British Togoland and Tanganyika administered by Great Britain; French Cameroons and French Togoland administered by France; and Ruanda Urundi by Belgium.

C. Territories such as South-West Africa and certain of the South Pacific Islands which, owing to the sparseness of their population or their small size, or their remoteness from the centres of civilization or their geographical contiguity to the territory of the mandatory, were administered as integral portions of the territory of the mandatory subject to the safeguards mentioned above in the interests of the indigenous population. They were distributed as follows : South-West Africa administered by the Union of South Africa; Samoa by New Zealand; Nauru by the British Empire jointly by Great Britan, Australia and New Zealand; and Pacific Islands north of the Equator by Japan and those south of the Equator by Australia.

The mandate system was supervised by the League through the Permanent Mandates Commission consisting of the majority of members from the non-mandatory States.

The mandate system started from the year 1919, came to an end in 1946, when it was superseded by the trusteeship system.

Trust Territories.—The Charter of the United Nations Organization introduced a new system of "trust-territories" as a corollary to the former mandates system. Article 77 of the Charter provides that the trusteeship system shall apply to : (a) territories now held under mandate; (b) territories which may be detached from enemy States as a result of the Second World War; and (c) territories voluntarily placed under the system by States responsible for their administration. The trusteeship system does not apply to territories which have become members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

The objects of the trusteeship system are enumerated in Article 76 of the Charter. They are to further international peace and security, to promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence, to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, and to ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals.

The terms of trusteeship for each territory to be placed under the trusteeship, including any alteration or amendment, shall be agreed upon by the States directly concerned including the mandatory power in the case of territories held under mandate by a member of the United Nations. It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security.

The functions of the United Nations in respect of the supervision of trust territories and the approval of the terms of trusteeship agreements and of their alteration or amendment are carried out in the case of strategic areas by the Security Council (which may avail itself of the assistance of the Trusteeship Council, for performing such functions of the United Nations as relate to political, economic, social and educational matters in the strategic areas) and in the case of all other trust territories by the General Assembly assisted by the Trusteeship Council.

The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out its functions.

Functions and Powers.—The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may : (a) consider reports submitted by the administering authority; (b) accept petitions and examine them in consultation with the administering authority; (c) provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and (d) take these and other actions in conformity with the terms of the trusteeship agreement.

The Trusteeship Council has to formulate a questionnaire on the political, economic, social and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

Voting and Procedure.—Each member of the Trusteeship Council has one vote. Decisions of the Trusteeship Council are made by a majority of the members present and voting. The Trusteeship Council adopts its own rules of procedure, including the method of selecting its President. It has to meet as required in accordance with its rules, including provision for convening of meetings on the request of a majority of its members.

Declaration to place mandated territories under the trusteeship system.—At the first Assembly of the United Nations in 1946, Great Britain, Australia, New Zealand, Belgium and, with some qualifications, France made declarations announcing their intention to place their mandated territories under the trusteeship system. South Africa, however, claimed the right to incorporate the mandated territory.

South-West Africa.—By virtue of the stand taken by South Africa in respect of her mandated territory, viz., South-West Africa, she discontinued sending reports and petitions from the inhabitants of South-West Africa to the United Nations. The General Assembly of the United Nations, therefore, submitted a series of questions to the International Court of Justice. The two important questions for decision of the Court were :

(1) What are the international obligations of the South African Government with regard to the former mandated territory of South-West Africa ?

(2) Has the South African Government the right to modify the international status of South-West Africa, and, in the event of a negative reply, where does competence rest to determine and modify the international status of the territory ?

On July 11, 1950, the International Court of Justice, the highest tribunal in the world, unanimously decided at The Hague that South West Africa was still a territory under international mandate and that the Union of South Africa was not competent to modify its international status. The findings of the Court may be summed up as under :

(1) The Court held by 12 votes to 2 that South Africa continued to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa, including the obligation

to submit reports and transmit petitions from the inhabitants of that territory, the supervisory functions to be exercised by the United Nations to which the annual reports and the petitions are to be submitted.

(2) The Court unanimously decided that the provisions of Chapter XII relating to trusteeship of the U.N. Charter were applicable to South-West Africa in the sense that they provided a means by which the territory might be brought under the trusteeship system; but by a majority of eight to six, the Court decided that provisions of Chapter XII of the Charter did not impose on the Union of South Africa legal obligation to place the territory under the trusteeship system.

(3) The Court unanimously held that the Union of South Africa acting alone had not the competence to modify the international status of the territory of South-West Africa and that the competence to determine and modify the international status of the territory rested with the Union of South Africa acting with the consent of the United Nations.

(4) The terms of the original mandate given to the Union Government did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League with the object of promoting the well-being and development of the inhabitants.

(5) As regards the argument advanced by the Union Government that the mandate had lapsed because the League had ceased to exist, the Court observed that if the mandate lapsed, the Union Government's authority would have equally lapsed. There was a dissenting opinion by three Hague Judges—a Russian, a Belgian and a Chilean—who held that South Africa was legally obliged to place South-West Africa under the U.N. Trusteeship system, inasmuch as all the mandatory powers except South Africa had consented to the conversion from the mandatory to the trusteeship system.

The trusteeship system represents a compromise between the competing claims of interested Powers. And as Duncan Hall observed, the trusteeships are examples of the international frontier in which Powers, particularly the Great Powers, expanding along their main lines of communications to the limits of their political and economic influence and their defence requirements impinge upon each other in conflict or compromise.

The administrative States have to perform a large number of duties in regard to trust territories, and any dispute arising between the trust territory and the administering State is referred to the International Court of Justice. The administering authority does not exercise sovereignty over the trust territory and has international obligation in respect of the same.

Of the original 11 Trust Territories there had remained only one, *viz.*, the Pacific Islands, also known as Micronesia, which had not yet attained the Charter goal of self-government or independence. In a proclamation of November 3, 1986, President Regan declared the Covenant establishing the Commonwealth of the Northern Marina Islands to be entered fully into force. The proclamation also declared November 3, 1986, as the date on which the Compact of Free Association between the United States and the Federated States of Micronesia, was entered into force and October 21, 1986, as the date on which the Compact of Free Association with the Marshall Islands was entered into

force. In the proclamation, the President declared that the United States had fulfilled its obligations under the Trusteeship Agreement and that these States are now self-governing and no longer subject to the trusteeship. Because these Pacific islands were the last on the U.N. Trust territories, the recent agreements between the United States and these island nations signify not only the end of the U.S. administration of the Pacific Islands but also the closing of the "trust territory" era. The Compacts of Free Association declare the island States to be fully self-governing and allow the "freely associated States" to pursue foreign affairs in their own name.

A Compact of Free Association similar to that of Micronesia and the Marshall Islands was also concluded between the United States and the Republic of Palau, the remaining island of the Pacific Islands Trust territory. The Compact was approved in a United Nations observed plebiscite by a 72% margin and was approved by Congress on October 16, 1986.

On May 28, 1986, the Trusteeship Council of the United Nations noted that the United States had satisfactorily discharged its obligations as the Administering Authority over the U.N. Trust Territory of the Pacific Islands, that the people of the Northern Marina Islands, the Federated States of Micronesia and the Republic of the Marshall Islands had freely exercised their right to self-determination, and that it was appropriate to terminate the Trusteeship Agreement. The Security Council has not addressed the issue.

Professor Roger Clark of the Miami University has described the agreements as "cheating the process of decolonisation" and being a "modern form of slavery."

The Security Council on 10th November, 1994, terminated the United Nations Trusteeship Agreement for Palau, the Organization's last trust territory. In the light of the entry into force on 15th October of a compact of Free Association between Palau and the administering authority, the United States, the Security Council determined that the objectives of the Trusteeship Agreement had been fully attained. It took action by unanimously adopting the resolution.

Non-Self-Governing Territories.—Chapter XI of the U.N. Charter provides that members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote to the utmost, the well-being of the inhabitants of these territories and to this end the administering powers undertake to develop self-government to ensure their political, economic, social and educational advancement, to develop self-government and to transmit regularly to the Secretary-General for information purposes statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible, other than those territories to which Chapters XII and XIII, *viz.*, International Trusteeship system and the Trusteeship Council, apply.

General Assembly resolution to revoke the Mandate for South Africa.—The United Nations General Assembly resolved in 1966 to terminate South Africa's right to administer the mandated territory of South-West Africa. In its resolution the Assembly declared that South Africa has failed to fulfil its

obligations in respect of the administration of the mandated territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South-West Africa and has, in fact, disavowed the mandate and consequently it decided that the mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no right to administer the territory and that henceforth South-West Africa shall be under the direct responsibility of the United Nations.

Advisory opinion of the International Court of Justice on the legal consequences for State of the continued presence of South Africa in Namibia.—The International Court of Justice in its advisory opinion on the Status of South-West Africa opined on the 21st of June, 1971, that it considered South Africa's presence in South-West Africa to be illegal and that it should withdraw from the territory immediately. The opinion, by 13 votes to two, had been sought by the United Nations Security Council. The General Assembly had passed a resolution in 1966 terminating South Africa's mandate over South-West Africa, granted to the former by the League of Nations fifty years ago. Before acting on that resolution, the Security Council wanted to arm itself with the World Court's advisory opinion on the issue. The Security Council had asked the Court for its opinion on the legal consequence of South Africa's continued presence in South-West Africa. The two dissenting votes were cast by the Judges of Britain and France.

By 11 votes to four, the Court advised that the U.N. members were under obligation to recognise the illegality of South Africa's presence there and the invalidity of acts on behalf of or concerning Namibia (South-West Africa) and to refrain from any acts, and in particular any dealings with the Government of South Africa, implying recognition of the legality of, or lending support or assistance to, such presence and administration.

On November 12, 1974, the General Assembly of the United Nations decided to oust South Africa from the 29th (1974-75) session of the Assembly for pursuing policies based on racial discrimination and refusal to relinquish control over Namibia. The ouster was approved by the Assembly by upholding the ruling given by the Assembly President that South Africa was not entitled to sit in the Assembly as its credentials had already been rejected.

Neutralised States.—"A neutralized State is one whose independence and political and territorial integrity are guaranteed *permanently* by a collective agreement of Great Powers subject to the condition that the particular State concerned will never take up arms against another State except to defend itself and will never enter into treaties of alliance, etc., which may compromise its impartiality or lead it into war." According to Svarlien, "States whose independence and neutrality are guaranteed for all future time by treaty are known as 'neutralized' States." (Oscar Svarlien).

The neutralized State is, therefore, prohibited from carrying on war except in its own defence or from entering into treaties or arrangements with other States that may affect its neutrality in time of war. The neutralized State to this extent limits the exercise of its sovereign rights. The prohibition proceeds from the general body of nations. The object of neutralization is to protect weak States from their powerful neighbours, but no State can be neutralized without its consent. The big powers neutralize a weak State for the purpose of maintaining the balance of power by keeping it a buffer-State in between their frontiers.

It is often argued that a neutralised State is a part-sovereign State as it cannot enter into treaties of alliance with or declare war against another State. But this argument is fallacious for a neutralised State is as fully sovereign as any non-neutralized State in matters falling within its territory. A neutralized State does not differ from a fully sovereign State in these respects.

The number of neutralized States is small, these being Switzerland (since 1815), Belgium (1831 and 1839), Luxembourg (1867), the Ionian Islands (1863-64), the Congo (1885), Austria (since 1955) and Laos (since 1962).

Switzerland.—Switzerland has pursued a policy of neutrality since 1648. On March 20, 1815, at the Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden and Russia accorded to Switzerland the status of permanent neutrality and collectively guaranteed its independence. The Swiss statute of neutrality prohibits her from participating in political or military alliances. The position of Switzerland was recognised by the Council of the League when she was admitted as an original member on the understanding that she will not be forced to participate in a military action or to permit the passage for foreign troops or the preparation of military enterprises upon her territory. Her neutrality was respected by the belligerents in both the world wars.

Switzerland has refused to join the United Nations lest membership in the U.N. should infringe her neutrality since the Charter makes collective military sanctions against the offending State a duty for all members. She, however, participates fully in specialized agencies of the United Nations and is a party to the Statute of the International Court of Justice.

Distinction between Neutralized and Neutral States.—The term 'neutrality' denotes a treaty between two States whereby they mutually agree that if one of them is attacked by a third State, the other will maintain an attitude of neutrality towards the conflict. Neutrality, therefore, involves two essential elements, *viz.*, the element of abstention from acts of war and the element of freedom to abstain or not to abstain at pleasure. In neutralization, the first element remains the same, *viz.*, the element of abstention from acts of war; but instead of the second we have either an obligation not to fight except in the strictest self-defence, or an obligation to abstain from warlike use of certain places and things which have had the neutral character stamped on them by international agreement. Neutrality, therefore, is a temporary affair, but neutralization is a permanent measure, the status having been guaranteed by the explicit agreement of a limited number of great powers, accompanied by a definite sanction and a corresponding obligation on the part of the neutralized State to remain as such. Enforced neutrality is, therefore, the essence of neutralization. Neutralization, therefore, involves neutrality but neutrality does not necessarily involve neutralization. In short, neutralization is permanent, general and involuntary, while neutrality is temporary, particular and voluntary.

Starke observes that "neutralization differs fundamentally from neutrality, which is a voluntary policy assumed temporarily in regard to a state of war affecting other Powers, and terminable at any time by the State declaring its neutrality. Neutralisation, on the other hand, is a permanent status conferred by agreement with the interested Powers, without whose consent it cannot be relinquished. It is thus also essentially different from 'neutralism', a newly

coined word denoting the policy of a State not to involve itself in any conflicts or defensive alliances."

Diminutive State.—Since the Second World War, almost all the erstwhile colonies have been granted independence. Most of them did not grow out of the natural course of national evolution, but were products of inter-imperial rivalry and accords signed in the European capitals. The colonial powers left them as they were and, consequently, some of them even though sovereign stand as tiny entities whether as regards area, population or national economy. Since every state, irrespective of its size or power, has one vote in the United Nations, the question of diminutive States, mini-States or micro-States has now turned into a problem difficult to resolve.

A sovereign State is one which has a permanent population, defined territory, effective government and independence. There is no minimum size prescribed. Oppenheim has cited the examples of Vatican City, Monaco, San Marino and Liechtenstein which in his opinion can qualify as sovereign States. Some theorists like Dr. Higgins, Bowett and O'Connell have tried to introduce a variable concept of statehood, i.e., the small States are eligible for full membership of the Specialised Agencies but not of the United Nations itself. But the theory is not tenable if we closely examine the relevant provisions of international law. The concept of statehood cannot be used in different senses by the same actors (diplomatic representatives of the States) in similar *fora* (intergovernmental organisations) for the same purposes (participation).

The second objection that is often raised is regarding the ability of diminutive States to fulfil the obligations of membership. The obligations of members of the United Nations are not very onerous. Most of the provisions of the Charter are nothing but rules of peaceful behaviour which are pursuable by big and small States alike. The most onerous obligation in the Charter seems to be the one contained in Article 17(2)—the obligation to contribute to the U.N. budget. The minimum annual contribution to the U.N. budget currently comes to about 55,000 dollars which is a pretty big sum for diminutive States.

The third point that comes up for consideration is regarding the desirability of the diminutive State's membership. The membership confers on a State some sort of prestige in political circles. The U.N. happens to be an international platform and being its member normally means being better equipped to resist political pressure from the powerful States. If the diminutive States are debarred from membership, then, as Jenks has remarked, "they may become havens of exemption for the lawless.....or for over-mighty interests." On the other hand, the disadvantages of admitting the diminutive States are obvious. The combined voting strength of all eligible diminutive States is quite substantial although their combined populations would amount to no more than that of one normal State. In conjunction with another block they could easily sway the General Assembly while their contribution to the U.N. expenses would be negligible.

Writer Nkambo Mugerwa, however, holds a different view. According to him, "They (the diminutive States) are certainly not typical full subjects of international law. They are all dependent to a greater or lesser extent on a third State, especially for the conduct of their foreign relations.....While possessing a defined territory, a government and a population, these States do not possess the full capacity to enter into foreign relations. For this reason they cannot be regarded as full sovereign independent States.

In the past few years many ministers or micro-States have been elected to U.N. membership, these being the Bahama Islands, Grenada, the Cape Verde Islands, the Comoro Islands, Sao Tome, Principe, the Seyehelles, etc. Nations with approximately 70,000 and 57,000 inhabitants, as in the case of the last two, have been admitted to the United Nations, thus breaking all precedents with regard to minimal population standard for its membership.

In view of the U.N. Legal Counsel's opinion, the issue may remain dormant.

The Holy See and the Vatican City.—The Church and her main body, the Holy See have constantly obliged the secular power to recognize their independence. Although after the annexation of the Papal States, by Italy in 1870 the Holy See ceased to exercise any territorial sovereignty which had been exercised for more than 1,100 years, her independence was not only admitted but recognized by the State Laws, and even during the period 1870-1929 Italy did not claim territorial sovereignty over the Holy See. The Italian Law of Guarantees conferred on the Pope personal immunities and prerogatives as are accorded by International Law to the heads of sovereign States. The Pope and his successors were also guaranteed the possession of the Basilica of St. Peter, the Vatican and Lateran Palaces as the villa of Castel Gnadolfo. The Holy Father had complete authority within the area. The Pope was also offered an indemnity of an annual sum for the loss of his temporal possessions. But Pius IX proclaimed himself a "prisoner in the Vatican" refusing to accept the terms of the Law of Papal Guarantees, enacted by the Italian Parliament in May, 1871, on the ground that such enactments by the Government of Italy were unilateral, alterable at any time by the Italian Parliament. He demanded a guarantee not by the Government of Italy but the recognition of this position by other States as well. The Government of Italy did not accede to this view, with the result that the relations between the Pope and the Government of Italy continued to remain strained for about half a century and the Pope never left the Vatican in the period between 1870 and 1929.

Finally, the Lateran Treaty of February 11, 1929, entered into between the Holy See and the Kingdom of Italy created the Vatican City, consisting of an area of about 1/2 km. sq. and having a population of 1,000, as a symbol of the Pope's territorial sovereignty. This marked a return of territorial possession to the Holy See which she had lost in 1870. The preamble to the Treaty emphasizes the necessity to guarantee to the Holy See a complete and visible independence and a sovereignty unassailable in International Law.

As head of State, the Pope exercises sovereignty in the Vatican. The executive, legislative and judicial powers of the Pope within the State are absolute. The Vatican issues its own stamps and currency and has its own banking system, radio station and telephone system. The Vatican maintains a regular army of more than 100 Swiss guards.

The Vatican is a permanently neutralised country, its territory being invoilable. This neutrality was respected by the belligerents during the Second World War. Under Article 24 of the Lateran Treaty, the Holy See has declared to keep itself aloof from rivalries of a temporal nature between other States and from international congresses convened to deal with them, unless the contending parties make a joint appeal to its mission of peace.

The Holy See although strictly temporal can be classed a true State. She has the right of legislation under the Lateran Treaty. The sovereignty of the Holy See in the international field is clearly acknowledged, and Article 26 recognized the State of Vatican City under the sovereignty of the Pope. Article 22 provides for an extradition clause which obliges the Holy See to extradite a culprit if the act has been committed on Italian Territory and the same is regarded as crime by the laws of both States. Professor Oppenheim shares the view that "the Lateran Treaty has treated a new international State of the Vatican City, with the incumbent of the Holy See as its Head. That State possesses the formal requirements of statehood and is an international person recognized as such by other States. Its true significance in the field of International Law lies in the fact that international personality is here recognised to be vested in an entity pursuing objects essentially different from those inherent in national States such as those which have hitherto composed the society of States." Lauterpacht, Guggenheim and Verzjil also share the view that the Vatican is a State, albeit a tiny one.

The Holy See maintains diplomatic relations with third States and has entered into treaties, particularly of a humanitarian character, such as the Convention relating to the Status of Stateless Persons, 1954. The Vatican City is a member of the International Telecommunication Union and Universal Postal Union, the two Specialised Agencies of the United Nations. It is also a party to other conventions and is invited to participate in diplomatic conferences and treaties sponsored by the United Nations.

There are, however, certain other writers on International Law who hold that the Vatican does not fulfil the test of statehood. This view is endorsed by Mendelson who observes that "in two respects it may be doubted whether the territorial entity, the Vatican City, meets the traditional criteria of statehood. In the first place, it can hardly be said to have a permanent population capable of maintaining and reproducing itself. Apart from a few lay officials and their families, the population consists entirely of celibate clergy and nuns; moreover, Vatican nationality attaches to them only for the usually limited time during which they are seconded to the Holy See. Secondly, the various 'governmental' functions conducted in the Vatican are not, for the most part, exercised in relation to, or for the benefit of, the City itself. But even if the Vatican cannot then be classed as a State, it is not its exiguity that is the cause."

Even the new Constitution of the Italian Republic gives recognition to the fact that the State and the Catholic Church are independent and sovereign in their own sphere and that their relations are regulated by the Lateran Pacts.

CHAPTER VIII

RECOGNITION OF STATES

Introduction

The number and the identity of States is not fixed, it is rather variable. It changes with the march of history. Due to passage of time, old States disappear or unite with other States to form a new State or disintegrate and split into several new States; or former colonial or vassal territories may, by a process of emancipation, themselves attain statehood. Even in the cases of existing States, due to revolutions or military conquests, the status of new governments changes. These transformations bring problems for recognition of new States or new governments, to the international community.

It may be pointed out that the subject of recognition of States is not based on consistent and clearly defined rules or principles rather it is a subject involving unsystematic State-practices. It would be seen that while some States follow the traditional course of recognising or withholding recognition of new governments, whereas other States opposed to this course, favour for a system of deciding the circumstances to enter into relations with new regimes or to abstain from such relations, regardless of formal recognition or of formal withholding of recognition. There are however, two reasons of this inconsistency of adopting different principles for recognition :

(1) Firstly, according to the practice of States, recognition is much more a question of policy than of law. The policy of the recognising State is governed by the principle of protecting its own interests, which lie in maintaining proper relation with the new State or new government that is likely to be stable and permanent.

(2) Secondly, there are several distinct categories of recognition. Under the act of recognition, it should be understood what type of recognition is going to be conferred, whether it is *de jure* recognition or *de facto* recognition. It depends upon the attitude of the recognising State towards the new State in providing recognition to it.

In this context the observation of Professor Schwarzenberger is noteworthy. He writes, "The growth of International Law is best understood as an expanding process from a nucleus of entities which have accepted each other's negative sovereignty and on the basis of consent, are prepared to maintain and possibly expand the scope of their legal relation. Like most clubs, the society of sovereign States is based on the principle of co-option. In exercising this prerogative, the existing subjects of International Law employ the device of recognition."

Definition of Recognition.—Jessup observes that recognition of State is the act by which another State acknowledges that the political entity recognised possesses the attributes of statehood. Recognition may be defined as formal acknowledgment by an existing member of the international community of the international personality of a State or political group not hitherto maintaining official relations with it. It implies that in the opinion of the recognizing State

the nascent community possesses the requirements of statehood, and is therefore a normal subject of international rights and duties. It is the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organised, independent of any other existing State and capable of observing the obligations of International Law and by which they manifest therefore their intention to consider it a member of the international community.

Theories of recognition.—There are two theories of recognition, *viz.*, the constitutive theory and the declaratory or evidentiary theory.

According to the former, it is the act of recognition alone which creates statehood and clothes a new Government with authority in international sphere. It is the process by which a political community acquires personality in International Law by becoming a member of the family of nations. Only by recognition a State becomes a participant.

Hegel was the founder of this school. According to Anzilotti, since the rules of International Law have grown up by the common consent of the States, a subject of International Law comes into being with the conclusion of the first agreement as expressed by the treaty of recognition. Such a recognition is reciprocal and constitutive, creating rights and obligations which did not exist before. Holland leans in favour of the constitutive theory and in this sense shares the view of Oppenheim. He observes that a State cannot be said to have attained maturity unless it is stamped with the seal of recognition, which is indispensable to the full enjoyment of rights which it connotes.

The recognition of Poland and Czechoslovakia through the instrumentality of the Treaty of Versailles lends support to the constitutive theory of recognition.

The constitutive theory presents serious difficulties. It would oblige us to say that "an unrecognized State has neither rights nor duties at International Law", which is an absurd suggestion. Again, the status of a State recognised by some States and not recognised by others presents a queer phenomenon. Non-recognition of a State by others is not conclusive evidence of the absence of qualifications requisite for statehood.

According to the latter theory, statehood or the authority of a new Government exists prior to recognition and the act of recognition is merely a formal acknowledgment or admission of an already established fact. In other words, the exponents of this theory maintain that recognition merely has a declaratory, not a constitutive effect, inasmuch as recognition merely declares an existing fact that a particular community or Government possesses the necessary qualifications of a State as required by International Law. It does not bring into existence a State which did not exist before.

Article 3 of the Montevideo Convention of December 26, 1933, stated : "The political existence of the State is independent of recognition by the other States. Even before recognition, the State has the right to defend its integrity and independence, to provide for its conservation and prosperity and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define its jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other States according to International Law."

It is said in support of this view that Japan was possessed of all the

elements statehood, even long before the formal establishment of relations with the western world in 1854.

The exponents of this theory are Hall, Wagner, Pitt Cobbett, and Brierly.

Professor Hall maintains that the State, which is theoretically a politically organised community, enters as of right into the family of States and must be treated according to law as soon as it is able to show the marks of statehood. No State has a right to withhold recognition when it was been earned.

Pitt Cobbett in consonance with the declaratory theory is of the view that the existence of a State is a matter of fact for "so long as a political community possesses in fact the requisites of statehood, formal recognition would not appear to be a condition precedent to the acquisition of the ordinary rights and obligations incident thereto." This view lends support to the famous declaration of Napoleon : "The French Republic no more needs recognition than the sun requires to be recognized."

According to Brierly, the granting of recognition to a new State is not a 'constitutive' but a 'declaratory' act; it does not bring into legal existence a State which did not exist before. A State may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other States, it has a right to be treated by them as a State.

Oppenheim's view.—Adverting to the view of Oppenheim who advocates the constitutive theory, a State is, and becomes, an international person through recognition only and exclusively. The proposition, although partially true, is not the whole truth. Recognition is, no doubt, one of the chief methods of putting the seal of approval upon the existence of a State. But if this view were to be accepted, it will be difficult to account for a new State recognized by some States and refused by others. The People's Republic of China, although recognised by a large number of States, had not been accorded recognition by U.S.A. and other countries and was for long not admitted to the membership of the United Nations. The State of Communist China, however, continued to exist in spite of the non-recognition by America and its non-admission to the U.N. And even prior to accepting its credentials in 1971, the U.N. officers conducted cease-fire negotiations in Korea with the Red Chinese representatives. Furthermore, it was even invited to the various conferences to ease international tension. An effective established Government within a certain territory is, as observed by Dr. Alf Ross, decisive for the existence of the new State and also for its subjection to International Law.

In *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, the Court went to the length of holding that the Soviet Union although its government was unrecognised by the United States, was immune from jurisdiction by American Courts. The Court observed : "The Russian Federated Soviet Republic is the existing *de facto* government of Russia.....Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligation of an independent power, able to enforce its claims by military force is a fact, not a theory. For its recognition does not create the State, although it may be desirable." The political existence of a State is independent of recognition by other States.

It was observed in *German Polish Arbitral Tribunal* (1929) that recognition of

a State is not constitutive but merely a declaratory act inasmuch as the State exists by itself and recognition is nothing but the ascertainment of that existence.

Recognition, no doubt, enables a State to enter into diplomatic relationship with other States. But it cannot be asserted that non-recognition of a State does not confer on it international status. Statehood exists even prior to recognition. A State *ipso facto* becomes a member of the Family of Nations by its very birth and recognition only paves the way and furnishes evidence for its existence as an independent nation. Furthermore, the above view is strengthened by the fact that recognition is retroactive, *i.e.*, it dates back to the time when the recognised community in fact possessed the necessary elements of statehood, thereby showing that the State existed much prior to the date of its recognition. Again, acquisition of statehood is a matter of fact, and the process of acquisition is political in nature, not legal.

Correct view.—The correct view appears to be that recognition is both declaratory and constitutive. As Lauterpacht observes, it is declaratory of the simple fact of existence of a political community after ascertaining the facts of statehood in the conventional way. On such declaration of statehood, recognition is constitutive of certain legal consequences. Starke also shares the same view when he observes that probably the truth lies somewhere between these two theories. The one or the other theory may be applicable to different sets of facts. The bulk of international practice supports the evidentiary theory, inasmuch as while recognition has often been given for political reasons and has tended therefore to be constitutive in character, countries generally seek to give or to refuse it in accordance with legal principles and precedents.....Moreover, a mere refusal by a single State to recognise could not affect the situation if a great number of other States had already given their recognition.

Svarlien also shares this view when he observes : ".....It might be said that recognition is always declaratory in that it confirms the existence of a State and recognizes its legal position in the international community. But it may also, at times, be constitutive in so far as it has the effect of actually creating a State where none existed before."

Recognition—a legal or political problem.—Recognition is generally granted or withheld on legal principles. It is, however, often governed by consideration of economic, strategic or other political interest. It is in such cases dictated more on the ground of policy and political expediency than the admission of existing facts. Pressure from influential groups as in the case of Israel may shorten the process of the *formal* recognition of a State. But as Corbett observes : "Once a political community has achieved a certain degree of development.....it has such right as exists among States to legal treatment. In this sense, and in this sense alone it has a right to be 'recognized'. There is.....no right to *formal* recognition. This is something which States grant or refuse at discretion. It is a counter in the harsh game of international politics." Even where political considerations prevail, that fact does not affect its legal nature, for recognition while declaratory of an existing fact is constitutive in its nature.

It was laid down by the United States District Court in *Bank of China* v. *Wells Fargo & Union Trust Company*, that more recently recognition has been granted and withheld at the diplomatic bargaining table and that conflicting considerations are balanced in the executive decision.

Professor Lauterpacht in his new constitutive theory points out that

recognition is not an act of policy as embodied in the traditional constitutive theory and that there is a duty on each State towards the international community to recognise a new State or new government fulfilling the legal requirements of statehood. The theory is in accord with the majority view of the International Court of Justice in its Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations where the Court observed that paragraph 1 of Article 4 of the Charter precludes the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which complies with them. Starke differs from Professor Lauterpacht's thesis on the ground that the weight of precedents and practice did not support his views as to the law. He observes that "the divergences in 1949-1980 in the recognition of the new State of Israel (1948-49) and of the People's Republic of China can hardly be reconciled with them. If indeed there were such a legal duty to recognise, it is difficult to say by whom and in what manner it could be enforced ? No right to recognition is laid down in the Draft Declaration on the Rights and Duties of States, drawn up by the International Law Commission in 1949. The action of States in affording or withholding recognition is as yet uncontrolled by any rigid rules of international law; on the contrary recognition is treated, for the most part, as a matter of vital policy that each State is entitled to decide for itself. Podesta Costa's view that recognition is a 'facultative' and not an obligatory act is more consistent with the practice. There is not even a duty on a State under international law not to recognise initially, or to withdraw recognition if the qualifications of statehood or of governmental authority cease to exist." The political expediency that governs in such cases is only offset by the fact that while granting recognition, the States generally make sure that the nascent community possesses the requirements of statehood in the legal sense. To this extent, recognition fully takes into account legal principles.

While the States as a rule have refused to adhere to any rule of collective recognition of a State by the United Nations, the *membership* of a State in the United Nations and *representation* of a State in the organs is clearly determined by a collective act of the appropriate organs; in the case of membership, by vote of the General Assembly on recommendation of the Security Council, in the case of representation by vote of each competent organ on the credentials of the purported representatives. Since, therefore, recognition of either State or government is an individual act, and their admission to membership or acceptance or representation in the organization are collective acts, it would appear to be legally inadmissible to condition the latter acts by a requirement that they be preceded by individual recognition.

Hallstein's Doctrine.—In the case of dismemberment of a part of the State and the establishment of a new State or Government as a result of the liberation movement, as in the case of the Bangladesh Government, the attitude of some of the western countries and of pro-Pakistan nation was initially based on the West Germany's now abandoned "Hallstein Doctrine" under which no country could have simultaneous diplomatic relationship with two Germanys. The Hallstein Doctrine, named after Dr. Walter Hallstein, State Secretary for Foreign Affairs of the Federal Republic of West Germany, envisaged that recognition of the East German regime (German Democratic Republic) by a third State would be considered as an unfriendly act by the Federal Republic of Germany and

would mean the breaking off of diplomatic relations with the third party in question. The doctrine is fallacious and smacks of political considerations in the determination of the question of recognition of a State.

Forms of Recognition

(a) Express and Implied Recognition.—Recognition may be express or implied. Express recognition is accorded by some formal declaration. Implied recognition is effected through acts which imply an intention to grant recognition; it is accorded by entering into a bilateral treaty regulating relations, or by accrediting diplomatic representatives. Issue of a consular *exequator* by the recognising State also establishes implied recognition.

Recognition may be granted either individually or collectively by a number of States.

As a rule, recognition once given is irrevocable. A formal severance of diplomatic relations may subsequently be declared, but it does not annul the recognition of a State already given nor does that State lose its status in the international community. Great Britain recognised the Soviet Government *de jure* in 1924, but later broke off relations in 1927, but that did not affect the status of the Soviet Government.

(b) Conditional Recognition.—States are also recognized sometimes subject to some condition. The Berlin Congress of 1878 recognized the States of Bulgaria, Rumania, Servia and Montenegro on the condition that they did not impose any religious disabilities on any of their subjects. Since the recognition once made cannot generally be withdrawn, the failure to fulfil the obligation does not annul the recognition. The recognized State can only be guilty of violation of international law. The recognizing State can also sever diplomatic relations by way of sanction. An exception to the non-revocability of recognition is, however, furnished in the case of a nascent State. Thus, Great Britain granted recognition to the Esthonian National Council in 1919 "for the time being provisionally and with all necessary reservations as to the future." This was regarded on all hands as a revocable recognition.

Professor Lauterpacht condemns the practice of States to exact some guarantee or undertaking while granting recognition as a "spurious use of the weapon of recognition", and "as contrary to the true function of recognition which is the ascertainment and declaration of certain factual requirements of statehood or governmental capacity." Starke observes that Judge Lauterpacht overlooks not merely the weight of the practice, but also the important consequences of recognition on its internal law, for example, as regards property rights, which each State is entitled to consider for itself.

(c) Collective Recognition.—Collective recognition through the medium of an international institution removes the anomaly of some States granting recognition and others refusing to do so. The Treaty of London recognized Greece in 1830 and Belgium in 1831. The Berlin Congress of 1878 collectively recognised Bulgaria, Montenegro, Servia and Rumania, while the Supreme Council of the Allied Powers accorded collective recognition in 1921 to Esthonia and Albania, thereby extending recognition on behalf of France, Italy, Japan and Great Britain without separate acts of recognition by the four powers. The collective recognition paves the way for admission of the recognised State as a member of the family of nations. Such "collective recognition" is treated by some

authors as "simultaneous or general recognition", and the only collective recognition possible today is recognition of a State by an international organization, like the U.N., admitting the same to its membership. Quincy Wright and Wesley Gould regard collective recognition by the United Nations as no more than that the entity granted membership be treated as if it had been recognised in dealings inside the United Nations but not elsewhere. The position seems to be correct, and the Secretary-General opined in a memorandum submitted to the President of the Security Council on the 8th March, 1950, that the act of recognition is a political decision which each State decides in accordance with its own free appreciation of the situation and that the United Nations does not possess any authority to recognise either a new State or a new government of an existing State.

(d) *De facto* and *De jure* recognition.—Diplomats distinguish between recognition *de facto* and *de jure*. The former means that in the opinion of the recognising State, the new authority, actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability as to show that it will be able to maintain its independence over a prolonged period and yet fulfils the requirements laid down by International Law for effective participation in the international community, though only provisionally and temporarily. *De jure* recognition implies that the recognised State or Government fulfils the test laid down by International Law for effective participation in international community. This necessitates the exchange of diplomatic representatives and naval salutes between warships.

According to British practice, three conditions are required as precedent to the grant of *de jure* recognition of a new State or a Government, *viz.*, (i) a reasonable assurance of stability and permanence; (ii) the Government commands the general support of the population; and (ii) it is able and willing to fulfil its international obligations.

According to Lauterpacht, *de facto* recognition is an expression of desire to enter relations with the regime in power but for the time being without the usual diplomatic courtesies.

In the case of *Gagara*, where the question as to the status of the Esthonian National Council was raised, the Law Officers informed the Court that His Majesty's Government provisionally recognised the Esthonian National Council as a *de facto* independent body and accordingly a certain gentleman as the informal diplomatic representative of the Esthonian Provisional Government. The Court of Appeal held that such provisional recognition accorded, for the time being, to the Esthonian National Council the status of a foreign sovereign; that to permit the arrest of its vessel would be contrary to principles of international comity, as it would compel the Esthonian Government, whose sovereignty was entitled to be respected, to submit to the jurisdiction of the British Courts, and that the writ and all subsequent proceedings must be set aside.

In a conflict between a displaced *de jure* Government and a newly formed *de facto* Government, the English Court of Law has held that rights and status of the *de facto* Government prevail over the *de jure* Government. This proposition was laid down in two cases, viz., *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* and the *S.S. Arantzazu Mendi* v. *The Government of Republican Spain.*

Information from Foreign Office.—The information received from the

foreign office as to the status of a nascent community is conclusive for the Courts of the countries. It was so held in the *Civil Air Transport Incorporated* v. *Central Air Transport Corporation*. A similar question was earlier raised in the case of *Arantazazu Mendi*.

The declaration of the executive on the question of recognition of a foreign State or Government is always treated as conclusive and binding upon the Courts of the land and these declarations are considered as acts of State, falling within the discretion of the Head of the State. [*Luther* v. *Sagor, the Ddra, Duff Development Co.* v. *Government of Kelantan* and *Sultan of Johore* v. *Abubakar Tunku*.]

There is no ground for saying that because the question involves considerations of law these must be determined by the courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or law : *Duff Development Co. Ltd.* v. *Government of Kelantan*.

Courts should not regard executive policy in respect to recognition and non-recognition of foreign governments as meaningless or of little consequence. In any particular situation, executive policy may be crucial. But it is a fact which properly should be considered and weighed along with the other facts before the Court : *Bank of China* v. *Wells Fargo Bank & Union Trust Company*.

The rigour of the rule as to the conclusiveness of the Foreign office certificate is being gradually mitigated; and in *Luigi Monta of Genoa* v. *Cechofracht Co. Ltd.*, (*The Formosa case*) and *In Re. Al-Fin Corporation* (*the North Korea case*) the courts permitted evidence to be led to satisfy themselves about the effective control of the Government in question.

Distinction between *De facto* and *De jure* Recognition.—"*De facto* recognition", observes Schwarzenberger", is by nature provisional and may be made dependent on conditions with which the new entity has to comply. It differs from *de jure* recognition of a State. There is not yet a formal exchange of diplomatic representatives. The jurisdiction of the new international person is merely recognised to exist within its own territory and any extra-territorial effects of such jurisdiction are ignored. Thus, if a State which has received *de jure* recognition, should nationalise companies within its territory, its ownership in the property of such companies abroad (securities, land or ships) cannot be denied. If, however, such a State had merely obtained *de facto* recognition, such acts are without effect if purporting to apply to property in the country that has granted such *de facto* recognition.....there is an increasing tendency, both in decisions of national courts and amongst writers, to assimilate the effects of *de facto* recognition of a State to those of *de jure* recognition.....In contrast to *de facto* recognition, *de jure* recognition is considered to be retrospective, that is to say, to date back to the time when the newly recognised entity actually came into existence."

From the point of view of legal effects, there is hardly any difference between *de jure* and *de facto* recognition of a State, for the retroactivity of *de jure* recognition dates back to its *de facto* recognition. But as against a *de facto* government, a *de jure* government retains title in and control of property situated abroad. The Soviet Government could only get possession of Tsarist archives and other property in England not until its *de jure* recognition accorded in 1924.

De facto governments enjoy the same immunities from suit as *de jure* governments. But diplomatic courtesies and representaton are usually not accorded to *de facto* governments except in extraordinary circumstances occurring in time of war.

Recognition of Governments.—When a change in the head of a State which is already an international person, takes place in the normal and constitutional manner, such a change is notified to other States who accept the new head of the State by sending congratulatory messages. The difficulty, however, arises where a change in government—a term which is not synonymous with the term State—is brought about by revolution, i.e., by overthrow of the existing government or by a *coup d'etat*. In such cases two tests are to be applied : The first test is whether the new government is the *de facto* government in effective control of the State, exercising its authority over a substantial portion of the territory without any effective opposition, and having the backing of a substantial segment of public opinion in the country. This is called the objective test. And the second test is whether the new Government is prepared to carry out the obligations imposed on it by International Law and the Charter of the United Nations. This is called the subjective test. The United States of America granted recognition to the new Government of France established as a result of the French Revolution. The same test was applied in the case of Soviet Russia when she emerged as a result of the revolution of 1917, and it was presumed that the new government would be a peace-loving State, prepared to carry out its international obligations.

Political and economic motives also play a dominant role in recognition of governments. The new government is required to meet past obligations as the price of its recognition.

The granting or refusal of recognition of a government has, however, nothing to do with the recognition of the State itself. If a foreign State refuses the recognition of a change in the form of government of an old State, the latter does not thereby lose its recognition as an international person. The State remains in existence however violent or drastic the form of the Government may have been.

Premature Recognition.—Premature recognition is regarded as an unfriendly act and treated as an act of intervention or as a *casus belli*. India recognized the Bangladesh rebels as the legal government of that State on December 6, 1971, even though Bangladesh (formerly East Pakistan) declared its independence on March 25, 1972.

Even *de facto* recognition is sufficient to validate the acts of the State recognised : *Luther* v. *Sagor*.

In *Haile Selassie* v. *Cable and Wireless Ltd.*, the Court of Appeal (Great Britain) ruled against the plaintiff Haile Selassie and dismissed his claim by virtue of his failure to be the recognized Government of Ethopia.

Stimson's Doctrine of Non-recognition.—At the time of the Japanese invasion of the Chinese Province of Manchuria in June, 1932, the Secretary of State of the United States, Mr. Henry L. Stimson, pointed out that the United States of America could not admit the legality of any situation *de facto* nor did it intend to recognize any treaty or agreement between these governments or agents thereof which might impair the treaty rights of the United States and that it did not intend to recognise any situation, treaty, or agreement brought about

contrary to the covenants and obligations of the Pact of Paris of 1928 to which all the three, viz., China, Japan and U.S.A. were parties. He observed that a situation brought about in violation of International Law could not be legalised by the act of recognition. He further observed : "A caveat will be placed upon such actions which, we believe, will effectively bar the legality hereafter of any title sought to be obtained by pressure or treaty violation." This principle was given effect to by the League of Nations in its resolution of March 11, 1932, which declared : "It is incumbent upon the members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the covenants of the League of Nations or to the Pact of Paris."

The League of Nations passed in March, 1932, a resolution to the following effect :

> "It is incumbent upon the members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."

After the conclusion of the Second World War, Great Powers have refused to recognise changes brought about in contravention of the United Nations Charter. In pursuance of the above, the United Nations General Assembly condemned in December, 1956, the Soviet Union for violation of the Charter in depriving Hungary of its liberty and independence and the Hungarian people of the exercise of their fundamental right.

The Tobar Doctrine.—This doctrine is associated with the name of the Minister of Foreign Affairs of Equador, Tobar, who, in 1908, declared that indirect intervention by the American States in the affairs of any other American State in the form of refusal to recognise a government which came to power as a result of civil war or revolution was both permissible and legal. Under the garb of this doctrine, the United States, keeping in view political expediencey, used recognition as a means of interfering in the domestic affairs of the Latin American countries. The doctrine did, however, not prevent the United States recognising governments which had come to power through U.S. organised *coups*. The doctrine, besides being unsustainable on legal grounds, runs counter to Estrada doctrine discussed below.

The Estrada Doctrine.—The Estrada doctrine pleads for the abolition of the practice of recognition in some form. On September 27, 1930, Senor Estrada, Secretary of Foreign Relations of Mexico, issued a declaration, which has since been known by his name, in the following terms :

> ".....The Government of Mexico has transmitted instructions to its Ministers.....in the countries affected by the recent political crisis, informing them that the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favourably or unfavourably, as to the legal qualifications of foreign regimes. Therefore, the Government of Mexico confines itself to the maintenance or withdrawal as it may deem advisable,

> of its diplomatic agents, and to the continued acceptance, also when it may deem advisable of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or *a posteriori*, regarding the right of foreign nations to accept, maintain or replace their governments or authorities."

Briggs observes that although the Estrada Doctrine looks to the abolition of the practice of recognition of governments rather than the proposed establishment of a legal right to recognition, neither proposal succeeds in eliminating the political factor since, in the former case, it will be necessary to decide with what officials foreign diplomats may deal in fulfilling obligations or claiming rights under International Law, and in the latter, to what regime the alleged duty of recognition is owed and why.

"The Estrada Doctrine of recognition," observes Svarlien, "clearly assumes that diplomats are accredited to States rather than to governments. It also recognises the clear proposition of International Law that the States have a continuous existence, whereas governments do not."

The Lauterpacht doctrine.—According to Sir Hersch Lauterpacht, the States are under a duty to recognise entitites which fulfil the actual requirements of a State government, the only exception being where the State or government had come into being as a result of breach of international law. In 1970, the Security Council ordered member States not to recognise the Smith regime in Rhodesia.

Retroactivity of Recognition.—When a government which originates in revolution or revolt is recognized by a State as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. It was observed in the case of *Civil Transport Incorporated* v. *Central Air Transport Corporation*, that, primarily, retroactivity of recognition operates to validate the acts of a *de facto* government which has subsequently become the new *de jure* government, and not to invalidate acts of the previous *de jure* government.

The subject of retroactivity of recognition was discussed by the Supreme Court of the United States in *Guaranty Trust Co. of New York* v. *United States*, and it was observed : "The Government argues that recognition of the Soviet Government's action which for many purposes validated here that Government's previous acts within its own territory operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded.....But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own government." It was accordingly held that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the latter recognition.

Methods of Recognition.—Recognition *de facto* or *de jure* is accorded in any of the following ways : 1. By entering into a treaty; 2. By admitting to membership of the United Nations; 3. By exchanging, sending or receiving

diplomatic representatives; 4. By declaration, unilateral or collective; 5. By admitting to an international Congress; and 6. By the formal appointment of its consul.

Withdrawal of Recognition.—The *de jure* recognition of a State is irrevocable, but it was resolved by the Institute of International Law in 1936 that such recognition ceases to have its force in case one of the essential elements of statehood obtaining at the moment disappears. Such a possibility of withdrawal is, therefore, not completely out of view, but it would be a disputable point whether the recognised State has or has not lost the necessary elements of statehood. A State may lose its independence, a government may cease to be effective or a belligerent party in a civil war may be defeated. In all these events withdrawal of recognition is permissible. The act of withdrawal on the part of the recognising State can, however, be inferred from its granting *de jure* recognition to the rival government. This is clear from the act of the British Government when in 1938, it gave *de jure* recognition to the annexation of Abyssinia by Italy, thereby withdrawing its recognition of Abyssinia as an independent State. Again in 1939, it recognized the revolutionary Government of Spain and withdrew its recognition from what had till then been the *de jure* Government of Spain.

Withdrawal of recognition when practised for some ulterior political purpose is tantamount to breaking off of diplomatic relations.

Consequences of Recognition.—Oppenheim sums up the consequences flowing from the recognition of a new Government or State in these words :

(1) It thereby acquires the capacity to enter into diplomatic relations with other States and to make treaties with them;

(2) Within limitations, former treaties (if any) concluded between the two States, assuming it to be an old State and not a newly-born one are automatically revived and come into force;

(3) It thereby acquires the right, which, at any rate according to English Law, it did not previously possess, of suing in the courts of law of the recognizing State;

(4) It thereby acquires for itself and its property immunity from the jurisdiction of the courts of law of the State recognizing it;

(5) It also becomes entitled to demand and receive possession of property situate within the jurisdiction of a recognizing State, which formerly belonged to the preceding Government at the time of its supersession; and

(6) Where the revolutionary or *de facto* government of a country has been recognised by the government of a foreign State, a subject or such foreign State may safely contract with that *de facto* government; and if, by subsequent revolution, the previously existing government of the country is restored, the restored government is bound by International Law to treat any such contract as valid : *Republic of Peru v. Dreyus Brothers & Co.*

(7) Recognition being retroactive and dating back to the moment at which the newly recognized Government established itself in power, its effect is to preclude the courts of the recognizing State from questioning the legality or validity of such legislative and executive acts, past and future, of that Government as are not contrary to International Law; it, therefore, validates so far as concerns those courts of law, certain transfers of property and other transactions which before recognition they would have treated as invalid.

It may be added that recognition is not intended to sanctify every act, past and future, of a foreign government. The withholding of recognition may cast a mantle of disfavour over a government. But it does not necessarily stamp all of its acts with disapproval or brand them unworthy of judicial notice. Our executive, it was observed in 1952, by the United States District Court in *Bank of China* v. *Wells Fargo Bank & Union Trust Coy*, on occasion, has even entered into treaty with an unrecognized government.

Disabilities of Unrecognized States.—The legal disabilities of an unrecognized State or Government are as under :

(1) It cannot sue in the Courts of a State which has not accorded recognition to it. It was observed in the *Russian Socialist Federated Soviet Republic* v. *Cibrario* that a foreign power brought an action in American Courts not as a matter of right. Its power to do so was the creature of comity and until such Government was recognized by the United States, no such comity existed. A judicial court cannot take a notice of foreign government, not acknowledged by the government of the country, in which that court is; and the fact of acknowledgment is a matter of public notoriety : *The City of Bene in Switzerland* v. *The Bank of England.*

(2) Its representatives cannot claim immunity from legal process in a foreign State.

(3) It does not acquire the capacity to enter into diplomatic relations with other States and to make treaties with them.

(4) Property due to an unrecognized State may actually be recovered by the representatives of the overthrown regime.

Recognition and the League.—It was agreed that the admission of a State to membership of the League of Nations implied its recognition. In 1935, it was held by the Commercial Tribunal of Luxemburg in the case *Soviet Union* v. *Saar Co.*, that the admission of Soviet Russia to the League of Nations implied the recognition of the Soviet Government by Luxemburg. But this rule was not uniformly adhered to and Switzerland and Belgium refused to recognize the Government of Soviet Russia even after its admission to the League.

Recognition and the U.N.O.—According to Article 4 of the Charter of the United Nations, membership in the United Nations is open to peace-loving States which accept the obligations of Charter. Such admission takes place by a decision of the General Assembly upon the recommendation of the Security Council. The question arises whether an unrecognized State can be admitted to the membership of the United Nations. The short answer is that recognition *de facto* or *de jure* is itself accorded by admitting to membership of the United Nations—whether recognised by other States or not—it *ipso facto* becomes subject to all obligations imposed by the Charter and the general principles of International Law. The admission of a State to the membership of the United Nations by the General Assembly upon the recommendation of the Security Council amounts to a collective recognition by all the States, being members of

the U.N. It embodies the collective desire of the States concerned.

With regard to withdrawal of such recognition, Article 6 of the Charter provides for expulsion of a member of the U.N. for persistently violating the principles of the Charter.

Recognition of Belligerency and Insurgency

Belligerency.—On the outbreak of rebellion or insurrection in any country, the outside powers generally maintain an attitude of non-interference in the domestic affairs of that State. However, it may frequently render it not possible for other States to maintain an attitude of indifference either because the rebellious forces are in effective occupation of a large part of the territory of the parent Government or the actual war between the parent Government and the rebellious forces has reached a stage when outside powers will not treat it merely an internecine struggle. The disturbed State and outside powers may be so intimately connected with each other on account of the situation of the country or trade or commercial relations that a civil war in one country necessarily entails its consequences on the other. In such case, the political communities struggling to attain a condition of separate statehood are accorded a *de facto* recognition of belligerency pending the determination of the question whether they are formally admitted to membership or are formally brought back to subjection.

The recognition of belligerency is merely an assertion of fact that the rebels are in a position to exercise authority over the territory in their possession. It gives no cause for any offence to the parent States; nor is this recognition a violation of neutrality.

The British practice is that the mere declaration by rebels that they have constituted a Provisional Government is not sufficient to justify belligerent recognition unless the insurgent forces have gathered sufficient strength and the newly constituted "Government" is capable of maintaining international relations with foreign States. The recognizing State becomes entitled to neutral rights, which are respected by rival parties. Such recognition protects the belligerents from being treated as traitors on land or pirates on the sea. It also grants immunity to the parent State for acts of omission and commission on the part of the belligerents detrimental to the recognising State.

Recognition of belligerency confers an international status to the belligerents for purposes of war. Although there is no exchange of embassy or the conclusion of a treaty, yet consuls are generally exchanged for the protection of commercial interests. The recognising State also recognizes within its jurisdiction the flag of the revolted Government and the commissions it issues.

Recognition of belligerency has the effect of creating a new international entity possessing all the rights and obligations of independent States with respect to the conduct of armed conflict. The recognising State acting as a neutral accords the rights of belligerents to the warring parties who acquire the right of admission of their ships into the port of the recognising State, the right to visit and search at sea, the confiscation of contraband goods and the maintenance of blockade. Such recognition enables the belligerent community and the parent State to have the same international status with respect to the prosecution of the war.

Belligerency rights are accorded as a matter of convenience to the donor as

also to the recipients. After the belligerents have consolidated their position, they are recognised as an independent State.

Insurgency.—It may, however, happen that a civil war may not reach a stage to call for the recognition of a formal condition of belligerency by outside powers. The rebellious forces may not be acting under the command of an organized authority or may not be following the established rules of warfare. In such circumstances, third States may grant the rebels only "a precarious form of recognition", *viz.*, the status of insurgents, refrain from treating them as law-breakers and consider them as the *de facto* authority in the territory under their occupation. They may maintain with these insurgents such relations as be deemed necessary for the protection of their nationals, for securing commercial intercourse and for the other purposes connected with the hostilities.

The conditions essential for recognition of insurgency may be stated as follows : (1) It is necessary to see that the insurgents have gained control over a considerable part of the territory; (2) There is considerable support to the insurgents from the majority of the people inhabiting the territory—the support must be forthcoming out of their own free will and must not be the result of duress or compulsion; and (3) Lastly, the insurgents must have the capacity and be willing to carry out the international obligations imposed on them by the grant of insurgency.

The granting of the status of insurgency by a State protects the insurgents from being treated by it as pirates. It does not, of course, confer on the insurgent the status of a State with all the rights and privileges concomitant with it. Nor does it absolve the parent State from international torts for acts of insurgents which could have been prevented by due diligence.

The recognition of insurgency confers no belligerent rights, such as blockade, on the contestants.

The recognition of the insurgents as belligerents leads, according to Garner, to the following consequences :

Both the contending forces acquire a new status on recognition of belligerency and certain additional rights which they did not have prior thereto, but the recognizing State itself acquires no new rights so far as its relations with the insurgents are concerned.

According to Schwarzerberger, the recognition of insurgency can be distinguished from the recognition of belligerency in the sense that the latter and not the former includes the recognition of belligerent acts of the revolutionaries on the high seas and in the air space above the high seas.

CHAPTER IX

STATE SUCCESSION

Meaning of Succession of States.—"Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory. There is a succession of States where the territory of one State passes from its supremacy to that of another. The State, the territory of which passes to another State, or the State which has been replaced by another State on the occurrence of a succession of States, is termed as the predecessor State, while the succeeding State, or the State which has replaced another State on the occurrence of a succession of States, is called the successor State. "A succession of International Persons occurs", says Oppenheim, "when one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition."

Prof. Starke has observed that the term "State Succession" means transmission of rights and obligations from States which have altered or lost their identity to other States or entities, such alteration or loss of identity occurring primarily when complete or partial changes of sovereignty take place over portions of territory." He has pointed out that under Article 2 of the Vienna Convention, 1983, on Succession of States, it has been defined that Succession of States mean the replacement of one State by another in the responsibility for the international relations of territory." This definition is somewhat confusing and would be unacceptable regarded as an absolute proposition to cover all cases where international rights and obligations may pass to the Successor State, such as, the case where the sovereignty of a lessee State over particular territory reverts to the lessor State.[1]

Prof. Starke has further pointed out that the term "State Succession" is a misnomer as it presupposes the analogies of private law, where on the death or bankruptcy etc., rights and obligations pass from extinct or incapable persons to other individuals, are applicable as between States. The truth, however, is primarily a change of sovereignty over territory, through concurrent acquisition and loss of sovereignty, loss to the States formerly enjoying sovereignty and acquisition by the States to which it has passed wholly or partially. The State-Succession, involves firstly, the passing of rights and obligations upon external changes of sovereignty over territory, and secondly, the passing of rights and obligations upon internal changes of sovereignty, irrespective of territorial changes.

The observation of T.T. Poulose is also relevant here, who has described that "under traditional rules of International Law the term, State Succession, is used when there is transmission of the rights and obligations of one State or another in consequence to territorial sovereignty. Further, the term, State Succession has been regarded as inaccurate because it is based on municipal law

1. Vide J.G. Starke, "Introduction to International Law" pp. 321-322, Eleventh Edition (1994).

analogy of actual demise of a person and the transmission of his rights and liabilities to his successor, used by classical International Law writers like Gentilis, Grotius, Pufendorf and Vattal, D.P.O. Connell also writes in this context that "The term, State Succession has been objected to as begging the question which any investigation of the consequences of change of sovereignty seeks to resolve. It seems to suggest that the State which extends its sovereignty over a specific territory thereby becomes invested with all the juridical consequences of its predecessor's acts, that is, in law or in fact, the latter's successor." The observation of Prof. Oppenheim seems to be correct to a great extent, as he writes that "ordinarily the practice of States shows that no general succession takes place. With the extinction of international person—disappears its rights and duties as a person." Most jurists agree with the view of Prof. Oppenheim.

A State may succeed another State by incorporating a certain portion of the latter's territory; it may be spilt up into two or more States, or new States may emerge out of the territory of a dismembered State as happened to the territory of the Austo-Hungarian Monarchy as a result of the First World War, or to the territory of German Riech as a result of the Second World War. A State may merge voluntarily into another by treaty, or its territory may be forcibly annexed by another or by several other States. The Congo Free State lost its independence by merger with Belgium in 1908; Korea became part of Japan in 1910; Orange Free State and the South African Republic were conquered and absorbed by Great Britain in 1901. Part of the territory of a State may form part of the territory of a new State by a treaty or part of an existing State may break off and become a new State, *e.g.*, Dansi, the State of the Vatican City, Pakistan or Bangladesh. In other words, the succession of States implies the substitution of one State for another.

Succession is primarily a principle of private law, and involves political changes in the State.

The **Vienna Convention on Succession of States in respect of Treaties** is an international treaty promulgated in 1978 to set rules on *succession of states*. It was adopted partly in response to the "profound transformation of the international community brought about by the decolonization process".

Among its provisions it establishes that newly independent post- colonial states are subject to the "clean slate" rule, such that the new state does not inherit the treaty obligations of the colonial power. (article 16).

This treaty has proven to be controversial largely because it distinguishes between "newly independent states" (a euphemism for former colonies) and "cases of separation of parts of a state" (a euphemism for all other new states).

Article 16 states that newly independent states receive a "clean slate", whereas article 34(1) states that all other new states remain bound by the treaty obligations of the state from which they separated. Moreover, article 17 states that newly independent states may join multilateral treaties to which their former colonizers were a party without the consent of the other parties in most circumstances, whereas article 9 states that all other new states may only join multilateral treaties to which their predecessor states were a part with the consent of the other parties.

Succession is either universal or partial. According to Gerhard von Glahn :

Universal Succession.—There is universal succession :—

(i) when one State is completely absorbed by another as a result of annexation or conquest, e.g., the South African Republic was annexed by Great Britain in 1901, Korea by Japan in 1910 and Abyssinia by Italy in 1936;

(ii) when several States agree to merge into a Federal State or a Union; e.g., in 1871 the German States united to form the German Empire, the merger of Egypt and Syria on the 22nd February, 1958, and later Yemen on the 2nd March, 1958, to form the United Arab Republic; or the merger of Iraq and Jordan on the 14th February, 1958, to form the Arab Federal State; and

(iii) when one or more States are formed or one or more International Persons take the place of another International Person by division of a former single State or International Person, each of the independent States being a successor State.

Partial Succession.—Partial succession takes place :

(i) by succession, when another State is established by a part of the territory breaking off from the parent State and thereby gaining independence, e.g., the separation of the United States from the parent State, Great Britain in 1776;

(ii) by cession or conquest, when one State acquires a part of the territory of another State and assumes sovereignty over the portion ceded, e.g., cession of California to the United States in 1847;

(iii) by dismemberment, when a full sovereign State loses part of its independence through incorporation into a Federal State or coming under the suzerainty or protectorate of a stronger power or when a not full sovereign State, i.e., a suzerain or protectorate or even a member of a Federal State, becomes full sovereign, e.g., Czehoslovakia was dismembered in 1938 as a result of the Munich Agreement.

In the case of a total succession of States, the legal personality of the old sovereign disappears with the loss of the territory; in the case of a partial succession, the legal personality of the old sovereign remains unaffected, but the territory is lost.

Consequences of State Succession.—A succession of States entitles the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State. The 1978 Convention on Succession of States in Respect of Treaties was adopted in Vienna.

The question whether the replacement of one International Person by another involves a succession to the rights and duties of the former or not, has not been free from doubt. Some writers maintain that with the extinction of an international person no rights can possibly survive; others are of opinion that devolution of rights and duties does follow upon the succeeding State. On account of the uncertainty of the International Law of succession, usually all possible contingencies are covered by treaties between the parties.

1. Treaty Rights and Obligations.—The accrual of rights and obligations to the successor State depends upon the nature of succession. In the case of universal succession, where a State merges voluntarily into another State or

where it is subjugated by another State, the successor State remains one and the same International Person, while the predecessor State which has merged or been subjugated becomes totally extinct as an International Person. Political treaties and alliances and rights and obligations occurring thereunder, in the absence of a substantial continuity of personality, become extinct and invalid and the successor State does not succeeed to such rights and duties of the extinct State. Rights or obligations under multilateral conventions of universal application on health, technical and similar matters subsist and pass as happened in the case of Pakistan after separation from India in 1947 when she automatically became party to certain multilateral conventions of universal application binding India.

In the case of fusion or union of States, if it be merely the enlargement of the extinct State into a larger one, prior treaties continue to remain in force so long as they are not in conflict with the rights and obligations of the federal State. But if annexation be in the nature of absorpiton with the result that there is no division of sovereignty, treaty rights and obligations are extinguished, excepting State servitudes or easement rights which have to be respected by the successor State. "Servitudes", observes Dr. Reid, "establish a permanent legal relationship of territory to territory, unaffected by change of sovereignty in either of them and terminate only by mutual consent, by renunciation on the part of the dominant State, or by consolidation of the territories affected."

In the case of several States combining to form a federal union, all treaties to which these States were parties extinguish. Similar result follows when there is formation of several States as a result of the dissolution of an old State.

Personal treaties relating exclusively to the persons of the contracting parties, *e.g.*, treaties of alliance, arbitration or neutrality expire on the extinction of the family and no succession in respect thereof takes place. As regards treaties of commerce, navigation and extradition, it all depends on the attitude of the annexing State as to whether it is prepared to follow the provisions of such treaties or prefers to repudiate the same. The consensus of opinion is that they are not subject to succession. It was held by the Supreme Court of the United States in *Terlinden* v. *Ames* that the extradition treaty made between the United States and Prussia prior to the formation of the German Empire continued to be operative after the union on the ground that the treaty had been officially recognised by Germany.

2. Membership.—It is settled that membership of the international organizations and the obligations incidental thereto do not pass to a successor State. The Irish Free State applied for its admission, and was admitted, to the League of Nations; Iceland did not inherit any part of the membership of Denmark and was admitted to International Labour Organization in 1944. India continued to be a member of the United Nations, and Pakistan was subsequently admitted to membership as a new State on September 30, 1947.

3. Public Property and Public Rights.—When one State succeeds *de facto* to another, it succeeds to all the public and proprietary rights of the extinct State. State Property, State railways and fiscal funds pass to the annexing State.

The successor State takes all the assets of the vanquished State, including such assets as State funds, funds invested abroad, movable and immovable property. It also acquires the right to collect taxes due to the replaced State. Succession to the rights of the extinct State exists with respect to such local

matters as rivers, roads and railways, etc. The succeeding State has a right to the allegiance of those who were formerly subjects of the extinct State and remain on its territory. The principle of succession to public rights of the replaced State also comprises the right to collect taxes due to the replaced State.

4. Private Property.—A cession of territory from one State to another, however, affords no title to the successor State to private property in the soil for succession merely refers to public rights of sovereignty and not to private proprietary rights. The private rights of the inhabitants, and their relations to each other, unless specially altered by the conqueror, remain the same.

In *United States* v. *Percherman* Chief Justice Marshall observed that "sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged if private property should be generally confiscated. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisurbed."

Private Rights.—In the *German Settlers in Poland*, the Permanent Court of International Justice observed in its advisory opinion : "Private rights acquired under existing law do not cease on a change of sovereignty.....

"A cession of territory does not operate as a cession of the property belonging to its inhabitants."

It is a general rule of public law that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign.

5. Contractual Liability.—There is a considerable body of authority among text-writers inclined to the view that the successor State is bound by the contracts of the extinct State. The new State becomes liable for all local and contractual obligations.

Contracts, however, purely personal to the extinct State, do not survive.

6. Public Debts.—There is great divergence of practice as regards the succession to public debts. The sounder view appears to be that it is purely a matter of discretion and the practice has varied greatly, although of late, opinion has been gaining ground that the succeeding State assumes the public debts of its predecessor unless they relate to a purpose distinctly against the interests of the inhabitants of the territory transferred or contracted for financing of wars or other hostile undertakings against the successor State.

According to Hyde, the moral obligation to accept burdens as well as benefits which finds expression in such 'voluntary' State succession provides a solid reason for the claim that practice should shape itself accordingly and evolve a rule of law stamping evasion with an illegal character.

Arrangement with respect to public debts are usually made in treaties. According to the provisions of the Treaty of Versailles (1919) the States to which German territory was ceded took over part of the German national debt constituted on the 1st August, 1914, on the basis of proportionality of benefits received and financial capacity.

When the State territory becomes the territory of several States, the debts are proportionately taken over by the succeeding States by a prior agreement.

In the case of succession to public debts of a State which ceded part of a territory only but continues to exist, the question assumes greater difficulty. It was observed by Arbitrator Eugene Borel in the *Ottoman Public Debt Arbitration* on April 18, 1925, that "it is impossible despite existing precedents to say that a Power which acquires territory by cession is legally obligated to assume a corresponding part of the public debt."

When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

7. Torts.—The succeeding States, whether by conquest or voluntary absorption, are under no liability for the delicits of the extinct States. In the case of Robert E. Brown Claim, after Great Britain had acquired the territory of South African Republics by conquest, the U.S.A. Government laid a claim with the British Government on behalf of Mr. Brown, who was an American citizen, for the deprivation of his mining rights by the Government of the Republic in South Africa before its conquest by Britain. It was conceded that the Government of the South African Republic had been responsible for a denial of justice. It was held by the American and British Claims Arbitration in November, 1923 that the liability for the tort did not pass to the British Government. The decision in *Brown's* case was followed in cases arising out of Burma's annexation by the British Government in respect of injuries sustained by foreigners at the hands of the former Burmese Government.

8. Succession to public property and public funds.—The successor State may claim any State property, movable or immovable of the predecessor State lying in the territory over which it acquires sovereignty.

The Vienna Convention of 7th April, 1983, on State Succession in respect of State Property, Archives and Debts enumerates provisions as to the passing of State property to the successor State. The successor State, in general, takes over the predecessor's State property without compensation. When part of the territory of a State is transferred to another State, in the absence of any agreement, immovable property situate in the territory taken over by the successor State is to pass to it, as does also movable property connected with the activity of the predecessor State in relation to the territory taken over. When the successor State, however, is a newly independent State, immovable State property of the predecessor State situate in the territory passing, passes to the successor State, while that situate outside such territory but having belonged to the territory passing or becoming property of the predecessor State, shall pass to the successor State.

In the case of suppression of a revolt, the parent State by virtue of its paramount title gets the property of the rebel Government lying within its territory as also property lying in foreign State which belonged to the parent State and was seized by the rebel Government.

9. Laws.—The civil law of the former sovereign continues unless changed by the successor State; public law, however, changes simultaneously with the transfer of sovereignty : *Philippine Sugar Estates Development Co. Ltd.* v. *United States*. Whatever public law continues to remain in operation after a territorial transfer derives its force as positive law owing to its acceptance by the acquiring State.

A conquered country is to be governed by such laws as the conqueror will impose; but until the conqueror gives them laws, they are to be governed by their own laws, unless laws are contrary to the laws of God, or silent, for in all such cases the laws of the conquering country shall prevail : *Anon.*

10. Nationality.—As regards nationality, the inhabitants of the ceded or vanquished territory become subjects of the annexing State and lose citizenship of the former State. In Anglo-American countries, there exist strong support for the view that the inhabitants of the predecessor's State have 'the right to elect' which they can exercise by departure from the territory. In the case of the acquisition of a part of the territory of a State by another State, Article 18 of the Harvard Research Draft on Nationality provided that the nationals of the first State who continued their habitual residence in such territory lose the nationality of the State and become nationals of the successor State. The treaties often make provisions for this contingency. After the division of India, an option to choose their nationality between India and Pakistan was given to the former citizens of pre-partitioned India.

Succession on suppression of revolt.—"Changes in the government or the internal policy of a State do not as a rule affect its position in International Law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but though the government changes, the nation remains, with rights and obligations unimpaired.....The principle of the continuity of State has important results. The State is bound by engagements entered into by governments that have ceased to exist." (Moore, Digest, 1, 249).

As regards the property which formerly belonged to the parent State but was seized by the rebel Government in foreign States, the parent State can recover property, by an action in a foreign court by title paramount. Even the property acquired by the rebel government as a result of voluntary subscriptions, lawful seizures of prizes, etc., lying in foreign territory are recoverable by the parent Government by virtue of its rights as the successor of the rebel Government.

As regards liability for the debts and wrongful acts of the rebel government, the Mixed Commission appointed by the Treaty of Washington, 1871, held that the United States of America was not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces.

The parent government may be held responsible for the debts of the rebel government if the proceeds were utilised for the benefit of the State, but, if the creditor State had knowledge that the displaced government would not be liable for any new treaty obligations if it happened to oust the rebel government, the displaced government on its re-establishment would not be bound by such debts.

In the *Tinoco Concession Claim (1923) (Costa Rica and Great Britain)* it was held that a successor government was legally responsible for the acts of the revolutionary government and that the former could not avoid its obligations by the simple expedient of changing its form of government and asserting that the acts of the predecessor government were contrary to local law.

Succession in International Organization.—After the Second World War, the League of Nations was replaced by the United Nations, the Permanent

Court of International Justice by the International Court of Justice, the International Commission for Air Navigation by the International Civil Aviation Organization, and the International Sanitary Bureau by the World Health Organization. "While as a rule", observes Oppenheim, "the devolution of rights and competencies is governed either by the constituent instruments of organizations in question or by special agreements or decisions of their organs, the requirement of continuity of international life demands that succession should be assumed to operate in all cases where that is consistent with or indicated by the reasonably assumed intention of the parties as interpreted in the light of the purpose of the organization in question."

In the case concerning the *International Status of South-West Africa*, the International Court of Justice in its advisory opinion observed that the General Assembly of the United Nations was legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the mandated territory of South-West Africa, and that the Union of South Africa was under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it. It was held that South-West Africa was still considered a territory held under the Mandate of December, 1920.

LEGAL DOCTRINE

A doctrine for State succession reflects the state of legal doctrine as supported by precedents in State praxis and opinions of learned authors. State practice and legal theory regarding succession yield separate approaches dealing with the legal consequences of such succession :

(1) the continuity of treaties, claims, debts, etc.;
(2) the discontinuity "clean slate" or tabula rasa;
(3) a casuistic distinction according to the type of State succession or to the type of legal relationship concerned; and
(4) a case-by-case settlement by mutual agreement between the successor State and other States concerned. The fourth option includes the application of the rebus sic stantibus principle although the widely-accepted Vienna Convention on the Law of Treaties only allows the principle to be applied within an existing treaty relationship. The principle's invocation presupposes agreement on the treaty's continuity.

For many authors, the central issue of substance is simply whether or not one of two alternative theses should be applied : the 'universal succession' thesis or the 'clean slate' (tabula rasa) thesis. The former approach is a derivative of the Roman law concept of inheritance in civil law, in which the heres (the appointed successors) acquire not merely a single res, but an aggregate of rights and liabilities called a iuris universitas.

A. Tabula rasa : The Clean Slate Doctrine

The option of simply denying State succession to treaties, known as the tabula rasa or clean slate doctrine and re-inventing international law after each case of State succession has never been adopted or openly defended in recent State practice. The 'clean slate' thesis appears to have emerged in the late nineteenth century as a result of the influence of voluntarist or imperative

approaches to law. It proceeds from an understanding of law as deriving from the expression of sovereign will, and embodies thereby the view that legal relations are essentially personal. As a result, the process of transformation necessarily involves a legal hiatus when the sovereignty of one state comes to an end and another takes its place. In such a situation, there can be no 'transfer' of rights or obligations between the old and the new state. Rather, the incoming sovereign is free of all rights and obligations save those it assumes afresh. As Sir Thomas Baty has asserted :

> "If the government functioning in a given area disappears, and is succeeded by no one government, but new governments arise and maintain themselves in various portions of the original area, then it is clear that the State, as such ceases to exist, and that several new states arise on its ruins. Were it otherwise, Italy as the heir of the Roman Empire would have a good title to the whole continent of Europe."

Does the application of the tabula rasa doctrine also suggest that the Successor State may not have succeeded to either the property or the debt of the Predecessor State? The main argument in favor of the clean slate doctrine is that treaties are generally burdensome restrictions to sovereignty and that a new State should be free to reconsider the Predecessor State's treaties. The rationale being that a fundamental change of circumstances results in the formation of a new state and it is not the upholder of the obligations entered into by its predecessor. The distinction Vienna I makes between newly independent States, which are offered a clean slate, and other successor States, has been justified with the argument that these formerly dependent territories did not have a voice in the adoption of the predecessor State's treaties, whereas separated States presumably did. In fact, even Austria avoids application of its clean slate doctrine and concedes the practical continuation of treaty relations until a new agreement has been reached. Austria has negotiated lists of treaties to continue with some States and has confirmed these lists in an exchange of notes after receiving Austrian parliamentary approval. Austria has perceived the act as one of novation and the conclusion of a new treaty.

This analysis was also adopted by the Sixth Legal Committee of the General Assembly during the dismemberment of Pakistan from India and stated that when a new state is created by separation from a member of the United Nations it couldn't under the system of the Charter claim the status of a member of the U.N. unless it has been formally admitted as such in conformity with the provisions of the Charter. Therefore, states will not remain members when they are legally extinguished and new states will remain as new states.

B. Universal Succession : The Continuity Theory

The continuation theory of state succession is an anti-thesis to the clean-slate theory of membership. Under the continuity theory, rights and duties may still pass to States that have lost extensive portions of their territories and/or have undergone radical changes in government as long as they are considered to have inherited the essential legal identity of the former member. In this regard, a distinction must be made between the concepts of continuity and state succession. In the former, the same State is deemed to continue to exist, while in the latter, one or more successor States are deemed to have replaced the former State. Prichard explains that at the time of Justinian :

> The universal successor assumes the whole of the legal clothing of the person to whom he succeeds; steps, as it were, into his shoes. He takes over his rights and liabilities of every kind; his property (*res singulae*) and *iura in re aliena*, the debts and other obligations (such as rights of action for damages for breach of contract) owing to him, and the debts and obligations which he owes.

It was in the work of Gentili, Grotius and Pufendorf that such concepts found their way, in rudimentary form, into the body of international law, it being argued that the rights and duties of the predecessor passed *ipso jure* to a successor sovereign. Although such authors were generally concerned primarily with succession of the person of the sovereign (*i.e.* what is now referred to as succession of governments), rather than succession of 'states', the universal succession thesis survived largely intact until the late nineteenth century. By this stage it found its justification not so much in theistic dogma but in theories of 'popular continuity', 'organic substitution' and, improbably enough, 'auto limitation'.

Under the continuity theory, there can be only two ways to view the division of a state : (i) as a "breakaway," in which one of the divisions represents the continuing existence of the State while the others represent States that have seceded from it; or (ii) as a complete "dissolution," in which the State has been dissolved and none of the resulting States represent its continuity. Thus, the determination of whether the changes in a State constitute an extinction of its legal personality is critical to the inheritance of its rights and duties and other obligations. The legal identity of a State might be destroyed through division, if it loses (a) majority of the population and territory of the former state; (b) seat of government, its original territorial nucleus, or areas from which it obtained extensive revenues; (c) acceptance by the international community regarding its continuity.

The universal succession thesis demands too much. It argues for the maintenance of legal continuity in circumstances in which some alteration of legal relations is both inevitable and necessary. It assumes that states may be burdened with obligations in a situation where specific consent is palpably absent, not because of any universal necessity but because of some inchoate systemic interest in legal continuity. O'Connell's approach in this regard is undoubtedly radical, and for that reason his tentative phraseology is entirely apposite. His suggestion is tantamount to a disposal of all questions of 'succession' understood as an 'inheritance' or 'assumption' of rights and obligations by reference, not to the normal bivalent division between succession and non-succession, but to the integrity of the legal relations themselves.

The law of state succession has, for some time, been explicitly contingent upon the 'personality' of the state, and specifically its 'identity' or 'continuity', which remained the point of differentiation between the operation of two distinct legal regimes. Identity, therefore, serves to differentiate between a case of cession (or secession) and one of dismemberment, between a case of absorption (or annexation) and one of union, and between the birth of a new state and its resurrection. In each case, the defining consideration is whether or not the state concerned retains its legal identity; in other words, whether it continues its personality as a state. Such differentiations are thought to be particularly important because international law presumes that all decisions

relating to the continuation or otherwise of a state's rights and duties, assets and liabilities, will be dependent upon the universal characterization adopted. This, in turn, flows from the proposition that the possession of international rights and duties inheres in an entity with appropriate legal personality. Identity, therefore, provides the key to determining the proper set of norms that are to be applied in a given case.

The point of difference between 'identity' and 'personality' of a state may be described as follows : whereas the concepts of statehood and personality proceed on the understanding that states have certain attributes or qualities in common and that they are thereby attributed with, or inherently enjoy, certain competencies under international law, the concept of 'identity', by contrast, assumes that individual states, whilst being members of a particular class of social or legal entities, also possess certain distinguishing features that differentiate one from another. Identity, therefore, presumes personality but is concerned with what is personal or exceptional in the nature of the subject.

Therefore, stating as precedent the reunification of Germany did not affect the legal position of the Federal Republic of Germany since it remained identical with itself after the incorporation of the new Lander emerging from the former GDR. Because the State authority was the same as before and the State's territory was merely enlarged, the "moving frontier rule" applies under the law of succession. Furthermore, even the population of the enlarged Federal Republic was identical. The GDR underwent a peaceful revolution when demonstrators changed their slogans from "We are the people" (*i.e.*, the sovereign, above the State organs) to "We are one people." Despite the incorporation of the GDR into the Federal Republic of Germany, there was of course State succession as to the GDR since the GDR had actually and legally existed as a State entity.

In comparison, the claim of the Federal Republic of Yugoslavia (Serbia and Montenegro), created on April 27, 1992, to be identical with the former Socialist Federal Republic of Yugoslavia (SFRY) could only be upheld if there still was a Yugoslav nation. However, this condition was manifestly not present since four of the six federated States declared themselves independent after having been authorized to do so by plebiscites. Additionally, the organized political authority of the SFRY did not survive the disruption of the Federation.

CHAPTER X

INTERVENTION

What is intervention ?—It is the inalienable right of every State to manage its affairs according to its own volition, to adopt the constitution it likes, to change it within the terms of the law when it so desires or to enter into alliances and treaties with other States. But, as Lawrence points out, sometimes it happens that another State, or a group of States, interferes with its proceedings and endeavours to compel it to do something which, if left to itself, it would not do, or refrain from doing something which, if left to itself, it would do. Interference of this kind is called intervention.

Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things.

Mere friendly advice and general political influence do not strictly come under this term as the essential requisite of intervention, *viz.*, use of force or a threat to use force is lacking in them. The interference must take an imperative form—it should be forcible or backed by the threat of force.

The "intervention" prohibited by International Law is usually defined as dictatorial interference by a State in the affairs of another State. A "dictatorial" interference is an interference by the threat or use of force.....it is evident that general International Law does not prohibit intervention under all circumstances : forcible interference in the sphere of interest of another State is permitted as reaction against a violation of International Law.

Intervention is as a rule forbidden by the Law of Nations. Implying as it does use of force or threat to use force and violation of territorial supremacy, it conflicts with International Law, and is justified only in certain cases, which will shortly be discussed.

Provisions in the U.N. Charter.—Article 2, paragraph 4, of the Charter implicitly prohibits intervention on the part of individual State when it ordains the members to refrain in the international relations from the threat or use of force against the territorial integrity or political independence of any State. International Law, however, permits intervention, as dictatorial interference by one State in the affairs of another State, "only as reaction of the former against a violation of its rights by the latter. Such a doctrine is possible only if the *bellum justum* principle is recognised. For it is incompatible with the view that war, the most radical dictatorial interference in the affairs of another State, is not forbidden by general International Law."

General Assembly Resolution on Intervention

On October 24, 1970, the General Assembly adopted unanimously a resolution entitled as "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." This resolution declared that "Every State has the duty to refrain from organising, instigating, assisting or participating in acts

of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." As regards the principle of non-interference, the resolution added : "No State or group of States, has the right to intervene directly or indirectly for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of International Law." The resolution further declared that "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State or interfere in civil strife in another State."

It may be noted that the above resolution contains a far reaching interpretation of the fundamental principles embodied in Article 2(4) of the U.N. Charter. The additional principles relating to the prohibition of the use of force are included in the prohibition. Further, it is noteworthy that the General Assembly declared further that the principles of the Charter which are embodied in this Declaration, constitute basic principles of International Law, and appealed to all States, including non-members, "to be guided by these principles in their international conduct and to develop their mutual relations on the basis of strict observance of these principles." This is yet another important example of the legislative activity of the General Assembly leading to the creation of new International Law applicable to all States. Thus, non-interference in the internal affairs of States has become firmly established in international relations and International Law as a fundamental and generally recognised principle applicable to all Members and non-Members of the United Nations.

On November, 18, 1987, the General Assembly adopted "The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the threat or use of Force in International Relations." This Declaration which contains the Principles of Article 2(4) of the U.N. Charter, provides as follows :

1. Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the U.N. Such a threat or use of force constitutes a violation of International Law and the Charter of the United Nations and entails international responsibility.
2. The principle of refraining from the threat or use of force in international relations is universal in character and is binding regardless of each State's political, economic, social or cultural system or relations of alliance.
3. No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter of the United Nations.
4. The States have the duty not to urge, encourage or assist other States to resort to threat or use of force in violation of the Charter of the U.N.
5. States shall fulfil their obligations under International Law to refrain from organising, instigating, assisting or participating in para-military, terrorist or subversive acts, including acts of mercenaries in other States or acquiescing in the organised activities within their territory directed towards commission of such acts.
6. States have the duty to abstain from armed intervention and all forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.
7. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of sovereign rights and to secure from it advantages of any kind.
8. In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars or aggression.

This Declaration may be regarded to be an authoritative interpretation of Article 2(4) of the U.N. Charter or extension of the Charter itself.

Kinds of Intervention.—There are three different kinds of intervention, *viz.*,

(1) Internal.—It is the interference by one State between disputing sections of the community in another State either for protection of the legitimate Government or the insurgents. In 1936, a number of States intervened in the civil war of Spain. The interference on the part of the People's Republic of China in the affairs of the Republic of Korea in 1950 by providing aid to the North Koreans furnished another instance of intervention. Again, the intervention on the part of Russian forces in the uprising of Hungarian people of October, 1956 was yet another instance of internal intervention.

(2) External.—It is the intervention by one State in the relations—generally of the hostile relations—of other States. It is, in other words, an intervention in the foreign affairs of another State, such intervention being directed against hostile relations of such State. This kind of intervention is tantamount to the declaration of war. The entry of Italy in the Second World War siding with Germany against Great Britain provided an example of external intervention.

(3) Punitive.—It is a punitive measure falling short of war and is in the nature of a reprisal for an injury suffered at the hands of another State. It is frequently carried out by stronger nations towards weaker nations. A pacific blockade to compel the observance of treaty engagements or to redress some breach of law affords an illustration of this type of intervention.

Grounds of intervention.—"Intervention", says Sir W. Harcourt, "is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. Nevertheless it must be admitted that in the case of intervention, as that of revolution, its essence is illegality, and its justification is its success. Of all things at once the most unjustifiable and the most impolitic is an unsuccessful intervention."

According to Prof. Brierly, the strictly legal occasions of an intervention

may be brought under three heads, *viz.*, self-defence, reprisals and the exercise of a treaty right.

There are few interventions which can be justified by right and as such are not a violation by the intervening State of the independence of another. They are discussed below along with other grounds which may not afford a reasonable justification for intervention.

1. Self-Preservation.—The supreme interest of the State overrides law. The right of self-preservation is more sacred than the duty of respecting the independence of other States. A State has a right to interfere in the affairs of another State where the security and immedite interests of the former are compromised. Interventions, therefore, in order to ward off imminent danger to the intervening State are justified by the force of circumstances. The danger must be direct and immediate, not contingent and remote. The leading case of the *Caroline* sets out the principles that govern the doctrine of self-preservation. During the Canadian rebellion of 1837 the steamer *Caroline* had been used by the insurgents to send arms and men across the Niagra from America. The insurgents intended to descend on British territory from the American side of Niagra. The American Government made no effort to suppress an impending expedition. Some British troops crossed the river, seized the *Caroline* at a time when she was moored within American territory and set it adrift. The U.S.A. lodged a strong protest for the violation of her territory and urged that, for such an infringement of territorial rights, the British Government must show "a necessity of self-defence, instant, overwhelming and leaving no choice of means and no moment for deliberation" and that the Canadian authorities "did nothing unreasonable or excessive." Great Britain, however, could not justify her action on the basis of this test and had consequently to express regret at the incident, which was accepted by the United States.

Professor Hall justifies intervention on the ground of self- preservation by the menaced State when the adjoining State is too weak to prevent actual attacks upon its neighbour by its subjects, if it foments revolution abroad, or if it threatens hostilities which may be averted by its overthrow.

2. Enforcement of treaty Rights.—A State is justified in interfering in the affairs of another State if the provisions of any treaty oblige the former to preserve the independence or neutrality of the latter. Such intervention does not violate any right of independence because the State that suffers has conceded such liberty of interference by treaty. The Treaties of London of the year 1831 and 1839 guaranteed the integrity and neutrality of Belgium, but the invasion of Belgium by Germany in 1914 led to the intervention of Great Britain in pursuance of treaty rights by declaring war on Germany. It was again in pursuance of the Treaty of London, 1863, that France, Russia and Great Britain who had guaranteed the independence of Greece, interfered in the affairs of Greece in 1916 and re-established constitutional Government. Again, by the Treaty of Havana, 1903, Cuba agreed that the United States might intervene for the preservation of Cuban independence, the maintenance of a Government adequate for the protection of life, property, etc.

Soviet Intervention in Afghanistan.—On December 27, 1979, the Afghan President, Mr. Hafiz-ullah Amin, was overthrown in a *coup* by Mr. B. Babarak Karmal. The Soviet troops and equipment poured into the country in aid of an offensive against anti-communist rebels. They came in on an urgent request

from the Afghanistan Government for political and economic aid, including military aid. On December 28, President Carter denounced the Soviet intervention in Afghanistan in strong language, lifted the ban on the supply of arms to Pakistan and the administration decided to give both military and economic assistance to Pakistan. The U.N. Security Council discussed the matter on January 5, 1980, but its resolution calling for immediate withdrawal of Soviet troops from Afghanistan was blocked by the vote of the Soviet Union. The special U.N. General Assembly session on Afghanistan, however, called for the immediate, unconditional and total withdrawal of foreign troops from Afghanistan in order to enable its people to determine their own form of government and to choose their economic, political and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever. On November 20, 1980, and again on November 18, 1981, the U.N. General Assembly called for the immediate withdrawal of Soviet troops from Afghanistan and reaffirmed the Afghan people's right to determine their own form of government. The Afghan minister, however, stated that the inscription of the question on the agenda constituted a gross violation of U.N. Charter.

The critical development in the region could not, however, be viewed and assessed in vacuum or without a sequential perception. The Russians advanced the 'cause and effect theory', meaning thereby that the Soviet intervention took place following uninterrupted raids from across Pakistan to destabilise the regime in Afghanistan. Further, Moscow's intervention in Afghanistan was not an isolated affair—it was part of Soviet reaction to the U.S. action in West Asia including the oil-bearing Gulf. Many things had happened in the region and elsewhere which had already impinged on the Afghan situation such as new American bases in Somalia, Oman and Kenya. There was greater military build-up in Diego Garcia on the part of the United States of America, apart from the presence of a large U.S. naval fleet, with nuclear warheads, in the Gulf region. The estrangement between Moscow and Washington over the lack of settlement on the middle range missiles had a lot to do with developments in Afghanistan. American globalism was thus pitted against the emerging U.S.S.R. globalism. The treachant dichotomy in international politics was thus riveted in power politics, and not between what was right and what was wrong. The military and economic aid by the West to the discredited military rule of Pakistan, who had crushed democracy and human rights in Pakistan, would boost the unrepresentative and dictatorial regime of General Zia.

Geneva Accord on Afghanistan

Pakistan and Afghanistan formally signed a U.S. and Soviet-guaranteed accord in Geneva on April 14, 1988, that would lead to a pull out of all Soviet troops from Afghanistan within a maximum of nine months from May 15, 1988. The Soviet Union agreed to withdraw half of its estimated 115,000 troops from Afghanistan by August 15. The phased pull-out was to be completed within nine months from May 15.

The long awaited accord, reached after six years of the tough bargaining, was signed by Pakistani Minister of State for Foreign Affairs, Mr. Zain Noorani, Afghan Foreign Minister, Mr. Abdul Wakil, U.S. Secretary of State, Mr. George Shultz, and Soviet Foreign Minister, Mr. Eduard Shevardnadze.

Under the terms of a document signed only by Pakistan and Afghanistan,

but guaranteed by Washington and Moscow, the two countries vowed to respect each other's "sovereignty, territorial integrity, national unity, security and non-alignment." They pledged to "refrain from the threat or use of force so as not to violate the boundaries of each other, disrupt the political, social or economic order of the other party or to overthrow or change the political system of the other."

Islamabad and Kabul committed themselves to prevent their territory being used for the "training, equipping, financing and recruitment of mercenaries from whatever origin" and to "deny facilities for the transit of such mercenaries."

Another instrument signed only by Afghanistan and Pakistan provides for the orderly return to their homeland of the estimated three million Afghan refugees currently in Pakistan. Kabul pledged to take steps to ensure the refugees' "return in freedom", free choice of domicile, their right to work and adequate living conditions, their freedom of religion and their "right to participate on an equal basis in the civil affairs of the Republic of Afghanistan."

The Afghan Mujahideen condemned the Geneva agreement as a "sell-out" of their cause and vowed to continue their flight.

On February 15, 1989, the Soviet Union-Afghan adventure ended with its last soldier returning home after nine years of war that failed to defeat fierce opposition to the Communist revolution. With the departure of Soviet troops, the Afghan rebels stepped up their attacks on Kabul.

Invitational Intervention.—As regards invitation by the lawful government of the State to intervene in its internal affairs, the matter is not free from difficulty. The most conflicting intervention was the involvement of the United States and other States in the Vietnamese conflict. Although many writers, notably American, justified the United States' intervention in that conflict as a lawful intervention, it could not be denied that the civil war in that case had been sponsored, aided and promoted by the United States of America, much to the woe of Vietnamese. That intervention could be the outcome of the policy of maintenance of balance of power in that region.

India's role in Sri Lanka

The Prime Minister Mr. Rajiv Gandhi and the Sri Lankan President Mr. J.R. Jayewardene, signed on July 29, 1987, a historic agreement in a bid to end the island's four-year-old ethnic conflict. According to the Prime Minister of India, India's involvement in Sri Lanka yielded positive results. The IPKF role prevented forces inimical to India from getting into Sri Lanka. Secondly, the influx of refugees into Tamil Nadu has been arrested and with that such consequences as drug trafficking, violence and weapons. Also the IPKF ensured peace in that country. The salient points of the accord were : Creation of a single new integrated north-east provincial council in answer to aspirations of the Tamils; cease-fire by the militants and the Sri Lankan security forces in the next 48 hours in the troubled Tamil provinces of the island; laying down of arms by the militants in the next 72 hours; a bilateral peace-keeping force for the supervision of the observance of ceasefire and presence of a representative of the Election Commission of India during the proposed referendum in the east to decide whether the merger with the north should continue or not. It provided general amnesty for all political prisoners then in jail and also facilities for

rehabilitation of militants who would surrender arms and return to normal civilian life.

The internecine conflict between the warring Tamil militant groups erupted in Sri Lanka early in September, 1987. They held back weapons which they had otherwise planned to hand over to the Indian peace-keeping force.

The Liberation Tigers of Tamil Eelam (LTTE) is the largest of the Tamil militant groups in Sri Lanka. Their aggressive posture towards the implementation of the Jaywardene-Gandhi accord created obstacles. They had taken over the civilian administration in parts of the two provinces. The LTTE demanded a majority representation in the proposed 10-member council of interim government and was anxious to regain its earlier position of military strength by creating a rift between the Tamil population and the Indian forces.

India found herself embroiled in a most difficult situation in Sri Lanka. She was getting deeper and deeper into the mire of the ethnic conflict. Tamils of Jaffna for whom India had the deepest concern were being brutally assaulted by the Indian Peace-keeping Force. India had not long ago dropped food and clothings to the besieged and starving Tamil population which were being massacred by Sinhalese and the Sri Lanka forces and she found herself now in a most difficult predicament of airdropping commandos with a view to exterminating Tamils who failed to surrender arms and were fighting a relentless battle against Indian forces.

The supremo of the Liberation Tigers of Tamils Eelam (LTTE) Mr. V. Prabhakaran said that Sri Lankan President J.R. Jayewardene cleverly succeeded in creating a confrontation between India and LTTE.

According to the Prime Minister of India, India's involvement in Sri Lanka yielded positive results. The IPKF role had prevented forces inimical to India from getting into Sri Lanka. Secondly, the influx of refugees into Tamil Nadu had been arrested and with that such consequences as drug trafficking, violence and weapons. Also, the IPKF ensured peace in that country.

The Tamil intransigence and the failure of the Indian Government to appreciate Tamil aspirations have greatly contributed to the delay in the implementation of the accord. The Sinhalese elite and the turbulent LTTE both continue to harbour ill-will against each other.

It is no doubt true that the Indian Peace-keeping Force had gone to Sri Lanka according to the agreement signed by the President of Sri Lanka as the head of democratically elected and constitutionally established government and the Prime Minister of India. The Indian army, however, continued to fight Jayewardene's war with no end in sight. Despite regular reports of the fall of several LTTE strongholds and the seizure of large quantities of arms and ammunition, the LTTE did not seem to have lost its fighting capacity or its hold over the Tamil civilian population of Sri Lanka.

India had no right to be a party to the accord in Sri Lanka with Sri Lankan President. Her direct involvement in Sri Lanka's ethnic problem has not been a wise step. The IPKF has been fighting a double battle in the strife-torn island—on the one hand they have killed mercilessly Tamil militants and thus alienated themselves from the Tamils and on the other they have antagonised the Sinhalese. The Indian Government had been losing millions of rupees every day and many Indian soldiers were being killed.

Even customary International Law and the United Nations Charter may not permit India to use armed forces in a foreign territory with a view to annihilating Tamils who owe their origin from India and now are citizens of Sri Lanka. India's intervention in Sri Lanka appeared to be in violation of the celebrated rules of International Law. The use of Indian forces in Sri Lanka with a view to maintaining the regional balance of power was illegal. On July 28, 1989, a joint communique issued simultaneously from Colombo announced the resumption of withdrawal of the Indian Peace-keeping Force (IPKF) from Sri Lanka. In September, 1989, India and Sri Lanka signed another agreement to withdraw the IPKF by the end of December.

Coup bid in Maldives.—The Maldives Island, situated close to Sri Lanka, were invaded by armed men who landed in boats in Male, capital of the Maldives on November 3, 1988. President Maumoon Abdul Gayoon, an Islamic scholar, who was scheduled to be sworn in for his third five-year term on November 11, 1988, asked for military assistance from India, Pakistan and the United States. India soon after mobilised a naval flotilla, a crack force of 16,000 commandos and a fleet of transport aircraft to thwart the determined pre-dawn coup bid in Male by ship-borne mercenaries from Sri Lanka to depose Maldivian President. In a swift midnight operation, 300 crack Indian paratroopers drove the intruding foreign mercenaries out of Maldives and secured full control of the Indian Ocean island nation.

India's role was applauded by President Maumoon Abdul Gayoon, the Secretary-General of the Commonwealth of Nations and the U.S. President Mr. Ronald Reagan.

3. Grounds of Humanity.—Another justification for intervention is based on the ground of humanity. Lawrence observes that in the opinion of many writers such interventions are legal, but they cannot be brought within the ordinary rules of International Law, which does not impose on States the obligation of preventing barbarity on the part of their neighbours.

Provisions in the Charter.—The Charter of the United Nations reaffirms its faith in promoting and encouraging respect of human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. The General Assembly is enjoined by the Charter to assist in the realisation of human rights and fundamental freedoms for all without any distinction. The Economic and Social Council is also empowered to make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all. Oppenheim observes : "The Charter of the United Nations, in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society. This is so although under the Charter as adopted in 1945, the degree of enforceability of fundamental human rights is still rudimentary and although the Charter itself expressly rules out intervention in matters which are essentially within the domestic jurisdiction of the State."

The policy of racial discrimination pursued by the Union of South Africa has been receiving the attention of the U.N. on a complaint made by India originally in 1946. On November 30, 1970, the United Nations General Assembly declared that any State practising racial discrimination should have no place in

the United Nations. In a resolution that body condemned Government denying the rights of self-determination to the people, especially Africa and Palestine. The Security Council in its various resolutions has reaffirmed the inalienable and imprescriptible rights of the people of Namibia to self-determination, national independence and the preservation of their territorial integrity.

War in Iraq : Not a Humanitarian Intervention.—Humanitarian intervention was supposed to have gone the way of the 1990s. The use of military force across borders to stop mass killing was seen as a luxury of an era in which national security concerns among the major powers were less pressing and problems of human security could come to the fore. Somalia, Haiti, Bosnia, Kosovo, East Timor, Sierra Leone–these interventions, to varying degrees justified in humanitarian terms, were dismissed as products of an unusual interlude between the tensions of the Cold War and the growing threat of terrorism. September 11, 2001 was said to have changed all that, signaling a return to more immediate security challenges. Yet surprisingly, with the campaign against terrorism in full swing, the past year or so has seen four military interventions that are described by their instigators, in whole or in part, as humanitarian.

By contrast, the United States-led coalition forces justified the invasion of Iraq on a variety of grounds, only one of which—a comparatively minor one—was humanitarian. The Security Council did not approve the invasion, and the Iraqi government, its existence on the line, violently opposed it. Moreover, while the African interventions were modest affairs, the Iraq war was massive, involving an extensive bombing campaign and some 150,000 ground troops.

Human Rights Watch ordinarily takes no position on whether a state should go to war. The issues involved usually extend beyond our mandate, and a position of neutrality maximizes our ability to press all parties to a conflict to avoid harming noncombatants. The sole exception we make is in extreme situations requiring humanitarian intervention.

Because the Iraq war was not mainly about saving the Iraqi people from mass slaughter, and because no such slaughter was then ongoing or imminent, Human Rights Watch at the time took no position for or against the war. A humanitarian rationale was occasionally offered for the war, but it was so plainly subsidiary to other reasons that we felt no need to address it. Indeed, if Saddam Hussein had been overthrown and the issue of weapons of mass destruction reliably dealt with, there clearly would have been no war, even if the successor government were just as repressive. Some argued that Human Rights Watch should support a war launched on other grounds if it would arguably lead to significant human rights improvements. But the substantial risk that wars guided by non-humanitarian goals will endanger human rights keeps us from adopting that position.

Over time, the principal justifications originally given for the Iraq war lost much of their force. More than seven months after the declared end of major hostilities, weapons of mass destruction have not been found. No significant prewar link between Saddam Hussein and international terrorism has been discovered. The difficulty of establishing stable institutions in Iraq is making the country an increasingly unlikely staging ground for promoting democracy in the Middle East. As time elapses, the Bush administration's dominant remaining justification for the war is that Saddam Hussein was a tyrant who deserved to

be overthrown--an argument of humanitarian intervention. The administration is now citing this rationale not simply as a side benefit of the war but also as a prime justification for it. Other reasons are still regularly mentioned, but the humanitarian one has gained prominence.

The question is not simply whether Saddam Hussein was a ruthless leader; he most certainly was. Rather, the question is whether the conditions were present that would justify humanitarian intervention--conditions that look at more than the level of repression. If so, honesty would require conceding as much, despite the war's global unpopularity. If not, it is important to say so as well, since allowing the arguments of humanitarian intervention to serve as a pretext for war fought mainly on other grounds risks tainting a principle whose viability might be essential to save countless lives.

The invasion of Iraq failed to meet the test for a humanitarian intervention. Most important, the killing in Iraq at the time was not of the exceptional nature that would justify such intervention. In addition, intervention was not the last reasonable option to stop Iraqi atrocities. Intervention was not motivated primarily by humanitarian concerns. It was not conducted in a way that maximized compliance with international humanitarian law. It was not approved by the Security Council. And while at the time it was launched it was reasonable to believe that the Iraqi people would be better off, it was not designed or carried out with the needs of Iraqis foremost in mind.

The Iraq war highlights the need for a better understanding of when military intervention can be justified in humanitarian terms. The above-noted International Commission on Intervention and State Sovereignty was one important effort to define these parameters. Human Rights Watch has periodically contributed to this debate as well, including with this essay, and various academic writers have offered their own views. But no intergovernmental body has put forth criteria for humanitarian intervention.

This official reticence is not surprising, since governments do not like to contemplate uninvited intrusions in their country. But humanitarian intervention appears to be here to stay--an important and appropriate response to people facing mass slaughter. In the absence of international consensus on the conditions for such intervention, governments inevitably are going to abuse the concept, as the United States has done in its after-the-fact efforts to justify the Iraq war. Human Rights Watch calls on intergovernmental organizations, particularly the political bodies of the United Nations, to end the taboo on discussing the conditions for humanitarian intervention. Some consensus on these conditions, in addition to promoting appropriate use of humanitarian intervention, would help deter abuse of the concept and thus assist in preserving a tool that some of the world's most vulnerable victims need.

4. Balance of Power.—The doctrine of the necessity of a balance of power, observes Fenwick, between the leading States as the basis of mutual self-protection dominated the international relations of the nineteenth century. It was almost regarded as an essential condition of the maintenance of order and the preservation of liberty within the European system so that no State could be in a position to have absolute mastery and domination over others. The Crimean War of 1854 was undertaken by Great Britain and France with a view to protecting the Ottoman Empire for the maintainance of the balance of power among the States of Europe. Most of the interventions in the Balkan Peninsula

should be regarded as interventions in consonance with the policy of balance of power.

Intervention on the ground of preservation of the balance of power has been condemned by jurists of all ages.

5. Protection of persons and property.—Protection of the persons, property and interest of its nationals may provide justification for intervention. The necessity for protection may arise due to gross injustice or due to injury caused by unfair discrimination.

6. Intervention in Civil Wars.—With the establishment of the United Nations, there is no justification for intervention by individual States in the civil wars of other States. The Charter of the United Nations imposes an obligation upon States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. In 1945, the Soviet Union intervened in Iran by supporting the rebels in Azerbaijan and when the matter was referred to the Security Council, it did not regard itself as precluded from taking cognizance of the dispute in view of paragraph 7 of Article 2.

7. Collective Intervention.—Collective intervention at the present time is in pursuance of the provisions of the Charter of the United Nations, viz., the enforcement action under the authority of the United Nations Security Council in accordance with Chapter VII of the Charter.

These are interventions for checking illegal intervention, intervention against an immoral act, intervention to remove international nuisances and intervention to defend national honour or to protect the interest of the nationals abroad.

For many, the end of the Cold War brought new optimism. Cold War politics, which constrained collective decision making for fifty years, was apparently over. Just over ten years after, many post- Cold War expectations have subsided. The current intervention in Iraq — 'Operation Iraqi Freedom' - undermines post-Cold War international agreement. It was both this agreement that legitimised the first US-led Iraq campaign in 1990-1, and lack of that sparks concern in for current intervention in Iraq. In November, 2002, the United Nations Security Council unanimously passed Resolution 1441. This reaffirmed the Security Council's position on Iraq's Weapons of Mass Destruction program as per Resolution 687. Resolution 1441 calls for an enhanced inspection program to oversee Iraq's disarmament. However, Resolution 1441 does not authorise armed intervention. Rather, 'Operation Iraqi Freedom' relies on the reactivation of Resolution 687 and 688. The current debate is however, that ten years ago there was no mention of the reactivation of 687 and 688 to legitimise future forced disarmament. The coalition's intervention is questionable, particularly when the motivations cited for the intervention are mixed and potentially irreconcilable.

Other grounds.—Starke enumerates the following principal exceptional cases in which a State has at International Law a legitimate right of intervention :

(a) collective intervention pursuant to the Charter of the United Nations, *viz.*, the enforcement action under the authority of the United Nations Security Council, pursuant to Chapter VII of the Charter;

(b) to protect the rights and interests and the personal safety of its citizens abroad;

(c) self-defence, if intervention is necessary to meet a danger of an actual armed attack;

(d) in the affairs of a protectorate under its dominion;

(e) if the State subject of the intervention has been guilty of a gross breach of International Law in regard to the intervening State, for example, if it has itself unlawfully intervened.

Professor Brierly is of the view that the strictly legal occasions of an intervention may be brought under the following heads, *viz.*, legitimate case of reprisal, protection of nationals abroad, self-defence and the exercise of a treaty right with the State concerned.

Prohibition contained in Charter.—Article 2, paragraph 4 of the Charter of the United Nations clearly condemns intervention as a measure of self-help when it provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. Even the United Nations as a collective body is precluded from intervening in matters which are essentially within the domestic jurisdiction of any State. Article 4 of the Draft Declaration of the International Law Commission of the United Nations, 1949, also refrains a State from fomenting civil strife in the territory of another State and prevents the organisation within its territories of activities calculated to foment such civil strife.

The Monsoe Doctrine

The doctrine embodies a principle of American policy declining any European intervention in political affairs of the American continent. When in 1823 the Russian Government, then still in possession of Alaska attempted to exclude all but Russian ships from the north-western coast of America, and at the same time the reactionary "Holy Alliance" of Prussia, Austria and Russia, having just quelled the Spanish revolution, contemplated intervention in the newly-created South American republics, President Monroe in two widely separated passages in his Message to Congress on December 2, 1823, enunciated his famous doctrine in three parts :

(1) "The American continents by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for further colonisation by a European power.

(2) "In the wars of European Powers, in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so.

(3) "The United States had not intervened, and never would intervene, in wars in Europe; but they could not, on the other hand, in the interest of their own peace and happiness, allow the allied European powers to extend their political system to any part of America and try to intervene in the independence of the South American republics."

In his own words, President Monroe referred to the Holy Allies and declared "that we should consider any attempt on their part to extend their system to any portions of this Hemisphere, as dangerous to our peace and

safety."

President Monroe continued :

"With the existing Colonies or dependencies of any European powers, we have not interfered, and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration, and on just principle, acknowledged, we could not 'view any interpretation for the purpose of oppressing them, or controlling in any other manner, their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States."

"The Monsoe doctrine," observes Alexander DeConde, "states nothing new. It summed up old principles and applied them to immediate circumstances. It was a theoretical justification of a policy of self-interest and was concerned basically with three principles : non-colonization, meaning that no European power could in the future form colonies in either North or South America; non-intervention, which warned Europe against meddling in American affairs and said 'hands off'; and non-interference in European affairs, which implied that Europe's political system was distinct from that of the Western Hemisphere. The Monroe Doctrine also had a fourth principle not stated in the message but expressed in supporting documents. It was the non-transfer principle that had been American policy since 1811."

In his annual message of December, 1901 President Theodore Roosevelt observed that the Monroe Doctrine remained the cardinal feature of American foreign policy. It was not intended to be hostile to Europe, so long as Europe did not aggrandise itself on Latin-America soil. Nor was it intended to enable one World State to seek the advantage of another. It was, however, a policy of hemispheric security, and if any State within or without the Western Hemisphere engaged in misconduct, the United States by implication would seek to punish the transgressor.

The Roosevelt Corollary to the Monroe doctrine enunciated in 1904 was expressed by President Roosevelt in the following words :

"Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrong doing or impotence, to the exercise of an international police power.....We could interfere with them (i.e., Latin American countries)....only if their inability or unwillingness to do justice at home and abroad had violated the rights of the United States or had invited foreign aggression to the detriment of the entire body of American nations."

The Monroe doctrine has played an important part in guiding American policy. Its historical evolution reveals the way America's political history has developed. And, as observed by Alf Ross : "in the course of time it has developed, besides its original negative content—the prohibition of European intervention—a corresponding positive side, a demand from the United States for the right to intervention in every conflict between an American and

non-American State. This policy has in recent times been increasingly contested on the part of South America."

The Drago Doctrine

On December 29, 1902, Luis M. Drago, the Foreign Secretary of the Republic of Argentine, at a time when Venezuela had been pacifically blockaded by Great Britain and Germany on account of the pecuniary claims of the subjects of their countries, presented to the Department of State of the United States a proposition regarding collection of debts which has come to be known as the "Drago Doctrine." The proposition is : "The only principle which the Argentine Republic maintains, and which it would, with great satisfaction, see adopted, in view of the events in Venezuela, by a nation that enjoys such great authority and prestige as does the United States, is the principle, already accepted, that there can be no territorial expansion in America on the part of Europe, nor any oppression of the peoples of this continent, because an unfortunate financial position may compel someone of them to postpone the fulfilment of its promises. In a word, the principle which she would like to see recognised is that the public debt cannot occasion armed intervention, nor even the actual occupation of the territory of American nations, by a European power." In his note to Government of the United States, he further observed : "The recognition of a debt and the payment of its amount can and ought to be made by a nation without prejudice to its original rights as a sovereign unit, but the compulsory and immediate recovery of a debt by force at any given moment would mean the ruin of the weaker nation and the suppression by the stronger powers of a government with all its inherent possibilities."

Drago's objections were confined to use of armed force in the collection of public debts only. This view was incorporated in the first article of the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, approved by the Second Hague Conference, 1907, but was qualified by the addition that armed intervention could apply when the debtor either refused arbitration or failed to submit to the award.

On the occasion of the dispute of Venezuela referred to above, President Roosevelt in his message to Congress said : "We do not guarantee any State against punishment if it misconducts itself, provided that punishment does not take the form of acquisition of territory by any non-American Powers."

The "Drago Doctrine" is a corollary to the "Monroe Doctrine."

The Brezhnev Doctrine

The Communist countries, notably the U.S.S.R., have adopted a new socialist international law overriding the conventional law which takes into account new developments in international relations. Lenin first propounded this theory in February, 1918, by stating that the interests of socialism are higher than the interests of the right of nations to self-determination.

The doctrine, which bears the name of the author, was propounded by L.I. Brezhnev, General Secretary of the CPSU at the Fifth Congress of the Polish Communist Party, on November 12, 1969, which affirms that when internal and external forces hostile to socialism attempt to turn the development of any socialist country in the direction of the restoration of the capitalist system, there is a threat to the security of the socialist commonwealth as a whole. This doctrine has received trenchant criticism from independent nations. The

U.S.S.R.'s intervention in Czechoslovakia in August, 1968 was deplored by all right-thinking people of the world, and only proved that, until a more equitable order was established, the smaller States would only serve as factors in the grand design of the super powers.

Carter Doctrine for the Persian Gulf

President Carter in a message to the joint session of Congress on January 23, 1980, said : "Any attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and it will be repelled by use of any means necessary, including military force." The doctrine is reminiscent of the Monroe doctrine propounded by President Monroe in a Message to Congress on December 2, 1823, which aimed at insulating the Western Hemisphere from any further expansion by European nations by declaring that there must be no territorial aggrandisement by any non-American power on American soil.

The Carter doctrine proceeded on four premises, *viz.*, America's military strength which was to be strengthened keeping in view the enunciation of his doctrine; a regional security arrangement under American leadership covering Washington's allies and clients in the Persian Gulf region and bilateral co-operation of friends and clients in the Persian Gulf region; Pakistan's defence to ward off the Soviet attack; and the co-operation of the West European allies for containment of the aggressive postures of the U.S.S.R. in Central Asia.

The Carter doctrine—which is also patterned on the Brezhnev doctrine affirming that when internal and external forces hostile to socialism attempt to turn the development of any socialist country in the direction of the restoration of the capitalist system, there is a threat to the security of the socialist commonwealth as a whole and the interests of socialism are higher than the interests of the right of nations to self-determination—implicitly reserves the right of U.S.A. to intervene in internal affairs of a nation which may have a shadow of being overtaken by a socialist super power.

CHAPTER XI

DOCTRINE OF NECESSITY AND SELF-PRESERVATION

Its Justification for Violation of Territory.—From the earliest time it has been consistently held as a rule of International Law that a State has a right to violate the rights of another State in the exercise of the right of self-preservation. Such violations are, however, excused only in cases of necessity. Necessity, observes Grotius, creates a definite right and cannot be regarded as a mere excuse. It was observed by the Secretary of State of the United States of America in the case of the *Caroline* (1837) : "Undoubtedly it is just, that, while it is admitted that exceptions to the rules of International Law, especially the principle of the territorial integrity of States growing out of the great law of self-defence, exist, those exceptions should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation", and, further, the action taken must involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it."

Wheaton observes that in the exercise of the means of defence "no independent State can be restricted by any foreign power."

Inherent Right.—The Secretary of State, Frank B. Kellogg, observed while negotiating the Brainad-Kellogg Pact in 1928 that the right of self-defence is, therefore, inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence.

Pitt Cobbett observes, "For certain purposes and within certain limits, the principle of self-protection or self-defence is recognised in International Law, as in municipal law as a justification or excuse for certain forms of extra-territorial action which would otherwise be unlawful; and to this extent it may be said to possess the character of a legal rule or principle."

Hall observes : "Even with individuals living in well-ordered communities the right of self-preservation is absolute in the last resort. *A fortiori* it is so with States, which have in all cases to protect themselves."

According to Brierly, self-defence is a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question.

Article 1 of the Draft Declaration prepared by the International Law Commission states that every State has the right to independence, and "thus the first concern of a State is undoubtedly the integrity of its personality, and its preservation the most fundamental right; for upon this all other rights are dependent."

The German writer Norbert Gruke went to the length of asserting that only those nations and cultures could survive who had the will and strength to protect their freedom, and observed that International Law had taken from no nation the right to fight for self-assertion.

First World War.—During the First World War in 1914, Germany violated the neutrality of Belgium and Luxemberg on the pretext of the doctrine of self-defence. Germany justified the violation of the permanent neutrality of Luxemberg, as well as of Belgium, on the ground that she was threatened by attacks from Russia and France on two sides and that her self-preservation demand intrusion of her armies into Luxemberg and Belgium for a defensive blow at France. The German Chancellor justifying the stand before the Reichstag observed : "Our troops have occupied Luxemberg, and perhaps are already on the Belgium soil. Gentlemen, that is contrary to the dictates of International Law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. We know, however, that France stood ready for invasion. France could wait but we could not wait.....Anybody who is threatened, as we are threatened, and is fighting for his highest possessions, can have only one thought—how he is to back his way through." This plea of self-defence was negatived by world opinion as it was Germany who declared war on Russia and France and she had no justification to attack France through Belgium.

Affairs of Korea.—The intervention on the part of the People's Government of China in the affairs of Korea in 1950 was also sought to be justified on the ground of self-preservation.

Invasion of Tibet.—On the same analogy China invaded Tibet in 1950, which evoked strong protests from India. But China defended the invasion on the ground that the crossing of the 38th parallel in Korea and the progress of the Allied troops at the border of Manchuria made it imperative for China to invade Tibet as a measure of security of her own existence.

Provisions in the Charter.—Article 51 of the Charter of the United Nations secures to a member State the right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, but the measures taken by the member in the exercise of the right of self-defence have to be immediately reported to the Security Council. This right of self-defence continues until the Security Council has taken measures to maintain international peace and security. Such right of self-defence exists only in case of an armed attack and not where an attack is anticipated or unfriendly relations short of an attack exist.

The terms of Article 51 envisage both collective and individual self-defence, and this means, to adopt the language of Professor Oppenheim, "that a member of the United Nations is permitted to have recourse to action in self-defence not only when it itself is the object of armed attack, but also when such attack is directed against any other State or States whose safety and independence are deemed vital to the safety and independence of the States thus resisting—or participating in forcible resistance to—the aggressor."

Conclusion.—Article 51 of the Charter restrict the right of self-defence to the case of an "armed attack against a member of the United Nations", and to the time until the Security Council has taken the measures necessary to maintain international peace and security. Professor Brierly observes : "It is not a question

on which a State is entitled, in any special sense, to be a judge in its own cause. In one sense, a State in International Law may always be a judge in its own cause, for, in the absence of a treaty obligation, it is not compulsory for a State to submit its conduct to the judgment of any international tribunal." But this is a loose way of speaking. "A State which refuses to submit its case does not become a 'judge'; it merely blocks the channels of due process of law, as, owing to the defective organization of international justice, it is still able to do. This is a defect of general application in International Law, which applies, but not in any special sense, to a disputed case of self-defence."

CHAPTER XII

A. STATE TERRITORY, THE LAW OF THE SEA AND AIR LAW, ENVIRONMENT

(A) STATE TERRITORY

State territory is that portion of the earth's surface over which a State exercises supreme and exclusive sovereignty. It comprises land territory, territorial waters, national waters, and air-space over the territory as also the subsoil underneath. According to Kelsen : "the territory of the State is a space within which the acts of the State, and especially its coercive acts are allowed by general International Law to be carried out, a space within which the acts of a State may legally be performed." According to Svarlien, "the territory of a State is composed of all the land and water-surface within its boundaries and jurisdiction, all the earth and water below this surface, and all the air above it."

Boundaries.—The boundaries demarcate the territory of one State from that of another and constitute part of a State's title to territory. The boundary may be *natural* or *artificial*. The natural boundaries consist of rivers (such as river Ravi separating the boundaries of East Punjab and West Punjab forming part of India and Pakistan respectively), mountains (such as the Himalayas which protect India's border), deserts, forests and the like. The artificial boundaries are the imaginary boundary lines constructed for the purpose of dividing territories. They may consist of walls, pillars, poles, etc. About half of the boundary line between the U.S.A. and Canada is an artificial line running the 19th parallel. The boundary line dividing North Korea from South Korea runs along the 38th parallel.

Disputed boundaries have occasioned many international or inter-State arbitrations. *The Alaska Boundary Arbitration* of the year 1903 between the United States of America and Great Britain (representating Canada) affords an example. After the First World War, several Boundary Commissions were constituted for settlement of boundary disputes.

The Radcliffe Award of 1947 determined the boundary disputes between India and Pakistan in relation to Assam and East Bengal, and West Bengal and East Bengal. This Award was considered later on by a Boundary Disputes Tribunal known as the Bagge Commission (1949), which was constituted to solve the existing disputes arising out of the Radcliffe Award of 1947.

Great difficulty is experienced in water boundaries where the problem which baffles solution is the line in the river that should denote the boundary. In the case of a non-navigable river, the boundary line usually runs down the middle of the river following all turnings of the border line of both banks of the river. Where the river is navigable, the boundary line generally runs through the *Thalweg* of the river, *i.e.*, the middle of the deepest navigable channel. This general rule was accepted by the Treaties of Peace in 1919, except in treaty arrangements of immemorial possession.

Boundary lakes also demarcate land between two or more States by a boundary line running through the middle of the lakes.

The boundary line of the maritime belt is uncertain and it cannot run nearer than three miles from the shore.

India and Bangladesh entered into a border demarcation agreement in May, 1947 whereby the land boundary between the two countries was demarcated in the manner set forth in the agreement.

On June 28, 1974, the Prime Minister of India and Sri Lanka signed an agreement demarcating the boundary of the two countries in the waters from Palk Strait to Adam's bridge. Article 4 of the agreement provides that each country shall have sovereignty and exclusive jurisdiction and control over the water, the islands, the continental shelf and the subsoil thereof, falling on its own side of the aforesaid boundary.

Canals.—Canals are artificially construed and as such form part of the State within whose territory they lie. But sometimes they can also be neutralised or internationalized if maritime powers agree to refrain from naval hostilities within the said waterways. The Suez Canal, the Dardanelles, the Bosphorus, the Kiel Canal and Panama Canal are examples of international lakes.

(a) The Suez Canal.—The Suez Canal, 101 miles long, was opened in 1869 after 10 years' construction. It connects the Mediterranean to the Red Sea. It was owned by a French company called the *Campagnie Universelle du Canal Maritime de Suez*, the controlling interest whereof was held by the British Government. The charter of the canal was to expire on November 17, 1969, when it was to be the property of Egypt.

By the Convention of Constantinople of October 29, 1888, between Great Britain, Austria-Hungry, Germany, Holland, Italy, Spain, Russia and Turkey, the Suez Canal was made open in time of peace as well as of war to merchant-men and men-of-war of all nations. No permanent fortifications are allowed in the canal.

The canal lies on, and runs exclusively through, Egyptian territory.

The Suez Canal dispute was referred to the Security Council by Britain and France on account of the situation caused by Egypt's nationalisation in July, 1956, of the international Suez Canal Company. On October 13, 1956, the Security Council adopted unanimously a part of the resolution voted on in two parts, which affirmed six principles forming a basis for future negotiations on the Suez Canal dispute urging that : (i) there shall be free and open transit through the canal without discrimination; (ii) Egypt's sovereignty shall be respected; (iii) the operation of the canal shall be insulated from the politics of any country; (iv) the manner of fixing tolls and charges shall be decided by agreement between Egypt and the users; (v) a fair proportion of the dues shall be allotted to development; (vi) in case of dispute, unresolved affairs between the Suez Canal Company and the Egyptian Government shall be settled by arbitration with suitable terms of reference and suitable provision for the payment of sums found to be due. The second part of the Anglo-French resolution approving the 18-nation plan for international control of the Suez Canal was vetoed by Soviet Russia.

On October 29, 1956, Israeli forces attacked Egyptian positions in the Suez Canal area. Two days later, the United Kingdom and France followed suit. A

resolution moved by the United States in the Security Council calling on all nations to refrain from the use of force or threat of force in Egypt was vetoed by Britain and France on October 31, 1956.

On November 7, 1956, an Asian-African resolution was passed by the United Nations General Assembly calling for the immediate withdrawal of British, French and Israeli troops from Egyptian territory. The Assembly also voted to set in operation a United Nations police in the Suez area.

As a result of these resolutions, a cease-fire in the area of hostilities was brought about.

Egypt conditionally accepted the stationing of a United Nations force in Egypt after taking all necessary guarantees that the acceptance will not infringe Egypt's sovereignty.

On November 24, 1956, the General Assembly demanded the withdrawal of British, French and Israeli forces from Egypt forthwith and authorised the Secretary-General to go ahead with plans for clearing the canal under the world organization's auspices.

The end of the Middle East war in 1967 found the Israeli troops occupying the eastern banks of the Suez canal, with the result that no traffic through the canal was possible so long as there was no peace settlement between the U.A.R. and Israel. For more than ten years, Israel occupied a third of Egypt, the Sinai Peninsula. That meant that Israel did not have to worry that the Egyptians would try to close the Gulf of Aqaba to Israel shipping because Israel occupied the entire coastline. The state of 'No war, no peace' was no solution to the conflict. The plan for clearing and reopening the canal was reactivated after the cease-fire of October 22, 1973.

Egypt reopened the Suez Canal on June 5, 1975, after an eight-year shutdown, and hailed the waterway as a tributary of peace and a channel of prosperity and co-operation among men. On September 4, 1975, Israel and Egypt signed a peace agreement and formally undertook to put an end to hostilities.

(b) The Kiel Canal.—The canal connects the North Sea to the Baltic Sea. It runs wholly through German territory and before the First World War, although Germany kept it open to vessels of other nations, she had the power to close it at her pleasure. The canal was constructed in 1896 by the German Government for strategic purpose, and was entirely under its control up to the Peace Treaties which followed the First World War. Article 380 of the Treaty of Versailles (1919) provided that "the Kiel canal and her approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." In 1923, the status of the Kiel canal came up for determination before the Permanent Court of International Justice in the *S.S. Wimbledon* case. On 21st March, 1921, the *Wimbledon*, a British vessel chartered by a French company, was refused access to the canal by the German authorities on the ground that the vessel was carrying military materials to Poland which was then at war with Russia. The Permanent Court of International Justice held that it was the duty of Germany to have permitted the passage of the *Wimbledon* through the Kiel canal within the meaning of Article 380 of the Treaty of Versailles. It follows from that article that the *S.S. Wimbledon* belonging to a nation at that moment at peace with

Germany was entitled to free passage through the canal. She could not advance her neutrality orders against the obligations which she had accepted under that article. It was accordingly laid down that the Kiel canal was to be open to nations at peace with Germany even if the former were engaged in war in which Germany was neutral.

On November 14, 1936, Germany, however, denounced unilaterally the main provisions of the Treaty of Versailles relating to the Kiel canal. It was followed on January 16, 1937, by a regulation of the German naval command which required the foreign naval craft to obtain permission before entering the canal.

(c) The Panama Canal.—The international status of the Panama Canal is governed by the provisions of the Hay-Pauncefote Treaty between the United States and Britain (1901), which throws open the canal to vessels of commerce and men-of-war of all nations on equal terms.

The canal territory belongs to the Republic of Panama. In accordance with a treaty signed between the United States and the Republic of Panama in 1903 called Hay-Bunau-Varilla Treaty of 1903, the new Republic of Panama granted the U.S. in return for an initial cash payment of $10,000,000 and a stipulated annuity, exclusive control of a canal zone in perpetuity, other sites necessary for defence and sanitary control of Panama City. The independence of the Republic of Panama has been guaranteed by the United States in lieu of the grant in perpetuity of land five miles on either side of the canal by the former to the latter with rights of construction. The Republic of Panama was allowed greater jurisdiction over the canal area by an amendment of the above treaty in 1936. The canal maintains its neutralized character subject to the rights of the United States mentioned above.

An engineering marvel, the Panama Canal was built by American enterprise between 1904 and 1914. Construction began after the 1903-treaty between the United States and Panama, which had just then declared independence from Columbia.

Position of the Canal in two World Wars.—On the outbreak of the First Great War of 1914, the United States permitted the free passage of merchant vessels but regulated the passage of belligerent warships and prizes. When the United States became a belligerent, a proclamation was issued excluding all enemy vessels save with the consent of the canal authorities.

At the beginning of the Second World War, the President of the United States issued a proclamation prescribing regulations concerning neutrality in the canal zone on the same lines as those adopted by the United States in the First Great War before it became a belligerent. On January 14, 1942, President Roosevelt issued a Proclamation declaring the Gulf of Panama 'maritime control area' for purposes of defence and protection of the approach to the Panama canal.

In their 1974-joint statement on principles, the two parties, *viz.*, the United States of America and Panama, agreed that, while the former recognised the canal as Panama's chief resource and asset, the latter on its part acknowledged the need of the United States to protect its security interests. Further, the 1977—agreement allowed a phased transfer of control with the completion of the process by the end of the century. Panama is set on establishing for the canal

a regime of neutrality.

Under the 1977-treaties : (i) the United States will retain control of the canal until noon on December 31, 1999, when full responsibility will be transferred to the Republic of Panama; (ii) the United States will have the permanent right to share the defence of the canal with Panama; (iii) the 10-mile-wide Panama canal zone will cease to exist and the territory presently governed by the United States will revert to Panama and the entire area will be under the Panamanian flag.

Straits.—All straits which are not more than six miles wide are territorial. According to Starke, no general rules for boundary delimitation of bays or straits can be given, as consideration of history and geography come into play, and on many occasions the 'median line' has been accepted as the boundary. Certain straits are subject to special local regulations, *viz.*, the straits of the Dardanelles and the Bosphorus and they may be considered in a little detail. They connect the Mediterranean with the Black Sea and belong to Turkey. They were under the absolute sovereignty of Turkey until 1841, then Turkish-controlled, but subject to neutralization rules, until 1914. After the Great War of 1914-1918, they were occupied by the Allies. They were subsequently demilitarised, opened to navigation of all kinds and placed under an international commission. After the victory of Kemalist Turkey over the Greeks, the Straits Convention was signed at Lausanne in 1923 whereby the signatory powers declared the Dardanelles, the Bosphorus and the Sea of Marmora open to merchant vessels, warships and aircraft in times of peace and war. The Convention substantially mitigated international control by partly restoring sovereignty over the straits, inasmuch as she was given preference and control. The Convention of Montreux of July 20, 1956, provided for remilitarisation and refortification of the straits by Turkey, abolition of former international guarantees, removal of the international commission; in short, full sovereignty of Turkey was revived subject to certain conditions.

It was observed by the International Court of Justice in the *Corfu Channel Case* that it is generally recognised and is in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of coastal States, provided that the passage is innocent.

The U.N. Convention on the Law of the Sea, 1982, *inter alia*, makes provision for transit passage. It lays down that all ships and aircraft enjoy the rights of transit passage, which shall not be impeded, except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

National and territorial waters.—Waters adjacent to the territory of a State may be either national or territorial. National or interior waters consist of internal gulfs and bays, straits, lakes, rivers and harbours, ports, etc. These waters are entirely national and, in the absence of any convention to the contrary, foreign States cannot ask for any right for the passage of their vessels or subjects. According to Colombos : "It is now generally admitted that the bed of the waters and the subsoil beneath both the territorial and interior waters

belong, to an unlimited extent, to the State which is sovereign of the territory on the surface. It, therefore, possesses the right to carry out the exploitation of both the surface and its subsoil or tunnelling or mining for coal and other minerals. Similarly, the rights of the State extend to the air space above its territorial and interior waters."

Territorial waters, on the other hand, lie within a "definite maritime zone or belt adjacent to a State's territory", where foreign powers may claim certain rights for their vessels and their subjects, the chief of which is the right of innocent passage.

The Helsinki Rules.—The Helsinki Rules on the Uses of Waters of International Rivers were adopted by the International Law Association as a statement of existing rules of International Law. These rules envisage that each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.

These rules also deal with pollution, navigation, timber floating, and the prevention and settlement of disputes.

(B) LAW OF THE SEA

Maritime Belt.—The maritime belt is that part of the sea which is under the sway of the littoral State. There is considerable unanimity of opinion that the open sea cannot be State property and only such part of the sea as makes the coast waters would belong to the border State or would be the State property of the littoral States. These waters are again not national but territorial, *i.e.*, contained in certain zone or belt where foreign States have a right of innocent passage for their merchantmen. They are also termed as territorial waters or the "marginal belt" over which the littoral State has complete territorial sovereignty.

The term "territorial waters" is used to indicate that part of sea which extends from a line running parallel to the shore to a specified distance therefrom, commonly fixed by the majority of maritime States at three marine miles measured from low-water mark.

Extent of marginal waters.—With regard to the breadth of the maritime belt, Bynkershoek's view that the sea should belong to the State it borders as far as a cannon shot will reach from the shore, was adopted by many writers in the early stages. At the end of the 18th century, the range of artillery was about 3 miles, and this enabled Lord Stowell to observe in the *Anna* that since the introduction of firearms, the boundary of territorial limits "has usually been recognised to be about three miles from the shore." But according to this rule, the limit could not be consistent as it would increase according to the increased range of modern artillery. Grotius introduced the principle of limiting the dominion to the distance to which protection could reach it from the shore. Vattel observed that in general the dominion of the State over the neighbouring sea extended as far as her safety rendered it necessary and her power was able

to assert it.

Great Britain by enacting section 7 of the Territorial Waters Jurisdiction Act (1878) also prescribed the width of the belt as one maritime league, *i.e.*, 3 geographical miles from the low water-mark and extended the jurisdiction of English Courts over offences committed in the territorial waters. This Act was passed to counteract the effect of the judgment in the *Franconia case, R.* v. *Keyn*, which had held in the absence of a legislation that the British Criminal Court had no jurisdiction over offences committed by a foreigner on a foreign vessel in its territorial waters, *i.e.*, within 3 miles from the coast.

At the International Conference of the Law of the Sea held in Geneva in March, 1958, the consensus of opinion appeared to be to prescribe the breadth of territorial waters to six miles, but no definite decision could, however, be reached, and the matter was left to the General Assembly to convene a second sea conference if it should consider desirable. The Geneva Conference also considered coastal States' exclusive fishing rights up to 12 miles, but the matter remained indecisive.

The United Nations Convention on the Law of of the Sea, 1982, provides that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines. Ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. Further, coastal States have sovereign rights in a 200-nautical miles exclusive economic zone with respect to natural resources and certain economic activities, and have certain types of jurisdiction over scientific research and environmental preservation. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy the freedom of navigation and overflight and of the laying of submarine cable and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines.

Right of States over their territorial waters.—Maritime belt is open to merchant-men of all nations for inoffensive navigation although the littoral State is competent to frame laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen. The right to such inoffensive navigation flows from freedom of the open seas. The littoral State cannot levy tolls or require the payment of any dues for such passage from foreign vessels, except in consideration of special services rendered to them.

Men-of-war, according to the sounder view, also enjoy the same right of innocent passage in times of peace. The Institute of International Law in its resolution of 1894 declared that all ships, without distinction, enjoy the right of innocent passage through territorial waters subject to the rights of belligerents to regulate this passage. Vessels of war and vessels assimilated to them were, however, excluded from that provision. The Institute at the Stockholm Conference of 1928 declared that the free passage of warships be subjected to special rules by the territorial State. The International Law Association adopted at its Vienna Conferrence in 1926 the rule that the ships of all countries, public as well as private, have the right to pass freely through waters, but are subject to the regulations enacted by the State through whose territorial waters they pass, provided that such regulations do not infringe other provisions contained in the Convention.

In the *Corfu Channel Case*, the right of innocent passage was explained as "implying an obligation on the territorial State not to permit its waters to be used in such a way as to cause damage to the interests of other States." In short, as observed by Sir Robert Phillimore in *R.* v. *Keyn* this dominion is of a limited character—It is limited to the purpose of protecting the adjacent shore, for which it was granted, and did not extend to a general sovereignty over all passing vessels.

Under the United Nations Convention on the Law of the Sea, 1982, ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea. Passage is innocent so long as it is not prejudicial to peace, good order or security of the coastal State.

Islands.—The islands are natural appendages of the coast on which they border and from which indeed they are formed. Where the island is situate within three miles of the shore, the belt of waters round it constitutes territorial waters. Even where the island is separated by more than three miles but within a limit of six miles from the coast, there is usually an extension of the marginal belt. The formation of a new island on the high seas is, however, not the property of any State till it is effectively occupied and notified to other States.

Under the provisions of the U.N. Convention on the Law of the Sea, 1982, an island is a naturally formed area of land, surrounded by water, which is above water of high tide. The territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the Convention applicable to other land territory.

Under the provisions of the U.N. Convention on the Law of the Sea, 1982, in the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorise and regulate the construction, operation and use of artificial islands and installations and structures for the purpose of exploring and exploiting, conserving and managing the natural resources, and installations and structures which may interfere with the exercise of the rights of the coastal state in the zone.

Archipelagos.—These are a group of islands, and the Draft Convention of the Experts Committee submitted to the Hague Conference of 1930 recognised that they should be considered as a unit and the extent of territorial waters be measured from the centre of the archipelago.

Rocks and Banks.—The position of rocks and banks is the same as that of an island. Outside the three-mile limit of territorial waters, they do not form part of the territory of the State unless they are capable of being effectively occupied and utilised.

Under the provisions of the U.N. Convention on the Law of the Sea, 1982, rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Cabotage.—With regard to cabotage, or coastal trade the rule is that the littoral State, in the absence of special treaties to the contrary, has a right to reserve it exclusively for its own vessels. Cabotage originally signified trade between two ports along the same coast but now extends to trade between any two ports of the same country whether on the same coasts or different coasts of the same country.

The Doctrine of the Continental Shelf.—President Truman according to the first proclamation issued on 28th September, 1945, enunciated this doctrine the substance of which was : "A coastal power is not surrounded, even at low water, by a precipice leading vertically to the bottom of the ocean, perhaps two miles below. As a rule, the sea-bed shelves very gently outwards and downwards for a considerable distance, a distance generally (but not invariably) exceeding the three-mile territorial limit. Again, not always but often, where the sea reaches a depth of about a hundred fathoms or two hundred metres, the edge of this shelf is reached and there is a more or less abrupt plunge of the land-mass down to the ocean floor. The doctrine of the 'shelf' as proclaimed in the Truman Declaration of 1945, having concern for the urgency of conserving and prudently utilizing its natural resources, abrogated to the United States' jurisdiction and control over 'the natural resources' of the sub-soil and sea-bed of the American continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States subject to its jurisdiction and control." The proclamation went on to declare that where the continental shelf extended to the shores of another State, the boundary was to be determined by the United States and the State concerned in accordance with equitable principles.

The trend of thought in the present-day world is to include the continental shelf within the territory of the State. The concept of a marine league for the purposes of determining territorial waters has no doubt undergone considerable change and the requirements of national defence have made the same as understood in the 18th century completely out of date. Svarlien, therefore, suggests the extension of territorial waters to the edge of the continental shelf or to a depth of 100 fathoms, and in all cases to a minimum of 12 nautical miles.

According to Professor Lauterpatch, the doctrine of continental shelf is a reasonable one, although as observed by Lord Asquith, it has not yet the hard lineaments or the definitive status of established rule of International Law.

Geneva Convention on the Continental Shelf.—Since the Truman Proclamation, 1945, asserting control over the resources of the continental shelf of the United States, the subject of a nation's rights to the animal and mineral resources of the seabed continuous to its shores has received considerable attention. Other nations laid claims similar to those made by the United States. The Convention on the Continental Shelf adopted at the Geneva Conference on the Law of the Sea, 1958, marked the first worldwide agreement on the subject. Art. 1 of the Convention defines the "continental shelf". It reads :

> "For the purpose of these articles the term 'continental shelf' is used as referring : (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coast of islands."

Article 2 of the Convention provides that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these

activities, or make a claim to the continental shelf, without the express consent of the coastal State. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

The grant of sovereignty relates only to the seabed and subsoil, not in the seas and airspace above.

Article 5 of the Convention, besides other things, provides that the exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing, or conservation of living resources of the sea, nor result in interference with fundamental oceanographic or other scientific research carried out with the intention of open publication. Subject to certain restrictions, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection. Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands.

Criticism of the definition of Continental Shelf adopted in Geneva Convention, 1958

The obvious reason for adopting this definition was that by 1958, the scientific development was not capable of exploring and exploiting the resources beyond the depth of 200 metres. Science has developed by leaps and bounds from 1958 to the present day. Now science and technology have advanced so much that minerals and oils can be exploited and extracted from the depth of thousands of feet of the oceans. It was feared that if a clear definition and delimitation of the Continental Shelf were not made at the earliest possible time, the whole sea-bed might be partitioned by the advanced countries among themselves. Moreover, for the establishment of a regime of sea-bed beyond the limits of national jurisdiction, it was necessary first to define and delimit it from other maritime zones. But it depended upon a workable definition of the continental shelf.

Under Article 1 of the Geneva Convention on Continental Shelf, 1958, the definition of Continental Shelf contained three elements, viz., (1) Adjacency, (2) Depth, and (3) Exploitability. Juraj Andrassy explained five criteria as bases for delimitation of Continental Shelf. These are : (1) other limits of the shelf as defined for geological purposes; (2) a pre-determined distance from the coast; (3) a pre-determined depth or isobath; (4) an exploitability test; and (5) an adjacency test. The State practice shows that States do not consider all these elements essential. On the contrary, they take it as alternative criteria. For example, technologically advanced countries can very well exploit the resources of the sea-bed upto the depth of thousands of feet. It is quite obvious that advanced countries can very well exploit the resources of the sea-bed to the disadvantage of poor countries. Therefore, the Continental Shelf Convention, 1958, was very fatal to the common world community, as the definition of Continental Shelf adopted in 1958, was not based on the geological aspect of the time.

Impact of North Sea Continental Shelf Cases, 1969, on the definition of Continental Shelf

In the decision of North-Sea Continental Shelf cases, 1969, the International Court of Justice observed, "the right of the coastal State in respect of the area of Continental Shelf that constitutes of natural prolongation of its land territory and under the sea exists *ipso facto* and *ab initio* by virtue of its sovereignty over the land, and as an extension of it in exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources. In short, there is an inherent right. The Court further held, "More fundamental than the notion of proximity appears to be the principle—constantly relied upon by all the parties—of natural prolongation or continuation of the land territory or domain or land sovereignty of the coastal State into and under the High Seas *i.e.*, the bed of territorial sea which is under the full sovereignty of coastal State : What confers the *ipso jure* title with International Law attributes to the Coastal State in respect of its Continental Shelf includes the outer edge of the continental margin, that is the continental rise." In this connection, the court's judgment is relied upon by States advocating the proposition that the continental shelf extends upto the edge of the continental margin, that is the continental rise.

In the Third U.N. Convention on Law of Sea, however, consensus had emerged in favour of natural prolongation theory as propounded by the International Court of Justice.

U.N. Convention on the Law of the Sea (LOS) on Continental Shelf.—Article 36 of the United Nations Convention on the Law of the Sea, 1982, defines the continental shelf of a coastal State as comprising the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. The continental margin comprises the submerged prolongation of land-mass of the coastal State, and consists of sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor or the subsoil thereof. The fixed points comprising the line of the outer limits of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The coastal State shall delineate the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either : (i) a line delineated by reference to the outermost fixed point at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or (ii) a line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

The fixed points comprising the line of the outer limits of the continental shelf on the seabed either shall not exceed 350 miles from the baseline from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth

of 2,500 metres. The coastal State shall delineate the seaward boundary of its continental shelf where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by co-ordinates of latitude or longitude. The coastal State shall exercise over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters. All States are entitled to lay submarine cables and pipelines on the continental shelf. The coastal State shall have the exclusive right to authorise and regulate drilling on the continental shelf for all purposes. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances.

The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto. (Art. 76).

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. These rights are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State. The rights of the coastal State do not depend on occupation, effective or notional, or on any express proclamation. (Art. 77). All States are, however, entitled to lay submarine cables and pipelines on the continental shelf. The coastal State shall have the exclusive right to authorise and regulate drilling on the continental shelf for all purposes. (Art. 79). The coastal State shall make payments or contributions in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The payments and contributions shall be made annually with respect to all products at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource. The payments or contributions shall be made through the Authority, which shall distribute them to State Parties to this Convention on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them. (Art. 82).

Lakes and Land-locked Seas.—Land-locked seas and lakes which fall

entirely within the boundaries of one State are part of the territory of the State. Where, however, the shores of such lakes and land-locked seas belong to two or more countries, they will be called international lakes and land-locked seas, the sovereignty of each State bordering them being restricted to the zone of its territorial waters.

Black Sea being a land-locked sea was formerly a part of Turkish territory. Its approach was through Bosphorus and the Dardanelles which exclusively formed parts of the Turkish territory and were not open to the merchantmen of all nations. The Treaty of Paris of 1856 declared it open and free to the commercial navigation of all countries except as regards warships which only Russia and Turkey were allowed to keep there in limited number and of small tonnage. The neutralisation of Black Sea was abolished as a result of the Treaty of London, 1871. The Black Sea continues to be an open sea and its position is regulated by the Montreux Convention of 1936.

Under the provisions of the United Nations Convention on the Law of the Sea, 1982, land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.

The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, sub-regional or regional agreements.

Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in the Convention for land-locked States shall in no way infringe their legitimate interests.

Bays and Gulfs.—Gulfs are those bays which penetrate deep into the land. Bays and gulfs, whose entrance from the sea is not more than six miles wide (twice the width of the marginal belt) are internal or territorial. If it is more than six miles across, three miles on either side belong to the territorial power and the mid-channel is part of the open sea, belonging to no State but common to all for use. This rule is, however, not rigid for there are historical bays which are treated as territorial water, although they are much wider. There are others who regarded a bay of even ten miles as territorial water, which view was adopted by the North Sea Convention of 1882 and found favour in the *North Atlantic Coast Fisheries* case, decided by the Permanent Court of Arbitration in 1910. Apart from this rule, territorial jurisdiction may be claimed irrespective of the width on the ground of immemorial user, or historical acquisition followed by the acquiescence of other States. Thus, France claims the Bay of Cancale or Granville seventeen miles wide, Great Britain claims the Hudson Bay fifty miles wide, U.S.A. the Cape Code Bay thirty-two miles wide and Norway Vestifjord and Varanger-Fjord thirty-two miles wide.

The Doctrine of Hot Pursuit.—"A vessel may be pursued upon the high seas and there seized when she, or a person on board her, commits a violation of the laws of a foreign State while within its territorial waters. This is known as the doctrine of "hot pursuit." Briefly stated, hot pursuit is the doctrine under which, when a foreign vessel violates the laws of the coastal State by acts in waters within the latter's jurisdiction, the coastal State may pursue the offending

vessel beyond the limits of national jurisdiction in order to effect the arrest of the vessel. This right enables the men-of-war of a littoral State to pursue immediately upon the high sea, seize and bring back into a port for trial any foreign mechantman which has committed an offence within the territorial waters of that State. Article 11 of the unratified draft on the Legal Status of Territorial Sea annexed to the Final Act of the Hague Conference for Codification of International Law (1930) provides : "The pursuit of a foreign vessel for an infringement of the law and regulations of a coastal State began when the foreign vessel within the inland waters or territorial sea of the State, may be continued outside territorial sea as long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State."

The Geneva Conventions on the Law of the Sea, 1958, expressly recognise the right of hot pursuit. Article 23(1)(a) of the Convention on the High Seas provides that the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship, or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. Article 24 of the Convention on the Territorial Sea and the Contiguous Zone further provided that in a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal immigration or sanitary regulations within its territory or territorial sea.

The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

Under the provisions of Article 111 of the United Nations Convention on the Law of the Sea, 1982, the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

The doctrine received recognition in the case of *The North* where the Supreme Court of Canada held that, by the law of nations when a vessel within

foreign territory commits an infraction of its laws either for the protection of its fisheries or its revenue or coasts, she may be immediately pursued into the open seas beyond the territorial limits and there taken.

The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

Where the hot pursuit is affected by an aircraft, the above provisions shall apply *mutatis mutandis*.

In the case of *I'm Alone*, it was observed by the Commissioner that the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But they opined that the admittedly international sinking of the suspected vessel was not justified by anything in the Convention. The Final Report of the Commissioners was to the effect that the sinking of the vessel could not be justified by any principle of International Law, and the doctrine of hot pursuit could not be applied to the case.

The Geneva Conference on the Law of the Sea, 1958.—Upon a resolution of the General Assembly of the United Nations passed on 21st February, 1957, calling for a conference of its members to examine the law of the sea, taking account not only of legal but also of technical, biological, economical and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate, the Geneva Conference on the Law of the Sea was convened from February 24 to April 27, 1958, with representatives of 68 countries.

The Conference was presided over by Prince Van Waithayakon of Thailand. The Conference adjourned on 27th April, 1958, after adopting and opening for signature four Conventions on : (1) the territorial sea and the contiguous zone, (2) the high seas, (3) fishing and conservation of the living resources of the high seas, and (4) the continental shelf.

(1) Breadth of the territorial sea.—The Geneva Conference had the benefit of six sessions of prior work by the International Law Commission. The U.S.S.R. bloc claimed a twelve-mile breadth of the territorial sea; the Communist China laid claim to a six-mile limit; and Australia, Canada, Union of South Africa, the United Kingdom and the United States claimed a three-mile limit. The variety of conflicting claims provided the occasion for considerable discussion in the conference.

In order to be approved by the Conference for incorporation into the Convention, a proposal had to get the two-thirds majority (52) of the Conference participants. None of the resolutions secured a two-thirds vote, the American proposal having received the largest number of votes, 45 to 33. The result was that a two-thirds majority could not be obtained in favour of the traditional three-mile limit which only exhibited a desire on the part of nations to extend this limit, "not that such an extension in International Law has been accomplished."

After the conference, Iceland unilaterally declared on 30th June, 1958, that with effect from 1st September next, her fishing limits would be extended to

twelve miles.

Another conference held at Geneva in 1960 attempted in vain to fix the maximum breadth of the territorial sea; but this much is certain that under Article 24(2) of the Geneva Convention on the Territorial Sea, the breadth of the sea (the contiguous zone) may not extend beyond 12 miles from the baseline. The U.N. Convention on the Law of the Sea endorsed 12 nautical miles as the breadth of the territorial sea.

The Contiguous Zone.—Article 24 of the Convention adopted at the Geneva Conference on the Law of the Sea, 1958, reads in part :

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to :

(a) prevent infringement of its customs, fiscal immigration or sanitary regulations within its territory or territorial sea;

(b) punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baselines from which the breadth of territorial sea is measured.

The U.N. Convention on the Law of the Sea, 1982, provides that the contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

(2) The High Seas.—Article 1 of the Convention on the High Seas adopted at the Geneva Conference on the Law of the Sea, 1958, defines the term 'high seas' as all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

Article 2 states that the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States : (i) Freedom of navigation; (ii) Freedom of fishing; (iii) Freedom to lay submarine cables and pipelines; and (iv) Freedom to fly over the high seas. These freedoms, and others which are recognised by the general principles of International Law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Article 4 states that every State, whether coastal or not, has the right to sail ships under its flag on the high seas.

Article 14 of the Convention states that all States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Under the provisions of Article 22, except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchantship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting : (a) that the ship is engaged in piracy; or (b) that the ship is engaged in slave trade; or (c) that, though flying a foreign flag or refusing to show its flag the ship is, in reality, of the same nationality as the warship.

Under the provisions of Article 23, the hot pursuit of a foreign ship may

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

Article 24 states that every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject. Under the provisions of Article 25, every State shall take measures to prevent pollution of the sea from the dumping radioactive waste.

Article 26 states that all States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.

U.N. Convention on the Law of the Sea, 1982.—According to the 1982-Convention on the Law of the Sea, the high seas are open to all States whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by the Convention and by other rules of International Law. It comprises, *inter alia*, both for coastal and land-locked states : (a) freedom of navigation, (b) freedom of overflight, (c) freedom to lay submarine cables and pipelines, (d) freedom to construct artificial islands and other installations permitted under International Law, (e) freedom of fishing, and (f) freedom of scientific research. These freedoms shall be exercised by all States with due regard for interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under the Convention with respect to activities in the area. (Art. 87) The high seas shall be reserved for peaceful purposes. (Art. 88). No State may validly purport to subject any part of the high seas to its sovereignty. (Art. 90). Every State, whether coastal or land-locked, has the right to sail ships flying on the high seas. (Art. 90). Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. Ships shall sail under the flag of one State only and shall be subject to its exclusive jurisdiction on the high seas.

(3) Fishing and Conservation of Living Resources of the High Seas.—One of the most notable achievements of the 1958-Geneva Conference was the adoption of a comprehensive code regulating the conservation of the natural resources of the sea. Article 1 of the Convention recognises the general right of all States for their nationals to engage in fishing on the seas, subject to any individual treaties. It, however, imposes on all States a positive duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the living resources of the high seas.

Coastal States under the Convention occupy a special status as to the seas adjacent to them. They are entitled to participate in any system of research and regulation for conservation purposes, even though their nationals do not carry on fishing in the subject area. (Art. 6). States having a special interest in the conservation of a particular area, although not actually engaged in fishing in that area, may ask the States which do fish there to adopt a programme or take such States to arbitration. (Art. 8). An arbitration procedure by a special arbitral

commission of five members is provided in Article 9 of the Convention.

In the *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland* v. *Iceland*), the International Court of Justice held that the Government of Ireland was not entitled unilaterally to include United Kingdom fishing vessels from areas between the fishery limits agreed to in the Exchange of Notes of March 11, 1961, and the two Governments were under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights in the areas specified.

According to the U.N. Convention on the Law of the Sea, 1982, all States have the right for their nationals to engage in fishing on the high seas subject to their treaty obligations, the rights and duties as well as the interests of coastal States. (Art. 116).

In determining the allowable catch and establishing other conservation measures for living resources in the high seas, States shall : (a) take measures which are designed on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the inter-dependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global; and take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fisherman of any State. (Art. 19).

(4) Continental Shelf.—The provisions with regard to Continental Shelf adopted at the Geneva Conference, 1958, and the U.N. Convention on the Law of the Sea, 1982, have been adverted to earlier and discussed in detail.

Second U.N. Conference on the Law of the Sea.—The Second U.N. Conference on the Law of the Sea met in 1960. Both the first and second conferences failed to define the limits of the territorial sea and the fishing zone and the outer limits of the continental shelf. Between second and third conferences there were important developments. In 1967, the General Assembly established an *ad hoc* committee and its sessions saw wide recognition of the seabed and ocean floor beyond the boundaries of national jurisdiction as an area to be used exclusively for peaceful purposes. In 1968, the General Assembly established the committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, and as a result of its labours the General Assembly adopted in 1970 the Declaration of Principles governing the Seabed and the Ocean Floor. A large number of States in Asia and Africa had meanwhile attained independence and, with the advance in modern techonology, clamoured for greater rights in the wealth of the ocean.

Third United Nations Conference on the Law of the Sea.—The General Assembly of the United Nations on 17th December, 1970, adopted a resolution containing the Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction and another resolution on the same date, wherein it decided to convene, in 1973, a

Conference on the Law of the Sea, which would deal with the establishment of an equitable international regime—including an international machinery—for the area and the resources of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, with a precise definition of that area and with a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas, the preservation of marine environment (including, *inter alia*, the prevention of pollution) and scientific research.

The various sessions of the Third United Nations Conference on the Law of the Sea were held between 1973 and 1982. This first session was held at United Nations Headquarters in New York from December 3 to 15, 1973. Its tenth session began in New York on March 9, 1981, with the aim of completing its work on the Convention of the Law of the Sea. The Reagan Administration staged a hold-up of the Conference. The Administration sacked Mr. George H. Aldrich, acting head of the U.S. team to the conference, and half a dozen of his top deputies on the eve of the resumption of the conference. The U.S. Secretary of State, Mr. Alexander M. Haig Jr. ordered American negotiators to seek to ensure that negotiations did not end at the present session of the conference pending a policy review by the United States Government. The President of the conference suggested that the Reagan Administration be subjected to benign pressure to speed up completion of an international treaty governing the seas.

Adoption of Draft Sea Convention at the Third U.N. Conference of the Law of the Sea (UNCLOS), 1982.—The eleventh session of the Third U.N. Conference on the Law of the Sea opened in New York on March 8, 1982. In his statement at the opening session, the U.N. Secretary-General, Mr. Jaiver Perez de Cuelllar, said that consensus appeared to prevail in world opinion on the indelible influence this conference has had on the progressive development of International Law, on the actual practice of States with regard to the use of the sea, on methods of multinational negotiations and even on the use of legal vocabulary.

On April 30, 1982, the Law of the Sea Conference adopted by an overwhelming majority, the draft sea convention which was under preparation for the last nine years. While 130 countries voted the 320-clause package, having 17 parts, the United States and three others, *viz.*, Israel, Turkey and Venezuela, voted against it and 17 countries, including Britain, Belgium, the Netherlands, Italy, West Germany, the Soviet Union, Spain, East Germany, Czechoslovakia, Poland, Hungary, Bulgaria and Mongolia abstained. The treaty was signed on 10th December, 1982, by 117 States in Caracas. A year after 60 countries ratified or acceded to it. The convention provides for a 12-nautical miles territorial sea in which a coastal State can exercise its sovereign powers with few exceptions, but foreign vessels would be allowed 'innocent passage' through these waters for purposes of peaceful navigation. A coastal State will have a contiguous zone of 24 nautical miles from its coast to regulate its customs, fiscal, immigration and sanitary matters. Also envisaged in the convention are an exclusive economic zone of 200 nautical miles with respect to natural resources and certain economic activities and certain types of jurisdiction over scientific research and environmental preservation and a continental shelf extending out

to a maximum of 350 nautical miles in both of which the coastal countries have exclusive rights to exploit. It also allows innocent passage through straits and territorial waters for vessels generally, including warships. It provides straight baselines from the coastline, and not from the basepoints : "It deals with almost every human use of the ocean-navigation and overflight, oil and mineral resource exploration and exploitation, conservation and pollution of the seas, fishing and shipping. It defines maritime zones; lays down rules for drawing boundaries; assigns legal duties and responsibilities; and provides machinery for settlement of disputes."

India is accorded the status of a 'pioneer investor' in the treaty enabling it to undertake deep seabed mining for mineral-rich polymetalic sulphides in a site to be determined in the Indian Ocean.

The convention envisages establishment of an International Seabed Authority on the basis of universal membership. The Authority will have an assembly and a 36-member Council. It will also have a business organ called Enterprise which would conduct exploitation of the seabed resources for the benefit of all mankind.

The United States of America indicated that it would not sign the Law of the Sea Treaty on the ground that it was too sweeping and its sea-mining provisions were incompatible with U.S. interests.

The Soviet Union, which abstained from voting on the convention, however, considered the convention itself a good international legal document but it objected to one of the four additional resolutions on protection of preliminary capital investments.

The highlights of the Convention are summed up as follows :

Coastal States would exercise sovereignty over their territorial sea of upto 12 nautical miles in breadth, but foreign vessels would be allowed innocent passage through these waters for purposes of peaceful navigation.

Ships and aircraft of all countries would be allowed 'transit passage' through straits used for international navigation, as long as they proceeded without delay and without threatening the bordering States. States alongside the straits would be able to regulate navigation and other aspects of passage.

Archipelagic States, made up of a group or groups of closely related islands and interconnecting waters, would have sovereignty over a sea area enclosed by straight lines drawn between the outermost point of islands. They would have sovereignty over these archipelagic waters, while the ships of all other States would enjoy the right of passage through sea lanes designated by the archipelagic State.

Concept of Exclusive Economic Zone or Patrimonial Sea

The concept of exclusive economic zone or patrimonial sea was advocated for the first time by Kenya in the Asian-African Legal Consultative Committee at its Colombo session held in January, 1971. Subsequently, Kenya submitted a working paper in the Lagos Session of the Committee held in January, 1972. Finally, Kenya submitted the draft of exclusive economic zone concept in 1972 Geneva Session of the United Nations Sea-bed Committee.

During various conferences of law of sea under the patronage of Third U.N. Conference on Law of Sea, efforts were made to revise the concept of

economic zone. After the concept was advocated by Kenya, it attracted many adherents. The Third U.N. Convention on law of the Sea, 1982 has the credit of having settled the provisions relating to the exclusive economic zone, which is in the interest of Coastal States as well as for the freedom of other States to be governed by the relevant provisions of the Convention. Article 56 of the Third U.N. Convention on Law of Sea, 1982, deals with rights, jurisdiction and duties of Coastal State, in the exclusive economic zone and provides as follows :—

1. In the exclusive economic zone, the Coastal State has—
   (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living of the sea-bed and sub-soil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water currents and winds;
   (b) jurisdiction as provided for in the relevant provisions of this convention with regard to :
      (i) the establishment and use of artificial islands, installation and structures;
      (ii) marine scientific research;
      (iii) protection and preservation of the marine environment;
   (c) other rights and duties provided for in this convention.
2. In exercising its rights and performing its duties under this convention in the exclusive economic zone, the Coastal States shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this convention.
3. The rights set out in this article with respect to the sea-bed and sub-soil shall be exercised in accordance with Part VI of the Convention.

As regards the breadth of exclusive economic zone, Article 57 provides that it shall not exceed beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

As regards the rights and duties of other States in the exclusive economic zone, Article 58 provides as follows :

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this convention, the freedoms referred in Article 87 *i.e.*, of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea, related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of this convention.
2. Articles 88 to 115, and other pertinent rules of International Law apply to the exclusive economic zone, in so far as they are not incompatible with this part.
3. In exercising their rights and performing their duties under this convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply

with the laws and regulations adopted by the coastal State in accordance with the provisions of this convention and other rules of international law, in so far as, they are not incompatible with this Part.

Conclusion

Coastal States would have sovereign rights in a 200-nautical mile exclusive economic zone with respect to natural resources and certain economic activities, and would also have certain types of jurisdiction over scientific research and environmental preservation. All other States would have freedom of navigation and overflight in the zone as well as freedom to lay submarine cables and pipelines. Land-locked States and "States with special geographical characteristics" would have the right to participate in exploiting part of the zone's fisheries when the coastal State could not harvest them all itself. Delimitation of overlapping economic zones would be effective by agreement on the basis of International Law in order to achieve an equitable solution. Highly migratory species of fish and marine mammals would be accorded special protection.

Coastal States would have sovereign rights over the continental shelf (the national area of the sea-bed) for the purpose of exploring and exploiting it without affecting the legal status of the water or air space above. The shelf would extend at least to 200 nautical miles from shore, and extend out to 350 nautical miles or even beyond under specified circumstances. Coastal States would share with the international community part of the revenue they derive from exploiting oil and other resources from any part of their shelf beyond 200 exclusive economic zone. A Commission on the Limits of the Continental Shelf would make recommendations to States on the shelf's outer boundaries.

All States would enjoy the traditional freedoms of navigation, overflight, scientific research and fishing on the high seas. They would be obliged to adopt, or co-operate with other States in adopting measures to manage and conserve living resources.

The territorial sea, exclusive economic zone and continental shelf of islands would be determined in accordance with rules applicable to land territory, but rocks which could not sustain human habitation or economic life would have no economic zone or continental shelf.

States bordering enclosed or semi-enclosed seas would be expected to co-operate on management of living resources and on environmental and research policies and activities.

Land-locked States would have the right of access to and from the sea, and would enjoy freedom of transit through the territory of transit States by all means of transport.

States would be bound to use the best practical means at their disposal to prevent and control marine pollution from any source.

All marine scientific research in the exclusive economic zone and on the continental shelf would be subject to the consent of the coastal State, but those States would be obliged to grant consent to foreign States when the research was to be conducted for peaceful purposes and it fulfilled other criteria laid down in the Convention. A coastal State could deny permission for such research or insist on its cessation, but only under circumstances defined in the Convention;

in the event of a dispute, the researching State could require the coastal State to submit to international conciliation on the ground that it was not acting in a manner compatible with the Convention.

States would be bound to promote the development and transfer of marine technology on fair and reasonable terms and conditions.

States would be obliged to settle by peaceful means their disputes over the interpretation or application of the Convention. When they could not agree on the means of settlement, they would have to submit most types of disputes to a compulsory procedure entailing decisions binding on all parties. They would have four options : an International Tribunal for the Law of the Sea, to be established under the Convention, the existing International Court of Justice, arbitration and special arbitration procedures. Certain types of disputes would have to be submitted to conciliation, a procedure whose outcome is not binding on the parties.

The Convention envisages establishment of an International Sea-Bed Authority on the basis of universal membership. The Authority will have an Assembly and a 36-member Council. It will also have a business organ called Enterprise which would conduct exploitation of the sea-bed resources for the benefit of all mankind.

International Sea-Bed Authority.—The Convention would establish a 'parallel system' for exploring and exploiting the deep sea-bed. Under this system, all activities in the area would be under the control of the International Sea-Bed Authority, which would be authorised to conduct its own mining operations through an organ called Enterprise. At the same time, the Authority would contract with private and State ventures to give them mining rights in the area, so that they could operate in parallel with the Authority. The resources of the area would be managed as a "common heritage of mankind."

To meet the concerns of a number of Western industrialised countries whose private consortia had already begun exploring the deep sea-bed, the Conference adopted a resolution setting out a scheme for protecting the investments of such firms by virtually guaranteeing that they will receive sea-bed mining contracts after the Convention enters into force, as long as they are sponsored by a State party to the Convention. The scheme was expanded during the negotiations, so that it now encompasses State or private enterprises from Japan, India and the Soviet Union as well as five consortia from countries of North America and Western Europe, with room left for future investments by developing countries.

The Convention provides that all sea-bed activities must be carried out either by the Enterprise or by private and State entities "in association with the Authority." The Convention also contains an "anti-monopoly clause, aimed at ensuring that no single nation obtains too large a share of the sea-bed as a whole or of any sizeable part of it."

To ensure the Enterprise access to technology, the Convention would oblige contractors to make available to that body, on commercial terms, the know-how they employed in their mining ventures. If the Enterprise found it could not obtain such technology on the open market, it would have the option of buying it from a contractor, provided he was the owner.

The Enterprise.—The sea-bed mining arm of the International Sea-Bed

Authority would be a commercial venture under the over-all control of the Assembly of the Authority and Council of the Authority but with its own Statute and a Governing Board to direct its business operations. The funds required for its initial mine-site perhaps $1 billion or more would have to be borrowed. Half of this sum would be loaned, interest free, by the States that became members of the Authority, while the rest would be borrowed on the financial market, the loans guaranteed by the same States.

The Assembly.—The general policies of the Authority are to be fixed by an Assembly consisting of all parties to the Convention. The text describes it as the 'Authority's supreme organ', with power to approve the budget on its submission by the Council.

The Council.—The Council of the Authority would consist of 36 members elected by the Assembly according to a formula set out in the Convention. Half of them would come from one of four major interest groups, while the rest would be elected in such a way as to ensure equitable geographical representation in the Council as a whole. The four groups are : the largest investors in sea-bed (four States), the major consumers or importers of minerals found on the sea-bed (four States), major land-based exporters of the same minerals (four States) and 'special interests' among developing countries (six States). The 'special interests' category of developing countries would include States with large populations, the land-locked or geographically disadvantaged, major mineral importers, potential producers of the minerals in question, and the least developed States. No over-all geographical distribution is specified, but at least one country from each region would be elected from among the 18 members chosen on the basis of geography.

In the Council, the most important questions would be decided by consensus rather than voting.

The Council's task would be to execute in specific cases the policies set out in the Convention and defined in general terms by the Assembly. Among the most important of these would be the approval of rules, regulations and procedures governing the entire sea-bed system.

An Economic Planning Commission and a Legal and Technical Commission are to assist the Council. Each would have 15 members elected by the Council with due regard for geographical balance, or more if the Council decided to expand their membership. The Economic Planning Commission is to review supply, demand and prices of sea-bed raw materials, make recommendations to the Council on adverse effects of sea-bed mining on land-based producers, and propose a compensation for such producers. The Legal and Technical Commission would make recommendations to the Council on plans of work (contracts) for sea-bed activities, supervise activities in the area, recommend environmental measures, calculate ceilings for over-all sea-bed production and recommend production authorizations for individual contractors.

The Authority would be financed by assessed contributions from its member States, the earnings of the Enterprise, receipts from a tax scheme on sea-bed contractors, and possible loans and voluntary contributions.

All State parties to the Convention would be members of the Authority. The Authority would be exempt from direct taxes imposed by States on

transactions within the scope of its official activities, including its purchase of goods and service. It would also be immune to legal process.

The text contains a procedure for a fundamental review of the system 15 years after the start of commercial production.

The Sea-Bed Disputes Chamber would handle disputes between State parties to the Convention on the interpretation or application of the sea-bed clauses, as well as disputes involving the Authority and contractors. States could also submit their disputes to a special or an *ad hoc* chamber of the Tribunal.

A total of 159 signatures had been affixed to the United Nations Conventions on the Law of the Sea when the treaty document closed for signature on 9th December, 1984.

Agreement amending deep seabed missing provisions of the Law of Sea Convention.—On July 28, 1994, the General Assembly adopted the Agreement on the implementation of the deep seabed missing provisions contained in Part XI of 1982-Convention on the Law of the Sea. The Agreement amending deep seabed provisions of the United Nations Convention on Law of the Sea will be interpreted and applied together with those provisions as a single instrument. In the event of any inconsistency, the provisions of the Agreement will prevail.

The Agreement is a step towards making the Law of Sea Convention more acceptable to the industrialised nations.

The Agreement was adopted by the General Assembly by 121 votes in favour with seven abstentions.

The International Tribunal for the Law of the Sea and Sea-Bed Disputes Chamber

It is significant to note that Article 287 of the U.N. Convention on the Law of the Sea, 1982, provides that when signing, ratifying or acceding to the Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention :—

(a) The International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) The International Court of Justice;

(c) An Arbitral Tribunal constituted in accordance with Annex VIII;

(d) A Special Arbitral Tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

It has been further provided that a declaration made under paragraph 1 of Article 287 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI of the Convention (Section 5). Further a State Party, which is a party to the dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

The United Nations Convention on Law of the Sea, 1982, having come in force on November, 16, 1994, vigorous efforts were made to establish the International Tribunal for the Law of the Sea. The seat of the Tribunal is in the free and Hanseatic city of Hamburg in the federal Republic of Germany. The Tribunal may, however, sit and exercise its functions elsewhere whenever it

considers this desirable. In August, 1996, twenty-one judges of the Tribunal were elected. In accordance with the Law of the Sea Convention, 1982, they were elected on the basis of "equitable geographical distribution". Dr. P.C. Rao of India was also elected as one of the Judges of the Tribunal. After all formalities were completed, the Tribunal was formally established on 21st October, 1996.

Composition of the Tribunal

The International Tribunal for the Law of the Sea comprises a body of 21 members, elected from among persons enjoying the highest reputation of fairness and integrity and of recognised competence in the field of law of the sea. In the Tribunal as a whole, the representation of the principal legal systems of the world and "equitable geographical distribution" shall be assured.

No two Members of the Tribunals may be the nationals of the same State. There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations. On August 1996, twenty-one Members of the Tribunal were elected on the basis of "equitable geographical distribution system" out of these twenty one members, five are from Asia, five from Africa, four from Western Europe, four from Latin America and Caribbean States and three from Eastern Europe.

The Members of the Tribunal are elected for nine years and may be re-elected, provided, however, that of the members elected at the first election, the terms of seven members shall expire at the end of three years and the terms of seven more shall expire at the end of six years. The Members of the Tribunal whose terms are to expire at the above mentioned initial period of three and six years, shall be chosen by the lot to be drawn by the Secretary- General of the United Nations immediately after the first election.

Access to the Tribunal

All the State Parties to the U.N. Convention on the Law of the Sea, have access to the Tribunal. The Tribunal shall be open to entities other than State Parties in any case expressly provided in Part XI of the Convention or in any manner submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

Applicable Law

The Tribunal shall decide all the disputes and applications in accordance with Article 293 of the Convention on Law of the Sea. According to Article 293, the Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention. However, this will not prejudice the power of the Tribunal to decide a case *ex acquo et bono*, if the parties so agree.

Any decision rendered by the Tribunal shall be final and binding and shall be complied with all parties to the dispute. But any such decision shall have no binding force except between the parties and in respect of that particular dispute.

Jurisdiction

(According to Article 288 of the U.N. Convention on the Law of the Sea, 1982, the Tribunal shall have jurisdiction over any dispute concerning the interpretation or application of the Convention which is submitted to it in accordance with Part XV of the Convention.) The Tribunal shall also have

jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention, which is submitted to it in accordance with the agreement.

In the event of any dispute as to whether the tribunal has jurisdiction, the matter shall be settled by decision of the Tribunal.

Thus, the Tribunal exercises jurisdiction over all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. As regards reference of disputes subject to other Agreements, Article 22 of the Statute of the Convention provides that of all the parties to a treaty or Convention already in force and concerning the subject-matter covered by the Law of the Sea Convention, 1982, so agree, any disputes concerning the interpretation or application of such treaty or concerning may, in accordance with such agreement, be submitted to the Tribunal.

(The Jurisdiction of the Tribunal is not compulsory. It is optional and voluntary and based on the consent of the parties to the dispute.)

Sea-Bed Disputes Chamber

Composition

Article 186 of the U.N. Convention on Law of the Sea, 1982, provides that the establishment of the Sea-Bed Disputes Chamber and the manner in which it shall exercise its jurisdiction shall be governed by the provisions of Section 5 of Part XI, Part XV and Annex VI of the Convention. Article 14 of the Statute (Annex VI) provides that a Sea-Bed Disputes Chamber shall be established in accordance with the provisions of Section 4 of Annex VI containing Articles 35 to 40. Article 35 of the Statute, which deals with the composition of Sea-Bed Disputes Chamber, provides that the Sea-Bed Disputes Chamber shall be composed of eleven Members, selected by a majority of the elected member of the Tribunal from among them. In the selection of the members of the Chamber, the representation of the principal legal systems of the world and equitable geographic distribution shall be assured.

The members of the Chamber shall be selected every three years and may be selected for a second term. The Chamber shall elect its President from its Members, who shall serve for the terms for which the Chamber has been selected.

The Sea-Bed Disputes Chamber may form *ad-hoc* Chamber, composed of three of its Members, for dealing with a particular dispute submitted to it in accordance with Article 188, paragraph 1(b).

Special Chambers

The Tribunal may form such chambers composed of three or more of its elected members, as it considers necessary for dealing with particular categories of disputes. This is provided in Article 15, paragraph 1 of the Statute of the Tribunal. Acting pursuant to this provision, the Tribunal at its meeting on 14th February, 1997, formed Special Chamber for Fisheries Disputes. The Tribunal at its meeting on 20th, February 1997, selected seven members of the Tribunal to serve in the Chamber for Fisheries Disputes. The seven members selected were : Hugo Caminos, Soji Yamamoto, Paul Bamela Engo, Dr. P.C. Rao (India), David H. Anderson, Edward A. Laing and Gudmundur Erriksson. The term of office

of these members, ended on 30th September, 1999. The Tribunal also decided that the Chamber for Fisheries Disputes will be available to deal with the disputes which the parties agree to submit to it concerning the interpretation or application of any provision of :

(a) U.N. Convention on the Law of the Sea, 1982, concerning the conservation and management of marine living resources; and

(b) any other agreement relating to the conservation and management of marine living resources which confers jurisdiction on the Tribunal.

On the same day *i.e.*, on 14th February, 1997, the Tribunal formed a Standing Special Chamber for Marine Environment Disputes. On 20th February, 1997, the Tribunal selected seven members to serve on this special Chamber. The members selected were to hold office upto 30th September, 1999. The Tribunal decided that the Chamber will be available to deal with disputes which the parties agree to submit to it concerning the interpretation or application of any provision of :—

(a) the U.N. Convention on Law of the Sea, 1982, concerning the protection and preservation of marine environment;

(b) special convention and agreements relating to the protection and preservation of the marine environment referred to it in Article 237 of the Convention;

(c) any agreement relating to the protection and preservation of the marine environment which confers jurisdiction on the Tribunal.

Advisory Opinion

According to Article 191 of the U.N. Convention on the Law of the Sea, 1982, the Sea-Bed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council of the International Sea-Bed Authority on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

Finality and Binding force of Decisions

The decision of the Tribunal is final and shall be complied with all the parties to dispute. But the decision of the Tribunal shall have no binding force except between the parties and in respect of that particular dispute. In the event of dispute as to the meaning or the scope of the decision, the Tribunal shall construe it upon the request of any party.

It may, however, be noted that an agreement on co-operation and relationship between the United Nations and the International Tribunal for the Law of the Sea, has been entered into on 18th September, 1997. This relationship will facilitate to achieve the objectives for the establishment of the Tribunal to serve the best interests of the world community. Indeed the Tribunal is best suited to settle all the disputes relating to the Law of the Sea.

THE M/V 'LOUISA' CASE

The dispute.—Saint Vincent and the Grenadines instituted proceedings against Spain on 24th November, 2010, regarding the *MV Louisa*, a vessel flying the flag of Saint Vincent and the Grenadines, which was seized on 1st February, 2006, by the Spanish authorities. The Application instituting proceedings before the Tribunal included a request for provisional measures under Article 290,

paragraph 1, of the Convention, in which the Tribunal was requested, *inter alia*, to order the Respondent to release the *MV Louisa* and return the property seized.

Pursuant to Article 290, paragraph 1, of the Convention, the Tribunal may, if it finds that *prima facie* it has jurisdiction over the dispute, prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

The Order of 23rd December, 2010.—In its Order of 23rd December, 2010, the Tribunal finds, by 17 votes to 4, that 'the circumstances, as they now present themselves to the Tribunal, are not such as to require the exercise of its powers to prescribe provisional measures under Article 290, paragraph 1, of the Convention.'

Finding that it has *prima facie* jurisdiction over the dispute, the Tribunal considers that, at this stage of the proceedings, it does not need to establish definitively the existence of the rights claimed by Saint Vincent and the Grenadines. In this context, the Tribunal refers to its earlier jurisprudence in the M/V 'SAIGA' (No. 2) case, in which it had stated that 'before prescribing provisional measures the Tribunal need not finally satisfy itself that is has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.'

In the circumstances of the case, the Tribunal does not find that there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute before the Tribunal so as to warrant the prescription of the provisional measures requested by Saint Vincent and the Grenadines.

Furthermore, the Tribunal notes that the Applicant contended that 'there is a definite threat to the environment by leaving this ship docked in El Puerto de Santa Marma for any significant additional time.' In this respect, the Tribunal places on record the assurances given by Spain that 'the Port authorities are continuously monitoring the situation, paying special attention to the fuel still loaded in the vessel and the oil spread in the different conducts and pipes on board' and that 'the *Capitanma Marmtima* of Cadiz has an updated protocol for reacting against threats of any kind of environmental accident within the port of El Puerto de Santa Marma and the Bay of Cadiz.'

The Tribunal also notes that the present Order in no way prejudges the question of the jurisdiction of the Tribunal to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the rights of Saint Vincent and the Grenadines and Spain to submit arguments in respect of those questions.

Finally, the Tribunal reserves for consideration in its final decision the submissions made by both parties for costs in the present proceedings.

Judge Paik appended a separate opinion to the Order. Judges Wolfrum, Treves, Cot and Golitsyn appended dissenting opinions to the Order.

Sovereignty Over the Air

Theories as to the Air Space.—It is universally agreed that the air space over the open sea and over unoccupied territory is absolutely free.

As regards air space over the occupied territory, both national and

territorial, there is a difference of view among jurists, and the different theories in this regard may be stated as described hereunder. The first theory advocates that air space is entirely free and open to all. The second theory propounds, upon the analogy of the maritime belt, that the lower zone of territorial air space belongs to the subjacent State while the higher zone of air space is free. The third theory is that air space to an unlimited height lies within the domain of the subjacent State. The last theory is that air space is within the sovereignty of the subjacent State subject to a servitude of innocent passage for foreign civil aircraft, but not military aircraft.

(Before the First World War, it was generally agreed that air space over the territory of national and territorial waters of a State was within the exclusive sovereignty of the subjacent State without any servitude of innocent passage for foreign aircraft.)

Paris Convention, 1919.—In 1919, a Conference of the principal States at Paris adopted an instrument known as the Convention for the Regulation of Aerial Navigation. This Convention applies at the time of peace only. The United States of America was not a party to this Convention. The main provisions of the Convention were : (1) The contracting States recognized that every State had complete and exclusive sovereignty in the air space above its territory and territorial waters, but each party undertook to accord in times of peace freedom of innocent passage to the private aircraft of other parties so long as they complied with the rules of the Convention. Each contracting State also reserved the right to prohibit all private aircraft flying over certain areas for military reasons or for public safety. (2) The aircraft must bear their nationality and registration marks and the name and residence of their owner when engaged in international navigation. (3) Every party aircraft in international navigation must carry : (a) a certificate of registration; (b) a certificate of air worthiness from the State to which it belongs; (c) certificates of competency and licences in respect of each member of the operating crew; (d) a list of passengers; (e) bills of lading; (f) log books; and (g) special licences for wireless equipment. Private aircraft exercising their right of innocent passage across another State without landing must follow the route prescribed by the State flown over, and must land even against their will if ordered to do so. (4) The authorities of the territorial State have the right to visit every foreign private aircraft and verify its documents, upon landing and upon departure. (5) Military aircraft may not fly over, or land in, the territory of another party without special authorization. (6) The Convention established an International Commission for Air Navigation as a permanent Commission under the direction of the League of Nations.

Havana Convention, 1928.—The Paris Convention of 1919 did not apply to certain American States, but in February, 1928, a number of American States, including the United States, concluded a Convention, known as Havana Convention on Commercial Aviation on the line of the Paris Convention.

Warsaw Convention, 1929.—The Warsaw Convention prescribing rules regarding international air transport was signed on October 12, 1929, with a view to bringing uniformity in the rules regulating the conditions of international carriage by air.

Five Freedoms of the Air or the Chicago Convention, 1944.—The International Civil Aviation Conference met at Chicago in 1944 to conclude world-wide arrangement for commercial air traffic rights as also technical and

navigational matters. The Conference discussed a variety of subjects, and there was a proposal to obtain agreement of all the States to the concession of the 'Five Freedoms of Air', namely the rights of the airlines of each State—

(a) to fly across foreign territory without landing;

(b) to land for non-traffic purposes;

(c) to disembark in a foreign country traffic originating in the State of origin of the aircraft;

(d) to take on passengers, mail, and cargo destined for the territory of that State whose nationality the aircraft possesses; and

(e) to carry traffic between two foreign countries.

The International Air Services Transit Agreement embodying the Five Freedoms was signed by 19 States only, and a majority of the States represented at the Conference, including Great Britain, did not sign this agreement.

An International Air Services Transit Agreement, called "two freedoms agreement", was ultimately drawn up which embodied an agreement on the part of the States to grant to international air services the first two Freedoms, namely, the privilege to fly across foreign territory without landing and to land for non-traffic purposes in foreign territory. This agreement was signed in 1945 by 30 States and in 1951 it was in force among forty-one States. Soviet Russia was, however, not a party to the agreement.

Article 1 of the Chicago Convention recognized complete and exclusive sovereignty of every State over the air space above its territory. The Convention, however, granted freedom to fly across the territory of the contracting States without landing and freedom to land in the territory of contracting States for non-traffic purposes.

International Civil Aviation Organisation.—As a result of the agreement arrived at the Chicago Conference, an International Civil Aviation Organization has been established, replacing the 1919 International Commission for Air Navigation. The new organization is one of the specialised agencies of the United Nations and decides, subject to the International Court of Justice, disputes between members relating to application of the Convention.

The provisional International Civil Aviation Organisation began functioning in August, 1945 and was replaced by the permanent body on April 4, 1947. It has to study problems of international civil aviation and to establish international standards and regulations. Its principal achievement in the legal field was the I.C.A.O Assembly's adoption in June, 1948 of a Convention on the International Recognition of Rights in Aircraft.

In the case concerning banning of Pakistani air flights through Indian territory (*India* v. *Pakistan*) consequent on the hijacking of an Indian aircraft to Lahore on January 30, 1971, and the alleged encouragement by the Government of Pakistan to the hijackers, Pakistan complained to the I.C.A.O. on the ground that the suspension of overflights by India was a violation of international and bilateral commitments and asked for a declaration that India's decision to ban the overflight was illegal. India objected to the jurisdiction of the I.C.A.O., but it was negatived, and, on a reference to the International Court of Justice by India, the Court ruled that the I.C.A.O. had jurisdiction to hear Pakistan's complaint. As a result of the Simla agreement, Pakistan ultimately withdrew the case from the Council of the I.C.A.O.

Servitudes.—Prof. Starke defines an international servitude as "an *exceptional* restriction imposed by treaty of the territorial sovereignty of a particular State whereby the territory of that State is put under conditions or restrictions serving the interests of another State, or non-State entity." "It is a right whereby the territory of one State is made liable to permanent use by another State for some specified purpose." Thus, by agreement a State may be obliged to allow the passage of troops of a neighbouring State or may be prevented to fortify its frontiers in the interest of the neighbouring State.

Positive and Negative Servitudes.—Servitude may be either positive (affirmative or active) or negative in character. The former means that a State has a right to perform certain acts on the territory of another State, *viz.*, building and operating a railway in a certain territory, establishing a custom-house, having fishery rights in the territorial waters of another State, etc. The latter connotes that the State bound by the servitude must refrain from doing something on that territory or abstain from exercising its territorial rights in some ways. Thus, it may permit a State to demand that a neighbouring State shall not fortify its frontiers or increase its naval or land armament beyond a certain limit.

Military and Economic Servitudes.—Prof. Oppenheim mentions two more kinds of servitudes, *viz.*, military and economic. The former is a servitude acquired for military purposes, such as the right to keep troops in foreign territory, or to send an armed force through foreign territory, or to demand that a town on foreign territory shall not be fortified, and the like. The latter is a servitude which is acquired for the purpose of commercial interests, traffic and intercourse in general, such as the right of fisheries in foreign territorial waters, to enjoy the advantages of a free zone for customs purpose or of free navigation on a river, to build a railway on or lay a telegraph cable through foreign territory, and the like.

Extinction of Servitudes.—Servitudes being rights *in rem*, pass on to the annexing State if the State bound by the servitude is annexed or merged by another State. These being territorial in nature are not extinguished as a result of succession of the State. Servitudes may, however, be extinguished by agreement between the States concerned or by express or tacit renunciation on the part of the State entitled to the benefit. These may also be exinguished by vital change of circumstances, *i.e., rebus sic stantibus.*

According to Dr. Reid : "Servitudes establish a permanent relationship of territory, unaffected by change of sovereignty in either of them, and terminable only by mutual consent, by renunciation on the part of the dominant State, or by consolidation of the territories affected."

(C) ENVIRONMENT[1]

Its Importance.—Consciousness for environmental protection is of recent origin. The United Nations Conference on World Environment held in Stockholm in June, 1972 and the follow-up action thereafter spread its awareness. Over thousands of years, man had been successfully exploiting the ecological system for his sustenance, but with the growth of population the demand for land has increased and forest growth has been and is being cut

1. The topic "Human Environment" has been adverted to in great detail in Part III in a subsequent chapter, Chapter XXIX, titled "Economic World Order, Human Environment, Human Settlements for Better Living and Demography."

down and man has started encroaching upon Nature and its assets. Scientific developments have made it possible and convenient for man to approach the places which were hitherto beyond his ken. The consequences of such interference with ecology and environment have now come to be realised. It is necessary that the Himalayas and the forest growth on the mountain range should be left uninterfered with so that they may be preserved without being eroded and the natural setting of the area may remain intact.

Stockholm Conference (1972)—The United Nations Conference on the Human Environment was held at Stockholm (Sweden) from June 5 to June 16, 1972, pursuant to the United Nations General Assembly's resolution of December 3, 1968. The Conference adopted the Declaration on Human Environment, passed resolutions and made recommendations.

A resolution passed in plenary session condemned nuclear weapon tests, especially those carried out in the atmosphere. It called on States intending to carry out such tests to refrain from doing so, as these might lead to further contamination of the environment.

Principle 26 of the Declaration on the Human Environment adopted by the Conference inveighed—"Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction."

Recent French and Chinese nuclear tests have acted as a clog on the on-going negotiations on a Comprehensive Test Ban Treaty (CTBT) and undermined its successful conclusion.

The Conference made a recommendation that World Environment Day be observed on June 5 each year.

An "Action Plan" for the protection and enhancement of the environment was also recommended. The Plan was grouped in three parts : an "Earthwatch" programme prefaced warning against environmental crises; recommendations concerning "environmental management" and finally "supporting measures" so as to educate, train and finance and inform the public about the same.

The Conference recommended that the Food and Agriculture Organisation in cooperation with other concerned international agencies should strengthen the necessary machinery for the international acquisition of knowledge and transfer of experience on soil capabilities, degradation, conservation and restoration.

Another recommendation postulated that approximately ten baseline stations be set up, with the consent of the States concerned, in areas remote from all sources of pollutions, in order to monitor long-term global trends in atmospheric constituents and properties which may cause changes in meteorological properties, including climatic changes.

A network of not less than 100 stations, with the consent of the States concerned, was recommended for monitoring properties and constituents of the atmosphere on a regional basis and especially changes in the distribution and concentration of contaminants.

The World Meteorological Organisation was to guide and coordinate the aforesaid programmes.

Text of the Declaration—The text of the Declaration on the Human Environment was divided into two Parts—a Preamble and an Operative Part enunciating 26 principles to govern international and national action in the

environmental field.

The details of some of the Principles are noted below—Man has the Fundamental right to adequate conditions of life, in an environment of quality that permits a life of dignity and well-being (Principle 1).

Natural resources of the earth including the air, water, and, flora and fauna must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate. (Principle 2).

The capacity of the earth to produce vital renewable resources must be maintained and wherever practicable restored or improved. (Principle 3).

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources, and marine life, to damage amenities or to interfere with other legitimate uses of the seas. (Principle 7).

Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind. (Principle 18).

States have a sovereign right to explore their own resources pursuant to their own environmental policies. States are responsible for ensuring that activities within their jurisdiction or control do not cause damage to the environment of other States, or of areas beyond the limits of national jurisdiction. (Principle 21).

States are under a duty to cooperate to develop further the International Law regarding liability and compensation for the victims of pollution and other environmental damage caused by such activities within the jurisdiction or control of such States to areas beyond national jurisdiction. (Principle 22).

The Conference recommended to the United Nations General Assembly for the creation of new international machinery by setting up a Governing Council for Environmental Programmes, elected triennial by the General Assembly on the basis of equitable geographical distribution, to act as a central organ, with its operations reviewed annually by the Economic and Social Council and the General Assembly.

The Conference recommended that the draft articles of a Convention on Ocean Dumping to prevent marine pollution by the ocean dumping of wastes and for a world programme to make rivers cleaner, be referred for adoption to a Conference to be convened by the United Nations towards the end to 1972.

The diplomatic conference met at London from October 30 to November 13, 1972, and the text of a Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter was adopted and it entered into force on August 30, 1975. The Convention binds the State parties individually and collectively and requires them to take all practicable steps to prevent the pollution of the sea by the dumping of harmful wastes which may affect health, injure living resources and marine life or damage amenities.

Other Conventions or Declarations—Other conventions or declaratory documents bearing upon the protection of the human environment adopted since the Stockholm Conference (1972) by the world bodies are as under :

1. Convention for the Protection of the World Cultural and Natural Heritage adopted at Paris on 16th November, 1972.

2. Convention on International Trade in Endangered Species of Wild Fauna and Flora adopted at Washington on March 3, 1973.
3. The International Convention for the Prevention of Pollution from Ships, adopted on November 2, 1973.
4. Convention on Long Range Trans-Boundary Air Pollution, adopted at Geneva in 1979, and which entered into force on March 16, 1983.
5. The UN Convention on the Law of the Sea, dated December 10, 1982.

UNEP—The United Nations Environment Programme (UNEP) governing Council took upon itself the task of the establishment of necessary machinery the determination of priority areas for action and the implementation of projects. Within the UNEP, International Habitat and Human Settlements Foundation worked for the improvement of housing and community conditions for the world's disadvantaged peoples through the two important components of the 'Earthwatch' system, *viz.*, a Global Environment Monitoring System (GEMS) and International Referral System for Sources of Environmental Information (INFOTERRA). The first constituent *viz.*, GEMS monitored the dangerous and injurious pollutants, while the latter INFOTERRA constituted a global directory of information to information seekers facilitating access to knowledge of environmental matters.

Nairobi Declaration, 1982—The tenth anniversary to the Stockholm Conference of 1972 was celebrated at Nairobi from May 10 to May 18, 1982, which adopted a special declaration known as the "Nairobi Declaration" on May 18, 1982. The Declaration affirmed the validity of the Stockholm principles which provided a basic code of environmental conduct for the years to come and the participating States reaffirmed the commitment to the Stockholm Declaration and Action Plan.

The Nairobi Declaration referred to the partial implementation of the Action Plan formulated by the Stockholm Conference and pointed out the alarming deteriorations, including deforestation, changes in ozone layer, the increasing concentration of carbon dioxide and acid rain, pollution, and the extinction of animal and plant species. It urged the States to promote the progressive development of international environmental law and create an atmosphere of peace and security, free from the threats of any war, especially nuclear war. It called upon all governments and people of the world to discharge their historic responsibility collectively and individually, to ensure that our small planet is passed over to future generation is a condition which guarantees life in human dignity for all.

Vienna Convention for the Protection of Ozone Layer (1985)—The Vienna Convention initiated by the Conference of Plenipotentiaries and organised by the United Nations Environment Programme (UNEP) was adopted on March 22, 1985. It came into force on September 22, 1988. It has provided to States the international legal framework for working together to protect the atmospheric ozone layer, *viz.* the layer of atmosphere ozone above the planetary boundary layer. The parties were required in accordance with the provisions of the Convention and of the Protocols in force to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.

The United Nations Conference on Environment and Development or the Rio Declaration (1992)—The United Nations Conference on Environment and Development (UNCED), also known as Earth Summit was held at Rio de Janeiro (Brazil) from June 3 to 14, 1992. It was attended by delegates from 182 nations. The Framework Convention on Climate Change, the text of which had been adopted in New York earlier on May 9, 1992, was opened for signature. The Convention deals with the control of 'greenhouse gases' (a term used to denote increased warming of the earth's surface and lower atmosphere due to higher levels of carbon dioxide and other gases) which affect the world's climate. The Convention prescribes the establishment of a procedure by which the parties will monitor and control the emission from their territories of 'greenhouse gases'.

The Convention on Biological Diversity, the text of which had earlier been adopted at Nairobi on May 22, 1992, was also opened for signature. The Convention aimed to conserve biological diversity by requiring State parties to adopt national programmes and to cooperate with each other to protect against decline or extinction of animal, plant and microbial organisms. The United States declined to sign the Convention at Rio because of its provisions on the transfer of technology, intellectual property rights, biotechnology and biosafety and other matters.

The Conference adopted the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests. The Statement although authoritative was declared as 'non-binding' by the Parties thereto.

The Rio Declaration contains 27 Principles aiming to establish a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies, and people.

Human beings are at the centre of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1).

States have, in accordance with the Charter of the United Nations and the principles of International Law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that their activities do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (Principle 2).

The right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations. (Principle 3).

All States are ordained to enact effective national laws for the protection of the environment. (Principle 11).

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. (Principle 13).

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. (Principle 15). States were also required to notify other States of natural disasters, emergencies or activities having potential transboundary consequences and to consult with them.

Convention on Biological Diversity, 1992—The Convention on Biological Diversity under the aegis of United Nations Environment Programme (UNEP) concerning the conservation and sustainable use of all Earth's species and ecosystems was signed at Rio de Janeiro in June, 1992 and came into force on December 29, 1993. It provides for adoption of national regulation to conserve biological resources; compensation to developing countries for extraction of their genetic materials and imposition of legal responsibilities on countries for the environmental impacts of their private companies in other countries.

Indian Law and Environment.—Protection and improvement of the environment is a constitutional mandate—it is a commandment for the country wedded to the ideals of a welfare State.

The amendment of the Indian Constitution brought in Article 48-A in Part IV of the Constitution which provides that—

"The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."

Article 51-A (g) forming part of Part IV-A of the Constitution of India deals with Fundamental Duties and provides that—It shall be the duty of every citizen of India—

"(g) to protect and improve the natural environment including forest, lakes and wildlife and to have compassion for living creatures."

Taking into consideration the spirit and fundamental duties as contained in Part IV-A of the Constitution of India from time to time, environmental activities for development have assumed a new shape.

In the decision *Rural Litigation and Entitlement Kendra and others* v. *State of Uttar Pradesh and others*, reported in AIR 1987 S.C. 359, the Hon'ble Supreme Court has observed that preservation of the environment and keeping the ecological balance unaffected is a task which not only Government but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Article 51A (g) of the Constitution.

The Environment (Protection) Act, 1986 (Act No. 29 of 1986) came into force w.e.f. 19.11.1986. Under this Act power is vested in the Central Government to take measures to protect and improve the environment.

The Statement of Objects and Reasons of the Act, No. 29 of 1986, i.e., Environment (Protection) Act, 1986, provides as under—

"Prefatory Note—1. Statement of Objects and Reasons—Concern over the state of environment has grown the world over since the sixties. The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems. The world community's resolve to protect and enhance the environmental quality found expression in the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972. Government of India participated in the Conference and strongly voiced the environmental concerns. While several measures have been taken for environmental protection both before and after the Conference, the need for a general legislation further to implement the decisions of the Conference has become increasingly evident.

2. Although there are existing laws dealing directly or indirectly with several environmental matters, it is necessary to have a general legislation for environmental protection. Existing laws generally focus on specific types of pollution or on specific categories of hazardous substances. Some major areas of environmental hazards are not covered. There also exists uncovered gaps in areas of major environmental hazards. There are inadequate linkages in handling matters of industrial and environmental safety. Control mechanisms to guard against slow insidious build up of hazardous substances, especially new chemicals, in the environment are weak. Because of multiplicity of regulatory agencies, there is need for an authority which can assume the lead role for studying, planning and implementing long term requirements of environmental safety and to give direction to, and co-ordinate a system of speedy and adequate response to emergency situations threatening the environment.

Section 2(a) provides the definition of Environment, which includes water, air and land and the infer-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.

Section 6 of the Environment (Protection) Act, 1986, provides for framing of the Rules to regulate environmental pollution. It reads as under—

"6. Rules to regulate environmental pollution—

(1) The Central Government may, by notification in the official Gazette, make rules in respect of all or any of the matters referred to in Section 3.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely—

(a) the standards of quality of air, water, or soil for various areas and purposes;

(b) the maximum allowable limits of concentration of various environmental pollutants (including noise) for different areas;

(c) the procedures and safeguards for the handling of hazardous substances;

(d) the prohibition and restrictions on the handling of hazardous substances in different areas;

(e) the prohibition and restrictions on the location of industries and the carrying on of processes and operations in different areas;

(f) the procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing for remedial measures for such accidents."

Sections 7 and 8 of the Environment (Protection) Act, 1986, deal with the prevention, control and abatement of environmental pollution in the industries.

Importance of Forests in relation to Environment—In the case of *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, AIR 1988 S.C. 2187, the Hon'ble Supreme Court has observed that the time has come when we **realise that air and water are the most indispensable gifts of nature for preservation of life.** Their Lordships observed : "It is time to turn to the contention relating to forests. Air and Water are the most indispensable gifts of Nature for

preservation of life. Abundant sun-shine together with adequate rain keeps Nature's generating force at work. Human habitation all through the ages has thrived on river banks and in close proximity of water sources. Forests have natural growth of herbs which provide cure for diseases. Our ancestors knew that trees were friends of mankind and forests were necessary for human existence and civilization to thrive. It is these forests which provided shelter for the 'Rishies' and accommodated the ancient 'Gurukuls'. They too provided food and sport for our forefathers living in the state of Nature. That is why there is copious reference to forests in the Vedas and the ancient literatures of ours. In ancient times, trees were worshipped as Gods and prayers for up-keep of forests were offered to the Divine.

In the Artherva Veda (5.30.6) it has been said—

"Man's paradise is on earth : This living world is the beloved place of all; It has the blessings of Nature's bounties; Live in a lovely spirit."

"Forest was initially a State subject covered by Entry 19 in the list II of the Seventh Schedule. In 1976 under the 42nd Amendment the Entry was deleted and Entry 17-A in the Concurrent List was inserted. The change from the State List to the Concurrent List was brought about following the realisation of the Central Government that forests were of national importance and should be placed in the Concurrent List to enable the Central Government to deal with the matter."

The Supreme Court has further observed that in due course civilization developed and men came to live away from forests. Yet, the human community depended heavily upon the forests which caused rains and provided timber, fruits, herbs and sports. With sufficient sun-shine and water, there was luxuriant growth of forests in the tropical and semi-tropical zones all over the globe. Then came the age of science and outburst of human population. Man required more of space for living as also for cultivation as well as more of timber. In that pursuit, the forests were cleared and exploitation was arbitrary and excessive; the deep forests were depleted; consequently, rainfall got reduced; soil erosion took place. The earth crust was washed away and places like Cherapunji in Assam which used to receive an average annual rainfall of 500 inches suffered occasional drought.

Scientists came to realise that forests play a vital role in maintaining the balance of the ecological system. They learnt that forests preserve the soil and heavy humus acts as a porous reservoir for retaining water and gradually releasing it in a sustained flow. The trees in the forests draw water from the bowls of the earth and release the same into the atmosphere by the process of transpiration and the same is received back by way of rain as a result of condensation of clouds formed out of the atmospheric moisture. Forests thus help the cycle to be completed. Trees are responsible to purify the air by releasing oxygen into the atmosphere through the process of photosynthesis. It has, therefore, been rightly said that there is a balance on earth between air, water, soil and plant. Forests hold up the mountains, cushion the rains and they discipline the rivers and control the floods. They sustain the springs; they break the winds; they foster the bulks, they keep the air cool and clean. Forests also prevent erosion by wind and water and preserve the carpet of the soil.

In the second half of the 19th century felling of trees came to be regulated. In 1858, the Department of Forestry was set up and in 1864 the first Inspector

General of Forests was appointed. In the following year the first Indian Forest Act came into the Statute Book to be followed by another Act in 1878 and yet another in 1927 which is still in force providing measures of regulations. This Act has since been amended in the various States.

So far as environment activities are concerned in AIR 1987 S.C. 359, the Supreme Court has observed that the Himalayan range on the Northern Boundary of India is the most recent mountain range and yet it is the tallest. It has formed the northern boundary of the country and until recent times provided an impregnable protection to the Indian sub-continent from the northern direction. This mountain range has been responsible to regulate the monsoons and consequently the rainfall in the Indo-gangetic belt. The Himalayas are the source for perennial rivers, the Ganges, Yamuna and Brahmputra as also several other tributaries which have joined these main rivers. For thousands of years, nature has displayed its splendour through the lush green trees, innumerable springs and beautiful flowers. The Himalayas have been the store-house of herbs, shrubs and plants. Deep forests on the lower hills have helped to generate congenial conditions for good rain.

The Doon Valley has been an exquisite region bounded by the Himalayan and the Shivalik ranges and the Ganga and Yamuna rivers. The perennial water streams and the fertile soil have contributed not only to the growth of dense lush green forests but have helped the yield of **basmati** rice and **leechis**. Mussoorie, known as the queen of Indian hill stations situated at a height of 5000 ft. above sea level and Dehra Doon located below the heights have turned out to be important places of tourist attraction, centres of education, research and defence complex.

At present, the Valley is in danger because of erratic, irrational and uncontrolled quarrying of limestone. The landscape has been stripped bare of its verdant cover. Green cover today is about 10 per cent of the area while few decades ago it was almost 70 per cent.

CHAPTER XIII

MODES OF ACQUIRING AND LOSING STATE TERRITORY

The five common modes of acquiring territory are occupation, prescription, accretion, cession and conquest, which need consideration in some detail.

Occupation—Oppenheim states that occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State. It, therefore, relates to the establishment of sovereignty over a territory which had either been unoccupied or had recently been discovered. It is a means of acquiring territory not already in the dominion of any State. In other words, the territory must be *res nullius* for the purpose of occupation, either entirely uninhabited or inhabited by natives under an organisation which is not regarded as a State.

In order to constitute occupation, there must be the intention or will of a State to take possession of unappropriated territory and settlement upon the land, *i.e.*, establishment of some form of control over the occupied area. Oppenheim calls possession and administration as the two essential facts that constitute an effective occupation. By possession he means that the occupying State must take the territory under its sway *(corpus)* with the intention of acquiring sovereignty over it *(animus)*. This is done by a settlement on the territory accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty. This is usually done either by a proclamation of formal appropriation or by the hoisting of a flag which is the emblem of sovereignty. By administration, Oppenheim means that the possessor must establish some kind of administration of the territory which shows that the territory is really governed by the new possessor.

The assertion of sovereignty must be displayed. It should be actual and not merely a nominal one or a paper claim. The claimant must act in a way which is legitimate of an international sovereign to act in order to exercise sovereignty. If the territory is uninhabited or sparsely inhabited, no officer need be appointed, and it will be enough if the claimant State could assume local administration when deemed necessary. The exercise or display of authority must also be continuous so that there be no exhibition of intention to abandon title.

Mere discovery of a land does not constitute acquisition through occupation. It gives an inchoate title, which is perfected by effective control and administration, *i.e.*, by means of settlement as an act of possession. If the inchoate title is not perfected into a real title of occupation within a reasonably sufficient time, the inchoate title withers away enabling any other State to acquire the territory by means of possession and administration. It was observed by Professor Huber, the arbitrator in the *Island of Palmas Case* that discovery alone, without any subsequent act, cannot at the present time suffice to prove

sovereignty over the Island of Palmas.

In the *Eastern Greenland* case, the Permanent Court of International Justice observed :

"A claim to sovereignty based not upon some particular act or title such as treaty of cession, but merely upon continued display of authority, involves two elements each of which must be shown to exist : the intention or will to act as sovereign, and some actual exercise or display of such authority."

It was observed in the above case that legislation was one of the most obvious forms of the exercise of sovereign power. Professor Alf Ross seems to be correct in saying that this is a fresh example of how the terminology of 'sovereignty' may obscure a clear understanding. To legislate for a certain territory is merely a vain pretension when there are no authorities to enforce the laws.

There is some doubt about the necessity of occupation being notified to other States. Holland and Pitt Cobbett deem it to be essential, while Oppenheim denies the existence of any binding rule of International Law which makes notification of occupation to other power a necessary condition of its validity.

Man's Conquest of the Moon and Mars.—There cannot be any territorial claim on the Moon arising from the landing of cosmic rocket on the Moon's surface. Even the planting of flag on the Moon or any other heavenly body is not enough to claim sovereignty over it. The assertion of sovereignty must be displayed. It should be actual and not merely a nominal one or a paper claim. Mere discovery of land or conquest of Moon does not constitute acquisition through occupation. It gives an inchoate title, which is incapable of perfection by effective control and administration, *i.e.*, by means of settlement as an act of possession. Since the inchoate title cannot be perfected into a real title of occupation within a reasonably sufficient time, the inchoate title will wither away.

After tough negotiations lasting seven years, the United Nations Outer Space Committee reached agreement in July, 1979 on a draft treaty on the Moon proclaiming that its unexplored natural resources shall be the common heritage of mankind. The Moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means. The draft treaty evolved by the 47-nation committee was approved by the General Assembly on December 5, 1979.

Prescription.—Prescription in International Law is the acquisition of territory by an adverse holding continued for a certain length of time. According to Grotius, immemorial prescription for the Law of Nations has the advantage of extinguishing controversies concerning kingdoms and the boundaries of kingdoms by lapse of time which otherwise would have tended to disturb the minds of many and perpetuated wars, being repugnant to common sense of mankind.

International Law does not fix any certain period of time so as to constitute a title by prescription. But it is necessary that the possession must be peaceful, without protests and continuous for a long period. There is, however, a considerable difference of opinion as to the length of the period which should elapse to constitute prescription. Grotius maintained that "a possession beyond memory, not interrupted, nor disturbed by appealing to an arbitrator, absolutely

transfers dominion". On the other hand, Vattel recognised adverse possession as giving title if the owner had neglected his right or been silent about it during a considerable number of years. Vattel still conscious of the difficulty of this question asserted that prescription could be complete if neighbouring nations would come to an agreement on the subject by means of treaties. Oppenheim, however, tries to solve the difficulty of the period of time when he defines prescription "as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order."

According to Hall, "Title by prescription arises out of the long continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful the legitimate proprietor has neglected to assert his right, or has been unable to do so."

Vattel also recognised prescription founded on length of time as a valid and incontestable title. Phillimore also shares the same view when he observes that there is a lapse of time after which one State is entitled to exclude every other from property of which it is in actual possession.

Schwarzenberger sums up the rules developed by the Permanent Court of Arbitration and the Permanent Court of International Justice in the following four propositions :

Firstly, the State claiming title on the ground of prescription must display actual power in the contested region.

Secondly, the display must be reasonably continuous.

Thirdly, the display of sovereignty must be peaceful, at least in relation to other States.

Fourthly, though short of treaty obligations to the contrary, no obligation of formal notification to third States exists, the display of State sovereignty must be public.

If these conditions are fulfilled, prescription is a title which is as good as any of the other modes of acquiring territory, and equally valid *erga omnes*.

Accretion.—It is a mode of acquiring title by the action of rivers which increases land action of water and adds new land to existing territory already under the sovereignty of a State. This mode presupposes the existence of territory with an actual sovereignty capable of extending to a spot falling within its sphere of activity.

New formations through accretion may be artificial, *i.e.*, the outcome of human work by means of embankment, dykes and break-waters or natural, *i.e.*, produced by operation of nature as by the drying up of a river or the recession of the sea.

Accretion also takes place by alluvion, which means an accession to land washed upon on the river bank or on the seashore by the waters. Accretion may also take the form of a delta, which is a triangular island built up at the mouth of a river by the deposit of silt. It may also take the form of an island built up in the bed of a river. The addition in each case becomes the property of the owner of the mainland.

Cession.—It is one of the modes in which territories may be acquired. It

is the transfer of title to a territory by one State to another by means of a transaction. The transfer of territory implies the transfer of sovereignty over a definite area of territory. The term 'cession' is wide enough to include a voluntary cession by general consent of the inhabitants of the terriory. It is not necessary that the cession must be by the ruling power.

Cession takes place by means of a treaty by embodying under which the transfer takes place. Such treaty may be voluntary, *i.e.*, the result of peaceable negotiations (sale, gift or exchange) or may be made under compulsion, *i.e.*, the outcome of war and is provided in peace treaty or under threat of violent consequences in case of non-compliance. The cession may be made with or without compensation. The cession of Venice by Austria to France during war with Prussia and Itlay in 1866 as a gift and its subsequent cession by France to Italy afford examples of voluntary cession. As an example of voluntary cession by the general consent of the inhabitants of the country may be given the instance of Dadra and Nagar Haveli which originally were Portuguese possessions, but subsequently became independent by action of the people of the territory and came to be known as Free Dadra and Nagar Haveli. Subsequently, the people of Free Dadra and Nager Haveli voluntarily joined the Indian Union and their territory was made the Union territory of Dadra and Nagar Haveli under Part II of the First Schedule of the Constitution of India. On December 31, 1974, as a result of the Delhi-Lisbon treaty Portugal recognised the full sovereignty of India over these territories with effect from the date when they became part of India under the Constitution of India.

Pondicherry, Karaikal, Maha and Yanam in South India and Chandernagore in West Bengal are examples of territories which were acquired by cession by agreement between India and France.

In the *Berubari case*, which dealt with transfer of a *de facto* and *de jure* Indian territory, the Supreme Court of India held, on a consideration of the agreement and its background, that the agreement amounted to cession or alienation of a part of the Indian territory in favour of Pakistan and was not a mere ascertainment or determination of the boundary in the light of and by reference to the Bagge Award. Therefore, the implementation of the agreement would naturally involve the alteration of the content of and the consequent amendment of Art. 1 and of the relevant part of the First Schedule to the Constitution.

In the *Kutch Award*, the Supreme Court, however, held that it did not amount to a cession of territory. If no constitutional amendment is required, the power of the Executive which extends to matters with respect to which Parliament has power to make laws, can be exercised to correct boundaries which had been settled. The decision to implement the award by exchange of letters, treating the award as an operative treaty after the boundary had been marked in that area, was within the competence of the Executive wing of the Government and no constitutional amendment was necessary.

Occupation of territory in time of peace with the concurrence of the sovereign, will constitute a presumptive evidence that it is the result of cession by treaty : "*Bolletta, Trumpey.*"

The cession of a territory becomes effective only on actual transfer of sovereignty and not merely on an agreement to transfer.

Plebiscite.—Peace treaties in case of cession are often followed by a plebiscite of the inhabitants. The Peace Treaties after the First World War adopted the method of plebiscite in certain cases. President Wilson approving of the idea of a plebiscite in connection with a number of territorial problems following the First World War observed before the United States Senate : "And there is a deeper thing involved than even equality of right among organised nations. No peace can last, or ought to last which does not recognise and accept the principle that government derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty as if they were property." The Constitution of France (1946) also envisages plebiscite in case of addition of any territory. A cession may be made dependent on the fulfilment of a suspensive condition, *i.e.*, plebiscite confirming the cession. But, as Oppenheim observes : "It is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite."

Legal Aspects of Kashmir Problem.—Jammu and Kashmir, the northernmost State of India, borders on the U.S.S.R., Sinkiang and Tibet in the north and north-east and Pakistan on the west and south-west. With the passing of the Independence Act, 1947, by the British Parliament transferring power to Indian hands, the ruler of Kashmir was at liberty to choose the further consititutional status of the State.

The strong economic pressure resorted to by Pakistan in the beginning later assumed the form of a full-scale blockade against Kashmir. In September 1947, there was concentration of tribesmen at the North-West Frontier Province, who, along with Western Punjab Muslims, trekked into the villages on the border of Kashmir and committed loot, arson and murder. The raiders were highly organised and soon they occupied a large portion of Kashmir territory in the Poonch area and threatened the occupation of Srinagar, the summer capital of Kashmir Government, as a first step to overrunning the whole State.

The Maharaja of Kashmir appealed to the Government of India for military aid. India had no jurisdiction to intervene in the internal affairs of the Kashmir State without its accession to India. To overcome this difficulty, on the 26th of October, 1947, the Maharaja offered to accede the State of Kashmir to India and sent the instrument of accession for the acceptance by the Government of India. On 27th October, 1947, India accepted the accession of Kashmir by which Kashmir became an integral part of India. But for political rather than constitutional reasons, India volunteered that the accession should be subject to a plebiscite of the people to be held after the restoration of normal conditions in the State.

On the 30th of December, 1947, the Government of India, under Art. 35 of the United Nations Charter, referred the dispute to the Security Council and asked the Security Council to call upon the Government of Pakistan to stop giving such assistance by preventing their personnel, both military and civil, from participating in or assisting the invasion of the Jammu and Kashmir State and deny to the invaders access to and use of its territory for operations against Kashmir. Pakistan refused the allegations made by India and made countercharges.

In April, 1948, the Security Council appointed a Commission for the restoration of peace and order by the withdrawal of tribesmen and Pakistani

nationals that had entered that State for fighting. The Commission held numerous consultations with the two Governments and adopted a resolution on Auguts 13, 1948, consisting of cease-fire and truce agreement. The cease-fire order was accepted by both Governments and it became effective from midnight of January 1, 1949. As a result of cease-fire order in Kashmir, the Commission proceeded further and passed another resolution on January 5, 1949, signifying the acceptance by the Governments of India and Pakistan of the various principles as being supplementary to the Commission's resolution of the 13th of August, 1948. It provided for the determination of the question of accession of the State of Jammu and Kahsmir to India or Pakistan to be decided through the democratic method of a free and impartial plebiscite. In accordance with the resolution of January 5, 1949, Admiral Chester Nimitz of the U.S. Navy was chosen by the Secretary-General of the United Nations as Plebiscite Administrator, with the approval of India, Pakistan and Kashmir. Differences, however, arose subsequently inasmuch as Pakistan claimed the so-called Azad Kashmir forces to be a part of the Pakistan Army and refused to liquidate those forces as well as her nationals fighting in any guise in Kashmir until the question of the reduction of India's forces was discussed with the United Nations Commission. This stand was clearly in violation of the resolution of August 13, 1948, which had been accepted by both Pakistan and India.

On the 30th April, 1951 the Security Council appointed Dr. Frank Graham, President of the University of North Caroline, as U.N. representative in Kashmir with instructions to make best endeavours to obtain the agreement of India and Pakistan to a plan for the demilitarisation of the State of Jammu and Kashmir according to the principles contained in the two U.N.C.I.P. resolutions. Dr. Graham in his report presented to the Security Council on October 10, 1952, reported his failure to bring about an agreement between India and Pakistan on the method of demilitarising Kashmir before holding a plebiscite to decide whether Kashmir should accede to India or Pakistan.

In February, 1954, the Kashmir Constituent Assembly finally decided to accede to the Indian Union.

On February 21, 1957, the Security Council requested its President, the representative of Sweden, to examine with the Government of India and Pakistan any proposals which, in his opinion, were likely to contribute towards the settlement of the dispute. In his report Mr. Gunnar Jarring of Sweden, who was the President of the Security Council for the month of February, 1957, observed that in dealing with the problem, he could not fail to take note of the concern expressed in connection with the changing political, economic and strategic factors surrounding the whole of the Kashmir question together with the changing pattern of power relations in West and South Asia. He further expressed that the Council would, furthermore, be aware of the fact that the implementation of international agreements of an *ad hoc* character, which had not been achieved fairly speedily, might become progressively more difficult because the situation with which they were to cope with had tended to change.

Mr. Jarring in his report laid emphasis, in essence, on the fact that a plebiscite now would raise new difficulties and that there was substance in India's contention that the context of Kashmir question had been changed by Pakistan's adherence to military pacts and the opposition of the Kashmir people to the idea of a plebiscite on account of rapid progress already made in Kashmir.

On the 2nd of December, 1957, the Security Council adopted a resolution by which it requested the U.N. representative for India and Pakistan to make recommendations to the parties for further appropriate action with a view to making progress towards the implementation of the resolution of the U.N. Commission for India and Pakistan of August 13, 1948, and January 5, 1949, and towards a peaceful settlement. Dr. Frank Graham, who visited the sub-continent in February, 1958 with a view to securing peaceful ways of settling Kashmir question and implementation of the earlier resolutions of the Security Council, *viz.*, of August 13, 1948, and January 5, 1949, could not, however, succeed in his mission.

It might be recalled that on the eve of the transfer of power to India and Pakistan, Lord Mountabatten made the Indian States practically independent, remarking : "My scheme leaves you with all the practical independence that you can possibly use, and makes you free of those subjects which you cannot possibly manage on your own." All States had acceded, excepting three, *viz.*, Junagadh, Hyderabad and Kashmir, which did not accede either to Pakistan or India on account of the encouragement received from the above statement of Lord Mountbatten. The first controversy between India and Pakistan raged round the declaration of the Nawab of Junagadh to accede to Pakistan and the acceptance of such an accession by the latter. The Pakistan Government then did not emphasize geographical compulsions and a free plebiscite—arguments which were pressed into service by Pakistan in the case of Kashmir. As a matter of fact, on the 7th of October, an official announcement asserted that Junagadh and other States had acceded to Pakistan voluntarily and freely and that the Pakistan Government would not recognise anybody's right to interfere with the free exercise of their choice. It will thus appear that in the case of Junagadh, Pakistan completely ignored the principles of geographical contiguity and plebiscite, and considered the will of the ruler enough justification for agreeing to accession, as in their opinion the ruler of a State had an absolute right to accede to either of the dominions.

The Instrument of Accession by which the State of Jammu and Kashmir acceded to the Indian Union in respect of three subjects was voluntary, although made at a critical time when the freedom of the State was imperilled. But that condition will not invalidate, or detract from the legality of, a perfectly lawful and valid act. The accession of the State was complete in law and in fact on the date when the Instrument of Accession was executed. In the words of Johnson : "The legality of the accession is beyond doubt. On this particular issue Jinnah has been hoist with his own petard, as it was he who chose over Junagadh to take his stand on the overriding validity of the ruler's personal decision."

Taiwan.—The island of Taiwan (Formosa) was ceded to Japan by China by the Treaty of Shimonoseki which was ratified on May 8, 1895. After the Second World War, the island surrendered to Gen. Chiang Kai-shek in September, 1945 and was formally returned to China on 25th October, 1945. It is controlled by the remnants of the Nationalist Government. The Japanese Peace Treaty of September 5, 1951, provides for Japanese renunciation of all rights, title and claim to Taiwan. That may mean surrendering Taiwan to the other parties to the Treaty, who, according to Schwarzenberger, became the co-sovereigns. According to Lung-Chu Chen, the 1951 Japanese Peace Treaty affirmed the colonial status of Taiwan and kept its legal status undetermined pending an international

settlement. The People's Republic of China has, however, claimed that Taiwan is an integral part of its domain. Both the nationalist Government and the People's Republic of China, while agreeing that Taiwan's sovereignty lawfully belongs to China, disagree as to which government really represents and rules China.

According to Lung-Chu Chen, the principle of self- determination should be applied to Taiwan. Imposing any solution about the future of Taiwan against the wishes of its inhabitants is not a solution at all. Taiwan has more people than most of the European countries. Accordingly, a U.N. plebiscite for Taiwan in accord with the principle of self-determination is a pre-requisite and a key to a just and viable solution to the determination of the sovereignty of Taiwan.

Conquest and subjugation.—Conquest is the acquisition of the territory of an enemy through military force in times of war. Oppenheim says that mere conquest does not constitute title unless the conqueror, after having firmly established his conquest, annexes the territory. Such enemy State then ceases to exist and the war is brought to an end. And to such ending of war he terms subjugation. Thus, according to him, subjugation and not conquest is a mode of acquiring territory. Conquered enemy territory, therefore, remains under the sovereignty of the enemy—although actually in possession of the conqueror—till through annexation it comes under the sovereignty of the conqueror. Annexation thus turns the conquest into subjugation. It is thus incorporation of territory without the consent of the legitimate owner. The annexation of Korea by Japan in 1910 or of Abyssinia by Italy in 1936 furnishes examples of this form of acquisition of territory.

It will thus appear that the legal title by conquest arises when the territory is completely occupied and controlled by the military conqueror and the conquering State annexes by his declaration the conquered territory, or when the conquered territory is effectively reduced to possession and annexed by the conquering State.

According to Lord Wright : "A territory changed in national character and acquired that of the conqueror if there were effective subjugation and firm possession with the intention of keeping the conquests, even though, in the event, the dominion of the conqueror was temporary and even though there was either not formal annexation or cession."

The Permanent Court of International Justice noticed the effect of conquest in the *Eastern Greenland case* when it observed : "Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them, sovereignty over territory passes from the loser to the victorious State."

Title by Conquest under the Charter.—Prior to the establishment of the League of Nations or the United Nations and the General Treaty for the Renunciation of War, the right to make war was inherent in a State and title by conquest was perfectly legal. The position has since then changed. Article 2 of the Charter places an obligation upon all members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. The title to conquest, therefore, is illegal when the conquering State is bound by the Charter of the United Nations or the General Treaty for the Renunciation of War. It is legal only when resort to war in a particular case is lawful.

The acquisition of Goa, Daman and Diu by India is an example of acquisition by conquest. They constitute a Union Territory of India under Part II of the First Schedule.

Original and Derivative Methods

It will appear from a review of the above that of the five common modes of acquiring territory cession is a derivative mode of acquisition of territory, while occupation, prescription, accretion and conquest are original modes of acquiring territory. According to Schwarzenberger, conquest forms a hybrid between the two forms of acquisition of territory, *viz.*, original and derivative and, apart from exceptional cases, is not a title to territory, unless followed by cession.

Occupation as a mode of acquisition of territory differs from conquest inasmuch as in the latter, the territory belonged to another State, while in the former, sovereignty is established over such territory as is at the time not under the sovereignty of another State or that which is *res nullius*.

Occupation differs from cession, inasmuch as through the latter the acquiring State receives sovereignty over the territory concerned from the former owner-State by means of a treaty, while in the former, sovereignty is established over a territory which is *res nullius*. Cession is as such a derivative mode of acquisition, while occupation is an original mode of acquiring territory.

And, lastly, the distinction between cession and conquest may also be noted. When a military force occupies a State territory by conquest, which is confirmed by a treaty of peace at the end of the war, the legal title to the territory arises from cession and not from conquest.

Adjudication or Award.—Starke mentions an additional mode of acquisition of territorial sovereignty, namely adjudication or award by a conference of States. This occurs where a conference of the victorious powers at the end of a war assigns territory to a particular State in view of a general peace settlement. The territorial redistribution of Europe at the Versailles Peace Conference, 1919, is an instance in point.

Leases.—There is yet another method of acquiring territory. It is by means of leases. The leasing by China in 1898 of Kaiochow to Germany, Wei-Hoi-Wei and the land opposite the island of Hong Kong to Great Britain, Kuang Chou Wan to France and Port Arthur to Russia for 25 years, and the leasing of the Panama Canal Zone by the Republic of Panama in 1903 to U.S.A. in perpetuity afford examples of acquisition of territory by this mode. Another example of lease is furnished by an agreement between Great Britain and the United States, whereby the former on March 27, 1941, leased to the latter, in exchange for the transfer of certain American destroyers a number of naval air bases in the Carribbean Sea and adjacent waters, viz., Newfoundland, Bermuda, Jamaica, St. Locia, Antigua, Trinidad and British Guiana, for a period of 99 years. The leasing of Tin Bigha corridor by India to Bangladesh for 999 years on June 26, 1992, in tune with the 1974 international agreement between India and Bangladesh is another example of acquisition of territory by this mode.

In the case of lease, the terms of the treaty determine the amount and nature of authority that can be exercised by the lessee over the leased territory. But usually the sovereignty of the lessor State, although resting legally with the lessor State, is more nominal than real.

Spheres of Influence.—Analogous to acquisition of territory by the different modes discussed above, there is a minor right over a territory due to 'sphere of influence' introduced by colonial protectorates. According to Pitt Cobbett, it indicates a region generally inhabited by races of inferior civilisation, over which a State seeks, by compact with some other State or States that might otherwise compete with it, to secure to itself an exclusive right to making future acquisition of territory and generally, also, the direction and control of the native inhabitants. According to Brierly, "The very purpose of this device was that its incident should be vague; and it means no more than that a State, without establishing its jurisdiction or undertaking any responsibility for securing good government, signifies that it regards certain territory as closed to the ambitions of any other powers, probably because it intends some day to convert into a colony or protectorate, or because it regards it as strategically necessary to the security of part of its existing dominions." This arrangement neither confers any territorial rights nor imposes any responsibility on the State in whose favour it is created in relation to non-contracting States. The arrangement is a political act and has no legal significance. It also does not confer any prescriptive right.

Loss of State Territory.—The five common modes of acquiring territory also correspond to those of losing it. Territorial sovereignty may, therefore, be lost by dereliction (which corresponds to occupation as a mode of acquisition), prescription, operations of nature (which correspond to accretion as a mode of acquisition), cession and conquest. To these five modes of loss of State territory may be added as sixth method, viz., revolt.

Cession.—On the acquisitive side, cession is the transfer of sovereignty over the territory of a State by its owner to another State. What the acquiring State thus gains is a loss of the ceding State.

Operations of Nature.—This method corresponds to accretion as a mode of acquiring the territory. As in the case of accretion, the territory of a State may be diminished or lost by natural actions. An island near a shore may disappear by volcanic action or a piece of land attached to a State may be detached by the current of a river and annexed to another riparian State. These operations of nature result in loss of territory to a State.

Subjugation and Prescription.—A State may lose territory by its annexation by a victorious State with the intention of incorporating it into its own territory. In the same way, undisturbed possession of the territory of one State by another during a certain period of time causes its loss to the former. According to Kelsen, these two modes of acquisition of territory are in violation of International Law.

Dereliction.—It corresponds to occupation on the acquisitive side. It frees a territory from the sovereignty of the present owner-State and is completed by abandoning the territory by the owner-State with an intention of withdrawing from it or relinquishing sovereignty over it. Dereliction to be complete must comprise the actual abandonment of a territory and the intention of giving up sovereignty.

Revolt.—Revolt followed by secession of a part of the territory of the owner-State is a mode of losing territory. The examples of secession of territory by means of revolt are to be found in Netherlands breaking off from Spain in 1579, U.S.A. from Great Britain in 1776, Brazil from Portugal in 1822 and Belgium from Netherlands in 1830.

'Tibet under alien subjugation'

GENEVA : On December 24, 1997, International Commission of Jurists (ICJ) said that the Chinese-ruled Tibet was "under alien subjugation" and called for a United Nations-run referendum to decide its future status.

The Geneva-based body, which works to defend the rule of law around the globe, declared in a major report that the autonomy that Beijing argues is enjoyed by the Tibetans was fictitious and that real power lay in Chinese hands.

"It is to maintain its alien and unpopular rule that China has sought to suppress Tibetan nationalists dissent and extinguish Tibetan culture", said ICJ secretary-general Adams Dieng, a lawyer from Senegal in an introduction to the report.

"It is to colonise unwilling subjects that China has encouraged and facilitated the mass movement of ethnic Chinese population into Tibet, where they dominate the region's politics and security, as well as its economy."

The 365-page report, entitled "Tibet : human rights and the rule of law", said that there had been an escalation of repression since the beginning of 1996 in the region, formerly a Buddhist theocracy that was absorbed into China in 1950.

The 365 page report of the International Commission of Jurists (ICJ) said that the Chinese ruled Tibet under alien subjugation and called for a United Nation-run referendum to decide its future status.

The ICJ, which has 80 national sections and is guided by 45 leading world jurists, said political re-education had been stepped up in remaining monasteries and torture and other forms of violence was widely used.

The report asserted that communist party leaders had declared "total war" on the exiled Dalai Lama, the Tibetan spiritual leader who fled into exile in 1959 after an abortive uprising against rule from Beijing.

The authorities were also threatening to extend their campaign to eradicate his influence to schools and villages, and had launched a drive against some aspects of traditional Tibetan culture condemned as "obstacles to development."

CHAPTER XIV

JURISDICTION

A State has jurisdiction over all persons and things within its territory. Such persons may be natural born subjects, naturalised subjects or domiciled aliens. With regard to things they include all property under the control of the State. Its jurisdiction also extends over its own ship in its territorial waters and ports and over all acts committed on them. It has also jurisdiction over its harbours and territorial waters. Its jurisdiction with regard to these persons and things is exclusive and absolute within its territorial supremacy.

With regard to its territorial waters, ships of foreign States have a right of innocent passage. The littoral power has no doubt absolute jurisdiction with regard to revenue, fishery, police powers or sanitation rights in such territorial waters.

The Hague Codification Conference (1930) laid down rules for the exercise of civil and criminal jurisdiction by the coastal State. Articles 8 and 9 provided that a foreign vessel was granted immunity in the territorial waters of a State in respect of crimes committed by persons on board the vessel. But the immunity did not extend if the consequences of the crime extended beyond the vessel, if the crime committed was so serious that it affected the peace and order of the coastal State or if the captain of the ship or the consul of the country to which the vessel belonged asked for the assistance of the local authorities. A coastal State was also prevented from arresting or diverting a foreign vessel passing through the territorial sea for the purpose of civil jurisdiction in relation to a person on board the vessel.

Jurisdiction on the Open Sea.—According to Higgins and Colombos : "The high seas are generally described as so much of the ocean as is exterior to a line running parallel with the shore and some distance therefrom." Oppenheim describes the open sea, or the high seas, as the coherent body of salt water all over the greater part of the globe, with the exception of maritime belt and the territorial straits, gulfs and bays which are part of the sea but not parts of the open sea.

The open sea, apart from territorial waters, is not under the sway of any State. Its freedom is now settled as an accomplished fact. It is an unquestionable proposition of international jurisprudence that high seas are of right navigable by the ships of all States, the reason being that the open sea is incapable of continuous occupation and unsusceptible of permanent appropriation and also because the use of it is inexhaustible and therefore common to all mankind. The liberty of navigation is a fact recognized by all civilised States.

"The ocean", observes Burgh, "is common to all nations for purposes of commerce and as a means of intercourse amongst mankind." According to Grotius : "All property is grounded upon occupation which requires that movable shall be seized and immovable things shall be enclosed; whatever, therefore, cannot be so seized or enclosed is incapable of being made a subject

of property. The vagrant waters of the ocean are thus necessarily free. The right of occupation, again, rests upon the fact that most things become exhausted by promiscuous use and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, that is to say, in neither of the two ways in which it can be used." The above principle received recognition in the case of *Le Louis* when Lord Stowell summed up the rule : "All nations have an equal right to the unappropriated parts of the ocean for their navigation." The rule was followed by Story, J. in the *Marianna Flora* when he said : "Upon the ocean in times of peace all possess an entire equality. It is the common highway of all, appropriate to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there."

Article 87 of the United Nations Convention on the Law of the Sea, 1982, provides that the high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by the present Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States : (a) Freedom of navigation; (b) Freedom of overflight; (c) Freedom to lay submarine cables and pipelines; (d) Freedom to construct artificial islands and other installations permitted under International Law; (e) Freedom of fishing, subject to conditions laid down hereunder; and (f) Freedom of scientific research. These freedoms shall be exercised by all States, with due consideration for the interests of other States in their exercise of the freedom of the high seas, and also with due consideration for the rights under the present Convention with respect to the activities in the Area, *i.e.*, the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.

The high seas shall be reserved for peaceful purposes. (Art. 88). No State may validly purport to subject any part of the high seas to its sovereignty. (Art. 89). Every State, whether coastal or land-locked, has the right to sail ships under its flag on the high seas. (Art. 90).

A State can, however, exercise jurisdiction on the high seas in the following matters :

1. In respect of its vessel and the things and persons thereon;
2. In respect of piratical acts. Under the provisions of Article 105, on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a private ship or aircraft, or a ship taken by piracy and under the control of pirates and arrest the persons and seize the property on board.
3. In respect of a foreign vessel wrongfully flying its flag;
4. In respect of the right of visitation and search of neutral merchantmen by a belligerent to ascertain if they are attempting to break blockade or are carrying contraband or rendering unneutral services to the enemy;
5. In respect of the right of 'hot pursuit' on the open seas in peace time when foreign vessels after having committed some breach of the local law within its territorial waters escape to the open sea, provided they are chased immediately.

Legal conceptions on the freedom of the high seas.—There are two

different views with regard to the legal conceptions on the freedom of the high seas. The first is that the high sea is a thing belonging to nobody, *i.e.*, it is *res nullius* on the ground that sovereignty is conspicuous by its absence on the high seas. The second is that high sea is a thing belonging to everybody, *i.e.*, it is *res communis* on the ground that the sea is a necessary instrument to international navigation and trade and as such common to all. Both the views are not free from comment. Fauchille observes that if it be admitted that the sea is *res nullius*, this in Roman Law signified that the thing, though unowned, was capable of ownership, which is not the case with the high seas. On the other hand, if the sea be regarded as *res communis*, this means that all the States are owners in common, it being the property of the collectively of States. But community of ownership, he observes, means the possibility of partition and so of separate ownership. Fauchille, therefore, concluded that the right view is that the usage of the sea remains eternally open to all the nations. Higgins and Colombos share this view when they observe that the legal position of the high sea is based on the conception that it is common and open to all nations.

The Institute of International Law summed up the principle of the freedom of the sea as implying the following consequences : (i) freedom of navigation on the high seas, subject to the exclusive control, in the absence of a convention to the contrary, or the State whose flag is carried by the vessel; (ii) freedom of fisheries on the high seas, subject to the same control; (iii) freedom to lay submarines on the high seas; and (iv) freedom of aerial circulation over the high seas.

Public Ships.—Public ships in foreign ports are exempt from local jurisdiction, though they are subject to local regulations of the port. A ship bearing the national flag of the State is for purposes of jurisdiction regarded as the floating territory of that State, whether the ship is on the high seas or within foreign territorial waters. This topic has been discussed in detail in a subsequent chapter.

Piracy.—A State has jurisdiction over all pirates seized by its vessels. Piracy is an act of robbery on the seas or an armed violence at sea which is not a lawful act of war. Such acts are not authorized by any sovereign State. It is a crime in International Law as it is an offence against the whole body of civilized States and is not directed against any particular State.

Fisheries in the Open Sea.—On account of the freedom of the open sea, it is clear that the fisheries thereon are open to vessels of all nations. Fish and marine mammals are not "property" until caught and hence every State is empowered to legislate for the exercise of the right of fisheries by its vessels on the open sea. It is, however, recognised that unlimited fishing at all seasons might seriously deplete the seas of fish. This has necessitated the various Conventions [e.g., The North Seas Convention of 1882, Behring Sea Seal Fisheries Convention, 1911, Washington Convention for the Preservation of 'Sockeye' Salmon and Whales, 1930, and the Protocol on the International Regulation of Whaling (1944) for the regulation of fisheries].

In the case of maritime belt, however, the littoral State has full liberty to reserve the fisheries to its own subjects.

The International Court of Justice observed in the *Fisheries case* :

"The delimitation of sea areas has always an international aspect : it cannot

be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon International Law."

The question of the breadth of the territorial sea and that of the extent of the coastal State's fishery jurisdiction were left unsettled at the 1958 Geneva Conference on the High Seas.

The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial seas; the extension of the fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries, and to be implemented by agreement between the States concerned, either bilateral or multilateral, and, in case of disagreement, through the means for the peaceful settlement of disputes provided for in Article 33 of the Charter of the United Nations.

Under the provisions of Article 116 of the United Nations Convention on the Law of the Sea, 1982, all States have the right for their nationals to engage in fishing on the high seas subject to : (a) their treaty obligations; and (b) the rights and duties as well as the interest of coastal States. All States have the duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. States shall co-operate with each other in the management and conservation of living resources in the areas of the high seas. In determining the allowable catch and establishing other conservative measures for the living resources in the high seas, States shall : (a) adopt measures which are designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and any generally recommended sub-regional, regional or global minimum standards; and (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

Under the provisions of Article 66 of the Convention, States in which rivers foster the growth of anadromous stocks shall have the primary interest in and responsibility for such stocks and shall ensure their conservation by the establishment of appropriate regularity measures for fishing in all waters landward of the outer limits of its exclusive economic zone.

Bed of the Sea.—It has been held in successive cases by British Courts that the Crown is the owner of the bed of the sea. It was observed by Parker J., in *Lord Fitzardinge* v. *Purcell* that clearly the bed of the sea, at any rate for some distance below water-mark, and the beds of tidal navigable rivers, are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership.

To the same effect are the observations of Lord Watson in *Lord Advocate* v. *Wemyss*, "I see no reason to doubt that by the law of Scotland the *solum* underlying the waters of the ocean, whether within the narrow sea or from the coast outward to the three-mile limit, and also the minerals beneath are vested in the Crown."

On the basis of the above two cases, Lord Shaw observed in the case of *Secretary of States for India* v. *Chellikami Rama Rao* : "The Crown is the owner, and the owner in property of islands arising in the sea within the territorial limits of the Indian Empire. It should be added with reference to suggestion that the territory of the Crown ceases at low water-mark and that the right over what extends seawards beyond is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this principle. There is nothing to recommend a local jurisdiction over a space of water lying above a "*res nullius*." As to practical results, the confusion that might be produced by leaving islands emergent within the three-mile limit to be seized by first comer is obvious."

Summing up his conclusions in his authoritative treatise, Sir Cecil Hurst observes : "So far as Great Britain at any rate is concerned, the ownership of the bed of the sea within the three-mile limit is the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea. The claims have become restricted by the silent abandonment of the more extended claims. Consequently, where effective occupation has been long maintained of portions of the bed of the sea outside the three-mile limit, those claims are valid and subsisting claims, entitled to recognition by other States."

"The claim to the exclusive ownership of a portion of the bed of the sea and to the wealth which it produces in the form of pearl oysters, chanks, coral, sponges or other *fructus* of the soil is not inconsistent with the universal right of navigation in the open sea or with the common right of the public to fish in the high seas."

Subsoil under the Sea.—The old theory that since the high sea is the property of no State, the bed and the subsoil beneath the bed of the open sea cannot come under the sway of any State has now been discarded. The modern practice with regard to the appropriation of the continental shelf admits that the sub-soil beneath the bed of the high seas can be occupied by the coastal State to exploit its resources, to construct mines or tunnels and the like. Although no rules have so far been formulated which could be termed as law governing States, yet the practice of States regards the exploitation of the sub-soil beneath the sea-bed as perfectly justified in accordance with the spirit of the modern age. Thus, the coal mines of Comberland (in Great Britain) by means of the process of underwater excavation have been extended to such a large extent that a portion of the subsoil beneath the bed of the high seas meets with the mines. Again, France and Britain had long contemplated to construct a tunnel between

the two States under the bed of the English Channel and though the proposed project could not be accomplished because of the lack of popular interest over the whole matter, no States have challenged the legality of such a desire.

Atomic Tests over High Seas.—The conducting of nuclear experiments over high seas is a clear violation of International Law. Among the principles laid down by the International Law Commission one is that high seas were open to all nations and no nation might validly purport to subject any part of them to its sovereignty. From this it follows that the right to exercise sovereignty on the open sea is denied by law whatever the period and whatever the area. When a nation engaged in nuclear experiments declares an area of the open sea as prohibited area, it in effect reserves that area for its own uses, appropriates it and exercises dominion over it. This is subjecting part of the sea to its own sovereignty and such claims to sovereignty are opposed to whole history and development of law during the past few centuries.

On November 27, 1978, the U.N. General Assembly's main political committee adopted a resolution declining the use of nuclear weapons as a violation of the U.N. Charter and a crime against humanity. On December 1, 1978, it approved a resolution viewing with grave concern the continued testing of nuclear weapons by the weapon-States against the expressed wishes of the majority of member States.

Peaceful uses of sea-bed.—On December 21, 1968, the United Nations General Assembly adopted a resolution on reservation of sea-bed and ocean floor for peaceful purposes. It recognised that it is in the common interest of all nations that the exploration and exploitation of the resources of the sea-bed and the ocean-floor, and the sub-soil thereof, should be conducted in such a manner as to avoid infringement of the other interests and established rights of nations with respect to uses of the sea.

In 1969, the General Assembly declared that, until an international agency was established, no State shall exploit the resources of the sea-bed and ocean-floor beyond national jurisdiction.

On December 17, 1970, the General Assembly of the United Nations while planning for a Third United Nations Conference on the Law of the Sea in 1973, adopted a "Declaration of Principles" which, *inter alia*, laid down that the sea-bed beyond the limits of national jurisdiction and its resources shall constitute a "common heritage of mankind", *i.e.*, a space not subject to appropriation by individual States of persons and to be exclusively used for peaceful purposes, for the benefit of mankind as a whole, to be administered and exploited by the international community as such. The regime to be given effect by an appropriate international machinery shall provide for the orderly and safe development and rational management of the area, taking into particular consideration the interests and needs of the developing States as well as the need to preserve the marine environment and the resources of the area. All States, whether coastal or land-locked, shall have access to the area and its resources without discrimination and in accordance with the regime to be established.

The fifty land and shelf-locked States, (*viz.*, 28 States having no sea-coast and 22 States who are shelf-locked, i.e., States whose legal continental shelf is entirely cut off from the ocean floor beyond the limits of national jurisdcition) who form more than one-third of the international community, suffer from the

existing law of the sea, inasmuch as these States have no enforceable right of access to the sea and no right of transit through the territory of neighbouring coastal States. The position has since been changed. Under the Convention on the Law of the Sea, 1982, land-locked States would have the right of access to and from the sea, and would enjoy freedom of transit through the territory of transit States by all means of transport.

Peaceful Uses of Outer Space.—The question which crops up is what is space law ? In most general terms, space law is defined as a special branch of International Law, constituting a collection of rules and principles regulating the relations between States in the exploration and use of outer space.

G.P. Zhukov has thus defined the term : "Space law may be defined as a sum total of International Law rules governing relations among the States and their relations with international organisations in the sphere of space research, and establishing an international law regime for outer space and celestial bodies in accordance with the fundamental principles of International Law."

Space law is a "branch of International Law representing the sum total of the juridical rules and principles regulating the legal relations between States in the process of their co-operation and competition in exploring and using outer space for peaceful purposes exclusively." This definition underlines the independent character of national space programmes and removes from the sphere of space law, as unlawful any agreements, providing for the use of open space for military purposes.

Soviet jurisprudence on space law thus proceeds from the concept that this is a new separate branch of international law, but within the framework of the general system of international law. For an appropriate group of rules and principles to form a new, independent branch of International Law, it is sometimes enough to draw up a special international convention on the rights and obligations of States, thereby giving enactment to the existing principles and rules governing the behaviour of States in this area of relations. These rules and principles, just as any other branch of International Law, must be founded on the fundamentals of international law, including the *jus cogens* principles.

The various space treaties may be discussed as under :

(A) Nuclear Weapons Test Ban Treaty of 1963.—There is first the Nuclear Weapons Test Ban Treaty of 1963 under which each of the State Parties to the treaty "have undertaken to prohibit, to prevent, not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control (a) in the atmosphere, beyond its limits, including outer space..... or (b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State."

(B) Treaty on the Exploration of Outer Space, 1967.—The Treaty on the Principles governing the Activities of States in the Exploration of Outer Space, including the Moon and other Celestial Bodies commended to the States by the General Assembly and containing principles to be observed in the exploration and use of outer space, was signed on January 27, 1967, and came into force on October 10, 1967. The accretion of this treaty to the law of nations has forged a permanent disarmament agreement for outer space.

The treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, provides that there shall be freedom of scientific investigation in outer space, including the Moon and other Celestial Bodies, and States shall facilitate and encourage international co-operation in such investigation; and that outer space, including the Moon and other celestial bodies was not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. Further, the Moon and other Celestial Bodies shall be used by all State Parties to the treaty exclusively for peaceful purposes and the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on Celestial Bodies shall be forbidden. In order to promote international co-operation in the peaceful exploration and use of outer space, State Parties to the treaty conducting activities in outer space, including the Moon and other Celestial Bodies, have agreed to inform the Secretary-General of the United Nations of the nature, conduct, locations and results of such activities to enable him to disseminate it immediately and effectively.

(C) Agreement on the Rescue of Astronauts, 1967.—Besides the treaty, there is an agreement which came into effect on December 3, 1968, on the rescue and return of astronauts and the return of objects launched into outer space, under which parties agree to procedures for aiding the crews of spacecraft in the event of accident or emergency landing.

On January 21, 1971, the Academy of Sciences of the USSR and U.S. National Aeronautics and Space Administration signed an agrement for better co-operation in space efforts. It aims at exchange of information and joint endeavours in the fields of meterology, natural environment, space biology and medicine and space exploration.

(D) Convention on International Liability for Damage caused by Space Objects, 1971.—The Convention on International Liability for Damage caused by Space Objects was commended by the General Assembly on November 29, 1971, and entered into force in 1972. It provides that a launching State is liable for damage caused by objects sent into space. The Convention establishes legal responsibilities for State launching space objects which results in damage on the surface of the earth or to aircraft in flight. The Convention provides for the establishment of a Claims Commission in case there is no settlement between the State which suffers damage and the launching State.

(E) Convention on Registration of Objects Launched into Outer Space, 1975.—On November 12, 1974, the U.N. General Assembly unanimously adopted a resolution governing activities of States in the exploration and use of outer space. The new resolution sets forth Convention on Registration of Objects launched into outer space. A State launching a space object is required to register with the Secretary-General the name of the launching State(s), the designator of the space object, the date and location of the launch, the basic arbitral parameters and the general function of the space object.

(F) Agreement governing Activities of States on the Moon and Other Celestial Bodies, 1979.—After tough negotiations lasting seven years, the United Nations Outer Space Committee reached agreement in June-July, 1979, on a draft treaty on the Moon, proclaiming that its unexplored natural resources shall be the common heritage of mankind. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means. The draft evolved by the 47-nation committee after being

adopted by the General Assembly would be deemed to have taken effect after five nations ratify it.

(G) Vienna Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE, 82).—The Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space was held at Vienna from August 9 to August 22, 1982. The Conference adopted a report by consensus and appealed to the States to adhere to Outer Space Treaty, 1967, which prohibits the use of weapons of mass destruction in outer space in any manner, whatsoever. The 1967-Treaty envisages that outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. The Conference recognised that legal control over all activities in the Outer Space may not be possible and that a large part of future Outer Space Law should be institutional, *i.e.*, governing the relationships between the concerned international and national agencies, such as the United Nations Committee on the peaceful uses of Outer Space, the International Telecommunication Satellite Organization (INTELSAT), the European Space Agency (ESA), etc.

Space Law and Satellites.—I. Remote Sensing by Satellites. II. Direct Broadcasting by Satellites.

I. Remote Sensing by Satellites.—The vast ocean of knowledge and the enormous potentialities arising from the use of satellites have, while opening new vista of hope for the emancipation of mankind, posed serious international implication by their misuse. There is a conflict of views among nations about the use of remote sensing satellites and direct broadcasting by satellites. The question which crops up is whether or not prior consent is needed for a launching State to conduct remote sensing activities over the territory of another State. The next question which bristles with difficulty is whether the information obtained could be distributed to third parties without the consent of the sensed State.

Article 1 of the Outer Space Treaty, 1967, permits dissemination of co-operatively acquired data for the benefit of all countries. Article 4 of the Treaty provides that space is meant for being used for peaceful purposes, but Article 9 envisages international co-operation, regard being had to the corresponding interests of the other State Parties to the Treaty.

The conclusion of an international agreement and the drawing up of an international instrument may be the ultimate goal which is far-reaching; and, therefore, it would be more feasible to frame rules governing the relationships between the numerous international and national agencies, such as the United Nations Committee on the Peaceful Uses of Outer Space, the International Telecommunications Satellite Organisation (INTELSAT), the International System and Organisation of Space Communications (INTERSPUTNIK), the European Space Agency (ESA), the United States National Aeronautics and Space Administration (NASA), and the allied organisation CNES in France.

The remote sensing by satellites may also be used for gathering data about pollution of environment. There ought, therefore, to be some agreement about the dissemination of the data obtained by remote sensing among States keeping in view the specific interests of the detecting State and priority of access to processed data to the sensed State.

Considering the enormous potential benefits for the world population which can flow from the application of this new technology, including an increase of world food output, finding new materials, water and energy resources, and the foreseeing of catastrophes such as volcanic eruption, it is necessary that the U.N. Committee on Outer Space should devise guidelines with a view to collating all data obtained both from environmental as well as from earth resources surveying and should implement the principle that remote sensing activities be conducted for the benefit and interest of all mankind.

II. Direct Broadcasting by Satellites.—It is agreed on all hands that under the terms of the Treaty of Outer Space, 1967, the stationing of geostationary satellites is a legally permissible use of outer space. Direct broadcasting, however, opens an entirely new dimension in international communications which would speed up and enhance the free flow of information, expand cultural exchanges and promote the universal dissemination of knowledge thus contributing to increasing interdependence among nations. With this potentiality, there has been a divergence of views about obtaining prior consent of the concerned State where direct broadcasting by the State was likely to be received by the concerned State. The United States and some other countries adhering to the principles of freedom of information to be a fundamental human right has opposed the establishment of a system of prior consent. The Soviet Union, however, has not agreed with the principle of freedom of information being a fundamental human right and referred to the impact direct broadcasting might have on national security, fundamental, political, social, cultural and economic values.

The United Nations Outer Space Legal Sub-Committee has achieved considerable progress on the elaboration of principles for direct television broadcasting with a view to conducting an international agreement or agreements.

Imperial Jurisdiction over Nationals.—A State can exercise personal jurisdiction over its nationals for acts committed abroad when such nationals return again within the jurisdiction of the State. In *Earl Russel's* case, Earl Russel, a British peer, married in England and subsequently married in Nevada during the life-time of his first wife, having obtained an order of divorce from the Courts of Nevada. He was indicted for bigamy and convicted. It was held there that imperial jurisdiction was independent of place and depended on the national character of the person over whom it was exercised.

Many States, however, claim jurisdiction over the acts of foreigners committed abroad when they enter their territory. Such jurisdiction is claimed only in respect of offences which endanger their security and affect their credit or nationals.

Civil and Criminal Jurisdiction.—States also claim jurisdiction over foreign private vessels in respect of criminal acts as also in respect of municipal offences committed by them in their territorial waters but escaping to the high seas. Civil Jurisdiction extends to obeyeing the harbour regulations and quarantine rules. If any private vessel is driven by distress of weather or *vis major*, i.e., by an act of God, the local law of the port is also not applied to it. But the ship must not violate any law of the coastal State.

Merchant vessels in foreign ports have also no immunity from a civil suit *in rem* brought by a citizen of the foreign State and the officers and crew of the

vessels are also not immune from a civil suit *in personam* or from criminal prosecution by the foreign Government for contravening the State laws. The American courts claim jurisdiction in respect of foreign merchant vessels if the offence is a serious one.

In the case of *Creole*, the American vessel had on board, early in November, 1841, a cargo of 135 slaves. The vessel was sailing from Virginia to New Orleans. As there was a mutiny on board the ship, many crew were killed by the slaves. The ship entered the port of Nassau, in the Bahamas, a British port, on account of weather conditions. Slavery was an offence in Nassau and accordingly the British authorities at the port detained some of the slaves for murder and set free rest of them. On a protest made by the American Government, the matter was referred to arbitration where it was held that the authorities of Nassau acted in violation of the established law of nations in liberating a number of slaves who had revolted against the officers of the ship.

In the case of the *S.S. Lotus*, jurisdiction was claimed by Turkey over an act committed on the open sea by a French steamship the effect of which was produced on board the ship of the former State. The facts of the case, shortly stated, were that on August 2, 1926, a collision occurred between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt*, resulting in the loss of the latter and the death of eight Turkish nationals who were on board. When the *Lotus* arrived at Constantinople, the Turkish Government instituted joint criminal proceedings against the *Lotus* on a charge of manslaughter, and they were both sentenced to imprisonment. The French Government made diplomatic representations for the release of the French officer and claimed exclusive jurisdiction over acts committed on its ships on the high seas. The Turkish Penal Code had, however, provided for jurisdiction over foreigners who committed acts against Turkey or Turkish subjects. The dispute as to jurisdiction was referred by agreement to the Permanent Court of International Law in instituting criminal proceedings against the French officer because the act committed on board the *Lotus* produced its effect on board the *Boz-Kourt* flying the Turkish flag and consequently in a place assimilated to Turkish territory in which the application of the Turkish Criminal Law could not be challenged even in regard to offences committed there by foreigners. The Court also expressed the opinion that there was no rule of International Law prohibiting the State to which the ship on which the effects of the offence had taken place belonged from regarding the offence as having been committed in its territory and accordingly prosecuting the delinquent.

In the case of *Chung Chi Cheung* v. *The King*, Lord Atkin while delivering the decision of the Privy Council observed that the immunities granted to public ships and the naval forces extended to the internal disputes between the crew and that the local courts would not exercise jurisdiction over offences committed on board the ship by one member of the crew upon another unless the flag-sovereign elected to waive jurisdiction.

In another case, *Joyce* v. *Director of Prosecutions*, the facts of which were slightly dissimilar, even the House of Lords in 1945 upheld the conviction of William Joyce, popularly known as Lord Haw Haw, for high treason, although he was born in the United States. He had in September, 1939 entered in the service of the German Radio Company of Berlin as an announcer of British news. He had resided in England between 1921 and 1939, when he applied for

the passport describing himself as a British subject born in Ireland. The House of Lords held that, although William Joyce was not in law a British subject, he had by his own act maintained the bond which, while he was within the realm, bound him to his sovereign.

Position of foreigners in a foreign State.—A State has as much jurisdiction over foreigners as over its own citizens. This rule has been recognised because a foreigner cannot disobey the laws of the State where he happens to reside, though temporarily. But the State cannot claim a right to try a foreigner for what he had done in his own country before his arrival in the foreign State. In the *Cutting* case there arose a dispute between the United States and Mexico. Cutting was an American national. He had published an article in America against a Mexican citizen, then in Mexico. The Mexican Government arrested Cutting when he went to Mexico in 1886 for his writing on a previous occasion, which amounted to libel. The United States Government demanded his release as the offence of Cutting did not commence and was not completed in Mexico and contended that the Mexican Government had no jurisdiction. The Mexican Government acceded to the viewpoint of the United States.

Exterritoriality.—The exception to the rule that a State has as much jurisdiction over foreigners as over its own citizens is provided by the exterritoriality of States. It is a legal fiction by which certain persons and things are deemed for the purpose of jurisdiction and control to be outside the territory of the State in which they really are, and within that of some other State. The right of exterritoriality is founded upon the principle that it would be offensive to a State if its legal status could be determined by the courts of a co-ordinate State.

Chief Justice Marshall in *Schooner Exchange* v. *McFaddon* [1812, 11 U.S. (7 Cranch) p. 116] said : "This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that exclusive territorial jurisdiction which has been stated to be the attribute of every nation."

Immunities from territorial jurisdiction are granted to the following :

(1) Sovereigns whilst travelling or resident in foreign countries.—This privilege is extended to sovereigns even when they are in another State *incognito*. In the British case of *Mighell* v. *Sultan of Johore*, decided in 1893, the plaintiff Mighell brought a suit for breach of promise of marriage against the defendant, Sultan of Johore, who had been living *incognito* under the assumed name of Albert Baker. Upon being sued, the defendant disclosed his real character as Sultan of the independent State of Johore in the Malay Peninsula, whereupon the Court dismissed the proceedings for want of jurisdiction. Lord Esher M.R. observed in the case : "The principle.....is that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its court any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and

therefore, but for the common agreement, subject to its jurisdiction."

In the case of *Statham* v. *Statham and the Gaekwar of Baroda*, one George Wellington Statham prayed for dissolution of his marriage on the ground of the adultery of his wife Beatric Alice Statham with the Gaekwar of Baroda, who was impleaded as a co-respondent in the suit. The co-respondent objected to his being impleaded and prayed for the dismissal of the suit on the ground that he was a reigning sovereign, not amenable to the jurisdiction of the Court. The Court, relying on a certificate from the India Office that the Gaekwar of Baroda though not independent, exercised as a ruler of a State the attributes of sovereignty accepted the objection and dismissed the suit.

An accepted rule of law is that courts should recognise the immunity of a foreign sovereign. Historically, the rule may be traced to a time when most States were ruled by a personal sovereign who, in a very real sense, personified the State. The doctrine of foreign sovereign immunity cuts across the rights of individuals when governments engage in commercial or industrial activities reserved in many countries for private enterprise.

(2) Foreign States and Sovereign Immunity.—A foreign State cannot be made a party to a proceeding in some other State. In the case of the *Cristina*, it was observed by Lord Wright that there are general principles of International Law according to which a sovereign State is held to be immune from the jurisdiction of another sovereign State. This is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of International Law, accepted among the community of nations. This rule, however, does not apply in the case of companies which are wound up and in whose assets a foreign State sovereign has an interest.

In the case of the *Cristina*, the observations of Lord Summer in *Duff Development Company* v. *Kelantan Government* were quoted with approval : "The principle is well settled that a foreign sovereign is not liable to be impleaded in the municipal courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff or by appearing as a defendant without objection."

Lord Atkin further observed in the *Cristina* that the two propositions of International Law engrafted into our domestic law which seem to be well established and to be beyond dispute are : The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damage. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

Lord Denning in *Rehinitoola* v. *The Nizam of Hyderabad* had initially advocated the adoption of the restrictive theory of sovereignty in English law.

In the case of *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan*, Lord Denning, M.R. observed in his leading judgment in the Court of Appeal that the general rule is for sovereign immunity and against the right to implead a foreign sovereign. This general rule is, however, subject, *inter alia*, to the following four exceptions, *viz.*, first, a foreigner has no immunity in respect of land situate in England; secondly, a foreign sovereign has no immunity in respect of trust funds

here or money lodged for the payment of creditors; thirdly, there is no immunity with respect to debts incurred in England for services rendered to foreign property situate in England; and, fourthly, a foreign sovereign has no immunity when it enters into a commercial transaction with a trader in England, and a dispute arises which is properly within the territorial jurisdiction of English courts. The other two Lords, Lawton, L.J., and Scarman, L.J., however, did not specifically subscribe to the exceptions enunciated by Lord Denning and left the matter to be altered by the appropriate judicial or legislative body, if required, adding that it was not open to the Court of Appeal to apply a new rule or view developing in the international field if it be inconsistent with a rule already incorporated into their law by a decision of the Court of Appeal or House of Lords.

In the case reported in *Owner of the ship 'Philippine Admiral' v. Wallen Shipping (Hong Kong) Ltd. and others*, Lord Cross while delivering the judgment of the Judicial Committee of the Privy Council held that there is no apparent reason for the exemption from suit of one party to a commercial transaction. It confirmed the Full Bench decision of the Supreme Court of Hong Kong and held that the restrictive theory applied, at least in action *in rem*.

The United States of America enacted the Foreign Sovereign Immunities Act, 1976, on October 21, 1976, to be effective from January 19, 1977. The Act has codified the restrictive principle of immunity as recognised in International Law and applied in litigation before U.S. courts. Under the Act, the immunity of a foreign State is restricted to suits involving a foreign State's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). The Act further transfers the determination of sovereign immunity from the executive branch to the judicial branch; the responsibility for deciding the issue of sovereign immunity now rests exclusively with the courts. The Act incorporates international law on sovereign immunity into domestic law of the United States of America.

In *A.M. Qureshi* v. *Union of Soviet Socialist Republics*, the plaintiff claimed to have entered into a contract with the Union of Soviet Socialist Republics and its Trade Representation for supply and for commission for supply of goods (jeeps and trucks) to Pakistan Government and alleging breach of contract on the part of U.S.S.R. and its Trade Representation filed a suit and claimed damages. A preliminary objection was taken that the courts in Pakistan had no jurisdiction to try such a suit against a foreign sovereign. The objection prevailed in the High Court before a Single Judge as well as in Letters Patent Appeal. On appeal being filed before the Supreme Court of Pakistan, it was held that there was no jurisdictional bar on the part of Pakistan Courts to try such suits and the case was remanded to the High Court for trial on merits.

The Supreme Court of Pakistan held that the Vienna Convention, 1961, doctrines of comity and equality, treaty between Pakistan and U.S.S.R. and diplomatic certificate issued by the Government of Pakistan did not bestow immunity from jurisdiction in a commercial and trade transaction entered into between a Pakistan citizen and U.S.S.R. and its Trade Representation.

Section 86(1) of the Code of Civil Procedure has the effect of modifying to a certain extent the doctrine of immunity recognised by the International Law. The section provides that foreign States can be sued within the municipal courts of India with the consent of the Central Government and upon such consent

being granted as required by section 86(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure.

The basis of the absolute theory of sovereign immunity, *viz.*, dignity, equality and independence of a foreign sovereign, as emphasized by Lord McMillan in the *Cristina* has been emasculated by increased State trading through the medium of public corporation; and as Sir Hersch Lauterpacht has aptly observed, the strained emanations of the notion of dignity are an archaic survival and they cannot continue as a rational basis of immunity. This aspect of the matter has aptly been discussed by M. Sornarajah when he observes : "The more important reason advanced for abandoning absolute immunity of foreign sovereigns has been the ending of a *laizzez faire* economic system and the beginning of trading through public corporations. State trading through public corporation is not confined to socialist countries. Developing countries as well as industrialised States trade on international markets through State corporations. The wide prevalence of State trading has brought about a change in attitudes to sovereign immunity and it is generally accepted that a State which seeks to trade through public corporations should not be allowed to plead sovereign immunity and thereby avoid the commercial obligations it has undertaken. The restrictive theory of immunity, it can safely be concluded, has come to receive acceptance within the international community."

Under the doctrine of International Law, sovereign States enjoy absolute jurisdictional immunity in the courts of each other. But in spite of the aforesaid doctrine of immunity, every sovereign State can make its own laws in relation to foreign States to sue and to be sued in its municipal courts. The doctrine of absolute immunity in favour of foreign States being used in courts in India has not been accepted in India and under Section 86, Civil Procedure Code, 1908, the only immunity that the foreign States enjoy is a limited immunity from being sued without the consent of the Central Government.

Immunity of foreign States to be sued in the domestic forum of another State was and perhaps still is part of the general International Law and international order. As Professor H. Lauterpacht writes in "The British Yearbook of International Law, 1951" that the assumption of jurisdiction over foreign States by the domestic court was considered at one point of time to be contrary to the dignity of the foreign States and as such inconsistent with the international courtesy and the amity of international relations. This has been in the past a persistent theme of judicial decisions.

Section 86(1), C.P.C. is the statutory provision covering the field which would otherwise be covered by the doctrine of immunity under the international law. A foreign State in India if it fulfils the conditions stipulated in section 86(2), C.P.C. would be liable to be sued in this country. That would be in conformity with the principles of International Law as recognised as part of our domestic law and in accordance with our Constitution and human rights.

Sections 86 and 87, C.P.C., are intended to save the foreign States from harassment which would be caused by the institution of a suit, but except where the claim appears to be patently frivolous, the Central Government should normally accord consent or give sanction against foreign States unless there are cogent political and other reasons. Normally, however, it is not the function of

the Central Government to attempt to adjudicate upon the merits of the case intended to be made by the litigants in their proposed suits. It is the function of the courts of competent jurisdiction.

(3) Ambassadors and other diplomatic agents.—The immunity is absolute in the case of criminal jurisdiction but qualified in civil jurisdiction for the diplomatic agents can waive the immunity from civil jurisdiction. The immunity extends to the family of the diplomatic agents and their suites.

(4) Public vessels whilst in foreign ports or territorial waters.—In the case of *Schooner Exchange* v. *McFaddon* the *Exchange* was a vessel owned by two American citizens which had been seized by officers of the Emperor Napoleon in December, 1810 and commissioned as a public vessel of France. When the vessel arrived at the port of Philadelphia, a suit was brought by the original owners. The Supreme Court held that, although the vessel had originally belonged to American citizens, nevertheless the public character of the vessel now exempted it from the jurisdiction of the American Courts.

In the case of the *Parlemant Belge*, the Court of Appeal of England, reversing the judgment of the High Court of Admiralty, held that a publicly owned vessel of the State of Belgium was exempt from a suit *in rem* for damages arising out of a collision.

According to Oppenheim : "It is a customary rule of the law of nations that men-of-war and other public vessels of any State are, whilst on the open sea as well as in foreign territorial waters, in every point considered as though they were floating parts of their home States." A public armed ship constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign and as such it is a principle of public law that national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction.

The armed forces of a State when passing through foreign territory.—A State which admits to its territory an armed force of a friendly foreign power impliedly undertakes not to exercise any jurisdiction over the force collectively or its members individually which would be inconsistent with its continuing to exist as an efficient force available for the service of its sovereign.

Foreigners of European or American extraction, when resident in certain eastern States where the standards are different from or inferior to the western countries.—They are exempted from territorial jurisdiction or the authority of the native Courts and are usually placed under the jurisdiction of the Consular Courts. The U.S.-Japan Security Pact of February 28, 1952, provided for the United States Services in Japan to retain exclusive jurisdiction over United States personnel and their dependants.

With the independence of Eastern States and growing consciousness of their right of self-determination, such immunities to Europeans or Americans are becoming almost non-existent.

The International Court of Justice, while upholding the French position on the extent of U.S. Consular jurisdiction in the French zone of Morocco, held in the *Rights of Nationals of the United States of America in Morocco* that the competence of consular courts was restricted to disputes betwee U.S. citizens and did not extend to "mixed disputes."

CHAPTER XV

PIRACY

A pirate is an enemy of the whole human race, *hostis humani.* He is outlawed by the law of all nations, his act being one directed against the whole body of civilized States.

1. Definition

Molley in his book "A Treatise of Affairs Maritime and of Commerce" defines a pirate as : "A sea thief or *hostis humani generis* (the enemy of the whole human race) who to enrich himself either by surprise or open face sets upon merchants or other traders by seas." He clearly does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attempt. Hall states : "The various acts which are recognized or alleged to be piratical may be classed as follows : robbery or attempt at robbery of a vessel, by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use." It was observed by Viscount Sankey, L.C. in answer to the question referred to by His Majesty in Council *In re Piracy Jure Gentium* that the actual robbery is not an essential element in the crime of piracy *jure gentium* (piracy under International Law). A frustrated attempt to commit piratical robbery is equally piracy *jure gentium.* In that case the Privy Council refrained from giving a definition of piracy but favoured the definition of Kenney : "Piracy is an armed violence at sea which is not a lawful act of war."

Article 101 of the United Nations Convention on the Law of the Sea, 1982, defines piracy so as to consist of any of the following acts, *viz.*, (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed : (i) on the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in sub-paragraphs (a) and (b). (Art. 101).

The acts of piracy, as defined in Article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft. (Art. 102).

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. (Art. 103).

Wikipedia—Piracy is a war-like act committed by private parties (*not affiliated with any government*) that engage in acts of *robbery* and/or *criminal violence* at *sea*. People who engage in these acts are called **pirates.**

The term can include acts committed in other major bodies of water or on a *shore.* It does not normally include crimes committed against persons travelling on the same vessel as the perpetrator (e.g. one passenger stealing from others on the same vessel). The term has been used to refer to raids across land borders by non-state agents.

Britannica Concise Encyclopedia : Illegal act of violence, detention, or plunder committed for private ends by the crew of a private ship (usually) against another ship on the *high seas.* Air piracy (*i.e.*, the *hijacking* of an aircraft) is a more recent phenomenon. Piracy has occurred in all stages of history : the Phoenicians, Greeks, and Romans engaged in it, as did the Vikings, Moors, and other Europeans. It also occurred among Asian peoples. During the wars between England and Spain in the late 16th century, treasure-laden Spanish galleons proceeding from Mexico into the Caribbean were a natural target for pirates. In the 16th—18th centuries, pirates from North Africa's *Barbary Coast* threatened commerce in the Mediterranean. The increased size of merchant vessels, improved naval patrolling, and recognition by governments of piracy as an international offense led to its decline in the late 19th century. In the late 20th century, incidents of piracy occurred with increasing frequency in the seas of East and Southeast Asia.

2. Essential Ingredients of Piracy

Under International Law, piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence against persons. It constitutes a crime against the security of commerce on the high seas, where alone it can be committed.

Wheaton defines piracy as being the offence of "depredating on the seas, without being authorised by any foreign State, or with commission from different sovereigns at war with each other."

In Moore's "Digest of International Law", a pirate is defined as "one who without legal authority from any State, attacks a ship with the intention to appropriate what belongs to it. The pirate is a sea brigand. He has no right to any flag and is justiciable by all.

In the *United States* v. *Smith*, Story, J. observed : "Whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi*, is piracy."

In the American case *The Ambrose Light*, it was observed by the Federal Court that an armed ship must have authority of a State behind it, and if it has not got such an authority, it is a pirate even though no act of robbery has been committed by it. Rebels who have never obtained recognition from any other power are clearly not a sovereign State in the eye of international law, and their vessels sent out to commit violence on the high seas are therefore piratical.

It is clear from the above that the essential ingredients of an act of piracy are :

(1) It is an act performed by a person sailing the high seas.
(2) Such an act is without the authority or commission of any State.
(3) Actual robbery is not an essential element in the crime of piracy *jure*

gentium : a frustrated attempt to commit robbery is equally piracy *jure gentium.*

(4) Such act of robbery is committed by a private vessel against another vessel or by the mutinous crew against their own vessel.

(5) The essence of piracy consists in the pursuit of private, as contrasted with public, ends.

A public armed vessel has a right to search another vessel if there is a reasonable suspicion of piracy or if she suspects that the vessel is engaged in activities against the safety of the State to which the public vessel belongs. Where pirates are caught at sea, after committing robbery on land, the captor's State has jurisdiction over them. It was held by Dr. Lushington in *The Magellan Pirates* that the pirates can also be followed after their initial act of piracy on the high seas taken on shore. Dr. Lushington further held in that case that the insurgents could be considered as pirates.

Piratical acts authorised by Government.—Even an independent State may be guilty of piratical acts : *The Magellan Pirates*. Professor Hyde maintains : "National authorisation of the commission of piratical acts would not free pirates from their internationally illegal aspects." It was resolved at the Washington Conference (1922) that any person violating the rules of International Law, even while acting under superior orders could be proceeded against in the Courts of any State "as for acts of piracy."

Right of Visit and Seizure of Pirate Ships.—All warships are entitled to visit a vessel deemed to be piratical for the purpose of ascertaining her true character—whether the ship is engaged in piracy, in slave trade, in unauthroised broadcasting, is without nationality or though flying a foreign flag is in reality of the same nationality as the warship—and to chase, capture and bring her into the courts of their country for trial. A pirate loses the protection of the flag.

Ownership of property in piracy.—A robbery by piracy does not deprive the rightful owner of his property which has to be restored to him when recaptured. Under section 5 of the Piracy Act of 1850, all ships and goods taken possession of from pirates and proved to have belonged to any of Her Majesty's subject or from subjects of any foreign power shall be restored by decree of the Admiralty Court to the former owner.

Piracy according to Municipal Law.—Piracy according to International Law must not be confused with piracy according to municipal laws of States. A State can frame law treating as piratical certain criminal acts of lesser gravity than those embodied in the term piracy by International Law. The natural consequence is that there is a restriction on the jurisdiction of a State if the piratical act is only punishable by municipal law for in that case the State cannot enforce its municipal law on the open sea against a foreigner; it can, however, punish its nationals even though their act may not fall within the ambit of piracy by International Law for they being nationals are subject to the municipal law of the State. In the case of piracy by International Law, every State has jurisdiction to punish persons guilty of such acts for it is an offence against the whole body of civilized States.

Article 102 of the United Nations Convention on the Law of the Sea, 1982, lays does down that the acts of piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the

ship or aircraft are assimilated to acts committed by a pirate ship or aircraft. A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act. (Art. 102). A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived. (Art. 104). On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to ships, aircraft or property, subject to the rights of third parties acting in good faith. (Art. 105). Where the seizure of a ship or aircraft on suspicion of piracy has been affected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by seizure. (Art. 106). A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. (Art. 107).

Piracy in Somalia.—Piracy in Somalia has been a threat to *international shipping* since the *second phase* of the *Somali Civil War* in the early 21st century. Since 2005, many international organizations, including the *International Maritime Organization* and the *World Food Programme*, have expressed concern over the rise in acts of *piracy*. Piracy has contributed to an increase in shipping costs and impeded the delivery of food aid shipments. Ninety per cent of the World Food Programmable's shipments arrive by sea, and ships into this area now require a military escort.

A *United Nations* report and several news sources have suggested that piracy off the coast of *Somalia* is caused in part by illegal fishing and the dumping of *toxic waste* in Somali waters by foreign vessels that have, according to Somali fishermen, severely constrained the ability of locals to earn a living and forced many to turn to piracy instead. Other articles allege that 70 per cent of the local coastal communities "strongly support the piracy as a form of national defense of the country's territorial waters", and that the pirates believe they are protecting their fishing grounds and exacting justice and compensation for the marine resources stolen. Some pirates have suggested that, in the absence of an effective national *coast guard* following the outbreak of the *Somali Civil War* and the subsequent disintegration of the *Armed Forces*, they became pirates in order to protect their waters. This belief is also reflected in the names taken on by some of the pirate networks, such as the *National Volunteer Coast Guard (NVCG)*. However, as piracy has become substantially more lucrative in recent years, some reports are suggesting that financial gain is now the primarily motive for Somali pirates.

Combined Task Force 150, a multinational coalition task force, took on the role of fighting Somali piracy by establishing a Maritime Security Patrol Area (MSPA) within the Gulf of Aden. The increasing threat posed by piracy has also

caused concern in India since most of its shipping trade routes pass through the Gulf of Aden. The *Indian Navy* responded to these concerns by deploying a warship in the region on 23rd October, 2008. In September, 2008, Russia announced that it too would join international efforts to combat piracy. Some reports have also accused certain government officials in Somalia of complicity with the pirates, with authorities from the *Galmudug* administration in the north-central *Hobyo* district reportedly attempting to use pirate gangs as a bulwark against Islamist insurgents from the nation's southern conflict zones. However, according to UN Secretary-General, *Ban Ki Moon*, both the former and current administrations of the autonomous *Puntland* region in northeastern Somalia appear to be more actively involved in combating piracy. The latter measures include on-land raids on pirate hideouts, and the construction of a new naval base in conjunction with Saracen International, a UK-based security company. By the first half of 2010, these increased policing efforts by Somali government authorities on land and international naval vessels at sea reportedly contributed to a drop in pirate attacks in the Gulf of Aden from 86 a year prior to 33, forcing pirates to shift attention to other areas such as the Somali Basin and the wider Indian Ocean. According to Ecoterra, as of mid-November 2010, more than 500 crew members and at least 31 foreign vessels remain in the hands of Somali pirates. As of 11th December, 2010, Somali pirates are holding at least 35 ships with more than 650 hostages.

3. Air Piracy (Hijacking)

Aircraft hijacking defined.—"Aircraft hijacking" is a contemporary addition to the roster of international and national crimes, and the necessity for its control at the international levels is only beginning to be recognized by States. It is unlawfully interfering with, seizing or otherwise wrongfully exercising control of an aircraft in flight by a person who is on board in order to change its itinerary. The offence of aircraft hijacking essentially consists of taking or conversion to private use of an aircraft as a means of transportation and forcibly changing its flight plan to a different destination. Theft of the aircraft itself or robbery of passengers or crew has not normally been the practice of hijackers during the past two decades, although both acts have taken place on occasions.

Hijacking by Palestinian guerillas.—The subject of aircraft hijacking assumed great importance in September, 1970, when Palestinian guerillas hijacking as many as four planes and destroyed three by blowing them up, including a Pan-American Jumbo Jet, which they had hijacked to a desert airstrip in Jordan. The latest cases of hijacking were practised not for escaping from one country to another, but in furtherance of the "war of liberation", as the Marxists extremists among the Palestinian guerillas termed it.

International Air Law.—The rules of international civil aviation are enshrined in the various conventions adopted by nations from time to time. The Convention relating to the Regulation of Aerial Navigation, 1910, recognises that every nation has complete and exclusive sovereignty over airspace above its territory and that each contracting State undertakes in times of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States. The Convention on International Civil Aviation, 1944, provides that each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air

services, shall have the right, subject to the observance of the terms of the Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing.

Geneva Conventions on the High Seas, 1958.—In the 1958 Geneva Conventions on the High Seas, reference is made to piracy by aircraft. Article 15 defines piracy to consist of any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft, and directed on the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft. The emphasis here is on the high seas against another ship or aircraft. "This excludes from piracy *jure gentium* both acts solely inspired by political motives and acts committed on board a ship or aircraft by the crew or passengers and directed against the ship or aircraft itself or persons or property on board." The exclusion of these acts from being considered criminal acts of piracy under International Law does not in any way relieve the persons concerned of any criminal liability which may attach to them in respect of these acts under the law of the flag State or of the States whose nationals they may be.

Tokyo Convention, 1963.—The Tokyo Convention on Offences and Certain Other Acts committed on board Aircraft, which was signed at Tokyo on September 14, 1963, under the auspices of the I.C.A.O. and which came into force on December 4, 1969, forbids unlawful seizure of civl aircraft in flight and charges the contracting States with the duty of restoring such aircraft and cargo to the rightful owners and facilitating resumption of the interrupted flight (Art. 11). This provision does not prescribe adequate punitive measures, nor has the offence been made a crime under International Law. The main emphasis is on restoration of property and resumption of flight. Articles 13 and 16, no doubt, provide that the offender may be taken into custody by any contracting State and held for criminal procedure or for extradition, but neither action is mandatory.

The Tokyo Convention made no frontal attack upon the offence of hijacking, "but dealt in only a limited manner with hijackers; for example, by enabling hijackers to be taken into custody or subjected to restraint in the same manner as other offenders and by providing for restoration of control of the hijacked aircraft to the lawful commander, and for the continuance of the journey of passengers and crew."

U.N. resolution on skyjacking.—The U.N. General Assembly adopted a resolution on November 25, 1970, which condemned all acts of aerial hijacking and called upon States to take all appropriate measures to deter, prevent or suppress acts within their jurisdiction at every stage of the execution of these actions and to provide for the prosecution and punishment of those who perpetrate such acts in a manner commensurate with the gravity of those crimes.

Hague Convention, 1970.—The International Conference on Air Law convened at The Hague under the auspices of the I.C.A.O. from December 1 to 16, 1970, adopted on December 16, 1970, the Convention for the Suppression of Unlawful Seizure of Aircraft. Article 2 of the Convention obliged each State party to make the offence punishable by severe penalties. Article 4 enjoined on State parties to take measures to establish jurisdiction over the offence and

related acts of violence against passengers of air crew. Articles 6 and 7 provided for taking custody of a hijacker present in a contracting State's territory and obligation for prosecution of non-extradited alleged hijackers. The Convention applies only to civil aircraft, and not to aircraft used in military, customs or police service. In order to give effect to the Convention, Great Britain passed the Hijacking Act, 1971.

Montreal Convention, 1971.—A diplomatic conference convened by I.C.A.O. to consider the draft convention on acts of unlawful interference against international civil aviation met in Montreal in September, 1971 and adopted and opened for signature on September 23, 1971, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

Article 1 of the Montreal Convention enumerates the following unlawful acts as offences for the purposes of the Convention, *viz.*, act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; destroying or causing damage to an aircraft in service so as to render it incapable of flight; placing an aircraft in service any device or substance which is likely to endanger its safety in flight; the destruction or damage of air navigation facilities, or interference with their operation, if any such act is likely to endanger the safety of aircraft in flight; and the communication of information which is known to be false, thereby endangering the safety of an aircraft in flight.

The Tokyo Convention did not attempt to define specific offences, as this would have involved the preparation of an international criminal code covering a wide range of offences. The Hague Convention only defined the offence of unlawful seizure of aircraft. But the Montreal Convention, 1971, adopted the enumerative approach and described a number of penal offences within the framework of a multinational convention. Article 1 of the Convention extends the concept of universal jurisdiction to all offences or attempt at hijacking. The Montreal Convention embodies The Hague Convention provisions on the taking of the alleged offence into custody, joint air transport operating organizations or international operating agencies, etc. There is provision for the settlement of disputes, subject to a reservation concerning this provision. The Montreal Convention has broken new ground and goes beyond mere codification—in providing for international legal action to be taken by States in respect of many acts which, however reprehensible they may be, previously were not considered eligible for treatment in an international convention on criminal matters.

India has signed the three Conventions on Hijacking, *viz.*, the Tokyo Convention., 1963, the Hague Convention, 1970, and the Montreal Convention, 1971, but has ratified only the Tokyo Convention so far.

On the face of it, the act of hijacking constitutes a theft in that it involves the taking of personal property without consent in such a manner as to create an unreasonable risk of permanent loss. It is essentially an international criminal offence, and there should be concerted effort on the part of States to realise its gravity and to adopt punitive legislation relative to the offence and at the same time agreeing to the extradition of hijackers.

International control to regulate plastic explosives.—An international convention that will tighten controls over plastic explosives often used in executing acts of terrorism was adopted by the International Conference on Air Law at Montreal on March 1, 1991. Representatives from 79 States and six

observer-delegations attended the conference, which was held from 12th February to 1st March, 1991, at the Montreal headquarters of the International Civil Aviation Organisation (ICAO).

The Convention will enter into force when 35 States ratify it, provided that no fewer than five of these are producer States.

The Convention on the Marking of Plastic Explosives for the Purpose of Detection requires countries to prohibit and prevent the manufacture in their territory of unmarked explosives, as well as movement of such explosives into or out of their territory. All plastic explosives will have to be marked by manufacturers with anyone of four 'detection agents' agreed upon by the Conference.

Within three years, plastic explosive stocks not specifically held for military or police activities are to be destroyed, used or rendered ineffective. Those for military or police functions are to be similarly disposed of within 15 years.

An International Explosives Technical Commission set up by the Convention will assess development in plastic explosive manufacturing, marking and detection, keep the international community informed and propose amendments to the technical annex to the Convention.

A human tragedy was the catalyst for the Convention—the destruction of Pan Am flight 103 over Lockerbie, Scotland, on 21st December, 1988. A plastic explosive device was reportedly secreted inside a cassette player.

Other international instruments to protect international civil aviation against "criminal acts of unlawful interference" are : the Tokyo Convention on Offences and Certain other Acts committed on Board Aircraft (1963); the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970); the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988).

4. The Entebbe Incident

The Entebbe incident brought into prominence the propriety of the right of a nation whose nationals are victims of air-hijacking to save them from the jaws of death even by impinging on the sovereignty of the nation where the terrorists may have skyjacked the plane. In the Entebbe incident on June 27, 1976, the Air France Airbus lifted off the runway at Athens airport. The hijackers, who styled themselves as members of the Popular Front for the Liberation of Palestine, seized control of the plane which had 242 passengers and 12 crew members aboard the TeL Aviv-Paris flight. The hijackers flew their hostages first to Benghazi, Libya, for refuelling and then to Entebbe airport in Uganda, where many of them were held for six days in a dusty, unused passenger terminal. Their purpose, as proclaimed by them, was to force Israel and four other nations to release 53 Palestinian or pro-Palestinian terrorists currently in jail. On June 30 and July 1, 1976, the hijackers released their non-Israeli passengers reducing the number of captives from 253 to 106. On July 4, while there was a smoke-screen of negotiations, airborne Israeli commandos swept into the heart of Africa, turned Uganda's Entebbe airport into a battlefield and rescued more than 100 hostages held by pro-Palestinian skyjackers under threat of death. All the seven skyjackers were killed in the spectular strike about 3,700 km. south of the Jewish State. Israel lost four of its citizens, three hostages and an army officer. Twenty

Ugandan soldiers were also killed.

In July, 1976, there was an acrimonious debate in the Security Council. African and Arab nations denounced Israeli action as violation of sovereignty and territorial integrity of Uganda. The Secretary-General of the United Nations termed the incident at Entebbe as serious violation of the sovereignty by a member of the United Nations. India called upon the United Nations not to ignore the Israeli violation of the sovereignty and territorial integrity of Uganda.

5. European Nations Treaty

The 18-European nations prepared a draft treaty to deal with international terrorism, which was approved by the Justice Ministers of the European Council including Greece, Turkey, Cyprus and all key West European countries. It was formally approved by the heads of government at Streasbourg on September 22, 1976. The treaty covers plane skyjacking, kidnapping diplomats, assassination attempts and bombing. The treaty at a regional level is not expected to be effective in dealing with a problem which has assumed international dimensions. The European governments in co-operation with the U.S.A., may, however, seek wider acceptance of the principles at the U.N. General Assembly; but in view of the doubtful nature of the provisions of the treaty, the Socialist and developing blocs, including the African and Arab countries, may not be agreeable to subscribe to the provisions of the treaty.

At a special press conference, Dr. Waldheim noted that the existing Tokyo (1963), The Hague (1970) and Montreal (1971) Conventions covered issues such as safety of air transport, hijacking and hostage-taking, but the same had not been universally signed and ratified with the result that hijackers could go to certain countries.

On November 3, 1977, the U.N. General Assembly adopted without opposition a resolution which condemned skyjacking and called on all countries to take all necessary steps to stop it. The resolution is only advisory. It may, however, act as a pressure on those countries which have in the past served as safe havens for the gunmen in the skies. The Syrian representative, who apparently had some reservations, remarked that he would have been happier if the General Assembly had drawn a line somewhere to distinguish liberation movements from other terrorists.

6. Flouting of Anti-Air-hijacking Conventions by Pakistan

The Pakistan authorities refused to hand over any of the hijackers involved in five incidents of hijacking of Indian Airlines aircraft to that country, the first occurring 18 years ago, on January 30, 1971, when a Fokker Friendship plane, on a flight from Srinagar to Jammu with 28 passengers on board was hijacked to Lahore. The crew and passengers were released subsequently and the aircraft was blown up at Lahore. The hijackers have not been extradited. In the second incident, five years later, on September 10, 1976, a Boeing 737 aircraft on flight from Delhi to Jaipur with 78 passengers and seven crew members on board was hijacked to Lahore by six persons. The hijackers surrendered to the Pakistani authorities and the aircraft and crew were released. In that case also the hijackers were not handed over to India. In the third incident on September 29, 1981, a Boeing 737, on a scheduled flight from Delhi to Srinagar, with 117 persons, including the crew on board, was hijacked by five Sikh extremists with the help of *kirpans* and taken to Lahore. The hijackers were overpowered by the

Pakistani commandos and the passengers and crew were released. The fourth of these incidents occurred on July 5, 1984, when an Indian Airlines Airbus operating from Srinagar to Bombay via Delhi with 255 passengers and crew on board was hijacked by nine persons and taken to Lahore. The hijackers surrendered to the Pakistan authorities the next day and the passengers and crew returned. Yet another hijacking of an Indian Airlines, Boeing-737, took place after the aircraft left from Chandigarh on August 24, 1984, on a scheduled flight to Jammu. The plane was taken to Lahore and later, after refuelling, flown to Karachi and then to Dubai. The sole purpose of the hijackers, all Indian nationals, but separatists, rebels and extremists, was to get the plane to the United States where they hoped to get succour from successful Sikh businessmen who have links with some American politicians. Washington refused to permit them to enter that country, with the result that the hijackers, seven in number, had to surrender to the United Arab Emirates (UAE) Government. The Pakistani authorities this time did not wish to exert too much to end the game, perhaps with a view to pleasing the pro-Khalistan elements. It was also alleged that Pakistani authorities had armed the hijackers with pistol and ammunition. The authorities in Dubai, however, showed greater firmness by refusing to succumb to the hijackers' demand for refuelling the plane for taking it to the USA. The seven hijackers of the Indian Airlines jetliner were brought from Dubai in the night of September 3, 1984, and were remanded to police custody preparatory to their trial.

The Pakistan Government refused to return the hijackers on the ground that there was no extradition treaty between India and Pakistan. Hijacking is a form of terrorism and hijackers commit act of treason. They are a serious menace to peace and tranquillity of individual States and the world at large. No civilized country can be soft to this particular type of criminals. Besides the Convention against Terrorism, adopted by the Council of the League of Nations, in 1937, Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission in 1949, the Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States adopted by the General Assembly in 1970, the Convention to Prevent and Punish Acts of Terrorism adopted by the General Assembly of the Organization of American States (OAS) prohibiting States from affording direct or indirect assistance to terrorist activities and the Helsinki Declaration adopted on August 1, 1975, by 30 European States and others, affirming the same principles, there are the Tokyo Convention, 1963, the U.N. resolution on skyjacking adopted by the U.N. General Assembly on November 25, 1970, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, and the Montreal Convention, 1971, which envisage provisions for the suppression of unlawful acts against the safety of civil aviation.

India lodged a complaint with the Council of International Civil Organisation (ICAO) against the irresponsible and reprehensible action of Pakistan in arming the hijackers of the Indian Airlines Boeing 737 at Lahore airport on August 24, 1984.

After great procrastination, Pakistan started a facade of trial of five Sikh hijackers at Lahore in March, 1985. The second trial of nine hijackers of an Indian Airlines airbus in July, 1984 opened on June 10, 1985, in the special court at Lahore. The trial of ten Indian Sikhs for hijacking Indian airlines planes in

1981 and 1984 ended in conviction by the Special Judge in January, 1986. Three accused in the 1984-hijacking were sentenced to death, while two others were sentenced to life imprisonment. Five others were awarded life sentences for being involved in the 1981 case. The convicted persons preferred appeals before the Lahore High Court challenging the conviction order of the Special Judge.

CHAPTER XVI

NATIONALITY

What is Nationality?.—Nationality is the character or quality arising from membership of some particular nation or State which determines the political status and allegiance of a person. It is the quality of an individual "of being a subject of a certain State, and therefore its citizen." It is a continuing legal relationship between the sovereign State and the citizen. The legal relationship involves the conferment of rights and imposition of corresponding duties upon both. A man's nationality is not necessarily the same from his birth to his death. He may elect to become a citizen of another State.

Citizenship or nationality is the status of an individual who legally belongs to a certain State or—formulated in a figurative way—is a member of that community. (Hans Kelsen).

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

Nationality may be defined as the bond which unites a person to a given State, which constitutes his membership in the particular State, which gives him a claim to the protection of that State and which subjects him to the obligations created by the laws of that State. (Charles G. Fenwick).

Determination of Nationality.—The question of the determination of nationality falls within the domain of municipal law and not International Law. The right to nationality is not a 'natural' right. Nationality is the basis of international protection, being the indispensable link between the individual and International Law. Due to increasing international intercourse and traffic, however, conflict of municipal nationality law is not infrequent. The Hague Codification Conference in the year 1930 adopted several instruments with regard to nationality, e.g., Convention on the Conflict of Nationality Laws, Protocol on Statelessness, etc. It left for determination of each State as to who are its nationals under its own law, which law is to be recognized by other States in so far as it is consistent with international conventions, international customs, and the principles of law generally recognized with regard to nationality. (Art. 1).

The United States Supreme Court observed in *U.S.* v. *Wong Kum Ark* : "It is the inherent right of every independent nation to determine for itself and according to its own constitution and laws what classes of persons shall be entitled to its citizenship."

To the same effect are the observations in the *Stoeck* v. *Public Trustee* : "The question to what State a person belongs must ultimately be decided by the municipal law of the State to which he claims to belong to or to which it is alleged that he belongs."

Nationality, Domicile and Allegiance.—There is a subtle difference between nationality and domicile. Nationality, as explained above, is the character or quality arising from membership of some particular nation or State and determines the allegiance of a person. Domicile is an attribute of nationality and connotes a person's place of residence. It is the relationship between the individual and the locality where he has his permanent home. The concept of domicila is not uniform throughout the world and just as long residence does not by itself establish domicila, a brief residence may not negative it. But residence for a particular purpose fails to answer the quantitative test for the purpose being accomplished the residence would cease. The residence must answer "a qualitative as well as a quantitative test," that is, the two elements of factum at animus must concur. Thus, nationality may be acquired by domicile. The period of residence necessary to enable a person to acquire nationality varies in different countries. The political status of an individual by virtue of which he becomes the subject of a particular country, binding him by the tie of natural allegiance, is called his national character, while his civil status by virtue of which he acquires the character of a citizen of some particular country, possessing certain municipal rights and subject to certain obligations, is referred to by the term "domicile". Allegiance is a term synonymous with national character implying the obligations and fidelity that an individual owes to the State whose national character he bears.

Nationality and Citizenship.—'Nationality' and 'citizenship' are not inter-changeable terms. 'Nationality' has reference to the jural relationship which may arise for consideration under International Law. On the other hand, 'citizenship' has reference to the jural relationship under municipal law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to International Law, whereas citizenship is intimately connected with civil rights under municipal law. Hence, all citizens are nationals of a particular State, but all nationals may not be citizens of the State. In other words, citizens are those persons who have full political rights as distinguished from nationals, who may enjoy full political rights and are still domiciled in that country.

Modes of Acquiring Nationality.—According to Oppenheim, there are five modes of acquiring nationality. They are as under :

The first and the most important mode of acquiring nationality is by birth. It may be according to *jus soli, viz.*, the territory or locality of birth within the territorial jurisdiction of a given State, without regard to the status of parents, or *jus sanguinis, viz.*, the nationality of the parents at birth, i.e. principle of descent; or according to both.

The vast majority of the people of the world acquire their nationality by birth. Germany adopts the test of parentage (*jus sanguinis*) as the decisive factor for determination of one's nationality, the child having been born at home or abroad. Other countries which adhere solely to *jus sanguinis* (that is, parentage is the deciding factor), are Austria, China, Denmark, Finland, Hungary, Japan, the Netherlands, Norway, Poland, Rumania, Sweden, Switzerland, Turkey and the U.S.S.R. In Argentina, Bolivia, Brazil, Chile, Cuba, Panama, Paraguay, Peru and Uauguay, however, the decisive factor to determine one's nationality is the territory on which a child is born (*viz., jus soli*) irrespective of the fact whether its parents are citizens or aliens. Countries like Great Britain and the U.S.A.

adopt a mixed principle. According to British Nationality Act, 1948, every person born within Her Majesty's dominion and allegiance and born out of her Majesty's dominions and whose father was at that time a British subject born within her Majesty's allegiance or whose birth was registered at a British consulate shall be deemed to be a natural born British subject. The Tory Government of Mrs. Margaret Thatcher however enacted the new British Nationality Act, 1981, which came into force on January 1, 1983. It aims to define British citizenship. The Act sets up three new categories for British subjects—British citizenship, citizenship of Britain, the Channel Islands, Isle of Man along with those of the colonies "closely connected" with Britain who enjoy the right to live in Britain as citizens and also can pass on this right to their children; the second included British citizens residing in Hong Kong, Bermuda, Belize, the British Virgin Islands and some other distant island as well as places in the Antarctic territories; and the citizens of the third category consist of the Chinese and Asian minorities. Only the first category will have the automatic right of residence. The British citizens of the second category have no automatic right of residence. If they wish to move over to Britain their cases will have to be referred to Britain. The citizens of the third category are even worse off since for their children to acquire citizenship and resident rights prior Government approval will be necessary. This will break the 700-year old principle and legal tradition of "*Jus Soli*", or "right of the soil" by which any child born in Britain was automatically eligible for citizenship and became a British subject. On February 15, 1983, the British Parliament approved by a majority of 37 the new rules on immigration which allow husbands and "fiances" of British women to settle in Britain if they can prove that their marriage is genuine. The amended rules allow a husband to be granted settlement in Britain at the end of one year's residence and not two as earlier proposed. They also shift on to the couple involved, instead of the authorities, the onus of proof that a marriage is genuine.

A jolt to U.K. Immigration Law.—In a judgment of far-reaching importance for Indians and other foreigners, kept apart from their wives in Britain by the controversial migration rule, the European Court of Human Rights, on May 28, 1985, found Britain guilty of sex discrimination under these rules. A five-year old battle by three women of foreign origin but legally resident in England, to bring in their husbands, ended on May 28, 1985, in a judgment by the Strasbourg-based Court in their favour. One of the women was of Asian origin, the other a Turkish and the third from the Philippines. The women had claimed that the restrictions on admission of foreign husbands to Britain violated the Human Rights Convention. It amounted to sex discrimination because the same restrictions did not apply to men who lived in the U.K. The British Government justified the discrimination on the ground that it needed to control the number of immigrants workers at a time of high unemployment in Britain. The Human Rights Courts rejected the Government contention and ruled that the immigration rules amounted to discrimination on grounds of sex. The Court observed that many wives were economically active and their effect on domestic labour marked as compared to men could not be under-estimated. It was hoped that in view of the judgment, the Government would amend the rules.

In the United States, according to the Immigration and Nationality Act of

1952, a person born in the United States and subject to the jurisdiction thereof, a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe and a person born outside the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had residence in the United States or one of its outlying possessions prior to the birth of such person shall be national and citizens of the United States at birth.

The second mode of acquiring nationality is by *naturalisation*. It takes place when a person becomes the subject of a State to which he was before an alien. It is an artificial tie of allegiance between the person and the State where that person resides. There are six ways of naturalisation, *viz.*, (1) marriage, i.e. wife assuming her husband's nationality, (2) legitimation, whereby the illegitimate child acquires nationality of the father, (3) option, (4) acquisition of domicile, (5) appointment as Government official, and (6) grant on application to the State authorities. Naturalism is permissible only in case the alien applies for it.

The third mode of acquiring nationality is by **redintegration or resumption.** Such individuals, who having lost their original nationality by their long residence or naturalisation abroad may recover or resume their original nationality on fulfilling certain conditions.

The fourth and fifth modes of acquiring nationality are by **subjugation** and by **cession of territory.** Subjugation implies conquest and annexation of the territory conquered. Through annexation the territory comes under the sovereignty of the conqueror and the inhabitants of the subjugated or ceded territory acquire the nationality of the acquiring State.

Another ground of acquisition is a legislative or administrative act conferring citizenship upon a person.

Double Nationality.—There is no uniform rule in different States as to whether nationality is acquired by the nationality of the parents at birth or the territory or locality of birth. The result is that the practice of nations varies widely. Great Britain, the United States and a number of Latin-American States adhere primarily to the principle of *jus soli, i.e.*, mere birth upon the soil confers nationality. Even the child of an alien born in England or America acquires the British or American nationality, as the case may be. France, Germany and other European countries adhere primarily to *jus sanguinis* by which the nationality of children follows that of their parents, so that children born of their subjects become *ipso facto* by birth their subjects whether born at home or abroad. This rule excluded illegitimate children who acquire the nationality of their mother. Thus, a conflict of jurisdiction might arise when a child is born on the soil of one State of parents who are citizens of another State. For example, a child born in the United States of French parents is an American citizen *jure soli*, but the child is at the same time a French citizen *jure sanguinis*. His effective citizenship will then depend upon the jurisdiction with which he happens to be. In the United States, he is an American; in France, a Frenchmen; in any other country he is both. Similarly, a child born in Great Britain of German parents acquires two nationalities at the same time, viz., British and German. The double nationality can, however, cease if the person on coming of age declares his alienage.

Double or dual nationality may result from marriage. When an American woman marries an Englishman, the American woman would, according to

British law, acquire British nationality, although she would not also cease to be a United States citizen unless she has made a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens.

The diplomats call persons possessing double or dual nationality as *sujects mixtes* or mixed subjects.

The Hague Codification Conference of 1930 provided that a person having two or more nationalities might be regarded as its national by each of the States whose nationality he possesses and that the person could renounce one of them with permission of the State whose nationality he wished to surrender. A third State, shall however, recognise only the effective nationality of an individual possessing double nationality. The effective nationality meant either the nationality of the State in which he is habitually and principally resident or the nationality of the State with which he is most clearly connected.

Loss of nationality.—According to Oppenheim, there are five modes of losing nationality, which are as under :

(1) Release.—Some States, such as Germany, grant their citizens the right to ask to be released from nationality.

(2) Deprivation.—Certain States have framed some municipal laws the breach of which by its nationals results in the deprivation of their nationality.

Under the American laws, service in the armed forces of a foreign State also results in deprivation of citizenship.

(3) Expiration.—In certain States, on account of legislation citizenship expires due to long stay abroad. A naturalised American citizen loses his nationality by having a continuous residence for three years in the territory of a foreign State of which he was formerly a national or in which the place of his birth is situated.

(4) Renunciation.—In the case of double nationality of children, the municipal laws of certain States (Great Britain) give them a right on coming of age to declare whether they wish to cease to be a citizen of one State. The British Nationality Act of 1948 permits such a child to make a declaration of the renuniciation of citizenship of the United Kingdom, but the registration of such a declaration may be withheld by the Secretary of State if made during any war in which the United Kingdom be engaged.

(5) Substitution.—According to the laws of some States, the nationality of their subject is extinguished by their naturalisation abroad. The British Nationality Act of 1948 does not automatically entail loss of British nationality on the naturalisation of a British subject in a foreign State. The United States Nationality Act of 1952, however, entails loss of American nationality on the voluntary naturalisation of an American national in a foreign country.

Child's domicile.—It is an accepted principle of private International Law that the domicile of an infant automatically changes with any change that occurs in the domicile of his father. As between a living father and his infant there is unity of domicile even though they may reside in different countries. This unity is not destructible at the will of the father.

Statelessness.—The problem of statelessness has of late assumed some importance due to conflict of laws to nationality. There have also been cases where nationality has been lost due to the failure of nationals of a certain State to return to their own country. Numerous Russians lost their nationality after

the Revolution because they were unwilling to return to Russia.

It was observed by Russell J. in the case of *Stoeck* v. *The Public Trustee* that statelessness is a condition recognised by English Law. Russell J., quoted with approval the following observation of Oppenheim : "A person may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own."

A stateless person,.viz., a person without a nationality, is peculiarly open to persecution and general hardship.

Oppenheim mentions several cases of statelessness. He says that even by birth a person may be stateless. Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality, because according to German Law it does not acquire German nationality, and according to British Law it does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are themselves, according to German law, stateless. Further, the child of parents who are nationals of States following the *jus sanguinis* (that is, parentage is the deciding factor), is without a nationality. The parent's State does not confer nationality because the child was not born on its territory, while the State wherein the child was born also refuses because the parents are foreigners. Obviously, the child is stateless. But statelessness may also take place after birth, i.e., by deprivation of nationality. All individuals who have lost their original nationality without having acquired another are in fact destitute of nationality.

The Hague Convention of 1930 on the Conflict of Nationality Laws no doubt desired to end the state of statelessness and double nationality, but the provisions contained therein did not help much for want of ratification on the part of the States. The Convention provided that a child whose parents are unknown or who have no nationality, or whose nationality is unknown, are to have the nationality of the country of birth.

The Hague Codification Conference of 1930 concerned itself with the question of children of parents without nationality becoming stateless if *jus sanguinis* were the sole criterion for determining nationality at birth. The Protocol Relating to a Certain case of Statelessness aimed to eliminate statelessness of the child born in a State adhereing to *jus sanguinis*, but permitting only the father to transmit nationality by descent.

Stateless Minors.—The Convention on Nationality adopted at The Hague Codification Conference of 1930 sought to avoid the occurrence of statelessness in minors by making the loss of nationality conditional upon the acquisition of the nationality of the parents. Article 13 provided that naturalisation of the parents shall confer on such of their children as, according to its law, are minor the nationality of the State by which the naturalisation is granted.

Statelessness as a result of marriage.—There are three doctrines of nationality in relation to marriage, viz. (1) the doctrine of the unity of the family, whereby the wife's nationality merges in, or follows, that of the husband; (2) the doctrine of the independence of the woman's citizenship; and (3) a combination of these doctrines.

Afghanistan, Bolivia, Egypt, Germany, Haiti, Hungary, India, Iran, Iraq, Ireland, New Zealand, Poland, Perice, Siam, Spain, Switzerland and Union of South Africa follow the principle of the unity of the family, and the woman

national loses her nationality upon marriage to an alien.

Argentine, Australia, Bulgaria, Brazil, Canada, Chile, Colombia, Cuba, Czechoslovakia, EI Salvador, Guatemala, Mexico, New Zealand, Panama, Paraguay, Rumania, United Kingdom, United States, U.S.S.R., Uruguay, Venezuela and Yugoslavia, on the other hand, do not confer nationality upon a foreign woman who marries a national.

The nationality laws of certain States (e.g. Czechoslovakia, Hungary, Iraq, Poland, Spain and Switzerland) provided that a change in the husband's nationality during marriage affects the wife; but in certain other countries, e.g., Austria, Canada, China, Finland, France, Germany, etc., the wife becomes stateless if the husband acquires the nationality of a State which does not automatically confer its nationality upon the wife. Again, in certain other countries, naturalisation of an alien does not extend to the wife.

Most nations which follow the doctrine of family unity generally allow an alien woman who acquired their nationality by marriage to a national to retain their nationality after the dissolution of marriage.

The State within whose territory the stateless persons inhabit can require them, if their number increases considerably, to apply for naturalisation or direct them to leave the country. As these stateless persons belong to no country and do not own a nationality, they are deprived of the benefits that International Law secures to the citizen of a State.

The Convention relating to the International Status of Refugees, 1933, obliged the contracting States not to expel the refugees regularly residing in the States concerned and to grant them free access to courts. This was in relation to the treatment of Russian, American and other assimilated refugees.

Another Convention on the Status of Refugees was made in July, 1951, protecting persons who became refugees before the 18th of January, 1951, from discrimination on account of race, religion or country of origin. They were to be afforded equal treatment with nationals with regard to elementary education, public relief and social security. They were also given religious freedom.

International Law Commission.—The International Law Commission selected nationality including statelessness as a topic for codification at its first session in 1949. It prepared Draft Conventions on the elimination of Future Statelessness and on the Reduction of Future Statelessness. The preamble after referring to the Universal Declaration of Human Rights proclaimed that everyone has the right to nationality and that it required cooperative action between the member States to solve the problem of statelessness. Article 1 of the Draft Convention on the Reduction of Future Statelessness provides that a child who would otherwise be stateless shall acquire at birth the nationality of the party in whose territory it is born. Any person born on board a vessel at sea shall have the nationality of the State whose flag the vessel flies. Under Art. 3 if such birth takes place on board an aircraft nationality is to be that of the place where the aircraft is registered. If the law of a State entails the loss of nationality as a consequence of a change in the personal status of a person such as a legitimation or adoption, Art. 5 provided that such loss shall be conditional upon acquisition of another nationality. Under Art. 6 renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality. Persons shall not lose their nationality so as to become

stateless, on the ground of departure, stay abroad, or failure to register or any other similar ground. The States are not to deprive their nationals of nationality by way of penalty if such deprivation renders them stateless. No person is to be deprived of his nationality on racial, ethical, religious or political grounds, nor shall the transfer of territory automatically result in the loss of nationality on the part of the inhabitants of such territory. A special agency has been envisaged within the United Nations to enforce the above recommendations and hear complaint of the individuals concerned. In July, 1951, a Convention on the Status of Refugees was adopted under the auspices of the United Nations. The Convention is a most comprehensive charter ever written on the rights of refugees.

The International Law Commission observed in its sixth session (1954) that statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individuals of certain rights recognized by International Law.

Expatriation.—Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. The right of expatriation falls within the ambit of municipal law on the same principle as the question of nationality. The States have exclusive jurisdiction to determine the circumstances in which a citizen can be divested of his national status. This principle was given effect to in *Richards Claim*, a matter agitated before the Mixed Claims Commission between Great Britain and the United States and the Umpire held that the United States Congress of March 2, 1907, clearly recognised the general right of expatriation. The right of expatriation is an inherent and natural right of all persons, based on the principle of the rights of man and of the liberty of the human race.

CHAPTER XVII

EXTRADITION CONNECTED WITH JURISDICTION

Its Necessity.—"Where a person who has committed an offence in one country escapes to another, what is the duty of the latter with regard to him? Should the country of refuge try him in its own Courts, according to its own laws, or deliver him up to the country whose law he has broken? To the general question, International Law gives no certain answer. Some jurists—Grotius, Vattel and Kent among them—were inclined to hold that a State is bound to give up fugitives accused of crimes affecting the general peace and security of the society, but the majority—Puffendorf, Voet and Heffter among them—appear to deny the obligations, as a matter of right, and prefer to put it on the ground of comity." It is argued that independence and sovereignty of States is supreme and does not warrant the exercise by one State of the slightest act of jurisdictional authority within the territory of another State. But mutual interest of States for the maintenance of law and order and the administration of justice demands that nations should co-operate with one another in surrendering fugitive criminals to the State in which the crime was committed. Moreover, there is the obvious advantage in prosecuting the offender in the country where he has committed the offence since the evidence is more freely available there and that State has the greatest interest in the punishment of the offender as also facilities for ascertaining the truth. The universal practice of nations, however, is to surrender fugitive offenders only in consequence of some special treaty with the country which demands them, and few jurists now affirm any general duty or perfect obligation. The surrender in accordance with treaty and in compliance with a formal demand is known as extradition. The extradition treaties can be brought into force only after certain necessary formalities have been observed, including their incorporation in the municipal law of the States wanting to enforce them.

The term 'extradition' denotes the process whereby under a concluded treaty one State surrenders to any other State at its request, a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender. Though extradition is granted in implementation of the international commitment of the State, the procedure to be followed by the Courts in deciding whether extradition should be granted and on what terms, is determined by the municipal law of the land. Extradition is founded on the broad principle that it is in the interest of civilised communities that criminals should not go unpunished and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice.[1]

Definition.—Lawrence defines extradition as "the surrender by one State to another of an individual who is found within the territory of the former, and

1. *Rosiline George v. Union of India and others*, JT 1993 (6) S.C. 51.

is accused of having committed a crime within the territory of the latter; or who, having committed a crime outside the territory of the latter, is one of its subjects and, as such, by its law amenable to its jurisdiction."

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

Difficulties.—There are two practical difficulties about extradition which have prevented the growth of a uniform rule on the subject. They are the variations in the definitions of crime adopted by different countries and the possibility of the process of extradition being employed to get hold of a person who is wanted by his country not really for an ordinary crime, but for a political offence. Modern States almost invariably exclude offences of a political character from the operation of the law of extradition.

Extradition is the official process whereby one nation or state surrenders a suspected or convicted criminal to another nation or state. Between nation states, extradition is regulated by *treaties*. Where extradition is compelled by laws, such as among sub-national jurisdictions, the concept may be known more generally as *rendition*.

Extradition treaties or agreements

The consensus in *international law* is that a state does not have any obligation to surrender an alleged criminal to a foreign state as one principle of *sovereignty* is that every state has legal authority over the people within its borders. Such absence of international obligation and the desire of the right to demand such criminals of other countries have caused a web of extradition *treaties* or agreements to evolve; most countries in the world have signed bilateral extradition treaties with most other countries. No country in the world has an extradition treaty with all other countries; for example, the *United States* lacks extradition treaties with several nations, including the *People's Republic of China*, *Namibia*, the *United Arab Emirates*, and *North Korea*.

Restrictions

By enacting laws or concluding treaties or agreements, countries determine the conditions under which they may entertain or deny extradition requests. Common bars to extradition include :

Failure to fulfill *dual criminality*.—Generally the act for which extradition is sought must constitute a crime punishable by some minimum penalty in both the requesting and the requested parties.

Political nature of the alleged crime—Most countries refuse to extradite suspects of political crimes.

Possibility of certain forms of punishment.—Some countries refuse extradition on grounds that the person, if extradited, may receive capital punishment or face torture. A few go as far as to cover all punishments that they themselves would not administer.

Jurisdiction.—Jurisdiction over a crime can be invoked to refuse extradition. In particular, the fact that the person in question is a nation's own citizen causes that country to have jurisdiction.

Citizenship of the person in question.—Some nations refuse to extradite

their own citizens, holding trials for the persons themselves. In some cases, such as that of *Hafiz Muhammad Saeed*, the suspect will not face criminal charges at all.

English Extradition Act.—It is now generally agreed that surrender is a matter of comity and not of right. Each State is guided by treaty stipulations, and, in their absence, it has a right to refuse to surrender fugitives by granting them asylum in view of its territorial sovereignty. The Law of England appears to be strongly against surrender in the absence of treaty obligations. English Law does not warrant a surrender without express statutory authority. Such authority is now given by the Extradition Act of 1870 as amended by the Amending Acts of 1873, 1895, 1906, 1932 and 1935 only in the case of the offences therein specified, and with regard to countries with which an agreement has been entered into, and to which the Act has been applied by an Order-in-Council.

U.S. Practice.—The position was summed up with clarity by the Supreme Court of the United States in the case of *Factor* v. *Laubenheimer* : "The principles of International Law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, the legal right to demand his extradition and the correlative duty to surrender him to the demanding State exist only when created by treaty."

In the absence of treaty stipulation, it is always a matter of comity or courtesy. No government is understood to be bound by positive law of nations to deliver up criminals, fugitives from justice, who have sought an asylum within its limits.

The United States, however, is a party to the Montevideo Convention on Extradition, 1933, which permits extradition of a person charged with an offence constituting a crime and punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year.

Indian Extradition Act.—The Indian Extradition Act of 1962 lays down the procedure for the surrender of fugitive criminals by the Union Government after being satisfied, on the basis of an enquiry by a magistrate, that a *prima facie* case has been made out in support of the requisition.

Surrender of their own subjects.—In extradition cases, there must be an extraditable person and an extraditable crime. Many States such as France, Germany and Italy have adopted the principle of never extraditing their own subjects to a foreign State who return home after committing a crime abroad, and reserve to themselves the right of punishing them. But Great Britain has not agreed with this view. By a treaty entered into with U.S.A. and Britain, the subjects of each power are freely surrendered to the other. Even as early as in 1879, Great Britain surrendered to Austria one Tourville, a British subject, who after having murdered his wife in the Tyrol, had fled home to England. At any rate no duty to return their own nationals is recognized unless the treaty expressly stipulates such surrender.

The Montevideo Conference (1933) left the States free to decide whether to extradite their own national or not. The Harvard Research Draft Convention on Extradition, however, provided that a State shall not refuse to extradite its

national, but on refusal it was bound to try its national for the offence committed by him abroad.

Necessary Conditions.—The necessary conditions for extradition generally inserted in extradition treaties in compliance whereof the criminals are surrendered by one State to another through the diplomatic channels are the following :

(1) Offences of Political Character.—A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. The term "political offence" is not easy to define. It is a question of some nicety. Different criteria are adopted by different nations with regard to its meaning. Some take the motive of the crime and others look to specific offences. It has, however, been established according to judicial decisions that to constitute a political offence, there must be two or more parties, each seeking to impose a government of its own choice on the other or striving for political control in the State where the offence is committed, and the offence must be committed in pursuance of that objective. This naturally excludes anarchists and terrorists. The main object of anarchism is to reject law in general. It is opposed not only to established law, but to every form of legal coercion. It wants to set aside law altogether and thus to dispense with governmental institution. The party of anarchists, is therefore, the enemy of all governments and its efforts are directed primarily against the general body of citizens.

In *re Castioni*, Castioni, a Swiss subject, had taken part in a political disturbance in Switzerland in the course of which he killed a Municipal Councillor and later on fled to England. In the extradition proceedings initiated on behalf of the Swiss Government, the Magistrate in England committed Castioni to prison holding that his offence in Switzerland was not of a political character. He applied for a writ of *habeas corpus*, which was issued by the Divisional Court. It was held that at the moment at which Castioni fired the shot the reasonable presumption was that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of the very object which the rising had taken place in order to promote and to get rid of the Government who, he might until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. The Queen's Bench Division accordingly let off Castioni from custody by holding that the offence was a political one and refused to order his extradition to Switzerland. It was held that an offence has a political character if it was "incidental to and formed part of political disturbances," i.e., it was committed "in the course of" and "in furtherance of" the political disturbance.

In the case of *Meunier*, the accused had caused explosions in a Paris cafe. Since he was an anarchist, the offence of which he was charged could not be treated an offence of a political character. It was held by Justice Cave of the British Court that in order to constitute an offence of a political character, there must be two or more parties in the State each seeking to impose the government of their own choice on the other, and that, if the offence is committed by one side or the other, in pursuance of that object, it is a political offence, otherwise not.

The offence of 'political character' is not intended to shield acts of terrorism. The distinction between freedom fighters and terrorists relates to their

character of foray, mode of attack, kinds of demands (ransom) and targets attacked.

Attentat Clause.—The rule that political offences are not extraditable is subject to an exception which is contained in the attentat clause that murder of the head of a foreign State or a member of his family is not to be considered a political crime. Its necessity was felt for the first time in Belgium following the case of Jacquin in 1854 who, domiciled in Belgium, caused an explosion with the intention of murdering the French Emperor Napoleon III. Request for extradition made by France was refused on account of the Belgian extradition law interdicting the surrender of political offenders. This necessitated the enactment of the attentat clause by Belgium. The U.S.A. has adopted the attentat clause. The Montevideo Convention on Extradition (1933) also included this clause.

Convention against Terrorism.—The Council of the League of Nations tried to bring about an international convention for the prevention and punishment of crimes of a political character. The Convention was signed at Geneva on November 16, 1937, by twenty-three States undertaking to treat as criminal offences acts of terrorism including conspiracy, incitement and participation in such acts, and, in some cases, to grant extradition for such offences. The convention has not come into force.

With the rise in the number of crimes attributable to terrorism, the matter has been engaging the attention of the countries all over the world. Article 4 of the Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission in 1949, casts a duty on the States to prevent within their borders political terrorist activities directed against foreign States. The same principles are envisaged in the Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States adopted by the General Assembly in 1970. Article 8 of the Assembly of the Organization of American States (O.A.S.) prohibits States from affording direct or indirect assistance to terrorist activities. The Helsinki Declaration adopted on August 1, 1975, by 30 European States and others reaffirmed the same principles.

Individuals have no rights under extradition treaties except the principle of non-extradition of political offenders, which has assumed the character of a rule of International Law.

The conception of "political crime" presents serious difficulties. Oppenheim observes that "whereas many writers consider a crime 'political' if committed from a political motive, others call 'political' any crime committed for political purpose; again, others recognize such a crime only as 'political' as was committed both from a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term 'political crime' to certain offences against the State only, such as high treason, lese-majeste, and the like. Up to the present day, all attempts to formulate a satisfactory conception of the term have failed."

The First Protocol to the Geneva Convention, 1977, brings within the category of international armed conflict even wars of national liberation from colonial and racially discriminating governments. Article 1 of the Second Protocol to the Geneva Convention, 1977, applies to all armed conflicts which take place in the territory of a high contracting party between its armed forces

and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

The exemption from extradition of political offenders has in the recent past assumed contentious dimensions between the asylum and requesting or requisitioning States. By refusing to surrender the offender on the ground of the offence being of a political character, the requesting State is apt to consider the refusal as an act in support of the militant opposition amounting to a hostile act. Transnational terrorism has recently accelerated the controversy regarding the exemption of a political offender. The question as to whether terrorists are political offenders or not bristles with considerable difficulty. The old notion and doctrine of non-extradition of political offenders needs re-valuation and reformulation—new norms have grown up as a result of developing menace of transnational terrorism. The 1985-UN General Assembly resolution condemning all forms of terrorism lends support to this view.

In the case of *Cheng* (1973) A.C. 931 the majority in the House of Lords decided to surrender the fugitive to help combat world terrorism and differed from the classical view of political offence as propounded in Great Britain *In re. Castioni* (1891) 1 Q B. 149.

A number of Sikh militants, including some wanted for trial in Indian courts, sought asylum in Britain, and the Home office in Great Britain was not concerned with the religion but with the nationality of the militants. At the moment Britain has a multilateral arrangement with India and several other Commonwealth countries for the purpose of extradition. This has a political defence clause under which terrorists and extremists defend themselves on the plea that they indulged in violence for a political cause and not for any ordinary criminal purpose.

Britain offered its cooperation to India in extradition of terrorists as part of its resolve to ensure that the country does not become a safe haven for those who have committed offences of violence in India. The British Home Secretary, Mr. Douglas Hurd, coupled the offer with a warning to those who have settled in Britain not to disturb peace there, in pursuit of quarrels which have nothing to do with that country. The warning followed attacks on moderate Sikh leaders in Britain from extremists which caused serious concern in India. Calling for Indo-British cooperation in the fight against terrorism and in extradition of those terrorist offenders who flee to another country, Mr. Hurd said that Britain offered to extend the Suppression of Terrorism Act to India for the purpose. Under the Act those who commit serious offences of violence cannot avoid extradition on the ground that their offences were of a political character. On September 22, 1992, India and Britain signed an extradition treaty and an agreement for the confiscation of terrorist funds in a joint move against anti-India terrorists operating from British soil.

The United States has followed the principle laid down in *In re. Castioni* and held that if the crime is committed in the course of, or in furtherance of, a political disturbance, then it will be an offence of a political character. [*Omelas* v. *Ruiz*, 161 U.S. 502; *Jiminez* v. *Araisteguieta*, 311 F. 2d (1962)]. Following this principle, the U.S.. refused to extradite a member of the Provisional Irish Republican Army (IRA) to the United Kingdom, holding that a member of the Provisional Irish Republican Army commits a political offence inasmuch as there

is a political disturbance in Northern Ireland.

The aforesaid test is quite out of tune with the current dimension of international terrorism which actually impinges on the sovereignty of the requesting State.

The French view exempts pure political offenders, but not murder decree of the Head of State.

The Swiss approach is almost similar to that of the United Kingdom—the murder should be the sole means of safeguarding the aim of the organization for achieving political aims.

In conclusion, it may be said that since political offences assume very serious proportions and affect dangerously the international public order and the sovereignty of the disturbed State, a re-thinking on the issue has of late gained importance, especially in view of current international terrorism affecting the entire world.

The European Convention on the Suppression of Terrorism, 1977, aims to abolish the exemption of political offence clause for various offences and obliges the parties to the Convention either to extradite or to prosecute. But the Convention has not received the whole-hearted approval of the member States of the Council of Europe—the Republic of Ireland has not signed it and France has not ratified it. In January, 1982, the Council of Ministers adopted a recommendation concerning International Cooperation in the Prosecution and Punishment of Terrorism.

Apart from the above, there is a duty cast on a State to prevent within its borders political terrorist activities directed against foreign States, e.g. Art. 4 of the draft Declaration on the Rights and Duties of States, prepared by the International Law Commission in 1949; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the UN Charter, adopted by the General Assembly in 1971; Art. 8 of the Convention to Prevent and Punish Acts of Terrorism, approved by the General Assembly of the Organization of American States, Feb., 1971; Helsinki Declaration, adopted by 30 European States on August 1, 1975, the Holy See, the United States and Canada, in August, 1978, pledging themselves to refrain from direct or indirect assistance to terrorist activities.

UN Resolution on Terrorism.—In December, 1985, the 159-member U.N. General Assembly unanimously adopted a resolution condemning all forms of terrorism. It called for global treaties to eliminate the menace of terrorism and also asked member nations to refrain from instigating terrorists. The shipping companies and airlines authorities were advised to cooperate in the matter.

Venice Summit on Terrorism.—The 13th annual economic summit of the seven leading western industrialized nations, comprising the heads of State and Government of United States, West Germany, France, Britain, Canada, Japan and Italy, held at Venice, on the second day of their three-day summit on June 11, 1987, issued a strong statement on terrorism. They agreed to take several measures to bolster the 1978 Bonn declaration on terrorism in an effort to deal effectively with all forms of terrorism affecting civil aviation. They resolved to halt flight to a country which refuses extradition or prosecution of those who have committed offences described in the Montreal convention for the suppression of unlawful acts, against the safety of civil aviation or does not

return the aircraft. At the same time, their Governments would initiate action to halt incoming flights from that country, or from any country, by the airlines of the country concerned as stated in the Bonn declaration on terrorism.

The seven leaders pledged to continue efforts to improve the safety of travellers. They pledged increased cooperation in the relevant flora and within the framework of domestic and international law on the investigation, apprehension and prosecution of terrorists. In particular, they reaffirmed the principles established by relevant international conventions of trying or extraditing, according to national laws and international conventions, those who have perpetrated acts of terrorism.

(2) Military Offences.—Military offences, e.g., desertion, and religious offences are also generally not subject to extradition proceedings. The rule is that extradition is not allowed for trifling cases, and the States ensure that only serious crimes do not go unpunished.

(3) Rule of Speciality.—The fugitive demanded shall not be liable to be tried for any offence committed prior to his surrender other than the specified offence mentioned in the request for his extradition until he has been liberated and has had an opportunity of leaving the country. This is known as the Principle or Rule of SPECIALITY.

In the case of *United States* v. *Rauscher* (1186), Raucher, a sailor was surrendered by Great Britain to U.S.A. upon a charge of murder. He was, however, tried and convicted in U.S.A. upon a minor charge of inflicting cruel and unusual punishment to the man of whose murder he was before accused. On appeal, the Supreme Court of the United States quashed the conviction and ordered the release of the prisoner on the ground that, unless otherwise provided for by treaty, the prisoner could only be charged with the offence for which he was extradited unless he was given a reasonable time to return to the country which surrendered him.

The Supreme Court observed : "The weight of authority and of sound principle are in favour of the proposition that a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given to him, after his release on trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

(4) Double Criminality.—The crime must be an offence in both the States. This is based on the principle of double criminality. No person is to be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as of the State which demands extradition. The act complained of must be a crime under the laws of both the requesting and the requested State. Treaties generally embody a clause that acts punishable in both the countries with specified penalties shall only be extraditable.

In the case of *Factor* v. *Laubenheimer and Haggard*, the Supreme Court of the United States gave a liberal interpretation to the Extradition Treaty with Great Britain when it held that the offence with which the plaintiff was charged was an extraditable crime even though it was not punishable by the law of the State of Illionis where the plaintiff was taken in custody. The court observed : "Once

the contracting parties are satisfied that an identified offence is genuinely recognized as criminal in both countries, there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeed in finding in the country of refuge some State territory or district in which the offence charged is not punishable."

(5) Surrender after his trial for offence committed in his own State.—A fugitive criminal who has been accused of some offence not being the offence for which his surrender is asked shall not be surrendered until after he has been tried and has served his sentence for the offence committed in the State requested to surrender.

(6) Reasonable *prima facie* evidence.—There must be reasonable *prima facie* evidence of the guilt of the accused. The requested State shall satisfy itself that the evidence submitted justifies *prima facie* judicial proceedings against the accused but it is not within the province of the Courts of such a State to try the case on merits.

International Law also leaves to the States the right to grant asylum to foreign individuals by virtue of their territorial supremacy whose cases do not fall under stipulations of extradition treaties.

Under the English Law, a fugitive criminal is not actually surrendered until the expiration of 15 days from the date of his being committed to prison to await his surrender so as to enable him to file an application for a writ of *habeas corpus*.

Surrender of a person within the State to another is a political act.—The subject of extradition was succinctly dealt with by their Lordships of the Supreme Court of India in the *State of West Bengal* v. *Jugal Kishore More* and the following observations were made in that case :

Extradition is the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the courts of the other State. Surrender of a person within the State to another State—whether a citizen or an alien—is a political act done in pursuance of a treaty or an agreement *ad hoc*. It is founded on the broad principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognized as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. Extradition of an offender is primarily meant for suppression of crimes and administration of justice. The law relating to extradition between independent States is based on treaties. But the law has operation—national as well as international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the State, the procedure to be followed by the Courts in deciding whether extradition should be granted and on what terms, is determined by the municipal law. Sanction behind an order of extradition is the international commitment of the State under which the Court functions, but Courts jealously seek to protect the right of the individual by insisting upon strict compliance with the conditions precedent to surrender. The Courts of the country which make a requisition for surrender deal with the *prima facie* proof of the offence

and leave it to the State to make a requisition upon the other State in which the offender has taken refuge. Requisition for surrender is not the function of the Court but of the State. A warrant issued by a Court of an offence committed in a country from its very nature has no extra-territorial operation. It is only a command by the Court in the name of the sovereign to its officer to arrest an offender and to bring him before the Court. By taking a requisition in pursuance of a warrant issued by a Court of a State to another State for assistance in securing the presence of the offender, the warrant is not invested with extra-territorial operation. If the other State requested agrees to lend its aid to arrest the fugitive, the arrest is made either by the issue of an independent warrant or endorsement or authentication of a warrant of the Court which issued it. By endorsement or authentication of a warrant the country in which an offender has taken refuge signifies its willingness to lend its assistance, in implementation of the treaties or international commitments and to secure the arrest of the offender. The offender arrested pursuant to the warrant of an endorsement is brought before the Court of the country to which the requisition is made, and the Court holds an inquiry to determine whether the offender may be extradited. International commitment or treaty will be effective only if the Court of a country in which the offender is arrested after enquiry is of the view that the offender should be surrendered.

Functions of the Courts in the two countries.—The functions which the Courts in the two countries perform are therefore different. The Court within whose jurisdiction the offence is committed decides whether there is *prima facie* evidence on which a requisition may be made to another country for surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid, the requisition is transmitted to the police authorities, and the courts of that country consider, according to their own laws, whether the offender should be surrendered—the enquiry is in the absence of express provisions to the contrary relating to the *prima facie* evidence of the commission of the offence which is extraditable, the offence not being a political offence nor that the requisition being a subterfuge to secure custody for trial for a political offence.

The extradition magistrate is required to consider various aspects of the case, *viz.*, whether the accused before him has criminal charges pending against him in the requesting court, whether those crimes are listed in the treaty between the two countries and that there is probable cause to believe that the extraditee has committed the crime. The extraditee's right of defence is limited to his giving explanation rather than contradicting the process of extradition. His right does not permit him to establish evidence of *alibi* or to challenge the validity of the extradition treaty.

Once a magistrate decided that there was sufficient evidence to justify committal for trial, the accused must be so committed and there was no provision in the Extradition Act, 1870, giving a magistrate any wider power in extradition proceedings than in ordinary proceedings for committal for trial. By virtue of S. 10 of the Extradition Act, 1870, the question whether it would be wrong, unjust or oppressive to surrender the fugitive was not one for the courts but for the Secretary of State who was answerable to Parliament, but not to the courts for any decision he might make : *Atkinson* v. *United States of America Government*.

Indo-British Extradition treaty.—On September 22, 1992, India and Britain signed a historic extradition treaty and an agreement on confiscation of extremists' assets heralding a new era of bilateral cooperation against terrorism and drug trafficking. The new legal regime will ensure that the United Kingdom no longer shelters anti-India extremists operating from the British territory and that the British-based patrons of Indian terrorist groups are disallowed to operate with impunity.

The treaty replaces the ineffective Fugitive Offenders Act, hitherto governing extradition arrangements between Commonwealth countries.

The agreement on confiscation of terrorists' and drugrunners' assets is the first of its kind in the world, where two countries act together on the subject and India is the first country with which Britain has signed such an agreement. The agreement provides forfeiture of funds and assets of any individual or organisation involved in terrorism or drug-trafficking in the one country, but also in the other country.

British Parliament ratified the historic Indo-British extradition treaty on July 22, 1993, ushering in a new era of bilateral cooperation between the two countries in combating international terrorism.

The Indo-British extradition treaty obliterates the political factor from crimes of violence as a defence against extradition and provides that any crime carrying the sentence of 12 months or more in either country could become a case of extradition.

ASYLUM

Asylum.—According to Starke, the conception of asylum in international law involves two elements : (a) shelter, which is more than merely temporary refuge; and (b) a degree of active protection on the part of the authorities in control of the territory of asylum.

The Institute of International Law, at its Bath Session in September, 1950, defined the term "asylum" as under :

"Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek."

The term 'asylum' is used to describe a number of legal notions : the grant by States of admission into their territory to refugees, the protection of refugees against return to a country in respect of which they fear persecution and non-extradition of political offenders.

The above elements of asylum will show that extradition is the antithesis of territorial asylum. Asylum stops, as it were, where extradition begins.

According to Art. 14 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948 :

(1) Every one has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Territorial and Diplomatic Asylum.—Asylum may be territorial, i.e., granted by a State on its territory; or it may be extra-territorial, i.e., granted to

fugitives by a State within the precincts of its embassies or legations abroad. The former is called the territorial asylum and the latter diplomatic asylum.

The distinction between territorial asylum and diplomatic asylum was explained by the International Court of Justice in the Columbian-Peruvian Asylum Case.

"In the case of extradition (*territorial asylum*), the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty, the refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of the State.

"In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."

Territorial Asylum.—According to traditional International Law, the right of territorial asylum is the right of sovereign States to grant asylum within their territory at their discretion. Territorial asylum derives its bases from the territorial supremacy of the State over all persons on its territory, whether subjects or aliens. The General Assembly recognized as early as in 1948 in Art. 14 of the Universal Declaration of Human Rights the right of everyone to seek and to enjoy in other countries asylum from persecution.

According to Article 1 of the Convention on Territorial Asylum adopted at Caracas on March 28, 1954 :

"Every State has the right in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable without, through the exercise of this right, giving rise to complaint by any other State."

Similarly, Art. 1 of the Declaration on Territorial Asylum as adopted by the United Nations General Assembly in its resolution of December 14, 1967, states :

"Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Art. 14 of the Universal Declaration of Human Rights including persons struggling against colonialism, shall be respected by all other States."

"The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity."

"It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."

Under Art. 2, "Where a State finds difficulty in granting or continuing to grant asylum, states individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State."

The General Assembly recognized as early as in 1948 in Art. 14 of the Universal Declaration of Human Rights the right of every one to seek and to enjoy in other countries asylum from persecution. In 1951, the Convention on the Status of Refugees was adopted and, in 1966, the General Assembly

embodied in a legally binding instrument, international covenant on civil and political rights, the principle that an alien lawfully in the territory of a State party to the covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law. A year later, on December 14, 1967, the Assembly went one step further in the regulation of the institution of asylum by adopting unanimously the Declaration on Territorial Asylum which, among its most important provisions, called on governments to refrain from measures such as rejection at the frontier of persons seeking asylum. However, as a Declaration, it lacked binding force, and it was felt necessary to strengthen the legal basis for granting asylum by means of a convention.

A United Nations Conference of Plenipotentiaries opened in Geneva on January 10, 1977, to consider and adopt a Convention on Territorial Asylum which could represent a major improvement of the legal situation of persons seeking asylum. As observed by the U.N. Secretary-General in his message, the decision of the General Assembly to convene the Conference was doubly significant : first, it gave concrete expression to their awareness at the United Nations of the plight of the individual victim of persecution and, secondly, it reflected the commitment of the United Nations to the progressive development and codification of International Law in accordance with the Charter.

Principle of Non-Refoulement.—The principle of non-refoulement (i.e., protection of refugees against expulsion or return to a country where they fear persecution) finds place in Art. 3 of the Draft Declaration on Asylum adopted by the Human Rights Commission. It reads :

"No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights should, except for overriding reasons of national security or safeguarding of the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well-founded fear of persecution endangering his life, physical integrity or liberty in that territory..."

This principle has also been incorporated in Arts. 31, 32 and 33 of the Refugee Convention of 1951.

Art. 31. The contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorization.

Art. 32. The contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Art. 33. No contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories, where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The right of asylum is not merely a tradition in Switzerland. It is a political principle and an expression of the Swiss conception of freedom and independence.

The British Government also grants political asylum to a foreigner, if in his own country he appears to them to be in danger of life, or liberty on political grounds or on grounds of religion or race.

It is also the traditional policy of the government of the United States to

grant refuge in its territory to persons whose lives are believed to be in jeopardy as a result of political activities in a foreign country.

The United States regards a request for political asylum as an adminstrative matter.

The Government of India grants asylum in the exercise of its executive discretion. In granting asylum to Dalai Lama and his Tibetan followers, India exercised her right as a sovereign State.

Diplomatic Asylum.—As regards diplomatic asylum, Art. 6 of the Harvard Research Draft on Diplomatic Privileges and Immunities provides :

"A sending State shall not permit the premises occupied or used by its mission or by a member of its mission to be used as a place of asylum for fugitives from justice."

In the Columbian-Peruvian Asylum Case, the Court while considering Latin-American treaties and practice by which asylum might in circumstances be granted to political offenders but not to persons accused of common crimes, concluded "that Colombia, as the State granting asylum, is not competent to qualify the offence (as political) by a unilateral and definitive decision, binding on Peru" and that "the principles of International Law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum." The Court holding that Peru had failed to prove the common law nature of the crime of which it accused Haya de la Torre, found in favour of the counter-claim submitted by Peru, holding that asylum had been irregularly granted to him by the Columbian Legation in Peru because Haya de la Torre had sought refuge in the Embassy some three months after the suppression of the military rebellion, which showed that the urgency prescribed by the Havana Convention as a condition for the regularity of asylum no longer existed.

Diplomatic missions are accorded privileges and immunities for functional reasons as is clearly brought out in the Vienna Convention on Diplomatic Relations. Any unilateral expansion of these functions by a diplomatic mission would be considered as an encroachment on its authority by a territorial State. State practice, however, permits a diplomatic mission to give within its premises temporary refuge to a person who is in imminent danger of his life until the cessation of such danger. The practice of temporary refuge is clearly justified on grounds of humanitarian considerations. This practice does not in any way involve withdrawal of the person concerned from the jurisdiction of the territorial State. In fact, it helps the territorial State inasmuch as the refugee is returned to it after the cessation of the imminent danger to his life. This is not so in case of diplomatic asylum. There is a basic difference between temporary refuge given on humanitarian considerations and diplomatic asylum accorded for political reasons. The latter is tantamount to intervention in the internal affairs of a member State within the meaning of Art. 2(7) of the Charter and is in derogation of that State's sovereignty.

The same principles apply to asylum in consulates.

Asylum in the premises of international institutions is not contemplated under any law or treaty.

Leading Cases and Principles on the Law of Extradition

Savarkar's Case.—In connection with extradition the case of *France* v. *Great Britain* concerning Savarkar may here be noted. Savarkar, an Indian and a British

subject, was being transported in the P. and O. boat *Morea* to India for the purpose of his trial on a charge of high treason and abetment of murder. During the voyage on July 8, 1910, he made a dramatic bid to escape. The ship *S.S. Morea*, was at Marseilles when the prisoner entered the water closet and squeezing himself through its porthole jumped into the sea. The guards immediately noticed him and opened fire. Alternatively diving and swimming under a shower of bullets, he reached the port and climbed the quay. He was pursued by marine guards and seized by a French policeman, on French soil, who, in mistaken execution of his duty, handed him over to the captain without any extradition proceedings. Since Savarkar was a political offender, France demanded that Great Britain should give him up and ask for his extradition in a formal way in conformity with International Law. Great Britain did not comply with his demand. By consent on October 25, 1910, the matter was referred to the Permanent Court of Arbitration at The Hague. The award, while admitting that an irregularity had been committed by the handing over of Savarkar to the British authorities, decided in favour of Great Britain holding that there was no rule of International Law imposing in such circumstances any obligation on the power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that power.

Godfrey's Case.—In *Rex* v. *Godfrey*, the term 'fugitive' came in for interpretation and it was observed by Lord Hewart, C.J. that although "at the first blush it might appear that when a man is spoken of as a fugitive what is meant is that he fled from one country to another country, it seems that the words 'fugitive criminal' are equally satisfied whether the man has physically been present in that country or not, if he committed the crime there."

Mubarak Ali's Case.—In *re Government of India and Mubarak Ali Ahmed*, the Queen's Bench referred with approval to *Re Castioni*, in which the court refused extradition because the crime of the fugitive concerned (in having shot a member of the Government while taking part in a revolutionary movement of the Canton of Ticino) was considered to be political. The present case, however, concerned a man charged with forgery and even if the case had some political implications—into which the Court could not inquire—there was no reason to suppose that he would not receive a fair trial and it would be an 'impossible position for this Court to take up' and 'an insult to the Court of India' to say that he would not.

Dr. Ram Babu Saxena v. The State.—Dr. Ram Babu Saxena, a member of the U.P. Executive Civil Service, was appointed in 1948 as Administrator, Tonk State, which was then an Indian State and had extradition treaty with the British Government. It was alleged that while serving in Tonk State, he had committed crimes of extortion and cheating. Dr. Saxena contended that both these offences being not included in the extradition treaty of 1869, he was not liable for extradition. Under a warrant of arrest issued by the Regional Commissioner of the Rajasthan Government under S. 7 of the Indian Extradition Act of 1903, Dr. Ram Babu Saxena was arrested at Nainital. He was released on bail and directed to appear at Tonk on a particular date. He applied to the High Court at Allahabad for his release on the ground that his arrest was illegal and he was not bound to surrender himself to the Rajasthan Government. The High Court dismissed his application.

Their Lordships of the Supreme Court observed that extradition of an Indian subject under S. 7 for an offence which is not extraditable under the extradition treaty entered into between the British Government and the Tonk State in 1869, is not in any sense a derogation from the provisions of the treaty which provides for the extradition of offenders for certain specified offences, assuming that the treaty of 1896 still subsisted after the accession of the Tonk State to the Dominion of India. It was not correct to say that by providing for extradition for additional offences, the Act derogates from the rights of Indian citizens under the treaty or from the provisions of the treaty. Accordingly, Patanjali Sastri, J. (with whom Kania, C.J. and Fazl Ali, J. concurred) held that it was not correct to say that, by providing for extradition for additional offences, the Act derogates from the right of Indian citizens under the treaty or from the provisions of the treaty. The learned Judges were accordingly of opinion that the arrest and surrender of the appellant under S. 7 of the Act was not rendered unlawful by anything contained in the treaty of 1869, assuming that it still subsisted.

Mukherjea, Mahajan, Fazl Ali and Das, JJ., however, held that the extradition treaty between the Tonk State and the British Government in 1869 was not capable of being given effect to in view of the merger of the Tonk State in the United State of Rajasthan. When a State relinquishes its life as such through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation, the treaties of the former are automatically terminated.

Sardar Narmada Prasad v. Rex.—The District Magistrate of Rewa, Vindhya Pradesh, issued a search warrant under S. 96 of the Code of Criminal Procedure, 1898, for the search of the premises of the applicant in connection with an alleged offence under S. 409, I.P.C. committed by him in Vindhya Pradesh. The warrant was endorsed by the Regional Commissioner of Vindhya Pradesh and was brought to the District Magistrate of Allahabad who, in his turn, endorsed it forwarding the same to the Senior Superintendent of Police, Allahabad. The search took place at the house of the applicant on October 27, 1949. In the search, certain documents belonging to the applicant were seized and handed over to the Superintendent of Police, Rewa.

The only provision under which the applicant's house could be searched and documents seized therefrom on a warrant issued by a court in Rewa is under S. 22 of the Indian Extradition Act, 1903, which envisages that before a Magistrate in British India can issue a search warrant or endorse a search warrant issued by a Magistrate in a State like the Vindhya Pradesh, there must be before him some proceeding against some person for extradition under the Indian Extradition Act. A magistrate in British India gets jurisdiction only when extradition proceedings are pending before him against any person. If no such proceedings are pending, a Magistrate in British India has no jurisdiction either to issue a search warrant himself or to endorse a search warrant issued by a magistrate of a State like the Vindhya Pradesh. It was admitted on behalf of the Crown that no extradition proceedings against the applicant or anybody else were pending before the District Magistrate of Allahabad on October 27, 1949. Under these circumstances, the High Court at Allahabad held that the District Magistrate of Allahabad had no jurisdiction on that date to endorse the warrant for search of the house of the applicant. The search, therefore, which took place

on that date was illegal and those who conducted it had no authority to remove anything from the house of the applicant.

Other Indian Cases.—Apart from the Savarkar's case, Dr. Babu Ram Saxena v. The State and Sardar Narmada Prasad v. Rex. discussed earlier, the following other cases may also be noticed.

Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta.—The case has been adverted to earlier while dealing with the distinction between law of expulsion and extradition.

The petitioner Hans Mulļer, a West German subject, was arrested by the police in Calcutta on the 18th of September, 1954, and detained for his expulsion from India. The petitioner applied to the High Court of Calcutta for a writ in the nature of *habeas corpus* on the ground that the West Bengal Government had no power to deport the petitioner and only the Central Government could do that, but both the High Court and the Supreme Court on appeal dismissed the petition. Their Lordships of the Supreme Court held that when criminal charges for offences said to have been committed in India and abroad are levelled against a person, an apprehension that he is likely to disappear and evade an order of expulsion cannot be called either unfounded or unreasonable. Detention in such circumstances is rightly termed preventive and falls within the ambit of the Preventive Detention Act and is reasonably related to the purpose of the Act.

State of Madras v. C.G. Menon.—In this case, Mr. Menon was charged before the High Court of Madras with having committed criminal breach of trust and Mrs. Menon with abetment while they were in Singapore. Their extradition was sought by the Government of Singapore under the provisions of the Fugitive Offenders Act, 1881, while they had come to India. On the plea of the Menons, the Madras Court held that the relevant provision of the Fugitive Offenders Act was inconsistent with the provisions of Art. 14 of the Constitution. The Supreme Court on appeal held that the Fugitive Offenders Act could not operate after the coming into force of the Indian Constitution. Mahajan, C.J. observed that the situation completely changed after India became a Sovereign Democratic Republic. India could not be described as a British possession and it could not be grouped by an Order-in-Council amongst those possessions. Truly speaking, it became a foreign territory so far as other British possessions were concerned and the extradition of persons taking asylum in India, having committed offences in British possessions, could not only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation. The Union Parliament had not so far enacted any law on the subject nor had any arrangement been arrived at between these two governments. The Indian Extradition Act, 1903, has been adopted, but the Fugitive Offenders Act, 1881, which was an Act of the British Parliament, has been left severally alone. The provisions of that Act could only be made applicable to India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation on these lines, it seemed difficult to hold that S. 12 or S. 14 of the Act had force in India by reason of the provision of Art. 372 of the Constitution.

Mobarak Ali Ahmad v. The State of Bombay.—Mobarak Ali Ahmad while undergoing trial for forgery and fraud in the sessions court at Bombay fled

away first to Pakistan and thence to England. The Indian Government obtained his extradition under the Fugitive Offenders Act. It appears that when he was brought back to Bombay and was in jail custody with reference to the resumed sessions trial, the complainant got to know about it and filed his complaint, on June 30, 1952, for the offence of cheating. The accused urged that he was a Pakistani national and was at the time of the commission of the offence at Karachi and as such as he could not be tried by an Indian Court and that would be conferring extra-territorial operation to the Indian Penal Code. The Supreme Court negatived the contention and observed that the fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give an extra-territorial operation to the law, for it is in respect of an offence whose locality is in India that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India for the trial can be secured. Their Lordships opined that even on the assumption that the appellant had ceased to be an Indian citizen and was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code notwithstanding his not being corporeally present in India at the time.

Sucha Singh's Case.—After having murdered the Punjab Chief Minister Pratap Singh Kairon in 1956, Sucha Singh absconded to Nepal. In view of the extradition treaty between India and Nepal, on the request of the Government of India, the Government of Nepal extradited Sucha Singh after initiating proceedings against him in accordance with the law of Nepal. Nepal did not regard the crime as political.

Dharam Teja's Case.—Dharam Teja was the Managing Director of Jayanti Shipping Corporation. He fled from India and was charged for embezzlement of crores of rupees. He was traced in Ivory Coast, and the request of the Government of India for his extradition was refused on the ground that there was no extradition treaty with India. He was then traced in London, and on the request of the Government of India for his extradition, proceedings were initiated against him in the court in England. On completion of the extradition proceedings, he was extradited to India where he was charged for the offence of embezzlement of money of the Jayanti Shipping Corporation and convicted.

Abu Salem case.—The extradition of underworld don, Abu Salem, was a tribute to the co-ordination among the Central Bureau of Investigation, the ministry of home affairs, the ministry of external affairs and the Indian embassy in Lisbon, Portugal, and was made possible by the excellent co-operation received from the Portuguese authorities.

The extradition was a landmark event for many reasons.

Abu Salem had undergone plastic surgery in a South American country, and his actual visage at the time of his arrest in Lisbon was different from the photograph sent by the Central Bureau of Investigation to the Portuguese authorities. However, the CBI officers managed to establish his real identity through his fingerprints and thus convince the Lisbon court.

Abu Salem's extradition.—Intelligence sources also say the Portuguese police and the local court were convinced of the validity of the CBI's evidence relating to Salem's involvement in terrorism activities in India.

The Abu Salem episode is a turning point in India's fight against terrorism with global links, said a senior source in CBI.

For one, there is no extradition treaty between India and Portugal. The absence of such a treaty initially created legal difficulties but, wisely, the Indian government sought his extradition under the United Nations Convention on Suppression of Terrorism of 2000 under which all member nations have to help each other in the war against terrorism.

Portugal and India are both signatories to the Convention.

In the meantime, the Portuguese court sentenced Salem and his girlfriend, Monica Bedi, to four years imprisonment for illegally entering and staying in Portugal on forged passports. The court also ordered that their extradition could be made only after they have completed their prison term.

However, at the end of two years Salem and Bedi's lawyers moved the court for their release on parole on the ground that their behaviour in jail was 'exemplary'. The jail authorities too confirmed their lawyer's claims.

Salem's lawyer assured the court that his client will voluntarily go to India once he is released on parole and expressed his readiness to surrender to the Indian police.

Abu Salem : a dossier.—When the CBI got to know of Salem's plea, the Portuguese lawyer representing the Indian government rushed to the court to remind the judge about his previous order about extraditing the duo on completing their 4-year sentence.

India pleaded that instead of being released on parole, they should be extradited. The court accepted their request and gave India one of the most elusive legal victories.

But Salem and Bedi were not willing to throw in the towel so easily. The couple—who are said to be extremely motivated, focussed and calculating—rushed to seek the intervention of the European Court of Human Rights, which refused to intervene in the matter.

Mumbai police can try Abu Salem in two cases only.—Monica, who is a fighter by nature, kept avoiding India till the last moment. She even applied for political asylum in Norway where her parents are settled and where she had grown up. The liberal Norway turned down her request because of her conviction for travelling on a false Indian passport.

While Abu Salem did not enjoy any public support in Portugal, Monica enjoyed much sympathy because not only is she a pretty face, but also comes across as innocent. Added to this is her articulateness on various issues.

In Lisbon, she gave many interviews to the media in which she sounded quite convincing; on the basis of this many human rights organisations took up her case, but not Abu Salem's.

Monica was so desperate to not return to India that she even tried to seek the intervention of the Catholic Church by claiming that she had embraced Christianity.

However, her somewhat melodramatic efforts failed.

Finally, the Portuguese court ordered their extradition after the Indian government, through its lawyer, gave a solemn assurance that if convicted they would not be sentenced to death. If this commitment is not kept, it could affect

future extradition requests from India. Interestingly, Home Minister Shivraj Patil said 'the government cannot interfere with the judicial process and ask the courts not to award him capital punishment. But it has the power under the statute to commute a case of death sentence.'

The Portuguese authorities were surprised when the Indian government sent an Air Force plane (used by one of the defence- related establishments) to fly the couple to India. They were worried that Abu Salem's lawyers could move the court saying this mode of transport created doubts about the Indian government's intentions. Fortunately, the lawyers did not come to know of this and Abu Salem was brought to Mumbai.

The huge expense incurred on bringing Salem to trial in India can be debated but there is no doubt the CBI's efforts will prove a deterrent for terrorists hiding outside India.

It will also send a strong message to Dawood Ibrahim and others that laws against terrorism, and international cooperation, could catch up with them if they travel out of their safe environs in Pakistan.

The Abu Salem case has paved the way for Indian intelligence officers and investigators to move for Dawood Ibrahim's extradition from Pakistan under the UN convention by citing the Portuguese precedent.

India must say a heartfelt thank you to the Portuguese government.

CHAPTER XVIII

PLACE OF THE INDIVIDUAL IN INTERNATIONAL LAW AND HUMAN RIGHTS

Traditional view.—The orthodox positivist view—a product of the nineteenth century—has been that only States and not individuals are the subjects of International Law as International Law only regulates relations between States which alone can have international rights and duties. The individual, according to this view, has no juridical personality and he can have only rights and obligations with reference to his own State. Sir Frederic Smith observed that "States and States alone enjoy a *locus standi* in the law of nations and that they are the only wearers of international personality." Oppenheim in consonance with this view maintained that since the law of nations is primarily a law between States, States are normally the only subjects of the law of nations and individuals are the ultimate objects of International Law. As to seeming divergence due to certain rights and duties bestowed on monarchs and other heads of States, diplomatic envoys and even simple citizens, in conformity with International Law, he observes that foreign States granting these rights to foreign individuals do this by their municipal laws, and these rights are, therefore, not international rights, but rights derived from municipal laws in accordance with a duty imposed upon the States concerned by International Law. International Law is indeed the background of these rights, but such rights come into existence by municipal laws. Likewise, all duties which might necessarily have to be imposed upon individual human beings according to the Law of Nations are, on the traditional view, not international duties but duties imposed by municipal law in accordance with a right granted to, or duty imposed upon, the States concerned by International Law. Even the Statute of the International Court of Justice empowers only States to take action in International affairs. Article 34 expressly provides that only States may be parties in cases before the Court. It was observed by the Permanent Court of International Justice in the *Serbian Loans* that a dispute which was exclusively one between a State and the subjects of another State could not be brought before the International Court.

Professor L.C. Green observed that "in classical international law the individual was regarded as an object, that is to say, he enjoyed no rights and was burdened by no duties. By and large, it may be said that international law worked itself out upon the individual, using his home State for the purpose."

Extreme view.—There is then the other extreme view that the State is only a fiction of the brain, but in the ultimate analysis, it is the individuals alone who are the subjects of International Law. This view finds ample support from the observations of Westlake who, while emphasizing the importance of the individuals, observes that "the duties and rights of the States are the duties and rights of the men who compose them."

The exponents of this view assert that the State is only an institution to safeguard and protect the rights of the individuals constituting it and that its

personality is the sum total of the personalities of such individuals.

"The law of nations of previous centuries with its roots in natural law, both Christian and Greek, and in the *jus gentium* of the Romans gave a primary place to the individual, for the very essence of natural law is a sense of moral justice, of right reason, which has no meaning except in terms of a heightened awareness of the worth of human personality."

"The antiquated doctrine that the individual cannot be a subject of rights and duties in international law, should be thrown overboard....In order to give any real significance, in theory and practice, to international human rights, it is necessary to accept the principle that the individual can derive these fundamental rights directly from positive international law."

Lauterpacht refutes the view that States are the exclusive subjects of International Law. He observes : "The claim of the State to unqualified exclusiveness in the field of international relations was tolerable at a time when actuality and the interdependence of the interests of the individual cutting across national frontiers were less obvious than they are today. It is this latter fact which explains why the constant explanation of the periphery of individual rights—an enduring feature of legal development cannot stop short of the limits of the State. What is much more important, the recognition of the individual, by dint of the acknowledgment of his fundamental rights and freedoms, as the ultimate subject of International Law, as a challenge to the doctrine which in reserving that quality exclusively to the State tends to a personification of the States being distinct from the individuals who compose it, with all that such personification implies. That recognition brings to mind the fact that in the international as in the municipal sphere, the collective good is conditioned by the good of the individual human beings who comprise that collectively. It denies, by cogent implication, that the corporate entity of the State is of a higher order than its component parts. It challenges the absolute moral superiority of groups, and in particular of the collective agency of the State which thus artificially personified is prone to and certainly capable of disregarding all moral restraints."

States and Individuals subjects of International Law.—The correct view which has been gaining a considerable number of adherents is that States are no doubt subjects of International Law, but individuals may as well occupy the same position. The central figure in international law is man and his rights and responsibilities are inalienable and indefeasible.

Article 2 of the Declaration of Rights of Man, 1789, proclaims that "the end of all political association is the conservation of the natural and indefeasible rights of Man." Jefferson stated : "God who gave us life, gave us liberty at the same time." In the same breath, he cheered : "Rebellion to tyrants is obedience to God."

According to Schwarzenberger, "It may be considered paradoxical that the individual, the basis both of national communities and of international society, should be merely an object of International Law. Yet as long as the groups which, until now, hold the monopoly of admitting additional subjects to the realm of International Law chose to maintain this state of affairs, this situation is bound to continue. It is mitigated in fact by the diplomatic protection of nationals abroad by their home State and by multitude of treaties, like commercial or minorities treaties, which must directly concern individuals."

Nuremberg Trial.—The International Military Tribunal at Nuremberg had to consider the submissions made by the accused that International Law was concerned with the action of sovereign States, and provided no punishment for individuals; and further that where the act in question was an act of State those who carried it out were not personally responsible, but were protected by the doctrine of the sovereignty of the State. The Tribunal rejected both these submissions and observed : That International Law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the case of *Exparte Quirin*, Chief Justice Stone of the U.S. Supreme Court said :

"From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals."...

"...Individuals can be punished for violations of International Law. Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."

"On the other hand, the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence in International Law."

The various War Crimes Tribunals as also the International Military Tribunal at Nuremberg have recognised crimes against humanity as punishable offences under International Law resulting in the prosecution of individuals for such offences.

Genocide Convention.—The Convention on the Prevention and Punishment of the Crime of Genocide, approved by the U.N. General Assembly on December 9, 1948, further attaches direct responsibility to individuals by making provision for punishing persons committing genocide, whether they are constitutionally responsible rulers, public officials or private individuals. (Art. IV)

Atlantic Charter.—The Atlantic Charter (1941) gave expression to the four basic principles of human freedom : freedom from fear, freedom from want, freedom of speech and freedom of worship. These principles made a departure from the concept of International Law which considered relations between States with absolute sovereignty as its main theme, and created a new person in International Law—the human being. It became internationally established that "the State is an instrument to serve the people and not an end for man to serve."

The United Nations.—The preamble to the Charter of the United Nations has shifted the emphasis from "The High Contracting Parties" of the League of Nations to the "People of the United Nations" and states the determination of the peoples of the United Nations to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women..." Under Art. 56 of the Charter, member-States have pledged themselves jointly and separately in cooperation with the Organization, for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all. The United Nations lays great emphasis on the

development of human personality and the preservation of the fundamental human rights of the individual. The United Nations, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations International Children's Emergency Fund, etc., are all designed to secure economic, social and cultural unity of mankind.

Petitions under the Trusteeship System.—The Charter provides for the right to petition the U.N. in respect of territories under trusteeship. The right has been embodied in all trusteeship agreeements.

Universal Declaration of Human Rights, 1948.—The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948. It sums up the civil, political and religious liberties men have struggled for so long. It also contains new economic and social rights which are only being recognized today.

The preamble to the Declaration stresses the "dignity and worth of the human person." The first two articles emphasize that these rights and freedoms apply to everyone everywhere. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status."

Articles 3 to 15 restate the older recognized rights of life, liberty and the security of person, to recognition everywhere as a person before the law and to equal protection of the law. No one is to be subject to arbitrary arrest, detention or exile. The Declaration outlaws slavery, torture and cruel, inhuman or degrading punishment, arbitrary interference with home, family, or correspondence. The right to a nationality is recognised and the right to seek asylum from persecution in other countries has been guaranteed.

Articles 22 to 27 cover economic, social and cultural rights; the right to social security; the right to work; the right to rest and leisure; the right to a standard of living adequate for health and well being; the right to education; and the right to participate in the cultural life of the community.

Art. 28 provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realised. This implies that these rights are only attainable under a suitable form of government and in an atmosphere of co-operation among nations.

Finally, Art. 30 provides that nothing in the Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth above.

Importance of the Declaration.—The Declaration sets a new international standard. For the first time in history, the representatives of most governments on earth have agreed that certain rights belong not to anyone national or group but to every human being as a human being. The United Nations have proclaimed that people have these rights not because they are Swedes or Arabs, Christians or Buddhists, Eskimos, Hottentots or South Sea Islanders, but because they are human beings. What the Universal Declaration really says is that each person should be considered on his or her merits and all deserve a chance to live a full and happy life.

Two Conventions on the Declaration of Human Rights.—The Rights

embodied in the Universal Declaration of Human Rights have been set forth in two Covenants—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights—which were adopted by the General Assembly on December 16, 1966, by 66 votes to 2 with 38 abstentions. The two Covenants entered into force in 1976 after 35 States had ratified or acceded to each of them.

The two Covenants ensure equal right of men and women to the enjoyment of all civil and political rights and economic, social and cultural rights set forth therein. Together with the Universal Declaration of Human Rights on which they are based and an Optional Protocol providing machinery for complaints from individuals, they constitute the first global bill of rights. Each required 35 ratifications or accession before coming into force. The Optional Protocol, subject to entry into force of the Covenant on Civil and Political Rights, required 10 instruments of ratification or accession. The Covenant on Economic, Social and Cultural Rights entered into force on January 3, 1976, and the Covenant on Civil and Political Rights came into force on March 23, 1976. By 31st December, 1982, 75 States had ratified or acceded to the Covenant on Civil and Political Rights; 72 States had ratified or acceded to the Covenant on Economic, Social and Cultural Rights; and 28 States had also accepted the Optional Protocol.

A detailed discussion of the Covenant on Civil and Political Rights, 1966, and the Covenant on Economic, Social and Cultural Rights, 1966 will be relevant on this score.

(i) The Covenant on Civil and Political Rights, 1966

The provisions of the Covenant on Civil and Political rights deal with the traditional civil and political rights described in the Universal Declaration on Human Rights. This Covenant protects the right to life (Article 6); prohibits torture or cruel, inhuman and degrading treatment or punishment (Article 7); prohibits slavery, the slave trade and forced labour (Article 8); prohibits arbitrary arrest or detention (Article 9); provides that all persons deprived of their liberty shall be treated with humanity (Article 10); and that no one shall be imprisoned merely for inability to fulfil a contractual obligation (Article 11). This Covenant asserts the right to liberty of movement and freedom to leave any country including one's own State and that no one shall be deprived of the right to enter his own country, (Article 12); sets limitations on the expulsion of aliens lawfully in the territory of a State party (Article 13); provides for equality before the courts and tribunals and for guarantees in civil and criminal procedures (Article 14); prohibits retroactive criminal legislation (Article 15); stipulates the right of every one to recognition everywhere as a person before the law (Article 16); and prohibits arbitrary or unlawful interference with privacy, family, home or correspondence and unlawful attacks on honour and reputation (Article 17). The Covenant states the right to freedom of thought, conscience and religion (Article 18) and the right to freedom of opinion and expression (Article 19).

According to the Covenant, the States parties are required to prohibit by law any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20). The Covenant recognises the right of peaceful assembly (Article 21); and the right to freedom of association (Article 22). It calls for State Parties to take steps

to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution (Article 23). It provides that every child shall have the right to protection by his family, society and the State (Article 24). It stipulates that all citizens shall have the right and the opportunity to take part in the conduct of public affairs, to vote and be elected at genuine periodic elections held by secret ballot (Article 25). The Covenant describes that all persons are equal before the law and are entitled to its equal protection. Under Article 27, rights of minorities have been set out in the Covenant. The Covenant provides that persons belonging to ethnic, religious and linguistic minorities shall not be denied the right in community with other members and their group, to enjoy their own culture, to profess and practice their own language.

However, the above mentioned rights are not absolute but are subject to certain limitations. The limitations are those which are specified by law and which are necessary to protect national security, public order, public health and morals, or the rights and freedoms of others. The rights relating to freedom of thought, conscience and religion, as distinct from the right to manifest religion or belief, and the right to hold opinions without interference, as distinct from the right to freedom of expression, are not subject to any restriction. In time of State emergency, however, the State-Parties may take measures derogating from the obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under International Law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Certain rights have been considered by the Covenant to be so essential that no derogation from them may be made even in time of State emergency. These rights are the right to life, the right not to be subjected to torture or to cruel, inhuman and degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of imprisonment, merely on the ground of liability to fulfil a contractual obligation, the right of everyone to recognition as a person before the law, the freedom of thought, conscience and religion.

This Covenant provides for the establishment of a Human Rights Committee consisting of 18 nationals of the State parties serving in their individual capacity and elected by the State parties. In the election of the Human Rights Committee, due consideration of equitable geographical distribution of membership and the representation of different forms of civilization and of the principal legal systems, are to be ensured.

(ii) The Covenant on Economic, Social and Cultural Rights, 1966

It has been provided under Article 2 of the Covenant on Economic, Social and Cultural Rights, 1966, that each State-party undertakes to take steps, to the maximum of its available resources individually and through international assistance and co-operation to achieve progressively the full realization of the rights recognised in the Covenant, for attaining this object, State Parties will use all appropriate means including legislative measures. The Covenant provides that each State-Party undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant. However, the rights covered in the Covenant on Civil and Political Rights are to be implemented immediately upon ratification but the rights set forth in the Covenant on Economic, Social and Cultural rights are to be progressively

implemented in the jurisdiction of the State-Party.

Under this Covenant, State-Parties recognise the right to work, freely chosen (Article 16); the right to the enjoyment of just and favourable conditions of work (Article 7); right to form and join trade unions (Article 8); the right to social security including social insurance (Article 9); the right of family, mothers, children and young persons to protection and assistance, and the right of free consent to marriage (Article 10). This Covenant also recognises the rights of everyone to an adequate standard of living (Article 11). It recognises the highest standard of physical and mental health (Article); besides it recognises the right of participation in cultural life and to enjoyment of the benefits of scientific progress (Article 15). Under Article 14 of the Covenant it has been provided for making available compulsory primary education free of charge, and the State-Parties are required to implement within reasonable number of years to be fixed in the plan of compulsory education free of charge for all.

Under the comprehensive article on trade unions, it has been provided that State-Parties undertake to form trade unions and provide right to the workers to join them and also to provide right to strike provided it is exercised in conformity with national laws. It has been provided under Articles 10 to 23 of the Covenant that State-Parties have undertaken to submit reports on measures that they have adopted for progressively achieving the observance of the rights incorporated in the Covenant.

Optional Protocol

Under the Optional Protocol to the International Covenant on Civil and Political Rights, 1966, a third method of implementation has been provided. The State party to the protocol recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction, who claim to be victims of violation by that State party of any of the rights set forth in the Covenant on Civil and Political rights. This method of implementation is available only to the individuals who are subject to the jurisdiction of the State parties who have ratified the Protocol.

The individuals have been conferred the right to communicate with the Human Rights Committee about the violation of their rights. The concerned individuals are required to communicate with the Committee before they have exhausted their domestic remedies. An anonymous communication or one which the Committee considers to be an abuse of the right of petition or to be incompatible with the Covenant-provisions is inadmissible. The Protocol provides that no communication shall be considered by the Human Rights Committee unless it has ascertained that the matter is not being investigated under another international investigatory or settlement procedure.

The Human Rights Committee is required to bring any communication submitted to it under the Protocol to the attention of the concerned State-Party which on its own part undertakes to provide the Committee with a written explanation of the matter and the remedy, if any, that it might have taken. Meeting to closed session, the Committee will consider individual communication "in the light of all written informations made available to it by the individual and by the State-Party concerned." The Human Rights Committee is to forward its views to the State-Party concerned and to the individual and will provide the General Assembly annually a summary of its activities under

the Protocol.

Enforcement of the two Covenants and the Optional Protocol

The International Covenant on Civil and Political Rights, 1967 came into force on 23rd March, 1976. Earlier, on 3rd January, 1976, the International Covenant on Economic, Social and Cultural Rights 1966, had entered into force. These two Covenants were open for signature on 19th December, 1966, after being unanimously adopted by the General Assembly on 16th December, 1966. Each of these covenants required ratification or accession by Member-States, before coming into force. The Optional Protocol required ratification or accession by 10 Members. More than 150 Member-States have ratified International Covenant on Civil and Political Rights, 1966, by now and so is the case with ratification of Optional Protocol. However, India has already acceded the two Covenants in 1979.

The U.N. Secretary-General Javier Peraj de Cuellar had rightly commented the role of of these International Covenants on Human Rights on the occasion of its first anniversary in 1991 as follows :

> "The world is still a place where the tyranny of power, poverty and discrimination too often brutalizes human beings. Therefore, clearly in such a world, the protection of the weak and the vulnerable requires that the implementation of our Human Rights Instruments (the two covenants) assume a quality of moral urgency."

Significance of International Human Rights Covenants

The two International Covenants, *i.e.*, Covenant on Civil and Political Rights, 1966 and Covenant on Economic, Social and Cultural Rights, 1966, alongwith Optional Protocol, have made successful representation of United Nation's effort to fulfil the principles of the Universal Declaration of Human Rights, 1948. These two Covenants have legal force of treaties for the State Parties, besides constituting detailed codification of Human Rights. Ian Brownlie has rightly pointed out, "The Universal Declaration of Human Rights has been regarded as a preliminary step towards more elaborate formulation of standards in relation to human rights in instruments which would have undoubted legal force as treaties for the parties to them... The nature of the subject-matter is such that even for non-parties the contents of the Covenants represent authoritative evidence of the contents of the concept of human rights as it appears into the Charter of the United Nations."

It should be noted that instead of making futile exercises in attempting to persuade States to agree to incorporate stronger implementation measures, efforts should be made to persuade States to become parties to the International Covenants and Optional Protocol on human rights. But, it is noteworthy that even those State-Parties which have signed and ratified these covenants, have not still ratified and adopted them in their respective constitutions. So, this hurdle in the direction of proper implementation of these Covenants has to be removed first to achieve the desired goal. It is also to be noted that the promotion of human rights as the purpose of United Nations, is dependent upon other purposes of the United Nations. As such progress can be achieved in this direction only when other purposes of the United Nations are attained. Efforts should be undertaken in this direction through the machinery of United Nations to achieve the purposes of United Nations by activating the

Member-States.

Other Declarations.—On November 20, 1959, the General Assembly of the United Nations unanimously adopted the Declaration on the Rights of the Child. The spirit of the document was reflected in the preamble, which said in part, "mankind owes to the child the best it has to give."

At its twenty-seventh (1972) session the Assembly adopted a Declaration on the Rights of Mentally Retarded Persons—stating, for example, their rights to economic security and a decent standard of living.

In other measures relating to social matters, the Assembly urged States to provide severe penalties for drug traffickers; favoured progressive restriction of offences for which capital punishment may be imposed "with a view to the desirability of abolishing this punishment in all countries," recommended that the Standard Minimum Rule for the Treatment of Prisoners be effectively implemented; called on parties to armed conflicts to observe humanitarian rules laid down in relevant Hague and Geneva conventions and stated the need for a convention to provide protection for journalists engaged in dangerous mission in areas of armed conflict.

The Universal Declaration of Human Rights although having very laudable objects suffers from the inherent weakness of lack of effective support from the members of the United Nations.

European Convention for the Protection of Human Rights.—With a view to giving legal validity to the Universal Declaration of Human Rights, 1948, the member-States of the Council of Europe signed on a regional basis on the 4th of November, 1950, at Rome the European Convention for the Protection of Human Rights and Fundamental Freedoms. This was a step in the direction of the realization of the ideas enshrined in the Universal Declaration of Human Rights by legal commitments made by Governments of 15 States. Two new optional clauses have been inserted in the convention. *viz.*, right of an individual to have access to an international organization for the protection of his rights and the setting up of an international judicial organ competent to adjudicate on and above the national governments. These clauses though optional open a new vista of life towards the rights of an individual for the protection of his human personality, "against all tyrannies and against all forms of totalitarianism."

The European Commission of Human Rights.—The Convention provided for a European Commission as an impartial international organ to which complaints could be made on the failure of any member-State to secure to anyone within its jurisdiction the rights and freedoms defined in the Convention. The Commission, which comprises the number of members equal to the number of parties to the Convention, has jurisdiction to consider any alleged breach of the Convention by a party to the Commission and petition from any person, non-governmental organization or group of individuals claiming to be the victim of violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognized the competence of the Commission to receive such petitions. The Commission may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the States parties of the rights set forth in the convention. (Art. 25). There shall also be a sub-commission of seven members for achieving a friendly settlement. The

Commission as a whole will draw up a report and state its opinion on breach of the obligation by the State concerned. Under Art. 31 the Commission will forward its report to the Committee of Ministers by making necessary proposals. The High Contracting Parties have undertaken to regard as binding on them any decision of the Committee of Ministers in this respect taken by a two-thirds majority of the members entitled to sit on the Committee.

The European Court of Human Rights.—There is a provision for the creation of European Court of Human Rights, and the Court has jurisdiction in respect to those States which have expressly accepted its compulsory jurisdiction. Article 56 of the Convention provides that the minimum number of eight declarations accepting its compulsory jurisdiction must be made before a case can be brought before the Court. On necessary declarations having been made, the Court started functioning. The Commission has also referred several cases to the Court. The Court has jurisdiction only if the State concerned has recognized its jurisdiction by a declaration to that effect.

The jurisdiction of the Court extends to all cases concerning the interpretation and application of the Convention which the parties to the Convention or the Commission shall refer to it provided : (a) that the parties have declared that they recognize as compulsory the jurisdiction of the Court; and (b) that if the case is referred to the Court by a party to the Convention, that party must be either the State the national of which is alleged to be the victim, or the State which referred the case to the Commission, or the State against which the complaint has been lodged.

American Convention on Human Rights.—As a result of the Inter-American Specialised Conference on Human Rights held at San Jose, Costa Rica, from November 7 to November 22, 1969, the American Convention on Human Rights was signed on November 22, 1969. It entered into force in 1978. The Convention is modelled closely on the European Convention for the Protection of Human Rights, including the European Commission of Human Rights and the European Court of Human Rights.

Under the provisions of the American Convention on Human Rights, every person has the right to recognition as a person before the law and has the right to have his life respected. He has the right to personal liberty and security, and to have his honour respected and his dignity recognised. Every person has the right to have his physical, mental, and moral integrity respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. (Arts. 3-6). The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (Art. 17).

The Inter-American Commission on Human Rights (referred to as The Commission) and the Inter-American Court of Human Rights (referred to as The Court) are the organs having competence with respect to matters relating to the fulfilment of the commitments made by the State parties to the Convention. (Article 33)

The Inter-American Commission on Human Rights shall be composed of seven members and the Commission shall represent all the member countries of the Organization of American States. The main functions of the Commission

shall be to promote respect for and defence of the human rights. (Articles 34 & 41).

The Court consists of seven judges, nationals of the member States of the Organization of American States (OAS) elected in an individual capacity by the States parties to the Convention from among jurists of the highest moral authority and of recognized competence in the field of human rights. The judges of the Court are elected for a term of six years and may be re-elected only once. The judges constituting the first court were elected in May, 1979. Five judges shall constitute a quorum for the transaction of business by the Court. The permanent seat of the Court is located in Costa Rica. The Court has adjudicatory and advisory jurisdictions. The former involves decision of disputes involving charges of violation of human rights guaranteed by the Convention dependent upon the acceptance of the court's jurisdiction by the States parties to the dispute, specifically made by a separate declaration or special agreement. The latter jurisdiction enables the Court to interpret the Convention and other human rights instruments at the request of the member States and organs of the OAS. The Commission shall appear in all cases before the Court. Only the States Parties and the Commission shall have the right to submit a case to the Court. If the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. Reasons shall be given for the judgment of the Court (Arts. 52-61). The Convention has, however, no formal procedure to enforce the decision of the Court.

Banjul (African) Charter on Human and People's Rights.—The 18th Assembly of Heads of States and Government of the Organization of African Unity, meeting in Nairobi, Kenya, June 24-27, 1981, made a historic step towards the protection of human rights in Africa, when it passed the Banjul (The Gambia) Charter on Human and Peoples' Rights on to the member States of the Organization of African Unity (AU) to commence the ratification process of that document. Under Art. 63(3) of the Charter, a simple majority of member States of the O.A.U. must ratify the Charter before it enters into force. As of March 1, 1982, four of the 50 member States had deposited instruments of ratification in Addis Abba, thus leaving 21 remaining before the Charter comes into effect. Those States that have ratified the Charter are; Mali, Senegal, Togo, and Upper Volta.

The members States of the Organization of African Unity parties to the present Charter recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. (Art. 1).

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. (Art. 2).

Every individual shall be equal before the law and shall be entitled to equal protection of the law. (Art. 3).

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his rights. (Art. 4).

Every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; the right to be presumed innocent until proved guilty by a competent court or tribunal; and the right to defence. (Art. 7).

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. (Art. 14).

Every individual shall have the right to education. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions. (Arts. 17-18).

All peoples shall be equal. All peoples shall have the right to existence. All peoples shall freely dispose of their wealth and natural resources. (Arts. 19-21).

Every individual shall have duties toward his family and society, the State and other legally recognized communities and the international community. (Art. 27).

An African Commission on Human and People's Rights shall be established within the Organization of the African Unity to promote human and people's rights and ensure their protection in Africa. The Commission shall consist of eleven members, chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and people's rights, particular consideration being given to persons having legal experience. The members of the Commission shall be elected for a six-year period and shall be eligible for re-election. (Arts. 30-36).

The functions of the Commission shall be : to (i) promote human and people's rights; (ii) ensure the protection of human and people's rights under conditions laid down by the present Charter; (iii) interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU; and (iv) perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government. (Art. 45).

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary-General of the OAU and the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanations or statement elucidating the matter. If the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved. (Arts. 47-48). Notwithstanding anything contained above, if a State party to the present

Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary-General of the Organization of African Unity and the State concerned. (Art. 49).

Torture.—In 1975, the General Assembly proclaimed a declaration on torture which states that any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a violation of human rights and fundamental freedoms. The Declaration asserts that no State may permit or tolerate such acts, nor may it invoke as a justification in exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency. In 1977, the Assembly called on Member States to reinforce their support of the Declaration by making unilateral declarations against torture.

In the Helsinki Declaration adopted by 30 European States, the Holy See, the United States and Canada on August 1, 1975, the declaring States pledged themselves to refrain from direct or indirect assistance to terrorist activities.

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly of the United Nations on December 10, 1984. It declares that any kind of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and violates human rights. The 33-Article Convention defined torture as a punishable offence and provides guidelines to States parties for action to prevent it and punish those responsible for inflicting it. It also sets up machinery for monitoring the application of the Convention.

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

The United Nations approved the International Convention against torture with effect from June 26, 1987, after it received the necessary ratification from 20 countries. Under the convention, member States have agreed to take legislative, administrative and judicial action against those held responsible for torture. The convention rejects all extraordinary circumstances, such as war or political instability, as justification of acts of torture. The signatories to the convention also agreed not to expel people to another country, where they might risk torture, and also to extradite those held responsible for torture.

Inter-American Convention to Prevent and Punish Torture.—The Organization of American States adopted at its fifteenth regular session on December 9, 1985, an Inter-American Convention to Prevent and Punish Torture. For the purposes of this convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on person for purposes of criminal investigation, as a means of intimidation, as a personal punishment, as a preventive measure, as a penalty, or for any other

purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. (Art. 2).

A public servant or employee who acting in that capacity orders, investigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so, shall be guilty of the crime of torture, (Art. 3). The fact of having acted under orders of a superior shall not provide exemption from the corresponding personal liability. (Art. 4).

The crime referred to in Art. 2 shall be deemed to be included among the extraditable crimes in every extradition treaty entered into between State Parties. (Art. 13).

Committee Against Torture Concludes Annual Session.—The compatibility and conformity of Uruguyan and Luxembourg laws with the provisions of the Convention Against Torture, the after-effects of the former Romanian regime and the expulsion of foreigners in Italy were among the subjects of discussion during the eighth session of the Committee Against Torture, which ended on 8th May, 1992.

In the course of the session, the Committee, which is composed of 10 independent human rights experts, also continued to consider communications from individuals claiming that any of their rights as enumerated in the Convention had been violated by a State Party to the Treaty. So far, one such allegation has been declared admissible by the Committee, which will express its view on the matter when it completes its evolution.

In addition, the Committee adopted a draft optional protocol to the Convention that would permit a sub-committee of independent experts to make visits to place of detection. Members favoured the eventual adoption of the draft, though some spoke of the need for modifications, especially as regards the confidentiality of the procedures envisaged by it.

Another item examined at this session was the contribution of the Committee to the 1993 World Conference on Human Rights, to be held in Vienna in line with a recent General Assembly decision. During an exchange of views, members expressed the wish to see the Committee represented at regional meetings to be held in preparation for the Conference. The importance of ensuring wide participation at the 1993 gathering was also emphasised.

On the report of Uruguay, the committee concluded that the information supplied clearly demonstrated Uruguay's firm intention to respect its international commitment. However, it was noted that there were still some problems with regard to the full implementation of the provisions of the Convention. Members also considered that the Government should energetically prosecute persons guilty of torture, which continued to be practised in some cases as well as individuals who had been guilty of committing torture under the dictatorship.

With respect to Luxembourg, it was noted, according to the delegations of that country and the information contained in its report, torture did not exist there. The Committee observed, however, that the report was not fully comprehensive and that Luxembourg legislation was not in conformity with all of the provisions of the Convention. Accordingly, the Committee requested that

more detailed answers be provided regarding the following matters : the need for a legal definition of torture; the need to close any possible loopholes in domestic legislation; and measures taken to prevent torture, investigate complaints of torture or ill-treatment and future redress of victims of such violations.

On the initial report of Italy, the Committee considered that questions relating to the organisation of the legal system, the new code of criminal procedure and the expulsion or extradition of foreigners remained to be answered or completed. The establishment of a freedom court and of an interministerial committee for human fights were regarded as examples of Italy's commitment to human rights and its international obligations. The members nevertheless considered that their concerns had not been fully allayed, especially with regard to the method of integrating international standards into domestic law. They indicated that consideration should be given by the Italian authorities to the possibility of including a definition of torture in its legislation and making all acts of torture punishable by appropriate penalties.

In concluding consideration of the report of Romania, the Committee commended the Government for its determination to comply with the Convention, as evidenced by the new institutions and legislation introduced, and wished it success in overcoming the problems left by the former regime. Members of the Committee said in that connection that education about human rights was needed to combat these problems.

The committee was established on 26th November, 1987. One of its main tasks is to make general comments on reports submitted by States and to inform the other States Parties and the General Assembly.

The Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment which entered into force on 26th June, 1987, after being adopted unanimously by the Assembly in 1984, provides that States Parties shall outlay torture in their internal laws. It also explicitly prohibits using "higher orders" or "exceptional circumstances" as excuses for acts of torture.

Status of Women.—The first legal instrument dealing exclusively with women's rights which the General Assembly adopted in 1952, was the Convention on the Political Rights of Women. That convention states that women shall be entitled to vote in all elections on equal terms with men, without any discrimination, and that women shall be eligible to hold public office and to exercise all public functions established by national law on equal terms with men.

Under the 1957-Convention on the Nationality of Married Women, each contracting State agrees that neither the celebration nor the dissolution of marriage between one of its nationals and an alien, nor the change of nationality of husband during the marriage, shall automatically affect the nationality of the wife.

The 1962-Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, and a 1965-Recommendations on the subject, aim especially at prohibiting child marriages and at safeguarding the principle of free consent to marriage.

In 1967, the General Assembly adopted the Declaration on the Elimination of Discrimination against Women, which united in a single instrument

principles and standards relating to the rights of women in all spheres of family life and of society.

On 18th December, 1979, the General Assembly adopted the legally binding Convention on the Elimination of All Forms of Discrimination against Women, which includes and expands the principles of the Declaration. The purpose of the convention is to end the discrimination that denies or limits women's equality in political, economic, social, cultural and civil fields. It entered into force, after ratification by 20 States, on 3rd September, 1981. By the terms of the Convention, States parties undertake to submit periodic reports on the measures they adopt to effect its provisions.

In proclaiming 1975 as International Women's Year, the General Assembly called for intensified action to promote equality, full integration of women in development efforts and recognition of their role in strengthening world peace.

The United Nations-sponsored World Conference on Women, held in Mexico City from 19th June to 2nd July, 1975, attended by more than 1,000 representatives, about 70 per cent of them women, representing 133 States, adopted the Declaration of Mexico on the Equality of Men and Women and their Contribution to Development and Peace, 1975; the World Plan of Action and regional plans for the implementation of the objectives of the Year; and 34 related resolutions. The Declaration contains 17 principles which, among other things, stress the specific responsibility of the State to find ways and means to enable women to be fully integrated into society and the responsibilities of men in the context of family life.

Another World Conference was held in Copenhagen in 1980 (July 14 to 30) to review progress made towards the goals set out in the 1975 Plan of Action and to recommend activities for the second half of the Decade for Women. The Conference adopted a Programme of Action for the second half of the Decade and called for another world meeting to review progress in 1985. The Assembly endorsed these actions in 1980.

Convention on the Elimination of All Forms of Discrimination against Women, New York, 1979

Objectives.—This Convention, the most comprehensive treaty on women's human rights, establishes legally binding obligations to end discrimination. It provides for equality between women and men in the enjoyment of civil, political, economic, social and cultural rights. The Convention outlines ways to end discrimination against women by means of law, policy and programs, as well as by temporary special measures to accelerate women's equality, which are defined as non-discriminatory (as with the International Convention on the Elimination of All Forms of Racial Discrimination).

Key Provisions.—The Convention demands that countries end all forms of discrimination against women, and guarantee their equality with men in political life and in public life, in issues involving nationality, education, employment, health, and economic and social benefits. It also requires countries to eliminate discrimination against women in marriage and family life, and to guarantee that women and men are treated equally before the law. Countries must consider the particular problems of women in rural areas, and the special roles these women play in the economic survival of the family.

The Convention is the *only* human rights treaty that affirms women's

reproductive rights. It also urges countries to modify social and cultural behaviors of men and women to eliminate prejudices, customs and other practices based on ideas of the inferiority or superiority of either sex, or on stereotyped roles for men and women.

The Convention establishes the Committee on the Elimination of Discrimination against Women as a monitoring body. The Committee, made up of 23 independent experts, considers reports from countries and makes suggestions and general recommendations based on these reports. It directs suggestions to the United Nations system, and general recommendations to countries. As of May 2000, the Committee had adopted 24 general recommendations on such issues as female circumcision, violence against women, and women and health.

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 1999

Objectives.—The objective of the Optional Protocol is to allow people or groups of people who have exhausted remedies within their own countries to petition the Committee directly about their Government's alleged violations of the Convention on the Elimination of All Forms of Discrimination against Women. The Protocol also lets the Committee make inquiries into serious or systematic violations of the Convention in countries that are parties to the Convention and the Optional Protocol.

Key Provisions.—Countries that are parties to the Optional Protocol commit to making the Convention and the Protocol widely known, and to giving access to information about the Committee's views and recommendations. These countries must take all appropriate measures to guarantee that people under their jurisdiction are not treated badly or intimidated when they either take advantage of the Protocol's procedure or provide information associated with these procedures. Countries which ratify or accede to the Protocol may not comply only partially with its procedures, but they may opt out of the inquiry procedure.

Freedom from slavery.—The Slavery Convention of 1926 was signed in Geneva on 25th September, 1926, and came into force on 9th March, 1927. It was amended by the protocol of 7th December, 1953, with 98 parties and 82 with protocol. The parties to the convention have undertaken to abolish slavery in their territory, The 1953-Protocol opens the Convention to all States while making the U.N. its depository.

The Universal Declaration of Human Rights, 1948, prohibits slavery, servitude and the slave trade. Article 5 of the African Charter also prohibits slavery and slave trade. Further, the International Labour Organisation has framed numerous conventions to protect the freedom and conditions of workers.

International Year of the Child.—The General Assembly proclaimed 1979 as the International Year of the Child and it marked the twentieth anniversary of the United Nations Declaration of the Rights of the Child. The United Nations Children's Fund (UNICEF), which will co-ordinate activities of the International Year of the Child, has estimated that some 350 million children in developing regions are beyond the reach of minimal health, nutrition, educational and social services.

The General Assembly also decided in November, 1978 to proclaim 1985 as the International Youth Year with a view to recognizing "the profound importance of the direct participation of youth in shaping the further of humanity."

In November, 1989, the United Nations adopted the Convention on the Rights of the Child. It is a notable step forward in the needed promotion and protection of the right of children. The new convention aims to elevate the political and humanitarian obligations of nations toward children. It is a comprehensive and significant treaty on children's rights. The convention outlaws illicit transfer of children from countries. It obligates signatories to take firm steps for the control of adoption authorisations and place strict conditions of child transfers between countries and ensure that those involved do not make improper financial gains.

The Convention on the Rights of the Child came into force on 2nd September, 1990.

International Year for Disabled Persons.—The Year 1981 was observed as the International Year for disabled persons. The objectives of the year included : to help disabled persons in the physical and psychological adjustment to society, to promote national and international efforts to provide proper assistance, training, care and guidance, to make available opportunities for suitable work and to ensure their full integration in society; to educate the public on the rights of disabled persons and to promote effective measures to prevent disability and for rehabilitation.

World Assembly on Aging.—An International plan of action to guide States in dealing with problems brought about by rapidly increasing numbers of elderly persons all over the world was adopted in Vienna on August 6, 1982, at the conclusion of the UN-sponsored World Assembly on Aging. The plan of action emphasises the need to help the elderly "lead independent lives in their own family and community for as long as possible, instead of being cut off from all activities of society". To this end, Governments must provide assistance to help families care for elderly family members.

Year of Homeless.—On December 20, 1982, the U.N. General Assembly proclaimed 1987 as the International Year of Shelter for the Homeless. The resolution stated that the goal of activities, connected with the special year will be to improve the shelter and neighbourhoods of some of the poor and disadvantaged by 1987, particularly in the developing countries, according to national priorities, and to demonstrate by the year 2000, ways and means of improving the shelter and neighbourhood of the poor and disadvantaged.

Convention on Suppression and Punishment of Apartheid.—The General Assembly of the United Nations adopted on November 30, 1973, a new Convention designed to outlaw apartheid as a crime against humanity. The Convention defines the crime of apartheid as applying to certain "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group.....over any other racial group of persons and systematically oppressing them." Included among such acts are the infliction of serious bodily or mental harm, arbitrary arrest, and the deliberate imposition of living conditions calculated to cause the destruction of a racial group. Also included are measures designed to prevent a racial group from participating in the political, social, economic or cultural life of the country. Other measures are to

divide the population along racial lines, the prohibition of mixed marriage, exploitation of landed property belonging to members of a racial group, exploitation of labour, persecution because of opposition to apartheid, denial of the right of life and liberty of the person, deliberate imposition of living conditions calculated to cause physical destruction, measures calculated to prevent participation in the political, social, economic and cultural life of a country and the deliberate creation of conditions preventing full development of a racial group. International criminal responsibility would apply to those committing or directly inciting such acts, and parties to the Convention would undertake to suppress the crime of apartheid and punish those guilty of it.

The Assembly adopted the Convention by a vote of 91 in favour to 4 against, with 26 abstentions. The opposing votes were cast by Portugal, South Africa, the United Kingdom and the United States.

Declaration on Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.—On November 25, 1981, the General Assembly of the United Nations adopted a Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief. Article 1 of the Declaration states that everyone shall have the right to freedom of thought, conscience and religion and that no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Article 2 states that no one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or other beliefs. Article 3 further states that discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Rights and Duties of Aliens.—Every nation has an inherent right by virtue of its sovereignty to forbid the entrance of foreigners within its dominions, or to admit them upon conditions, save when treaty obligations provide to the contrary. In practice, however, due to intercourse and interdependence, every State makes its own laws to regulate the admission of aliens in its territory. A State may refuse admission of aliens if they are likely to compete with its nationals. In view of such considerations, immigration laws are found on the statute book of different countries. Likewise, a State may depart from its territory aliens whose presence is considered undesirable, it being incident of sovereignty.

Extradition.—The universal practice of nations is to surrender fugitive offenders only in consequence of a treaty with the country which demands them. The treaties invariably contain a clause that political offences are not extraditable. It is true that individuals have no rights under extradition treaties, except for the principle of non-extradition of political offenders, which has assumed the character of a rule of International Law, so that a political offender can place reliance on it before the court of the prosecuting State.

Recognition of the Right to Asylum.—There is no private right recognized in International Law as to the right of asylum. The fugitive who manages to get over the border into some other country is not thereby by International Law entitled to claim to stay there. It is perfectly competent for the country receiving the criminal, whether there is an extradition treaty or not, to hand the criminal over, if the country thinks that it will be fulfilling its duty to the world or if its conceptions of public policy require or justify it to do so.

Violations of Human Rights.—In the ethnic riots in Ceylon, there has been large scale violation of human rights. The International Commission of Jurists (ICJ) has condemned the flouting of internationally-accepted laws on human rights by the Sri Lankan Government. In the ethnic riots in June-August, 1983 riots were described as a series of deliberate acts, executed in accordance with a concerted plan, conceived and organised well in advance. There was no attempt to find out the truth through an official, public and impartial inquiry. The ICJ found that organised gangs of hooligans were available for hire. Private armies existed in the pay and the service of politicians. It was alleged that Sri Lanka army had committed genocide without any provocation. Amnesty International also severely indicted the Sri Lanka Government for deliberate killings of civilians by its security forces.

Amnesty International—the London based human rights organization—reported in April, 1984, that prisoners have been tortured or cruelly treated in at least one out of every three countries within the past four years. Men and women of all social classes, ages, trades and professions are victims. Children were tortured in EI Salvador and infants forced to watch their mothers being tortured in Iran. Most of the torture documented was aimed at intimidation, punishment or extracting confessions from political prisoners or the use in a number of countries of electrodes on sensitive parts of the body, made verification of torture or ill-treatment especially difficult. The Amnesty International urged adoption of an international anti-torture convention now being drafted by the United Nations.

Blueprint for UN Action on Crime Prevention.—The Committee on Crime Prevention and Criminal Justice concluded its inaugural session at Vienna on 30th April, 1992, by approving an onmibus draft resolution which could serve as a blueprint for the future operational activities of the United Nations crime prevention and criminal justice programme.

The comprehensive draft that the commission has recommended to the Economic and Social Council for adoption deals with all aspects of operational activities and co-ordination in the field of crime prevention and criminal justice. Approved by consensus, as orally amended, the draft covers strengthening of the operational capacity and advisory services of the programme, the establishment of sub-programme on operational activities, co-ordination of activities, funding, priorities of the programme and follow-up.

The draft was one of three proposals approved by the Commission at two meetings on 30th April. The other two deal with preparations for the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and measures against organised crime.

On preparations for the Ninth Crime Congress, scheduled for 1995, the Commission approved by consensus a draft resolution which, as orally amended, would have the Council decide that the topics to be discussed at the

Ninth Congress should be international co-operation and technical assistance for strengthening the role of law; action against national and transnational economic, organised and environmental crime; management and improvement of criminal justice systems; and crime prevention strategies for urban areas, especially juvenile and violent criminality.

By the terms of the draft resolution on organised crime, approved by consensus as orally amended, the Council would reaffirm that priority must be given to the struggle against all activities of organised crime, including money laundering, infiltration of legitimate business and corruption of public officers. It would request the Secretary General to promote greater international co-operation in efforts against economic crimes and the laundering of illicit funds.

The Secretary-General would also be requested to continue analysing the impact of organised criminal activities upon society, including data on nature, extent, forms and dimension of organised crime, on legitimate measures and international co-operation aimed at controlling organised crime and judicial practice in organised cases.

In the course of its 10-day session, which began on 21st April, the Commission adopted four other proposals. They deal with control of the proceeds of crime; strategic management of the United Nations crime prevention and criminal justice programme; the desirability of a convention on crime prevention and criminal justice; and measures to assist the Commission to carry out its mandate.

The Commission is the newest functional body of the Economic and Social Council. Established in February with a mandate to develop, monitor and review the United Nations programme on crime prevention and criminal justice, it replaces the Committee on Crime Prevention and Control.

Operational Activities.—The draft resolution on operational activities and co-ordination in the field of crime prevention and criminal justice, as Vice-Chairman's text, was approved as orally amended.

By its provision on strengthening the operational capacity and advisory services of the United Nations crime prevention and criminal justice programme, the Economic and Social Council would request the Secretary-General to commit the necessary human and financial resources to strengthen the programme, especially designing, implementing and monitoring technical co-operation projects.

Among other things, the programme would provide technical co-operation to assist countries in the improvement of national legislation and law reform; contribute to the preservation and the reinforcement of democracy; serve as a world-wide training network for developing countries with specific requirements; strengthen the United Nations criminal justice information network; and promote policy-oriented research.

The Council would also request the Secretary-General to initiate the necessary consultation for a report setting out option and recommendations for the creation of an appropriate mechanism, such as a foundation, to mobilise resources for technical co-operation.

Ninth Crime Prevention Congress.—The draft resolution on preparations for the Ninth United Nations Congress on the Prevention of Crime and the

Treatment of Offenders would have the Council decide that the following topics as included in the provisional agenda for the Congress : international co-operation and practical technical assistance for strengthening the role of law; action national and transnational economic, against organised and environmental crime; management and improvement of criminal justice system; crime prevention strategies for urban areas, and juvenile and violent criminality.

The Council would request the Commission on Crime Prevention and Criminal Justice to finalise the provisional agenda for the Ninth Congress taking into account that the Congress should deal with a limited number of precisely defined substantive topics which should reflect urgent needs of the world community.

By other terms of the draft, the Council would request the Secretary-General to prepare a discussion guide for the Commission's consideration as well as draft rules of procedure for the Ninth Congress. It would invite Regional Commissions, regional and international institutes active in the field, specialised agencies and other entities in the United Nations systems, intergovernmental and non-governmental organisations to become actively involved in the preparation for the Congress.

By the terms of the draft approved on organised crime, the Economic and Social Council, reaffirming that priority must be given to the struggle against all activities of organised crime, including money laundering, the infiltration of legitimate business and the corruption of public officers, would request the Secretary-General to continue analysing the impact of organised criminal activities upon society. Taken into account would be data on the nature, extent, forms and dimensions of organised crime, on legislative measures and international co-operation aimed at controlling organised crime and judicial practice on organised crime cases.

The Council would also request the Secretary-General to promote greater international co-operation in efforts against economic crimes and the laundering of illicit funds.

Other Actions.—By its resolution on controlling proceeds of crime, the Commission invited Member States to make every effort to modify their national legislation to effectively prevent and control the laundering of the proceeds of crime and related offences. It called on the Secretary-General to propose ways by which States could be assisted in revising legislation, in training financial and law enforcement personnel, and in developing regional and bilateral co-operation in a global effort to counter money laundering and related offences.

By the resolution on strategic management of the Programme adopted as orally amended by Finland, the Commission asserted its role as the principal policy-making body in crime prevention and criminal justice and decided that it would follow a plan for strategic management as outlined in the annex to the resolution.

According to the proposals, the Commission should agree on the general goal of the Programme and the needs to be met. It should ascertain the capacity available to meet these needs and should determine the specific activities to be carried out. The mechanisms to be used for the purpose and ways of assessing implementation should also be determined.

By the terms of the decision on a Convention on Crime Prevention and Criminal Justice, as orally amended by the United States, the Commission decided to consult Member States on or other legal instrument and to conduct a well-informed discussion on the issue at its next session.

By adopting the decision on measures to assist it in carrying out its mandate, the Commission decided that the post of Chairman and other bureau posts would rotate annually among the regional groups, beginning with the current session : African States, to be followed by the Eastern European States, Latin American and Caribbean States, Western and other States, and Asian States, in that order. At each session, the post of Rapporteur would be occupied by a member of the regional group that had occupied the post of Chairman at the previous sessions.

World Conference on Human Rights in Vienna

The World Conference on Human Rights was held in Vienna from 14th June, 1993 to 25th June, 1993.

The Secretary-General of the United Nations, Boutros-Ghali, told the World Conference on Human Rights in Vienna on 14th June, 1993, that "human rights are not the lowest common denominator among all nations, but 'irreducible human elements'—the quintessential values through which we affirm together that 'we are a single human community'."

With the development of communications, he went on, the whole world was called to witness the free enjoyment, or the violation, of human rights. Because judgments were based on that scale of norms and values, it was also part of power stakes. That was probably why some States sought to appropriate human rights for their own benefit, even turning them into an instrument of national policy. There was no denying that 'some States constantly try to hijack or confiscate human rights,' he said.

The Secretary-General called on the Conference to be guided by the 'three imperatives of Vienna'—universality, guarantees and democratization. It was now 'less urgent to define new rights than to persuade States to adopt existing instruments and apply them effectively'. The United Nations was obligated to help States along the road to democratization and to set up a 'civics workshop on a global scale'.

The final document for World Conference on Human Rights outlined in its final part a wide range of human rights issues of concern to the international community. It reaffirmed the universality and indivisibility of human rights, but specified that the exercise of any human right must not be denied because the full enjoyment of other rights has not been achieved. It further stated that it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The document stressed that democracy, development and respect for human rights are interdependent and mutually reinforcing. It reaffirmed the rights of minorities and stated that persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public. It called for the elimination of gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice.

The document attached great importance to the rights of children and of

groups who have been rendered vulnerable, including migrant workers.

The second part of the document comprises programme of action in the field of human rights for the years ahead. The programme described concrete steps which States can take in order to improve the enjoyment of human rights by their citizens. It also defined the role of the United Nations, specialized agencies and other institutions involved in the protection of human rights, and called for increased co-operation and co-ordination among them.

Human Rights Commission in India and U.N.

On September 29, 1993, the President of India promulgated an Ordinance setting up a five-member National Human Rights Commission headed by a retired Chief Justice of India. The Ordinance also provided for setting up similar Commissions at State level for better protection of the liberty, equality and dignity of individual. Safeguarding of these human rights will be guaranteed by the Constitution or embodied in the international covenants and enforceable by the courts in India.

The Commission, while inquiring into complaints under the Ordinance, would have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908.

On December 22, 1993, Parliament approved the Protection of Human Rights Bill, 1993, with the Rajya Sabha passing it by a voice vote after an assurance from the Government that it will accept the recommendations of the Human Rights Commission in letter and spirit. The bill had already been passed by the Lok Sabha.

The United Nations already has a Human Rights Commission, based in Geneva, and an Economic and Social Council and a Human Rights Committee, based in New York.

Human Rights Day was observed on December 10, 1993, by the United Nations—this was the first such observance since the World Conference on Human Rights was held in Vienna in June, 1993. The day also marked the forty-fifth anniversary of the Universal Declaration of Human Rights.

According to Mr. Ibrahima Fall, Assistant Secretary-General for Human Rights, the UN identified some themes for Human Rights Day that year.

1. The U.N. believes that the universal ratification of various conventions should be pursued with renewed vigour. These instruments include among others :

   (a) The Universal Ratification of the Convention on the Rights of the child by all States, and its full integration into national action plans by 1995;

   (b) The Universal Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women by all member States by the year 2000;

   (c) The Universal Ratification of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.

2. There must be a balanced implementation of Human Rights, integrating economic, social and cultural rights as indivisible from and interlinked with civil and political rights.

3. There should be a strengthening of the efficient implementation of

Human Rights through the United Nations Commission on Human Rights, Human Rights Treaties, monitoring bodies on various Covenants and Conventions, preventive diplomacy, and the participation of non-governmental organizations. This includes better co-ordination within the UN system regarding the implementation of Human Rights, especially in the context of the inter-linkages between Human Rights and Peace-Keeping, as well as between Human Rights and Development.

Constitution and Functions of Human Rights Commission in India

The National Human Rights Commission is constituted by the Central Government to exercise powers conferred upon, and to perform the functions assigned to it under the Act. The Commission consists of—

(a) a Chairperson, who has been the Chief Justice of the Supreme Court;

(b) one Member, who is, or has been, the judge of the Supreme Court;

(c) one Member, who is, or has been, the Chief Justice of a High Court;

(d) two Members, to be appointed amongst persons having knowledge of, or practical experience in matters relating to human rights.

Besides these, the Chairpersons of National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women, shall be the Members of the Commission for the discharge of functions specified in clauses (b) to (j) of Section 12 of the Act.

The Act also makes provision for a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.

In *Paramjit Kaur* v. *State of Punjab*, the Chairman of the Commission in his capacity as a judge of the High Court and then the Supreme Court and also as Chief Justice of India, and so also two other Members who have held high judicial offices as Chief Justice of High Courts, have throughout their tenure, considered, expounded and enforced the fundamental rights and are, in their own way, experts in their field. The Commission is truly an expert body to which a reference can be made by the Supreme Court under Article 32 of the Constitution. And once such a reference has been made, no prohibition under the Protection of Human Rights Act will affect the jurisdiction of the Commission to investigate a case referred to it by the Supreme Court.

Headquarters of the Commission

The Headquarters of the National Human Rights Commission is located at Delhi. The Commission may, however, with the previous approval of the Central Government establish offices at other places in India. The Commission shall ordinarily hold its meetings and sittings at Delhi. However, it may, in its discretion, hold its meetings at any other place in India if it considers it necessary and expedient. The Commission or some of the Members may transact business at places outside its headquarters as and when previously approved by the Chairperson, provided that if the parties are to be heard in connection with an enquiry under the Act at least two Members shall constitute the bench of the Commission for this purpose.

Appointment of Chairperson and other Members

The Chairperson and other Members are appointed by the President by

warrant under his hand and seal after obtaining the recommendations of the Committee consisting of—

(a) Prime Minister—Member.
(b) Speaker of the House of People—Member.
(c) Minister in charge of Ministry of Home Affairs in the Government of India—Member.
(d) Leader of the Opposition in the House of People—Member.
(e) Leader of the Opposition in the Council of States—Member.
(f) Deputy Chairman of the Council of States—Member.

The Committee is presided by the Prime Minister as Chairperson and others are the Members of the Committee.

The Chairperson of the National Commission for Minorities, the Chairperson of the National Commission of the Scheduled Castes and the Scheduled Tribes and the Chairperson of the National Commission for Women, are deemed to be Members of the NHRC for the discharge of certain functions.

However, no sitting judge of the Supreme Court or sitting Chief Justice of a High court can be appointed without prior consultation with the Chief Justice of India, and no appointment of a Chairperson or a Member shall be invalid merely for the reason that there exists any vacancy in the Committee.

Term of office of Members

A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier. A person appointed as a Member shall also hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years. This is, however, subject to the condition that no member shall hold office after he has attained the age of seventy years. Further, on ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of India or Government of any State.

This provision is a welcome step and ought to be made compulsory in respect of the offices of the Speaker of Lok Sabha, Deputy Speaker of Rajya Sabha, Chief Election Commissioner and the Governors of the States, in the Constitution.

Removal of a Member of the Commission

The Chairperson or any other Member of the Commission can be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground be removed. But despite this provision or notwithstanding this provision the President may, by order remove from office the Chairperson or any other Member, if the Chairperson or such other person, as the case may be—

(a) is adjudged an insolvent; or
(b) engages during his term of office in any paid employment outside the duties of his office; or

(c) is unfit to continue in office by reason of infirmity of mind or body; or
(d) is of unsound mind and stands so declared by a competent court; or
(e) is convicted and sent to imprisonment for an offence which in the opinion of the President, involves moral turpitude.

In above cases, it will not be necessary for the President to refer the matter to the Supreme Court and obtain its report before ordering the removal of a Chairperson or a Member.

Procedure of the Commission

The Commission shall meet at such time and place as the Chairperson may think fit. The Commission shall regulate its own procedure. All orders and decisions of the Commission shall be authenticated by the Secretary-General or any other officer of the Commission duly authorised by the Chairperson in this behalf.

Functions and Powers of the Commission

The Commission shall perform all or any of the functions, namely :—

(a) inquire, *suo motu* or on a petition presented to it by a victim or any other person on his behalf, into complaint of—
  (i) violation of human rights or abetment thereof; or
  (ii) negligence in the prevention of such violation by a public servant;
(b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;
(c) visit under intimation to the State Government any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of inmates and make recommendations thereon;
(d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;
(e) review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
(f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;
(g) undertake and promote research in the field of human rights;
(h) spread human rights literacy among various sections of the society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;
(i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights; and
(j) such other functions as it may consider necessary for the promotion of human rights.

Nature of the complaints not entertained

The Commission shall not entertain complaints of the following nature :—

(a) Complaints in regard to events which happened more than one year before the making of complaints;

This provision is available under section 36(2) of the Prevention of Human Rights Act, 1993. In *Paramjit Kaur* v. *State of Punjab*, the Supreme Court held that the power and jurisdiction of Supreme Court under Article 32 of the Constitution, could not be curtailed by any statutory provision including those contained under section 36(2) of the said Act and since this matter was referred to the Commission by the Supreme Court itself, therefore, the jurisdiction of the Commission would not be affected by the bar contained in section 36(2) and it would be well within its rights to investigate the matter even after one year of making the complaint. Thus, the provision of section 36(2) will not be applicable where the matter has been referred to the Commission by the Supreme Court under Article 32 of the Constitution,

(b) Complaints with regard to matters which are *sub judice;*

(c) Complaints which are vague, anonymous or pseudonymous;

(d) Complaints which are of frivolous nature; and

(e) Complaints which are outside the purview of the Commission.

Procedure for dealing with Complaint

Regulation 8 of the National Human Rights Commission (Procedure) Regulations, 1994, lays down the following procedure for dealing with complaints of alleged violation of human rights :—

(1) All complaints in whatever form received by the Commission shall be registered and assigned a number and placed for admission before a Bench of two Members constituted for the purpose not later than two weeks of receipt thereof. Ordinarily complaints of the following nature are not entertainable by the Commission :

(a) in regard to events which happened more than one year before the making of complaints;

(b) with regard to matters which are *sub judice;*

(c) which are vague, anonymous or pseudonymous;

(d) which are of frivolous nature; or

(e) those which are outside the purview of the Commission.

(2) No fee is chargeable on complaints.

(3) Every attempt should be made to disclose a complete picture of the matter leading to the complaint and the same may be made in English or Hindi enable the Commission to take immediate action. To facilitate the filing of the complaint, the Commission shall, however, entertain complaints in any language included in the list of eighth schedule of the Constitution. It shall be open to the Commission to ask for further information and affidavits to be filed in support of allegations whenever considered necessary.

(4) The Commission may, in its discretion, accept telegraphic complaints and complaints conveyed through fax.

(5) The Commission shall have power to dismiss a complaint *in limine.*

(6) Upon admission of a complaint, the Chairperson/Commission shall direct whether the matter would be set down for inquiry by it or should be investigated into.

(7) On every complaint on which a decision is taken by the Chairperson/Commission to either hold an inquiry or investigation, the secretariat shall call for report/comments from the concerned Government/authority giving the latter a reasonable time therefor.

(8) On receipt of the comments of the concerned authority, a detailed note on the merits of the case shall be prepared for consideration of the Commission.

(9) The directions and recommendations of the Commission shall be communicated to the concerned Government/authority and the petitioner as provided for in Sections 18 and 19 of the Act.

(10) The Commission may, in its discretion afford a personal hearing to the petitioner or any other person on his behalf and such other person or persons as in the opinion of the Commission should be heard for appropriate disposal of the matter before it and, where necessary, call for records and examine witnesses in connection with it. The Commission shall afford a reasonable hearing, including opportunity of cross-examining witnesses, if any, in support of the complaint and leading of evidence in support of his stand to a person whose conduct is inquired into by it or where in its opinion the reputation of such person is likely to be prejudicially affected.

(11) Where investigation is undertaken by the team of the Commission or by any other person under its discretion, the report shall be submitted within a week of its completion or such further time as the Commission may allow. The Commission may at its discretion, direct further investigation in a given case if it is of the opinion that investigation has not been proper or the matter requires further investigation for ascertaining the truth or enabling it to properly dispose of the matter. On receipt of the report, the Commission on its own motion, or if moved in the matter, may direct inquiry to be carried by it and receive evidence in course of such inquiry.

(12) The Commission or any of its Members when requested by the Chairperson may undertake visits for an on-the-spot study and where any such study is undertaken by one or more Members, a report thereon shall be furnished to the Commission as early as possible.

Powers relating to inquiries

Section 13 of the Protection of Human Rights Act, deals with the power of the Commission relating to the inquiry. The Commission, while making inquiries into complaints, shall have all the powers of a civil court particularly in respect of the following matters :—

(a) summoning and enforcing the attendance of witnesses and examining them on oath;

(b) discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or

office;

(e) issuing Commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed.

In addition, the Commission has powers to require any person to furnish information on such points or matters as in the opinion of the Commission, may be useful for, or relevant to, the subject-matter of the inquiry and any person so required shall be deemed to be legally bound to furnish so information. The Commission also has power to enter any building or place where the Commission has reason to believe that any document relating to the subject-matter of the inquiry may be found. The Commission may also authorise any officer, not below the rank of a Gazetted Officer to enter any building or place and seize the required document. If any offence under sections 175, 178 179, 180 or 228 of the Indian Penal Code has been committed in the view of the presence of the Commission, the Commission may after recording the facts constituting the offence and the statement of accused as provided for in the Code of Criminal Procedure, forward the case to a Magistrate having jurisdiction to try the same.

Every proceeding before the Commission shall be deemed to be judicial proceeding and the Commission shall be deemed to be a Civil Court.

Investigation

For the purpose of conducting any investigation pertaining to the inquiry, the Commission may utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.

No statement made by a person in the course of giving evidence before the Commission shall subject him to or be used against him, in any civil or criminal proceeding except a prosecution for giving false evidence by such statement.

If at any stage of the inquiry, the Commission : (a) considers it necessary to inquire into the conduct of any person, or (b) is of the opinion that the regulation of any persons is likely to be prejudicially affected by the inquiry, it shall give to the person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence.

Procedure of the Commission

The Commission while inquiring into the complaints of violation of human rights may, call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it. If the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own. If on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly. However, if the Commission considers necessary, having regard to the nature of the complaint, it will initiate an inquiry.

Steps after inquiry

After the inquiry under the Act is complete, the Commission may take any

of the following steps :—

(1) Where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons :

(2) The Commission may approach the Supreme Court or the High Court concerned for such directions, orders or writs as that court may deem necessary :

(3) The Commission may recommend the concerned Government, or authority for the grant of such immediate interim relief to the victim or members of his family as the Commission may consider necessary.

(4) Subject to the provisions of clause (5), the Commission may provide a copy of the inquiry report to the petitioner or his representative.

(5) The Commission shall send a copy of its inquiry report together with its recommendation to the concerned Government or authority which shall, within a period of one month or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission.

(6) The Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

Regulation 11 of the National Human Rights Commission (Procedure) Regulations, 1994, further provides that report of follow-up action shall be submitted to the Commission at every subsequent sitting indicating therein the present stage of action on each item on which the Commission had taken a decision in any of its earlier meetings, excepting the items on which no further action is called for.

Procedure with respect to Armed Forces

Section 19 of the Protection of Human Rights Act, 1993, provides :—

(1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of armed forces, the Commission shall adopt the following procedure, namely :—

(a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;

(b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.

(2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.

(3) The Commission shall publish its report together with recommendations made to the Central Government and the action taken by that Government on such recommendations.

(4) The Commission shall provide a copy of the report published under sub-section (3) of section 19 to the petitioner or his representative.

Annual and Special Reports of the Commission

Under section 20 of the Protection of Human Rights Act, 1993, the Commission is under obligation to submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

The Central Government or the State Government, as the case may be, shall cause the annual and special reports of the Commission to the laid before each House of the Parliament or the State Legislature respectively, as the case may be, alongwith a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non- acceptance of the recommendations, if any.

Evaluation of work of the National Human Rights Commission

The National Human Rights Commission has rendered a signal service for the cause of observance of human rights, especially in the field of civil liberties. For example, its work in the field of prevention of custodial death, rape and torture has been quite praiseworthy. Its direction to all District Magistrates and Superintendents of Police to report to the Commission all incidents of custodorial death or rape within twenty-four hours, has made a very salutary impact in preventing such incidents. Moreover, it is a sort of forewarning to the Police Officers that if they misuse their powers or commit excesses, they may be penalised for this. Besides this, the Commission has handled some cases of alleged custodorial death in such an effective manner that it has inspired the confidence of the people. For example, in the case of alleged custodorial death of Madan Lal in Delhi, the Commission took cognizance of this case *suo motu* and appointed Shri R.C. Chopra, a Member of Higher Judicial Service, to investigate the matter. The report was submitted by Shri R.C. Chopra, which inferred that Madan Lal died as a result of physical assault on his person while he was in custody within a police station for which an Assistant Sub- Inspector and three constables were held *prima facie* responsible. The Commission accepted this report and made recommendations to the NCTD *inter alia*, that the investigation of the case be handed over to the CBI, departmental action against the ASI of the police station concerned be taken and interim compensation of Rs. 59,000/- should be paid to the dependents of the deceased within one month, without prejudice to the compensation that may be claimed in accordance with law. Subsequently on 30th May, 1994, the Government of the NCTD conveyed its acceptance of the recommendations of the Commission.

To quote a case of rape among many handled by the Commission, is the case pertaining to the alleged rape in custody by an Asstt. Sub-Inspector of Delhi Police in July, 1994. According to the case reported in the annual report of the Commission for the year 1994-95, the Commission received a report from Dy. Police Commissioner, South Delhi in July, 1994, about a custodial rape committed by an ASI of Delhi Police. The victim had been brought to the police station by another ASI, as she had got lost on her way to her parents' home but no report was made in the daily diary of the police station of the victim having been taken to the police, nor was due care taken to ensure the return of the

victim to her family. The ASI who brought the victim to the Police Station was accordingly placed under suspension. The victim was raped by another ASI who took her to his house in the residential quarters of Pahar Ganj Police Station. The ASI who committed the rape was arrested and the case was sent to the court for trial. The Commission also received a complaint and a report of this incident from the Peoples' Union for Democratic Rights, Delhi.

The cases such as above handled by the Commission, have led to the evolution of the rule that women should not be called at Police Station for interrogation otherwise at night and in case it is urgent and necessary, there should be arrangement of lady Police Officers.

However, it cannot but be conceded that the Commission has no teeth and it can take no action directly. It can only recommend to the Government and the Government may or may not accept its recommendation. Its recommendations are not binding on the Government or the authority concerned. It is, therefore, desirable that the Central and State Governments should pay serious heed to the recommendations of the Commission and promptly implement the recommendations of the Commission.

U.N. Commissioner for Human Rights.—The General Assembly created the post of United Nations High Commissioner for Human Rights as the organization's principal official charged with playing an active role in preventing human rights violations throughout the world and engaging in a dialogue with all governments to secure respect for human rights, under the terms of a draft resolution adopted on 21st December, 1993, based on a report of its Third Committee (social, humanitarian and cultural).

According to the text, adopted without a vote, the High Commissioner will possess the understanding of diverse cultures necessary for impartial, objective, non-selective and effective performance. He or she would be guided by the recognition that all human rights—civil, cultural, economic, political and social—are universal, indivisible, interdependent and inter-related. The importance of promoting sustainable development and ensuring the right to development was to be recognised.

The Secretary-General will appoint the High Commissioner, to be approved by the Assembly, to serve a four-year term at the rank of Under-Secretary-General. He or she will co-ordinate the organization's human rights activities and supervise the Centre for Human Rights, through which advisory services and assistance would be provided to States upon request.

Adoption of the Resolution which was heralded by many speakers as a turning point in the history of United Nations action in the human rights arena, followed close consideration of the matter at the World Conference on Human Rights held at Vienna in June last. On that Vienna Declaration and Programme of Action, the Assembly began priority consideration of the proposed establishment of a High Commissioner.

By other texts on Human Rights matters, the Assembly :

—Endorsed the Vienna Declaration and Programme of Action adopted in June by the World Conference on Human Rights, and decided to consider its implementation on an annual basis.

—Requested additional resources for the Centre for Human Rights to enable it to implement the Vienna Declaration and Programme of Action

without diverting development resources.

—Urged governments to take urgent measures to prevent the killings of street children and to combat torture and violence against them.

—Expressed great concern over the growing number of incidents of the sale of children, child prostitution and child pornography.

—Condemned all acts of terrorism as activities aimed at destroying human rights.

UN Human Rights Commission condemns State-sponsored Terrorism

On March 4, 1994, the U.N. Human Rights Commission (UNHRC) in Geneva adopted a consensus resolution condemning all forms of terrorism. The consensus resolution moved by Peru and co-sponsored by many nations, including India, reiterates the United Nations unequivocal condemnation of all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomsover aimed at the destruction of human integrity and security of States, destabilising legitimately constituted governments, undermining pluralistic civil society and having adverse consequences on the economic and social development of States. It calls upon States to take all necessary and effective measures, in conformity with international standards of human rights, to prevent, combat and eliminate terrorism, and urges the international community to enhance co-operation in the fight against terrorism at the national, regional and international levels.

The resolution adopted at the 50th session of the Commission under agenda item-II on 'human rights and terrorism' voices deep concern at the gross violation of human rights perpetrated by terrorist groups.

The Commission has requested the sub-commission on prevention of discrimination and protection of minorities to consider the possibility of undertaking a study on the question of terrorism and human rights in the context of its procedures and decided to continue its consideration of the question as a matter of priority at its next session.

The Commission has requested the Secretary-General to collect information on this question from all relevant sources and to make it available to the special rapporteurs and working groups concerned for their consideration. It also urged all thematic special rapporteurs and working groups to address as appropriate the consequences of the acts, methods and practices of terrorist groups in their forthcoming reports to the Commission.

U.N. adopts Convention on Suppression of Terrorist Bombings.—The General Assembly on 15th December, 1997, adopted an International Convention for the Suppression of Terrorist Bombings. It did so on the recommendation of its Legal (Sixth) Committee by means of a resolution adopted without a vote.

The 24-article convention defines a terrorist bomber as a person who unlawfully and intentionally delivers, places, discharges or detonates a bomb, explosive, lethal or incidendiary device in, into or against a place of public use, a State or Government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury or the destruction of such a place resulting in major economic loss.

The Convention specifies crimes which are extraditable under treaties which State parties sign among themselves. It explicitly does not govern the

military activities of States in armed conflict or in exercise of their official duties.

States which ratify the Convention must take steps to establish their jurisdiction over terrorist bombings committed in their territories. They can also have jurisdiction when the offences are committed against their nationals or facilities abroad.

The Convention will be open for signature from 12th January, 1998, to 31st December, 1999, and will enter into force thirty days after the twenty-second State party has ratified it.

Human Development Report on Women, 1995

The Human Development Report released in New Delhi on August 15, 1995, presented a five-point strategy for accelerating progress towards closing the global gender gap. In his opening statement before the release of the report, the UNDP's resident representative in India, Hans-C Von Sponeck said that the five-point strategy recommends that countries adopt specific policies to overcome discrimination in law, expand rules and opportunities for men and women at home and in the workplace, ensure that more women participate at the top levels of decision-making in government and the private sector, provide women with greater access to education, reproductive health care, and financial credit, and mobilise national and international efforts to provide basic social services for all.

The report points out that there is no universal model of gender equality, and that each nation will need to adopt its own action agenda for removing barriers to equal rights. Nevertheless, according to the report, what is required is a wholesale political commitment.

The Human Development Report, 1995, five-point strategy includes :

(1) Setting a firm timetable, say the next ten years, to end legal discrimination against women and establish a framework for the promotion of legal equality. To achieve this, the international community will need to move on several fronts, including—

—The unconditional ratification of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) by the 90 UN member States that have not yet signed or ratified it or that have entered reservations. CEDAW adopted at the UN in 1979 is considered a path-breaking global charter of the human rights of women.

—Establishing an International non-Governmental Organisation—World Women's Watch—that prepares country-by-country reports on key aspects of discrimination before the law and on progress towards gender related targets fixed by national governments and international forums.

—Improving information on women's work, including a more detailed recording to unpaid work. Because women's work is not always reflected in national statistics, their contribution to economic and social life is 'invisible' and hence ignored.

(2) Initiating specific measures to move towards the 30 per cent threshold as a minimum share of decision-making position held by women in the national level in order to reach an ultimate target of 50 per cent.

Women are still far from sharing equally in decision-making in politics and

the private sector. Only ten per cent of parliamentary or legislative seats and six per cent of the cabinet positions are occupied by women today.

(3) Implementing key programmes for universal female education, improved reproductive health and more financial credit for women. These programmes can make a decisive difference in enabling women to gain more equal access to economic and political opportunities.

Choice in the spacing and number of children has enabled women to gain some measure of control over their lives. Yet, in too many countries, women are not assured health care and their reproductive rights are not guaranteed. About 125 million women still lack access to family planning. Half a million women die every year from pregnancy/related causes. And AIDS is the leading killer of women in several large cities.

Of the 1.3 million people living in absolute poverty, about 70 per cent are women. Lack of access to credit is often responsible for denial of economic opportunities to women. Normally less than ten per cent of bank credit is allocated to women.

(4) Mobilising national and international efforts to target programmes that enable all people, particularly women to gain greater access to economic and political opportunities.

The Fourth World Conference on Women (1995)

The Fourth World Conference on Women was held in Beijing, China, from 4th to 15th September, 1995. The first U.N. Sponsored Conference on Women was held in Mexico City in 1975 having been declared as the International Women's Year; The Second was held in Copenhagen in 1980 and the Third was held in Nairobi in 1985. Finally, the Beijing Conference marks an important decade in the history of women's struggle for equal rights in all spheres of life throughout the world.

The Platform for Action (PFA), a blueprint for women's advancement in countries around the world, formed the main document for adoption at the Fourth World Conference on Women.

A 246-paragraph draft document had earlier been approved at the 39th session of the UN Commission on the Status of Women in April, 1995 for presentation in Beijing. It reflects the review and approval of the progress made by women since 1985 in terms of the Forward-looking Strategies for the Advancement of Women to the year 2000, adopted in Nairobi at the Third UN Conference on Women.

The Draft Platform for Action lists 12 "Critical Areas of Concern". These are areas identified as obstacles to the advancement of women. The Platform offers corresponding strategic objectives and actions to be taken by governments, the international community, non-governmental organisations and the private sector for the removal of the existing obstacles.

The Platform for Action provided normative guidance for Governments who bear the primary responsibility for implementing its strategic objectives.

Meet adopts Beijing Declaration

The Fourth World Conference on Women finally concluded on September 15, 1995, with the adoption of the Beijing Declaration and the Platform for Action by 189 countries by consensus. No vote was taken.

Barring 31 countries which expressed reservations on specific paragraphs in the document and 10 countries which clarified how they would interpret some sections of it, the two documents were adopted through a process of consensus.

The areas of disagreement were narrowed down to three paragraphs and a fourth which only some Islamic countries stated that they could not accept. Two refer to sexual and reproductive rights in different contexts and one refers to the desirability of not punishing women forced to have illegal abortions.

The majority of the countries registering reservations were Islamic, the rest were Catholic-majority countries. Amongst the Islamic countries to dissent were Egypt, Kuwait, Malaysia, Iran, Libya, Sudan, Tunisia, Syria, Pakistan, Jordan and the Maldives.

The Catholic bloc was led by the Holy See which made a strong intervention when the leader of their delegation stated that the text of the document reflected "an exaggerated individualism" in which provisions of the Universal Declaration of Human Rights, such as the obligation to provide "special care and assistance" to motherhood, had been "slighted".

The Holy See stated that this "selectivity" marked "another step in the colonisation of the broad and rich discourse of universal rights by an impoverished, libertarian rights dialect."

Ethiopia objected to what it felt was the, Platform's emphasis on sexual freedom at the expense of health, education and other issues.

The predominantly Roman Catholic and Islamic countries made up most of the dissenters.

While the Catholic countries were dissatisfied with the definition of family—and repeatedly emphasised in their statements that in their view the term "family" could only mean a heterosexual couple—the Islamic countries held that the words in the paragraphs referring to women's rights over their sexual life could be misinterpreted as a license for promiscuity.

Iran, which has been one of the most vocal opponents of some of the provisions in the Platform for Action in relation to reproductive rights, stated that this could only be interpreted "in the context of marital relationship." The representative from Malaysia was even more specific when she stated that paragraph 97 in the section on health, to which the majority of Islamic countries objected, "should not signify sexual promiscuity, sexual perversions, or be seen to be synonymous with homosexuality and lesbianism."

A limited number of Islamic countries objected to paragraph 274(d) which referred to the inheritance rights of girls. Only Libya, Mauritania, the UAE, Tunisia, Morocco, Qatar and Syria raised specific reservations about this paragraph which refers to "equal" rights for girls and boys on issues of inheritance.

A major area of disagreement was sorted out when the paragraph in the chapter on human rights, 232(h) which referred to the need for "legal safeguards" to "prevent discrimination on grounds of sexual orientation or lifestyle" was dropped altogether.

India made its mark at the final plenary by interrupting the flow of countries expressing reservations to the Platform for Action, adopted by the Fourth World Conference on Women, by stating that it had absolutely no

reservations. India expressed its unqualified support for both the Beijing Declaration and the Platform for Action.

Through its unanimous adoption of the Beijing Declaration and Platform for Action, the Conference approved a comprehensive plan for the international community to promote the status of women to the ultimate benefit of society as a whole. In the Declaration, governments recognize the leading role that women have played in the peace movement, call for elimination of all forms of violence against women and girls and pledge to intensify efforts to ensure equal enjoyment of human rights and fundamental freedoms for women and girls.

The Platform for Action identifies objectives and actions in 12 critical areas of concern : poverty, education, health, violence, armed and other conflicts, economic participation, power-sharing and decision-making, national and international machineries, human rights, mass media, environment and development, and the needs of girls. Recommendations are addressed to various elements of the international community, particularly governments, international financial institutions, bilateral donors, the private sector, academic and research institutions, non-governmental organizations and the mass media.

U.N. report on violation of Women's rights

A United Nations report published in May, 1997 states that massive violation of human rights of women are taking place across the world especially because of gaps in reproductive healthcare and widespread discrimination and violence against them. It demands greater attention to human rights, particularly promotion of gender equality and women empowerment and recommends that international assistance programmes give greater priority to human rights goals.

The report says that there is a marked preference for boys over girls as reflected in nutritional and health differentials and a clear disparity between male and female mortality rate. Girls are given less food and receive medical services less frequently. Due to lack of malnutrition, the rate of maternal mortality is quite high in India. It says that though child marriages are illegal but the practice is quite common in rural areas.

The report points out that dowry giving, though illegal, remains customary and brides often become victims of mental and physical abuse when they fail to meet demands for more dowry after wedding. In this context it says that some five thousand dowry-related deaths were reported in 1993 and many cases go unreported or are attributed to accidents. Child prostitution, it adds, is rampant in India and minora are often held in bondage in brothels.

The report points out that most nations, especially in the developing world, are spending very little on education and health care whose adverse effects are mostly felt by women. Given the choice, the report says, women have still fewer children than their parents leading to smaller families which is a major need of the nations as well as the world.

Violence against women, the report notes, may be the most pervasive yet least recognised human rights abuse in the world. Gender violence, physical and emotional, perpetuates male power and control. Studies link violence against women to male socialisation and peer pressure rather than biology or sexuality, it says.

Human Rights are Universal

The Secretary-General, Kofi Annan, at a press conference held on 11th December, 1997 in Teheran stressed that human rights are universal. He expressed the hope that the reform process would enable the United Nations Organisation to focus on its objectives, incite Governments to move towards development, encourage Government to work for a clean environment, work to alleviate poverty, and encourage good Government and respect for human rights and the rule of law. The United Nations should at the same time "encourage Governments to come together to fight what I call uncivil society, that is, drug pushing, money laundering, terrorism and international crime."

The United Nations High Commissioner for Human Rights, Mrs. Mary Robinson, stressed on December 16, 1997, the independence of special rapporteurs and similar mechanisms of the United Nations Commission on Human Rights, such as working groups analyzing allegations of human rights violations. Mrs. Robinson said : "In order to provide the International Community with the independent and impartially analysed information which is essential in human rights policy making, the experts of the special procedures system must be secure in enjoying the privileges and immunity due to them as experts on the vision for the United Nations."

CHAPTER XIX

DIPLOMATIC AGENTS

Diplomatic Agents.—Diplomatic Agents are ambassadors residing in a foreign country as representatives of the States by whom they are despatched. In a broader sense, an ambassador represents not merely one government to another government but even one nation to another nation so that they may understand each other.

The word 'diplomacy' is derived from the Greek word 'diploma' meaning a letter folded double—a document, a writing conferring some honour or privilege. According to the Oxford English dictionary, diplomacy connotes "the management of international relations by negotiations." It is "the method by which these relations are adjusted and managed by the representatives of countries who are accredited to some other countries, i.e., the ambassadors or envoys." Diplomacy is the art of negotiation, especially of treaties between States, and involves the drawing up of documents in a negotiable form. It is the art of intercourse of nations with each other.

Vienna Convention on Diplomatic Relations, 1961.—The Vienna Convention on Diplomatic Relations, 1961, expresses in its preamble the conviction that an international convention on diplomatic intercourse, privileges and immunities would contribute to friendly relations among States irrespective of their differing constitutional and social systems. It has been emphasised that the purpose of such privileges and immunities is to ensure the efficient performance of the functions by diplomatic missions as representing States and not to benefit individuals. The rules of customary international law should continue to govern questions which have not been expressly regulated by the Convention.

Diplomatic Agent : Law & Legal Definition

A diplomatic agent is a national representative. Originally, diplomatic agents helped to work out certain negotiations between nations, but now a diplomatic agent acts as an intermediary of a foreign nation and the nation which employed the diplomatic agent. Diplomatic agents supervise and transact the affairs of the nation employing them. Diplomatic agents help to build a strong and improved relationship with the two countries. This can lead to an increase in trading opportunities and military alliances. Diplomatic agents also represent their nation in protecting the interests and welfare of its citizens in the jurisdiction of another nation.

Diplomatic agents can be any one from the four categories : 1, ambassadors, 2, envoys and ministers plenipotentiary, 3, ministers resident accredited to the sovereign, or 4, charges d'affaires accredited to the minister of foreign affairs. Diplomatic agents and their immediate families are immune from criminal prosecution and civil lawsuits.

Right of Legation.—The right of a State to send and receive diplomatic

envoys is termed as the right of legation. The right of a State to send its diplomatic envoy to another State is the active right of legation, while that of receiving a diplomatic envoy from another State is the passive right of legation. The right of legation is an important and precious attribute of the sovereignty of any State. Sovereign States possess the right of legation in full, i.e., they have the right of receiving diplomatic envoys from, and sending diplomatic agents to, other States. The right of legation of part-sovereign States is limited, depending upon the nature of freedom that they enjoy. The United Nations, although not a State, possesses the right of legation by virtue of being an international person *sui generis*.

The right of legation is generally the right of a *de jure* government and a belligerent community has no such right, unless the *de facto* government assumes a permanent character and receives recognition.

After World War I, almost all members of the British Commonwealth have the right of legation.

Classes of Diplomatic Representatives.—The Congress of Vienna, 1815, classified diplomatic representatives into three classes, to which the Congress of Aix-lachapelle, 1818, added a fourth. They are as below in order of seniority of rank.

(1) Ambassadors, Papal Legates and Nuncios.—They are the representatives of the person and dignity of the sovereign or Head of the State accrediting them and as such enjoy special honours. On their arrival at the foreign capital when they present a sealed letter of credence conferring on them their official character, they are entited to public audience from the Head of the State to whom they are accredited. They have also the privilege of negotiating with the Head of the State personally. They are entitled to the title of "Excellency". Only States enjoying royal honours can send ambassadors.

The diplomatic envoys sent by the Holy See are called Papal Legates or Nuncios.

(2) Ministers Plenipotentiary and Envoys Extraordinary.—They are not the personal representatives of the sovereigns or Heads of their State, though they are, no doubt, accredited to them. They have private audience from the Head of the State when on their arrival at foreign capital they present the letter of credence. They have also no audience as of right with a Head of State personally and receive the title of "Excellency" by courtesy only.

(3) Ministers Resident.—They are accredited to sovereigns and rank below the Ministers Plenipotentiary and envoys extraordinary. They do not enjoy the title "Excellency" even by courtesy. This class was added in 1818.

(4) Charges d'Affaires.—They are accredited not by a Head of State to another Head of State but by a Minister of Foreign Affairs to a Minister of Foreign Affairs. On arrival at the foreign capital, they present their letter of credence to the Minister of Foreign Affairs.

The Vienna Convention on Diplomatic Relations, 1961, divides heads of mission into three classes, namely :

(a) that of ambassadors or nuncios accredited to Heads of State, and to the head of mission of equivalent rank;

(b) that of envoys, ministers and internuncios accredited to Heads of State; and

(c) that of charge d'affaires accredited to Ministers for Foreign Affairs.

Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

The distinction between the different classes of diplomatic agents is purely ceremonial for all of them enjoy the same diplomatic immunities. Moreover, even the privilege of ambassadors to negotiate with a Head of State personally is of little use as most of the important business is attended to by the Minister of Foreign Affairs.

Besides the above, there are High Commissioners accredited to a member of the Commonwealth by another, the delegates of different member-States to the U.N. and the Judges of the International Court of Justice who enjoy diplomatic immunities.

Diplomatic Corps.—A diplomatic corps consists of all the diplomatic envoys from various countries of the world accredited to a particular State. Its head is termed as the Doyen, which office is held by the Papal Nuncio, and, in his absence by the oldest ambassador. The main function of the diplomatic corps is to protect the rights, privileges and honours of the body of diplomatic envoys.

Appointment.—International Law does not prescribe any qualifications of diplomatic agents, although municipal laws may contain the requisite qualification. Birth, breeding, looks, education and wealth have their distinct value. A diplomatic agent must, however, have a sound political judgment and be able to analyse events and size up their effect on the foreign policy of the country. He should also be able to speak the language of the country he is accredited to, know generally the country's history, its economy and important people in that country. Above all, his general demeanour should be of affability and good nature, tempered with dignity. And the statement of Talleyrand, Napoleon's famous Foreign Minister, "*Et, surtout pas trop de zele*" (And, above all, don't be excited) is as true today as when it was said.

The appointment of an individual as ambassador, minister or Charges d' Affaires is announced to the State to which he is accredited in certain official papers to be handed in by the envoy to the State to which he is sent. The first official paper is the **letter of credence** or *Lettres de Creance*, which sets forth the name of the diplomatic agent and the general object of his mission. The envoy takes with him the sealed letter of credence and an open copy. In the case of Ambassadors and Ministers, the letter of credence is addressed by the sovereign or Head of the State and is addressed to the sovereign or head of the receiving State, but in case of Charges d' Affairs, it is addressed by a foreign minister to another foreign minister. Diplomatic agents charged with special business carry with them a document called **Full Power** (*pleins pouvoirs*) which is given in letters patent signed by the Head of the State.

Full Powers.—A diplomatic agent charged with special business carries with him a document called Full Powers (*pleins pouvoirs*). It is a written commission authorising the agent to negotiate in the name of his head of State. It empowers him to negotiate a special treaty or convention or any other task entrusted to him. It is given in letters-patent signed by the head of State, and it is either limited or unlimited Full Powers, according to the requirements of the case.

Where Full Powers are essential.—In the matter of inter-Governmental

agreements and inter-departmental agreements Full Powers are essential. In the case of the British Commonwealth of Nations, Full Powers are issued by the appropriate Minister of the Dominion and the agreements are ratified by him. That in the past removed formal restrictions and delays in the full exercise of the treaty-making powers by the Dominions.

Recent international practice is favouring the development of treaties negotiated and signed expressly on behalf of the Head of the State by virtue of Full Powers received from him. That is a speedy process and obviates the cumbrous procedure of ratification of a treaty or, as in the United States, the consent of two-thirds of the Senate. The validity of such treaties is however in no way diminished, and stands on the same footing as ordinary treaties concluded after ratification.

When can a State refuse?.—A State may decline to receive a particular person as envoy, without causing any offence, in the following cases :

(1) If he is personally obnoxious to the sovereign of the country to which he is being sent on account of his personal character, e.g., refusal by France to accept the Duke of Buckingham as the ambassador of Charles I of England because he had in an earlier visit posed to be a lover of the Queen, or decline by Austria-Hungary in 1885 to accept Mr. Keiley as Minister of the United States because Mr. Keiley had a wife who was Jewess.

(2) If he has shown himself avowedly hostile to the people or institutions of the State to which he is accredited by his public pronouncement or otherwise, e.g., refusal by Italy to accept Mr. Keiley as ambassador of the United States in 1885 because he had protested in 1871 against the annexation of the Papal States by Italy.

(3) If he is one of the subjects of the State to which he is being sent and the accredited State does not want to accord him immunities that are attached to the office of an envoy. But if he is once accepted, he will receive full diplomatic privileges. Such was the case with Sir Halliday Macartney who, although a British subject, acted as the Secretary to the Chinese legation in London in 1890. No objection had been made at the time of his appointment, and accordingly it was held that he could not be obliged to pay rates on the house occupied by him. It was laid down in that case that a government is entitled to refuse to receive one of its own nationals as a member of the diplomatic staff of a foreign embassy or legation, but if it receives him without imposing any condition or stipulation that he shall be subject to the local jurisdiction, he is entitled to the same measure of diplomatic privilege and immunity as is accorded to the privileges of the 'corps diplomatique' and it would follow that his personal effects would be exempt from seizure.

The Vienna Convention on Diplomatic Relations, 1961, stipulates that the members of the diplomatic staff of the mission should, in principle, be of the nationality of the sending State and they may be appointed from among the nationals of the receiving State only with the consent of that State which may be withdrawn any time. The receiving State has also a similar right with regard to the nationals of a third State who are also not nationals of the sending State.

Article 4 of the Vienna Convention codifies the existing practice by providing that the receiving State is not obliged to give reasons to the sending State for a refusal of *agreement*.

Functions of a diplomatic agent.—He has a variety of functions to perform. He represents the Head of his own State and as such is the mouthpiece of his home government in a foreign State. He should never forget that he represents his country and its Government. He has to interpret the policy of his government to the accredited State and to maintain good relations between his home country and the country to which he is accredited, and to create goodwill for his own country. He has to create and project an image of his country which makes it respected and admired. "It is his duty to represent his country in its multifarious phases and facets—its political approach, social traditions, economic activities and cultural heritage. He has to maintain the reputation and prestige of his country." It is his duty to take up the matter at once with the foreign minister of the accredited State if any disrespect is shown to his country or when the interests of his countrymen are threatened. In short, he has to enhance the reputation of his country in every possible manner. Dr. Ross observes that as far as International Law is concerned, an envoy is an instrument of negotiation for the competent authorities in his home State.

The functions of a diplomatic mission, as contained in the Vienna Convention on Diplomatic Relations, 1961, consist *inter alia* in :

(a) representing the sending State in the receiving State;
(b) protecting in the receiving State the interests of the sending State and of its national, within the limits permitted by international law;
(c) negotiating with the Government of the receiving State;
(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Nothing in the Convention shall, however, be construed as preventing the performance of consular functions by a diplomatic mission.

The main purpose of an ambassador's work is "to create in the country to which one is accredited, the greatest possible degree of understanding of one's own nation, its hopes and fears, its achievement, and the objectives towards which it aspires".

His task is to observe attentively every occurrence that might have its repercussion in his home State, and to report such observations to his Government.

A diplomatic envoy is required to protect the persons, property and subjects of his home State which might be within the boundaries of the State to which he is accredited. He has the obligation to safeguard and promote the interests of his own country.

His office registers births, deaths and marriages of the subjects of his own State. He has to send despatches to his country regarding political and social conditions in the accredited State which might affect the interests of his home State. He deals with the foreign office of the accredited State for extradition of a national of his State in case the latter has committed a crime in his State. He issues passports and protects the property and interests of the nationals of his country.

A diplomatic agent is not expected to take part in local disputes and other internal or political affairs of the State where he has been sent. He should not discuss the desirability or otherwise of a pending legislation in that State or incur the displeasure of the accredited State by his interference in its internal affairs or offend it in any matter whatsoever.

Oppenheim very correctly sums up the functions of an envoy under three heads, viz., Negotiation, i.e., acting as a medium between his home State and the foreign State; Observation, i.e., keeping a vigilant eye over the happenings in the foreign State; and Protecting, i.e., protecting the person and property of the nationals of his home State staying abroad.

Diplomatic Immunities—Nature and Enforcement.—A diplomatic envoy is deemed for the purpose of jurisdiction and control to be outside the territory of the State in which he really is. He is regarded just as sacrosanct as the Head of the State that he represents and enjoys immunities to enable him to discharge his functions efficiently and in an atmosphere of absolute fearlessness.

An ambassador does not own even a temporary allegiance to the sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country.

Article 26 of the 1961-Convention on Diplomatic Relations stipulates that, subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

"Diplomatic privileges as commonly recognised today are little more than the agreed consequences of the mutually accepted obligations incumbent upon States to treat foreign representatives as exempt from local jurisdiction." In the words of Lord Campbell in *Magdalena Steam Navigation Co.* v. *Martin*, a foreign ambassador does not owe even a temporary allegiance to the sovereign to whom he is accredited. Sir Cecil J.B. Hurst observes that "this non-subjection....to the local law is admitted because the purpose of the individual's presence is the maintenance of relations between the sovereign whom he represents and the sovereign to whom he is accredited. The privileges which he is accorded are conditioned and limited by the purpose for which he is received. If the representative is called up by his own sovereign to perform functions other than those of maintaining relations with the sovereign to whom he is accredited, the purpose with which the latter acquiesces in his non-subjection to the local jurisdiction ceases to operate in respect of those functions. The extraterritoriality or non-subjection to the local jurisdiction enjoyed by a member of a foreign diplomatic mission is, therefore, due not to the fact that he is engaged on the business of a foreign government, but to the fact that he is part of the machine for maintaining relations between the two governments."

Diplomatic immunity is a form of legal immunity and a policy held between governments that ensures that diplomats are given safe passage and are considered not susceptible to lawsuit or prosecution under the host country's laws (although they can be expelled). It was agreed as international law in the Vienna Convention on Diplomatic Relations (1961), though the concept and custom have a much longer history. Many principles of diplomatic immunity are now considered to be customary law. Diplomatic immunity as an institution, developed to allow for the maintenance of government relations,

including during periods of difficulties and even armed conflict. When receiving diplomats—who formally represent the sovereign—the receiving head of state grants certain privileges and immunities to ensure they may effectively carry out their duties, on the understanding that these are provided on a reciprocal basis.

Originally, these privileges and immunities were granted on a bilateral, ad hoc basis, which led to misunderstandings and conflict, pressure on weaker states, and an inability for other states to judge which party was at fault. Various international agreements known as the Vienna Conventions codified the rules and agreements, providing standards and privileges to all states.

It is possible for the official's home country to waive immunity; this tends to happen only when the individual has committed a serious crime, unconnected with their diplomatic role (as opposed to, say, allegations of spying), or has witnessed such a crime. Alternatively, the home country may prosecute the individual. Many countries refuse to waive immunity as a matter of course; individuals have no authority to waive their own immunity (except perhaps in cases of defection).

Diplomatic Immunity and the Raymond Davis Case.—The shooting to death of two Pakistani youths, namely Faizan Haider and Muhammad Faheem, by a U.S. Consulate official, Raymond Allen Davis, and the death of a third Pakistani, namely Obaid-ur- Rahman, by a vehicle operated by the U.S. Consulate, in Lahore on 27th January, 2011, has, once again, raised concerns relating to the conduct of American officials working for the U.S. Embassy and Consulates in Pakistan.

Raymond Davis was arrested by the Punjab Police on the same day and, on 28th January, 2011, was presented before a magistrate in Lahore, who remanded him into police custody for six days. On 29th January, 2011, three days after the incident, the U.S. Embassy in Islamabad, without even naming Raymond Davis, called for his release whilst claiming that he was a diplomat and was being detained illegally in violation of the Vienna Convention on Diplomatic Relations, 1961 (the 'Vienna Diplomatic Convention'). On 1st February, 2011, the Lahore High Court, in response to a public interest petition, restrained Pakistani authorities from handing Raymond Davis over to the U.S. authorities and has ordered his name to be placed on the Exit Control List to prevent him from leaving Pakistan.

It may be pertinent to note that the U.S. Embassy's press release of 29th January, 2011, makes the following, rather surprising, claim :

> 'On January 27, the diplomat acted in self-defense when confronted by two armed men on motorcycles. The diplomat had every reason to believe that the armed men meant him bodily harm. Minutes earlier, the two men, who had criminal backgrounds, had robbed money and valuables at gunpoint from a Pakistani citizen in the same area.'

One wonders the basis on which the U.S. Embassy is claiming that two of the deceased had criminal backgrounds or had committed any crime. The deceased have not been found guilty of the offence alleged by the U.S. Embassy, either by the investigating police authorities or by any court of law. In making such an unwarranted claim, which is against diplomatic norms and also amounts to unlawful interference in a legal process of a host state in violation of Article 41(1) of the Vienna Diplomatic Convention, the U.S. Embassy has

clearly overstepped its bounds.

The press release goes on to say :

> 'When detained, the U.S. diplomat identified himself to police as a diplomat and repeatedly requested immunity under the Vienna Convention on Diplomatic Relations. Local police and senior authorities failed to observe their legal obligation to verify his status with either the U.S. Consulate General in Lahore or the U.S. Embassy in Islamabad. Furthermore, the diplomat was formally arrested and remanded into custody, which is a violation of international norms and the Vienna [Diplomatic] Convention, to which Pakistan is a signatory.'

It seems that the U.S. Embassy is unaware that when a foreigner is arrested and claims diplomatic immunity, it is not the legal responsibility of the arresting authority, in this case the Punjab Police, to ascertain his diplomatic status; it is the responsibility of the arrested person and his embassy or consulate to establish his diplomatic credentials and the same cannot achieved by orally boasting of diplomatic immunity without any documentary proof. The Vienna Diplomatic Convention does not require states to assume that every foreigner is a diplomat. It is the responsibility of all diplomats to carry on their persons, at all times, their diplomatic identity cards, which are issued by the Foreign Ministry of the host state and to produce the same on demand when required by any government authority, including law enforcement agencies such as the police. The U.S. Embassy has overlooked the fact that Mr. Raymond Davis was arrested from a non-diplomatic vehicle (with non-diplomatic registration plates) and he failed to produce any diplomatic identity card to establish his diplomatic credentials.

Also, the mere holding of a diplomatic passport does not confer diplomatic status on someone. Diplomatic status must be expressly recognized by the host state. For example, a foreign diplomat in India will not be a diplomat in Pakistan. He may visit Pakistan using a diplomatic passport, however, he will have no diplomatic immunity in Pakistan by virtue of his diplomatic passport because he is not a member of any diplomatic mission in Pakistan and has not been recognized as such by Pakistan. Recognition of diplomatic status is expressed through the issuance of a diplomatic identity card to a person by the host state, which, in the case of Raymond Davis, seems to be absent.

Earlier, the U.S. Embassy issued the following press release on 28th January, 2011, a day after the arrest and detention of Raymond Davis :

> 'A staff member of the U.S. Consulate General in Lahore was involved in an incident yesterday that regrettably resulted in the loss of life. The U.S. Embassy is working with Pakistani authorities to determine the facts and work toward a resolution.'

Clearly, there is an inconsistency in the U.S. Embassy's presses releases of 28th, January, and 29th January. The U.S. Embassy did not raise the issue of diplomatic immunity a day after the arrest and, in fact, referred to Raymond Davis as being a 'staff member of the U.S. Consulate, General in Lahore'. In other words : a consular officer. The U.S. Embassy's press release of 28th January, only reinforced the belief of the Punjab Police and the Punjab Government, and justifiably so, that Mr. Raymond Davis was not a diplomat but a 'consular officer' and, as such, not immune from detention and prosecution.

Under the Vienna Convention on Consular Relations, 1963 (the 'Vienna Consular Convention'), consular officers do not enjoy unfettered diplomatic immunity. Article 41 of the Vienna Consular Convention states :

> 'Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.'

It is evident that shooting to death of two human beings constitutes 'a grave crime' pursuant to the Vienna Consular Convention and Raymond Davis's detention is pursuant to a judicial process, having been authorized by a competent judicial authority as per the Vienna Consular Convention.

What needs to be appreciated by the U.S. Embassy is that if a Pakistani national, shoots dead two Americans on the streets of New York using an unlicensed weapon whilst driving a non- diplomatic vehicle and is, subsequently, arrested by the New York police and claims diplomatic immunity without producing any diplomatic ID, will the New York police be bound to release him or keep him under detention till such time that he or the Pakistani Consulate in New York establishes his diplomatic credentials? Clearly, the New York police will have the right to detain him till such time.

Therefore, in light of the aforesaid, the arrest of Raymond Davis by the Punjab Police was legal and not in violation of the Vienna Consular Convention or, for that matter, the Vienna Diplomatic Convention (both ratified by Pakistan in its Diplomatic and Consular Privileges Act, 1972). Furthermore, the continued detention of Raymond Davis is not a violation of the Vienna Diplomatic Convention till such time that it is proved that he is a diplomat.

The U.S. Embassy, until now, has failed to establish the diplomatic status of Raymond Davis. Indeed, the evidence so far is to the contrary. A local news channel has shown a letter written by the U.S. Embassy dated 20th January, 2010, wherein it is informing Pakistan's Foreign Ministry that Raymond Davis is a member of the Embassy's 'administrative and technical staff' and requesting for him the issuance of a 'non-diplomatic ID' card. This letter clearly shows that the U.S. Embassy itself did not recognize Raymond Davis as a diplomat. It, therefore, seems that the U.S. Embassy's 29th January, 2011, press statement claiming that Raymond Davis is a diplomat is an afterthought intended to shield him from criminal prosecution.

No one should dispute the fact that diplomats are immune from criminal prosecution under the Vienna Diplomatic Convention (Article 31(1)). Even if we were to hypothetically assume, without admitting, that Raymond Davis is a diplomat, there are still options that can be exercised. The Vienna Diplomatic Convention clearly reveals its spirit when it states, in its preamble, that 'the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.' The Vienna Diplomatic Convention allows foreign states to (i) punish their own diplomats for committing crimes in host countries (Article 31(4)) or (ii) waive the diplomatic immunity of its diplomats so that they can be prosecuted by the host state (Article 32). Therefore, the host state may itself request the foreign state to waive the immunity of a diplomat so that it can prosecute such diplomat.

The Vienna Diplomatic Convention also contains a mechanism under

which a diplomat can be stripped of his diplomatic status and immunity by the host state. The host state has the authority under Article 9 of the Vienna Diplomatic Convention to declare a diplomat as a persona non grata and, thereafter, under Article 43(b), to issue a notice to the foreign state's embassy informing it that it refuses to recognize such person as a member of the foreign country's diplomatic mission. Upon receipt of the notice under Article 43(b) by the foreign state's embassy, the diplomat in question forthwith ceases to remain a diplomat and is automatically stripped of his diplomatic immunity. Therefore, even if it is established that Raymond Davis is a diplomat, the Government of Pakistan can strip him of his diplomatic status and immunity by, firstly, declaring him a persona non grata under Article 9 of the Vienna Diplomatic Convention and, thereafter, by issuing a notice under Article 43(b) of the Vienna Diplomatic Convention to the U.S. Embassy, Islamabad informing it therein that Pakistan refuses to recognize Raymond Davis as a member of the U.S. diplomatic mission.

Even if Pakistan does not take the above action, the U.S. can take the moral high ground and itself waive diplomatic immunity for Raymond Davis. There are precedents in this regard and one need not look beyond the manner in which the United States itself views diplomatic immunity. Though, in the case of Raymond Davis, who is a junior functionary, the U.S. Embassy is claiming diplomatic immunity for a person who shot dead two Pakistani youth using an unlicensed weapon, the U.S. itself demanded the lifting of immunity of a senior diplomat who accidently killed a U.S. citizen in a car accident on its soil.

In 1997, Gueorgui Makharadze, the Georgian Deputy Ambassador to the United States, accidently killed an American teenager in a road accident in Washington, D.C. The U.S. exerted extreme pressure on the Georgian government to lift his diplomatic immunity even though it was not a deliberate shoot-to-death killing, as in the case of Raymond Davis, but a car accident. The Georgian government finally relented 'in the interests of U.S.- Georgian relations and on moral and ethical grounds.' Makharadze was tried in a U.S. court, found guilty of manslaughter and sentenced to 21 years in prison. While lifting Makharadze's diplomatic immunity, then Georgian President. Eduard Shevardnadze observed, 'I cannot imagine diplomacy and politics devoid of moral principle.'

Even if Raymond Davis is a diplomat, wouldn't it be prudent for the U.S. to follow little Georgia's example and lift his diplomatic immunity in the interests of U.S.-Pakistan relations and on moral and ethical grounds? Or, perhaps, unlike Georgia, the United States of America sees diplomacy as being devoid of moral principles.

Three different theories.—The universal practice of granting diplomatic privileges and immunities may be traced to three different theories, viz.

(1) Extraterritoriality.—This is based upon the fiction that an ambassador, residing in the accredited State, should be treated for purposes of jurisdiction as he were not present. Extraterritoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of State X are on the territory which is foreign from the point of view of the State in question.

In *Radwan* v. *Radwan*, the British Court held that a consulate general in the

United Kingdom did not constitute foreign territory for the purpose of recognizing a divorce under S. 2(a) of the Recognition of Divorces and Legal Separation Act. Mr. Justice Cumming-Bruce observed that there was consensus that there was no valid foundation for the alleged rule that diplomatic premises were to be regarded as outside the territory of the receiving State, and adopted the observations of Fawcett in the Law of Nations, p. 65 : "The premises of a mission are inviolable and the local authorities may enter them only with the consent of the head of the mission. But this does not make the premises foreign territory or take them out of the reach of local law for many purposes. It was significant that neither Art. 31 of the Vienna Convention on Diplomatic Relations, 1961, stated that the premises of a mission were part of the sending State and if that had been the view of contracting parties, it would no doubt have been formulated."

(2) Representative character of diplomat.—The second theory bases diplomatic privileges and immunities upon the representative character of the diplomat. It "equates the immunities of the agent with those of the sending State itself." This theory is inadequate as "it explains only those exemptions concerning official acts which diplomatic agents enjoy in common with other State officials, but leaves unexplained those immunities which they possess with reference to acts performed in a private capacity."

(3) Interest of function.—The third theory bases diplomatic privileges and immunities upon the interest of function with a view to ensuring free communication between States. The one solid basis for dealing with the subject of diplomatic immunities is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the State which he represents and the respect properly due to secular traditions. Preuss very pertinently observes : "As the foundation of diplomatic immunities the theory *ne impediatur legation* or the interest of function is now predominant, having supplanted the function of extraterritoriality as the theoretical basis of diplomatic privileges and immunities. It shares the field with the representation theory, without being excluded by it."

The immunities are founded on common usage and tacit consent of nations. "Modern Public International Law rejects the theory of extraterritoriality and prefers rather the necessity of recognising a full dignity in the State which delegates an ambassador." In other words, the States recognise a parity of rights and privileges amongst themselves and concede a perfect equilibrium of authority and of jurisdiction.

Immunities and Privileges.—The various diplomatic immunities and privileges may be summed up as follows :—

(1) Personal Safety.—The Vienna Convention provides that the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity. It was observed in *Respublica* v. *De Longchamps* that the person of a public minister is sacred ad inviolate. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of crime against the whole world. In *Palachie case*, it was held that ambassadors should be kept free from all injuries and

wrongs, and by the law of all countries and of all nations, they ought to be safe and sure in every place, in so much that it is not lawful to hurt the ambassador of our enemy; and herewith agreeth the civil law. "The duty to care for and protect a foreign minister is higher than the general duty on a State to protect all persons on its territory whether natives or foreigners." The person of an ambassador has ever been held sacred and inviolable, by the law of nations.

A diplomatic agent may, however, be expelled and, if necessary, arrested for being sent home if he plots against the Head of the receiving State or the State itself, is guilty of conspiracy or espionage, or otherwise causes disturbance to internal order and peace. In the same manner, he is not entitled to complain if he is injured by retaliation caused by his unreasonable or unjustified conduct.

(2) Immunity from Criminal Jurisdiction.—A diplomatic envoy accredited to a State enjoys absolute *immunity from criminal jurisdiction and police action* as he is in no sense considered to be under its legal authority. If a diplomatic agent commits a crime, the only remedy open to the accredited State is to report the matter to his home-Government and demand his recall and punishment according to the law of his country. If, however, he conspires to overthrow the accredited State, he may be arrested for the time being so that he may be safely sent home in due course.

The immunity of diplomatic agents is derived from the local law of each country. The Vienna Convention provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. The Common Law of England and the Diplomatic Privileges Act, 1708, the Pan-American Convention of 1928 and the Decree of the Supreme Soviet of the 14th January, 1927, grant personal immunity to diplomatic agents and other members of the mission by virtue of being the representatives of foreign sovereigns.

(3) Immunity from Civil and Administrative Jurisdiction.—A diplomatic agent as well as his suite is exempt from the local jurisdiction. He is free from local process as well as from personal restraint. No civil action of any kind can be brought against him in civil courts of the accredited State. He cannot be compelled to appear in court and plead, but if he elects to waive his privilege, the court will deal with him as an ordinary citizen. Such waiver of jurisdiction can only be taken notice of when the court is about or is being asked to exercise jurisdiction over him and not at any previous time.

By the law of nations, neither an ambassador, nor any of his train or comites, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside : *The case of Andrew Artemnowitiz Mattue of Ambassador of Muscovy.*

The Vienna Convention on Diplomatic Relations lays down that a diplomatic agent shall enjoy immunity from its civil and administrative jurisdiction, except in the case of :

(a) a real action relating to private immovable property situated in the territory of the receiving State unless he holds it on behalf of the sending State for the purpose of the mission;

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

(c) an action relating to any professional or commercial activity exercised

by the diplomatic agent in the receiving State outside his official functions.

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

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

(4) Exemption from subpoena as witness.—Persons enjoying immunity from jurisdiction cannot be made to appear as witnesses in any civil, criminal or administrative or any territorial court. They are entitled under the law governing international relations to be relieved from service by subpoena or sworn as a witness in any case. Under the provisions of the Vienna Convention on Diplomatic Relations, a diplomatic agent is not obliged to give evidence as a witness. He may, however, waive his privilege.

(5) Immunity of Envoy's Retinue.—The retinue of an envoy consists of : (a) officials and other servants of the legation; (b) wife, children and other members of his family living with him under the same roof; (c) his private servant; and (d) couriers.

As said above, a diplomatic agent has complete immunity with regard to his person and that of his suite. The immunity, though in a lesser degree, extends to the ambassador's wife, children, his official staff, secretaries, interpreters, naval and military attaches, chaplain and servants, which are the necessary accompaniment for his comfort and convenience. Diplomatic immunity is limited to such members of the family who are living with the diplomatic agent. The immunities in the case of servants extend to indoor and outdoor domestic servants including chauffeurs and gardeners. It is usual for the envoy to deposit with the Foreign Office a list of such persons for whom immunity is claimed.

The Vienna Convention on Diplomatic Relations, 1961, failed to define the term 'member of the family' and under the Convention members of the family of a diplomat would be those forming part of his household.

Personal inviolability from the jurisdiction of the State, however, does not extend to visitors and hangers-on of the embassy.

A chaplain to an ambassador, if he does no duty in his house, shall not be protected.

The other members of the retinue of the diplomatic agents, such as officials and other servants of the legation, also enjoy the immunities detailed above. But such privileges are extended only to those who are officially attached to the legation.

The dependent relatives of the diplomatic agent living with him are also immune from the jurisdiction of civil and criminal courts and enjoy other privileges.

As regards immunity of private servants of diplomatic agents, the practice is not yet clearly established. They are no doubt exempt from civil jurisdiction unless engaged in trade, but in criminal matters, Great Britain claims jurisdiction if the offence is committed by servants outside the residence of the diplomatic agent. After the commission of the crime, the servant is dismissed by the envoy

or is handed over to the local authorities to facilitate his trial. When an offence has been committed by him within the envoy's residence, the servant is sent home for necessary action.

Actual domestic service to a foreign minister must be shown. A domestic physician is not protected by an ambassador retainer.

Where the servant of an ambassador did not reside in his master's house but rented and lived in another, part of which he let in lodgings, his goods in that house not being necessary for the convenience of the ambassador were liable to be distrained for poor rates.

The immunities enjoyed by those in the service of a diplomatic agent are purely derivative. The privilege is the privilege of the employer, not the privilege of the servant himself. Being only derivative, it ceases the moment that the service ceases. An ambassador cannot protect; it is the law that gives the protection.

Couriers or despatch-bearers being officially connected with the embassy are immune from civil and criminal jurisdiction. They have a special passport for their duties and a right of innocent passage through third States.

(6) Immunity connected with residence.—As mentioned above, the official residence of the ambassador, with goods and furniture, stables and carriages, is considered as though it is situate outside the territory of the accredited State. It is regarded as sacred and is exempt from the local jurisdiction. It is virtualy held to be a portion of the accrediting State. In other words, the fiction of extraterritoriality is applied to the residence of the diplomatic agent.

The immunity also extends to buildings, other than residence, occupied by a diplomatic agent for his diplomatic work. It also applies to carriages used by him in execution of his functions. Such immunity means that no police officer or tax collector can enter his residence without his consent for discharging his duties. As Vattel observes, "the independence of the ambassador would be very imperfect and his security very precarious if the house in which he lives were not to enjoy a perfect immunity and to be inaccessible to the ordinary officer of Justice...to insult it is a crime both against the State and against all other nations."

The Vienna Convention on Diplomatic Relations, 1961, provides that the private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission. His papers, correspondence, and property shall likewise enjoy inviolability.

Grant of Asylum.—The Government of India while allowing the Soviet defector, Mr. Aziz Ouloug-zade, to go to the United Kingdom, the country of his choice, from India in December, 1967, however, urged foreign missions in India to respect the well-established international practice of not affording asylum to any person within their premises and told them that it did not recognize the right of such mission to give asylum to any person. The matter arose out of an incident in which the Soviet defector had sought refuge in the American Embassy and stayed there for five days before placing himself under the protection of the Government of India. In its circular to all diplomatic missions and consular posts, issued in the wake of the above diplomatic incident, the Government of India expressed the view that the immunity from local

jurisdiction is granted to diplomatic missions and legations to enable the representatives and members of the missions concerned to enjoy full opportunity to represent the interest of their States and to promote friendly relations between India and their countries. As regards the legal position, the Legal Adviser to the Ministry of External Affairs drew a distinction between territorial asylum and diplomatic asylum and observed that the latter was not recognised as a part of general international law. It was clear from the Vienna Convention of 1961 on Diplomatic Relations to which India was a party, that diplomatic missions should not be used for purposes which were incompatible with performance of their official function.

In this connection, the most celebrated example of diplomatic asylum concerning Senor Haya De La Torre, a Peruvian political leader, may be referred. He was given asylum in the Columbian Embassy in Peru in January, 1949. The Columbian Embassy in Peru requested safe conduct for Senor De La Torre to leave the country which was refused. The matter was taken to the World Court which ruled that Peru was not obliged to grant safe conduct to Senor De La Torre. Subsequently, the Court ruled that the asylum granted by the Columbian Embassy to Senor De La Torre must cease as it had been given irregularly. It observed that a decision to grant diplomatic asylum involves a derogation from the sovereignty of that State and such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.

As regards the territorial asylum, every sovereign State has the right and competence to grant asylum to foreigners prosecuted or threatened with prosecution in their home States, though the foreigners have no right to be granted asylum. Territorial asylum is granted in cases where the person concerned genuinely apprehends prosecution or is wanted for political crimes in his home State, and it would not be proper to grant territorial asylum to an ordinary criminal. The asylum granted to the Dalai Lama and a number of Tibetan refugees by India furnishes an example of territorial asylum.

The U.N. General Assembly adopted unanimously a declaration on territorial asylum which makes it clear that "the right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity."

(7) Exemption from Taxes.—The envoy is free from the payment of taxes levied upon his residence as the receiving State has no jurisdiction over such residence. He is expected to pay the charges for sewerage, light and water taxes, but he cannot be compelled to pay the same since he is immune from legal process. Very often such taxes are also not charged from him.

Under the provisions of the Vienna Convention on Diplomatic Relations, a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except :

(a) indirect taxes of a kind which are normally incorporated in the price of goods or service;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purpose of the mission;

(c) estate, succession or inheritance duties levied by the receiving State;

(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provision of Art. 23, which lays down that the sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

(8) Exemption from seizure of goods.—The ambassador cannot be sued for debts whether contracted before or in the course of his mission; he is free from arrest and his furniture cannot be seized or attached for the same.

By the law of nations, neither an ambassador, nor any of his train or comites, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside : *The Case of Andrew Artemonowitz Mattueorf, Ambassador of Muscovy.*

The English and American Courts have held that a judicial process is not possible against a diplomatic agent and any person so doing violates the law of nations and disturbs public peace. If, however, he brings an action before a local court, he is obliged to observe the rules of the court and to pay costs if he loses (*In re Suarez; Suarez, The Amazone, Bergman* v. *De Sieyes*).

(9) Right to worship.—An ambassador has the right of having private chapel in his hotel according to his own religion. He has perfect freedom to celebrate divine worship in his own way, even though prescribed by the country in which he resides. But he is not free to invite subjects of the accredited country to such worship if the law of that country does not allow it.

(10) Freedom of Communication.—A diplomatic agent enjoys freedom of communication to enable him to discharge his functions properly. His despatches are immune from local jurisdiction and censure, even in third countries. Such immunity has received general approval in the conduct of relations between independent sovereign States. His mail goes in diplomatic bag, free from postal censorship.

Commencement and discontinuance of immunities.—Diplomatic officers enter upon the enjoyment of their immunity from the moment they pass the frontier of the State where they are going to serve and make known their position.

The immunities continue during the period that the mission may not be suspended; and even where the mission has terminated, immunity continues for a reasonable time after the termination of the envoy's mission to enable him to wind up his affairs and to be able to withdraw the mission : *Musurus Bey* v. *Godban.*

After referring to a number of cases, Sir Cecil Hurst observes that "these cases show that the rule is that the immunities of a diplomatic agent subsist for a period after his functions have come to an end, long enough to enable him to settle up his affairs and return home. How long a time reasonably be allowed for this purpose is a question which must be left to the government to which

he had been accredited.

Right of Innocent Passage.—The opinion of jurists is divided upon the question as to whether a diplomatic agent appointed to a country is entitled to innocent passage through a third country if he has to go through the same for reaching the country to which he is sent. Grotius and Bynkershoek held the view that the inviolability of ambassadors was binding only on those to whom they were sent and by whom they were received. Vattel, on the other hand, stated that passports were necessary to an ambassador, in passing through different territories on his way to his destined post in order to make known his public character. The opinion has, of late, settled in favour of the right of innocent passage. A diplomatic agent is entitled to enjoy complete personal security and any injury or insult to him is regarded as injury and insult both to the State to which he is accredited and the home State. The above view finds support from the case of *Bergman* v. *De Sieyes*. The defendant was the French Minister to Bolivia. He was served with civil process by the plaintiff, while he was passing through New York on his way from France to Bolivia. The defendant pleaded his immunity. It was held that a foreign minister *en route*, either to or from his post in another country, is entitled to innocent passage through, a third country and is also entitled to immunity from the jurisdiction of the third country that he would have if he were resident therein.

The Pan-American Convention, signed at Havana on the 20th February, 1928, expressly provides that persons of diplomatic missions shall enjoy the same immunities and privileges in the States which they cross to arrive at their post or to return to their country and to whose Governments they have made known their position.

The position is, however, different when the third State is at war with the State to which the agent is accredited. In such circumstances, the third State commits no breach of International Law if it arrests the envoy of a hostile State.

Further, diplomatic agents are not entitled to any special privileges or immunities in third States if they are sojourning there for their own purpose though a short stay for rest in the course of an official journey will not disentitle them to such immunities.

Immunity of plenipotentiaries of foreign countries at foreign courts.—The establishment of the United Nations Organization has brought about the necessity of granting immunities from local jurisdiction to members of the Secretariat and other officials of the international organisation. Legislation to that effect has been carried out by America and Britain.

Article 105 of the Charter provides that the Organization and representatives of the members of the United Nations and officials of the Organization shall enjoy such privileges as are necessary for the independent exercise of their functions in connection with the Organization. The first General Assembly framed detailed provisions for immunity and inviolability of the property, premises and archives of the United Nations. The Judges of the International Court of Justice, when engaged on the business of the Court enjoy diplomatic privileges and immunities. The agents, counsel and advocates of parties before the Court also enjoy the privileges and immunities necessary for the independent exercise of their duties.

The General Assembly approved in February, 1946, the Convention on the

Privileges and Immunities of the United Nations, Article II, s. 2, whereof provides that the Organisation, its property and assets shall enjoy immunity from every form of legal process except in so far as, in particular case, the immunity has been waived. In addition to the Convention, a number of special agreements dealing with privileges and immunities have been concluded with the States in whose territory the United Nations or one of its subsidiary organs has its headquarter or hold meetings. Notable among these are the Agreement of June 26, 1947, between the United Nations and the United States, regarding the headquarters of the United Nations in New York, and the Interim Arrangement on Privileges and Immunities of the United Nations, concerning the United Nations office at Geneva, concluded with the Swiss Government on June 11, 1946. The General Assembly also approved on November 21, 1947, a Convention on the Privileges and Immunities of the Specialized Agencies.

Flouting of diplomatic immunities.—In spite of the sacrosanct nature of the Vienna Convention on Diplomatic Relations, 1961, its provisions are sometimes flouted with immunity. On November 4, 1979, several hundred Iranian students invaded the U.S. embassy and seized a group of hostages and demanded that the exiled Shah of Iran be sent back from the United States. Iranian fanatics adopted a dangerous venture. The inviolability of embassy premises and diplomatic personnel is one of the basic principles of international law and the seizure of the embassy personnel could not be justified on any principles, except that it might be reminiscent of feudalism and barbarism. The Security Council passed a pious resolution on December 4, 1979, calling on Iran to immediately release the hostages in the U.S. Embassy in Teheran. The United States in desperation also referred the matter to the International Court of Justice, and The Hague Court on December 15, 1979, called for the immediate release of the American hostages in Iran. Delivering the judgment, and while indicating a provisional measure in its order, the Court's President, Sir Humphrey Waldock of Great Britain said : "The continuation of the present situation exposes the hostages to privation, hardship, anguish and even danger to life and health." He said that the hostages should be immediately released and accorded full protection, privileges and immunities to which they are entitled, in accordance with the treaties between the two States and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran. Sir Humphrey also ordered that the Iranian Government should immediately ensure that the U.S. embassy and consulates were restored to American control and ensure their future inviolability. There was no more fundamental requirement than the inviolability of diplomatic envoys. There were principles which were deeply rooted in international law and no State could fail to recognise.

On December 17, 1979, the U.N. General Assembly unanimously adopted a treaty to make hostage-taking an international crime and required governments to prosecute or extradite any hostage-takers that fell into their hands.

In delivering the judgment in the case concerning United States diplomatic and consular staff in Teheran (*U.S.* v. *Iran*), the International Court of Justice on 24th May, 1980, while confirming the earlier provisional ruling ordered Iran for the second time to release the 53 U.S. hostages being held in Iranian cities since

November 4, 1979. It held that the Islamic Republic of Iran had violated in several respects, and was still violating obligations owed by it to the United States of America, under international conventions in force between the two countries as well as under long-established rules of International Law. The Court unanimously decided that Iran must immediately take all steps to redress the situation resulting from events of 4th November, 1979, and what followed from these events. It urged Iran to immediately terminate unlawful detention of the United States Charge d' Affaires and other diplomatic and consular staff and other U.S. nationals now held hostage in Iran and must release each and every one and entrust them to protecting power. The Court also said that Iran must ensure that all said persons have the necessary means of leaving Iranian territory, including means of transport and must immediately place in the hands of the protecting power premises, property, archives and documents of the United States Embassy in Teheran and of its consulates in Iran. The Court unanimously decided that no member of U.S. diplomatic and consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as witness.

The Chamber President, Sir Humphrey Waldock of Britain said that the 15 judges had voted 13 to 2 to condemn Iran for a catalogue of violations of International Law, including breaches of the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations.

The International Court of Justice by a split decision by a vote of 12 to 3 decided that the Government of Islamic Republic of Iran was under obligations to make reparation to the Government of United States for injury caused to the latter by events of 4th November, 1979, and what followed those events. The Court decided that the form and amount of such reparation, failing agreement between the parties, shall be settled by the Court and reserved for that purpose subsequent proceedure in the case.

The Court did not rule on an American claim that Iran be ordered to put on trial those responsible for November 4 seizure of the U.S. embassy in Teheran.

The taking of people as hostages is a gross violation of human rights—it has in fact brought anarchy in the realm of diplomacy and foreign relations. And in spite of the indignant world public opinion, the verdict of the International Court of Justice, the unanimous Security Council resolution calling on Iran to immediately release the hostages in the U.S. embassy in Teheran and the U.N. Convention against the taking of hostages, the hostages continued to be detained illegally.

Termination of Diplomatic Mission.—A diplomatic mission may terminate for various reasons. They are as follows :

(1) Recall of the envoy by his accrediting State.—The envoy may be recalled by the accrediting State if it temporarily breaks off diplomatic relations for any grave cause. The Indian High Commissioner in the Union of South Africa was recalled in May, 1946 as a mark of protest against the policy of racial discrimination adopted by South Africa against the people of Indian origin residing there, and the office of the High Commissioner was maintained in charge of a junior officer. The slender link in diplomatic relationship between India and South Africa was snapped by closing the office of the Indian High Commissioner in the Union from July 1, 1954. Such a recall is a sign of a rupture

and shows the strained relations existing between the two countries.

Earlier in July, 1953 the Government of India which had opened a legation in Lisbon to bring about direct negotiations with the Portuguese Government over the question of Goa, withdrew their representative from Lisbon and closed their legation there.

(2) Fulfilment of the object of the mission.—When the mission is for special purposes, it comes to an end on the completion of the object. They are missions sent to conferences and congresses or representations at ceremonial functions.

(3) Revolutionary change of government in either State.—With the change in the government on account of revolution, like changing a republic into a monarchy or a sovereign and enthroning another, the envoy also ceases to represent the government and must receive a new letter of credence.

(4) Death of the envoy.—On the death of the envoy, the mission comes to a close and the letter of credence loses its force. When a new envoy is appointed, a fresh letter of credence has to be issued.

(5) Death or abdication of the Head of either State.—Such a contingency also terminates the mission and the envoys at their posts must exchange new letters of credence. According to Oppenheim, a constitutional change in the headship of republic like France and the United States of America, through death, abdication or expiration of office (where the President is the head of the republic), terminates the missions sent and received by the former head, and must necessitate new letters of credence. But when, as in Switzerland, a body of individuals is considered to be the Head of the republic, the death or abdication of the President, or the expiration of his term of office, does not terminate the missions, as no new letters of credence are necessary.

(6) Return of the regular Minister to his post.—Where a minister has been accredited *ad interin*, there is a termination of the legation when the permanent minister returns.

(7) Change in the rank of the diplomatic agent.—There is termination of the mission when the accredited diplomatic agent is promoted in rank without being transferred. A fresh letter of credence is necessary.

(8) War between the accrediting and receiving State.—This brings about the end of the mission and the envoy and his staff and suite receive their passport.

Even apart from war, a State may ask for the closure of the legation of another State on account of strained relations. The Government of India decided to ask for the closure of Portuguese legation in New Delhi with effect from August 8, 1955, on account of the recalcitrant attitude adopted by Portugal with regard to the transfer of sovereignty of the Portuguese territories in the Indian Union.

(9) The extinction of State either by merger or annexation.—In such a case, the diplomatic mission terminates.

(10) Dismissal of the envoy by the sending or receiving State.—Dismissal of an envoy by the receiving State is the extreme step taken by it when its demands for the recall of the envoy are not complied with. There may as well be differences between the sending State and the receiving State and passports may be given to the envoy by the receiving State marking his

dismissal.

(11) Demand of recall by the accredited State.—The receiving State may also demand the recall of an envoy if he made himself obnoxious to the government of the country. The accrediting State has a right to ask for reasons leading to the demand of recall by the accredited State. If the reasons are inadequate, the accrediting State may mark its sense of disapproval by leaving the embassy in charge of an inferior member of its diplomatic service. Such recall may also occasion a rupture of diplomatic intercourse.

(12) Request for a Passport.—The request for a passport by the diplomatic agent on the ground of ill-treatment by the receiving State marks the termination of the diplomatic mission.

(13) Expiration of letters of credence.—If a letter of credence is for a limited duration, the mission of the envoy comes to an end on the expiry of the period.

The Vienna Convention on Diplomatic Relations provides that the function of a diplomatic agent comes to an end, *inter alia* :

(a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end,

(b) on notification by the receiving State to the sending State that it refuses to recognize the diplomatic agent as a member of the mission.

Formalities at the Termination of Mission.—When the mission of an envoy terminates through his recall, he receives a letter of recall from the head of the State if he is an ambassador or minister, or from his foreign minister if he is a Charge d' Affaires. On his departure, he has similar formal audience where the ambassador or minister presents his letter of recall to the Head of the receiving State and the Charge d' Affaires to the foreign minister.

Convention on protection of diplomats.—On 14th December, 1973, the General Assembly adopted by consensus the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. The Assembly emphasized the great importance of international law concerning the inviolability of and special protection to be afforded to internationally protected persons and the obligations of States in relation thereto. Under the Convention, each party shall make the crimes against diplomatic agents, (e.g., international commission of murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a threat or attempt to commit any such attack and an act constituting participation as an accomplice in any such attack) to be crime under its internal law, and each State party shall make these crimes punishable by appropriate penalties which take into account their grave nature.

Article 1 of the European Convention on the Suppression of Terrorism passed by the Parliamentary Assembly of the Council of Europe on January 27, 1977, provides that attack against the life of internationally protected persons including diplomatic agents shall not be regarded as a political offence.

Convention against the taking of hostages.—On December 17, 1979, the U.N. General Assembly unanimously adopted a treaty to make hostage-taking an international crime and required governments to prosecute or extradite any hostage-takers that fell into their hands. In a resolution approved without a vote, the 152-nation Assembly also opened the agreement for signature, which

entered into force on the 30th day after 22 countries had ratified it. The Assembly's action climaxed a campaign for such a treaty by West Germany in the 1976 Assembly session.

The taking of American hostages in Iran by the Iranian students was a gross violation of human rights, and what happened in Teheran, Islamabad, Tripoli and Bogota had brought about anarchy in the realm of diplomacy and foreign relations. There was a move for fitting the U.S. embassies abroad with teargas nozzles on the gate and in the lobbies so that uninvited guests could be disabled by a cloud of disabling gas. That was one of the anti-terrorist measures then under serious consideration. There is also a move to build "safe haven" vaults with appropriate escape features in embassies where embassy staff can hide until they are rescued. Such a vault in the embassy in Islamabad saved scores of American lives when a Muslim mob sacked the U.S. embassy on November 22, 1979.

Diplomatic immunity has from times immemorial been treated as sacrosanct and a diplomatic envoy is deemed for the purpose of jurisdiction and control to be outside the territory of the State in which he really is. It is, therefore, unthinkable that anti-terrorist measures have to be thought of by countries in spite of the United Nations Conventions and long-standing practice on the subject.

On December 15, 1980, the U.N. General Assembly strongly condemned the act of violence against diplomatic and consular missions.

U.N. resolution condemning acts of hostage-taking.—On December 18, 1985, the Security Council agreed on a draft resolution that condemned unequivocally all acts of hostage-taking, abduction and called for the immediate and safe release of all hostages and abducted persons wherever and by whomsoever held. The agreement came in private consulations of the 15-member U.N. body at the initiative of the United States.

The resolution affirmed the obligations of all States in whose territory hostages of abducted persons were held urgently to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage-taking and abduction in the future. It appealed to all States that had not yet done so to consider the possibility of becoming parties to the International Convention against the taking of hostages adopted on December 17, 1979, the Convention on the prevention and punishment of crimes against internationally protected persons including diplomatic agents adopted on December 14, 1973, the Convention for the suppression of unlawful acts against the safety of civil aviation adopted on September 23, 1971, the Convention for the suppression of unlawful seizure of aircraft adopted on December 15, 1970, and other relevant conventions.

The Council considered that the taking of hostages and abduction were offences of grave concern to the international community having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and cooperation among States.

CHAPTER XX

CONSULS

During the *Roman Republic*, the consuls were the highest civil and military magistrates, serving as the *heads of government* for the Republic. New consuls were elected every year. There were two consuls and they ruled together by mutual consensus, *i.e.* only when they agreed with each other could they exercise the authority of their office. However, after the establishment of the Empire, the consuls were merely a figurative representative of Rome's republican heritage and held very little power and authority, with the emperor acting as the supreme leader.

Definition.—Consuls are commercial agents maintained by modern States in the territory of other States, in addition to diplomatic agents. Their duty is to protect the commerce, navigation and other allied subjects of their country. They are sent as resident agents abroad for the purpose.

Hall defines consuls as persons appointed by a State to reside in foreign countries, and permitted by the Government of the latter to reside, for the purpose of partly watching over the interests of the State by which they are appointed, and partly of doing certain acts, on its behalf which are important to it or to its subjects to which the foreign country is indifferent, it being either unaffected by them or affected only in a remote or indirect manner.

Their origin.—They have been in existence from long before the establishment of the permanent diplomatic missions. Their origin dates back to the Middle Ages when merchants from Italy, Spain and France settling down for trade in the Mediterranean coast used to elect one of their men as consul for settling their commercial disputes by arbitration. Later on, the Muslim countries of the Mediterranean on account of the immigration of the communities of merchants adopted the consular system. In course of time and in consequence of treaties concluded between the Muslim princes and the home States of the merchants, consuls had the function of protecting the rights and privileges of the citizens of their home countries residing in the town. In the 15th century, Italian consuls had full jurisdiction over the Italian merchants in the ports of England and the Netherlands. The consular system lessened in its importance in the 17th century on account of the introduction of permanent legation, and it was deprived of the privilege of its civil and criminal jurisdiction. With the increase in commerce and navigation in the 19th century, the consular practice gained momentum in the European States. Numerous treaties defining their character and functions were concluded between different States. The provisions of the treaties are now almost uniform, and the consular practice is governed by customary International Law. A number of States have enacted statutes regarding the duties of their consuls abroad, e.g., Consular Act passed by Great Britain in 1825.

Vienna Convention on Consular Relations, 1963.—Supplementing the work of the Vienna Conference on Diplomatic Intercourse and Immunities, 1961,

the Conference on Consular Relations met at Vienna in 1963 and codified the limited privileges and immunities to which consuls are entitled regarding acts performed in their official capacity, their archives and correspondence with their home governments. The convention covers the whole field of status and activities of consuls. It stipulates the condition under which a State having no diplomatic mission may, with the consent of the receiving State, authorise a consular officer to perform diplomatic acts, and act as a representative of the sending State to any inter-governmental organization.

Grades of Consul.—There are various grades of consuls, viz., consuls-general, consul, vice-consul, consular agent and pro-consuls. **Consuls-general** are appointed as the head of several consular districts or of one large district and have several consuls under them. **Consuls** coming next in rank are appointed for smaller districts or for towns and ports only. **Vice-Counsuls,** as the name implies, are assistants of consuls-general and consuls. They are appointed according to the municipal laws of some States by the consul subject to the approval of the home State. **Consular-agents** are of the lowest rank, appointed by a consul-general or consul subject to the approval of the home Government. They exercise certain parts of the consular functions in certain towns or other places of the consul district. **Pro-Consuls** are appointed for a short period, viz., in the absence or illness of consul-general or consul and their appointment terminates with the return of the consul to duty. In the British Consular Service, they exercise the notarial functions of a consular officer. The Vienna Convention on Consular Relations, 1963, follows the customary classification.

Appointment of Consuls.—Consuls are appointed through a patent or commission termed *Lettre de provision* issued by the head of the appointing State and the receiving State issues a permit termed as *exequatur* which enables them to function in that State. The grant of *exequatur* confirms his commission.

According to Hall, a State does not indirectly recognise a newly created State merely by appointing a consul to a district in it. Oppenheim is, however, of the view that if consuls are formally appointed and formally receive the *exequatur* on the part of the receiving State, then indirect recognition has been said to be involved.

Functions.—The functions of consuls are regulated primarily by the municipal law of each State. Since the exercise of their functions encroaches upon the jurisdiction of the local government, its consent is embodied in the form of consular treaties. Such functions may be summarised as below :

1. Consuls look after commercial interests of their State, advise their merchantmen and supervise their papers. They may arrest deserters from the vessels of their nation and are required to superintend the proceedings relating to salvage operations. They have to watch the execution of the commercial treaties entered into between their respective home States and States which have admitted them. They look after the commercial interests of the citizens of the country they represent. They also attend to various other miscellaneous work, e.g., the administration of the estates of subjects dying intestate, settling disputes between captains and crews, receiving reports from masters of vessels of their State, settling question of damages suffered at sea by the vessels of their country, etc. They are also expected to apprise their Government of the state of commerce, industry and agriculture of the State in which they happen to live.

They have also to advise the merchants and manufacturers of their home State in any matter concerning the protection of their commercial interests.

2. Consuls have also to protect the subjects of their home State—a task similar to that of a diplomatic agent. They have to keep a register showing the names and addresses of the citizens of their own State residing in a consular district. They also register marriages, births and deaths and take charge of wills. They make out passports and render assistance to paupers and the sick, and to litigants before the Court. They send home shipwrecked or destitute persons. They administer property of their nationals if they die abroad.

3. Consuls have also to supervise the navigation of the appointing States. They have to keep a watch over their merchantmen, sailing under the flag of their home States, to inspect them on their arrival and departure, to assist vessels in distress and to settle disputes between the vessel, master and their crew.

4. They also perform notarial functions such as attesting and legalizing signatures, recording depositions of witnesses, captains and crews of vessels of their own country and administering oaths, registering marriages, taking charge of wills, registering births and deaths and legalising adoption. They may appear personally on behalf of the absent heirs or creditors of deceased nationals of their own State. The Vienna Convention details their functions in Art. 5 in great detail.

According to the Vienna Convention on Consular Relations, 1963, consular functions consist in :

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by International law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State;

(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

(e) helping and assisting nationals, both individuals and bodies corporate of the sending State;

(f) acting as notary and civil registrar and performing certain functions of an administrative nature;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding the interests of minors and other persons lacking full capacity who are nationals of the sending State particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practice and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining provisional measures for the preservation of the rights and interests of these nationals where, because of absence or any other reasons, such nationals are unable at the proper time to assume the defence of their rights and interests;

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force;

(k) exercising rights of supervision and inspection in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) above, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

The Exequatur.—The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed as exequatur. A State which refuses to grant an exequatur is not obliged to give to the sending State reasons for such refusal. The head of a consular post shall not enter upon his duties until he has received an exequatur.

Consular officers should, in principle, have the nationality of the sending State.

Privileges.—Consuls are not diplomatic agents and as such they are not immune from local jurisdiction unless agreed to by treaty. They, however, enjoy certain privileges by courtesy or by special convention between particular States. According to the generally accepted practice they are regarded immune from local, civil,—and also perhaps criminal—proceedings in respect of acts performed in their official capacity. Even in respect of criminal matters they are proceeded with only for serious crimes.

Their official papers and archives are exempt from seizure according to usage. Article 41 of the Vienna Convention of 1963 provides that consular officers shall not be liable to arrest or dentention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority. In the case of criminal proceedings for lesser offences, special consideration is to be shown to the consul so as to hamper the exercise of his consular functions as little as possible. By commercial and consular treaties they are often exempted from local rates and direct personal taxes, such as income-tax and taxes upon other personal property, but are subject to the usual taxes on real property and

their private business. They are exempted from service on juries. The modern tendency is to accord them by treaty greater rights than they have enjoyed hitherto under International Law.

Sometimes consuls are also charged with the tasks assigned to diplomatic representatives, but this does not automatically invest them with the privileges of envoys if the same are not provided for by treaties between the home State and the State in which they reside.

Unlike that of an ambassador, the office of a consul does not terrminate on the change in headship of a State or with the death of the sovereign of either State.

According to Starke, "The modern tendency of States is to amalgamate their diplomatic and consular service, and it is a matter of frequent occurrence to find representatives of States occupying, interchangeably or concurrently, diplomatic and consular posts. Under the impact of this tendency, the present difference between diplomatic and consular privileges may gradually be narrowed." The Vienna Convention on Diplomatic Relations, 1961, also laid down that nothing in the Convention should be construed as preventing the diplomatic mission from performing consular functions. The Vienna Convention on Consular Relations, 1963, lists in Arts. 28-39, their privileges and immunities in detail.

Termination of Consular Office.—It comes to an end on any of the following happenings :

(1) death of consuls;
(2) withdrawal of the exequatur;
(3) recall or dismissal of the consul; and
(4) declaration of war between the sending and receiving States.

The death of the sovereign or head of either State, as said earlier, does not terminate the consular office.

According to the Vienna Convention on Consular Relations, 1963, the functions of a member of a consular post shall come to an end *inter alia* :

(a) on notification by the sending State to the receiving State that his functions have come to an end;
(b) on withdrawal of the exequatur;
(c) on notification by the receiving State to the sending State that the receiving State has ceased to consider him as a member of the consular staff.

INTERNATIONAL TRANSACTIONS

CHAPTER XXI

TREATIES

Conception of Treaty.—A treaty is an agreement or contract entered into between two or more States whereby they undertake to carry out obligations imposed on each of them.

International treaties, according to Oppenheim, are agreements, of a contractual character, between States or organisations of States, creating legal rights and obligations between the parties.

In the Harvard Draft Convention on the Law of Treaties, the term "treaty"—called as elastic as Jurisprudence by someone—has been limited to mean "a formal instrument of agreement by which two or more States establish or seek to establish a relation under International Law between themselves." This would imply that it does not include "an agreement effected by exchange of notes," a view difficult to justify.

Treaty means 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.

Treaties, as said elsewhere, form an important source of International Law. They may determine legal relations between parties on a footing different from the accepted customary rules of nations or they may supplement, modify or define the pre-existing International Law.

A **treaty** is an express *agreement* under *international law* entered into by actors in international law, namely *sovereign states* and *international organizations*. A treaty may also be known as : **(international) agreement, protocol, covenant, convention, exchange of letters,** etc. Regardless of the terminology, all of these international agreements under international law are equally treaties and the rules are the same.

Treaties can be loosely compared to *contracts* : both are means of willing parties assuming obligations among themselves, and a party to either that fails to live up to their obligations can be held liable under international law.

Kinds of Treaties.—Oppenheim classifies treaties into law-making treaties which are concluded for the purpose of laying down general rules of conduct among a considerable number of States, and treaties concluded for any other purpose.

Treaties classified according to subject-matter are treaties of alliance, treaties of guarantee, treaties of commerce, treaties neutralising a State, etc.

Vattel classifies treaties as equal and unequal and real and personal.

Real treaties relate solely to the subject-matter of the convention independently of the persons of the contracting parties. They continue to bind the State irrespective of changes in the persons of its rulers. They impose

obligations of an indestructible character. Boundary treaties belong to this category of treaties. Personal treaties relate to the person of the contracting parties and bind only the personal ruler, dynasty or government that made them. They expire on the death of the King and do not survive a change of sovereignty. Such treaties are in the nature of treaties of alliance and friendship or treaties of political, economic or administrative character. With the change in the international person such personal treaties are extinguished.

The treaties may be distinguished as unilateral and bilateral, accordingly as they bind one party or both the parties. There are also multilateral treaties which bind more than two States as parties. Such treaties may be either political or non-political. There are also law-making treaties, e.g., the Pact of Paris, the Covenant of the League of Nations and the Charter of the United Nations.

Treaties classified according to objects are political, commercial, social and treaties of guarantee, neutrality, cession or extradition.

There are also transitory and permanent treaties.

The most perfect classification is to be found in that given by NcNair, [British Year Book of International Law (1930)], which is as follows :

(a) Treaties having the character of conveyances;

(b) Treaties having the character of contracts;

(c) Law-making Treaties which may be sub-divided into :

  (1) Treaties creating constitutional law, e.g., the Statutes of the Permanent Court of International Justice (now the International Court of Justice);

  (2) Pure Law-making Treaties, e.g., several Labour Conventions negotiated by the International Labour Organisation;

(d) Treaties akin to Charters of Incorporation, e.g., Treaties which established the Universal Postal Union, 1874.

Power to enter into treaties.—A sovereign State, which has not parted with any portion of its sovereignty either by confederation or treaty of alliance, possesses full treaty-making power. The power of semi-sovereign States to enter into treaties with other States is limited and depends upon the nature of freedom that they enjoy. In the case of a Federation, the constitution defines the power of the member States to enter into treaties with other sovereign States. In the case of a vassal State or the protectorate, the power of the vassal State or protectorate to enter into treaties with foreign States depends upon the freedom allowed to them by the suzerain or the protecting State.

It was observed by the Permanent Court of International Justice in the case of the *S.S. Wimbledon* that "the capacity of entering into international engagements is an attribute of State sovereignty."

Treaty-making power of U.N.—There are a number of stipulations contained in the Charter of the United Nations which lead to a conclusion that the Organization can conclude treaties. It was clearly held by the International Court of Justice *In the Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) that the United Nations has a sufficient international personality to permit it to present a claim for damages in respect of injuries done to its servants in the course of their duties. The Court further observed :

> ".....The Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, and that its legal personality and rights and duties are the same as those of a State. Still less is the same thing as saying that it is 'a super-State,' whatever that expression may mean...What it does mean is that it is a subject of International Law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims."

It must, however, be clearly understood that this treaty-making power of the United Nations cannot be treated as on par with that of States.

The treaty-making power of the United Nations is signified first by Article 43 of the Charter, which empowers the Security Council to conclude a treaty with the members of the United Nations to enable them to contribute to the maintenance of international peace and security, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. This conclusion is further reinforced by the provision contained in Article 24 whereby the members have conferred on the Security Council and have further agreed that in carrying out its duties, the Security Council acts on their behalf.

Article 63 lends support to the above view by providing that the Economic and Social Council may enter into agreements with the various specialised agencies, established by inter-governmental agreement, and define the terms on which the agency concerned shall be brought into relationship with the United Nations.

With regard to the trusteeship agreements, the relevant provisions are contained in Chapter XII. Article 77 lays down that the trusteeship system shall apply to territories as may be placed thereunder by means of trusteeship agreements and it will be a matter for subsequent agreement as to which territories will be brought under the trusteeship system and upon what terms. That the United Nations is to have a supervisory role in the administration of trust territories admits of no doubt. Clive Parry observes that "the result of the consideration of Chapter XII of the Charter does not go beyond the conclusion that the 'trusteeship agreements' of which it speaks are instruments *sui generis*. Whatever their claim to be designated 'treaties,' they are without doubt acts in the law, creative of rights and duties."

There then remains to consider agreement relating to privileges and immunities.

The International Court of Justice in *The Reparation for Injuries Suffered in the Service of the United Nations* referring to the capacity of the Organisation to enjoy rights and obligations under treaty as provided in Article 105 declared that the Charter provided for the conclusion of agreements between the Organization and its members and that the Organization had a large measure of international personality and capacity to operate upon an international plane.

Mutual Consent of the Contracting Parties.—Since a treaty is an agreement, there should be an accord of will between the contracting parties manifested by signs, spoken or written words. There must be mutual consent of the parties. Mere proposals made by one party and not accepted by the other are not binding upon the proposer. Duress does not invalidate consent as it does

in private law of contract. There must further be capacity on both sides and the object must be legal.

Contracts and treaties.—In Municipal Law, contracts are agreements which are enforceable at law having been entered into between citizens of a State. International treaties, on the other hand, are agreements entered into between States for the purpose of carrying out the various transactions that emanate on account of international relationship existing between them. As to the legal character or binding force of international treaties, whatever difference of opinion there existed, it has been set at rest by the considered opinion of Oppenheim who bases it on the customary rule of International Law. He says that many writers find the binding force of treaties in the Law of Nature, others to religious and moral principles, others in self-restraint exercised by a State in becoming a party to a treaty and some others ascribe it to the will of contracting parties, but the correct answer is probably that treaties are legally binding because there exists a customary rule of International Law that treaties are binding.

In private contract, there must be a free offer and a free acceptance, besides valuable consideration. Accordingly, in Municipal Law, freedom of consent is essential to the validity of every agreement, and contracts entered into under duress or forced by threats or by violence are not binding upon the parties thereto. In International Law, duress has to some extent been recognized in the conclusion of treaties. At the end of the war, the victor nation is in a position to dictate terms, which are accepted by the vanquished State. By virtue of the unenviable position of the vanquished State, any treaty signed by it will be tainted with some amount of coercion. Even Hall shares the view that "in International Law, force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for." To the same effect are the observations of Wheaton : "...the welfare of society requires that the engagement entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territories by any enemy should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party. Nor does inadequacy of consideration, or inequality in the conditions of a treaty between nations, such as might be sufficient to set aside a contract between private individuals of the ground on gross inequality or enormous lesion, form a sufficient reason for refusing to execute the treaty."

The Treaty of Versailles is a glaring example where conditions were imposed upon Germany without any pretext or excuse of entering into a treaty. The German Republic was obliged to accept the onerous terms and conditions of the Versailles Treaty—which in fact bore the seeds of the Second World War—by the mere overwhelming force of the Allied and Associated Governments.

Apart from the above, it has to be emphasized that a treaty concluded as a result of violence or intimidation exercised personally against the sovereign or the diplomatic agent will not be binding. Lord Birkenhead observed that "to introduce an armed force into the Conference Chamber for terrorising a negotiator into submission would invalidate the agreement extorted from him."

Then, like contracts under Municipal Law, treaties are not binding if the consent was based upon material error or given on account of fraud or misrepresentation.

After the establishment of the United Nations Organization, there should now be little chance of restricting the freedom of action of the States in regard to conclusion of treaties, by the use of coercion, intimidation or force.

Treaties inconsistent with the Charter and Immoral Treaties.—Article 103 of the Charter of the United Nations lays down that the obligations of the members of the United Nations under the Charter shall prevail over their obligations under any other international agreement in case of any conflict. Accordingly, treaty obligations so as far as they are inconsistent with the principles of the Charter will not be valid. "It is plain, therefore," observes Svarlien, "that the Charter of the United Nations constituted 'higher law,' limiting to a certain extent the contractual capacity of those States who are members of the Organization."

It is recognized by the usage of International Law that moral obligations imposed by treaties or treaties opposed to public morality are not binding on the parties.

Vienna Convention on the Law of Treaties. 1969.—A Convention on the Law of Treaties was adopted by the U.N. Conference in Vienna in May, 1969, by 79 votes to 1, with 19 abstentions. The Convention is a major work of codification and progressive development of the law of treaties and is the result of the efforts of the International Law Commission covering a period of about 20 years. It broadly reflects existing international law and practice on the subject of treaties.

The Vienna Convention on the Law of Treaties, termed by Richard D. Kearney and Robert E. Dalton as 'the treaty on treaties' "does not approach perfection. The international legislative process remains much too primitive a mechanism to produce an approach to perfection. This convention is, however, in an unspectacular and earth-bound way, a giant step for mankind toward a world in which the rule of law will not be a dream but a reality."

Constitutional Requirements.—In the case of sovereign States, the power of entering into treaties rests with the heads of State or their representatives. In case they violate the constitutional limitation imposed by the municipal laws of their respective States, the treaties are not binding on them. In some States like the United Kingdom, the making of a treaty is an executive act while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.

Conclusion of Treaties.—There is no specific form for the conclusion of treaties. An oral agreement between representatives of the States charged with the task of conducting negotiations and empowered to bind their respective countries is sufficient to have binding effect if it is the intention of the representatives to conclude a legally binding transaction. The enormous importance of the issues involved in such agreements however necessitates the compliance of formal requirements and reducing the agreements into a document.

The various steps towards the conclusion of a treaty are :

(1) Accrediting of representatives.—Each of the States conducting

negotiation appoints a representative or plenipotentiary for this purpose. He is provided with an instrument given by the Minister for Foreign Affairs showing his authority to conduct such negotiations, which is known as the Full Powers.

(2) Negotiation.—The two plenipotentiaries exchange their full powers or a copy thereof before entering upon their task. They then proceed with negotiations. In the case of bilateral treaties, negotiations are conducted through pourparlers but they take the shape of a diplomatic conference when a multilateral treaty is to be adopted.

(3) Signature.—When the final draft of a treaty is drawn up, the instrument is ready for signature. The signature is affixed at a formal closing session. A treaty generally comes into force on signature by plenipotentiaries of the contracting States unless the States desire to subject it to ratification. Treaties and conventions are generally always sealed.

(4) Ratification.—It is an act of adopting an international treaty by the parties thereto. In other words, ratification implies the confirmation of the treaty entered into by the representatives of the different States. So long as a treaty is not ratified by proper authority under the constitution of the country, it lacks the formal validity or sanction. Although treaties are confirmed subsequently, legal effects are held to date from the moment of the signature. The time lag between the signature and actual ratification is allowed to the States, who are parties to the treaty, to ponder over the matter and refuse to confirm or ratify the agreement for any valid reasons. This also affords them an opportunity to obtain the approval of Parliament should it be necessary to do so or otherwise consult public opinion.

The reasons for refusal to ratify the treaty must not, however, be arbitrary or capricious. Ratification of a treaty may be withheld on the following grounds :

(i) if the representative or plenipotentiary has exceeded his powers;
(ii) if any deceit as to matters of fact has been practised upon him;
(iii) if the performance of treaty obligations becomes impossible;
(iv) if there has not been *consensus ad idem*, i.e., there has not been agreement as to the same thing.

According to Brierly, there is no legal bar nor even a moral duty on a State to ratify a treaty signed by its own plenipotentiaries; it can only be said that refusal is a serious step which ought not to be taken lightly.

As regards the form of ratification, as said above, there is no express rule. It may be made expressly or tacitly. Ratification is often made with reservation. Such reservations require the formal consent of the other States who are parties to the treaty before the treaty can be said to have binding effect.

Ratification subject to reservations in bilateral treaty.—As said above, ratification is an act of adopting an international treaty by the parties thereto. In other words, ratification implies the confirmation of the treaty entered into by the representatives of the different States. Ratification, subject to reservation, however, alters the character of the treaty. According to the Vienna Convention on the Law of Treaties, 1969, reservation means a unilateral statement, however, phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that

State.

The International Law Commission formulated the reservation clause by stating that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless : (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservation is incompatible with the object and purpose of the treaty. The clause was adopted by the Vienna Convention on the Law of Treaties (Art. 19); except that U.S.S.R. amendment based on the traditional Soviet doctrine that "the formulation of a reservation is an act of State sovereignty and does not require acceptance by other States", was also accepted. The amendment incorporated into the Convention provides that "an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State." [Art. 20 (4)(b)]. Paragraph 5 of Art. 20 further provides that unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Multilateral conventions.—In the case of multilateral conventions of a law-making character, which lay down certain general principles of conduct, the rights of the parties are not very meticulously defined. Therefore, the same general principles which relate to bilateral treaties are not quite applicable to the multilateral conventions. It was observed by the International Court of Justice in its Advisory Opinion *On the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (I.C.J. Reports, 1951, p. 29) that a State making reservation which is being objected to by one or more of the parties to the Convention but not by others, nevertheless remains a party to the Convention if the reservation is compatible with the object and purpose of the Convention; that if a party to the treaty objects to reservation which it considers to be incompatible with the object and purpose of the treaty, it can consider the reserving State not to be a party to the treaty; and that in the case of a party which accepts the reservation as being compatible with the object and purposes of the treaty, it can consider the reserving State to be a party to the treaty.

(5) Accession and Adhesion.—A third State can become a party to an already existing treaty by means of accession. This may be brought by formal entrance of the third State with the consent of the original contracting parties or, as Oppenheim observes, by becoming, "a party to a treaty between other States for the purpose of guaranteeing its due performance" whereby the acceding State also becomes a party to the treaty.

Adhesion denotes the entrance of a third State into an existing treaty with regard to certain stipulations or certain principles only embodied in the treaty.

Oppenheim is of the view that the distinction between accession and adhesion is one made in theory, to which practice does not frequently correspond.

(6) Coming into force of treaties.—The treaty, unless where ratification is necessary, comes into force on the date of signature. In case of ratification, the treaty comes into force after the exchange or deposit of ratifications by the States signatories. Multilateral treaties come into operation on the deposit of a

prescribed number of ratifications and accessions.

(7) Registration.—After the treaty has been so ratified, it has to be registered at the headquarters of the international organization. Article 18 of the Covenant of the League provided that every treaty or international engagement should be registered with the secretariat of the League and published by it as soon as possible. No such treaty or international engagement was binding on any State until it was so registered. This meant that in case of any dispute, the treaty could not be relied upon if it was not registered. To the same effect are the provisions in the United Nations Charter. Article 102 of the Charter reads :

"(1) Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

(2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph (1) of this Article may invoke that treaty or agreement before any organ of the United Nations."

The second part of Article 102 clearly prohibits States to bring before the bar of world opinion any secret treaty. The effect of non-registration is, however, limited to this extent that parties to the treaty cannot invoke it before any organ of the United Nations.

(8) Incorporation of treaty into State law.—The final stage of the treaty is its actual incorporation in the municipal law of the contracting State where such incorporation is necessary in order to assume a binding character.

Invalid Treaties.—In accordance with International Law, treaties may be deemed invalid on any of the following grounds :

(1) Where the object of the treaty is illegal. Treaties stipulating immoral obligations are void *ab initio;*

(2) Where fraud or misrepresention has been practised on the parties to the treaty in the conclusion of the same;

(3) Where the treaty has been concluded by intimidation or coercion or by terrorising the negotiator;

(4) Where there is an error produced by fraud in the conclusion of the treaty;

(5) Where the treaty provides for obligations the performance of which is impossible;

(6) Where there is an incapacity from status of the contracting parties to the treaty. A mandatory territory, for example, has no treaty-making power;

(7) Where treaties are concluded in violation of the principles of International Law or in derogation of the principles of the Charter.

Vienna Convention on Succession of States in respect of Treaties.—The Vienna Convention on Succession of States in respect of Treaties was adopted on August 23, 1978, by a vote of 82 in favour with 2 abstentions (France and Switzerland) at The United Nations Conference on Succession of States in respect of Treaties, Vienna. The Convention applies only in respect of a succession of States which has occurred after the entry into force of the

Convention except as may be otherwise agreed. Under the provisions of Art. 8 of the Convention, the obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of State do not become the obligations or right of the successor State toward other State parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State. Notwithstanding the conclusion of such an agreement the effects of a succession of States on treaties which, at the date of the succession of States, were in force in respect of the territory in question are governed by the present Convention. Under the provisions of Art. 15 when part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of another State, becomes part of the territory of another State : (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of State relates from the date of the succession of States, and (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operations.

Effect of Treaties on Third Parties.—It was observed by the Permanent Court of International Justice in the *Case concerning certain German Interests in Polish Upper Silesia* that "a treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third State." But the court observed in the *Case of the Free Zones of Upper Savoy and the District of Gex* that "it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such." Kelsen cites the following instances of treaties which confer rights on third parties :

(1) Treaties by which State servitudes are established by creating rights for the successor to the dominant State though not a contracting party to the treaty;

(2) Treaties establishing the protection of minorities and opening to States that are not contracting parties to the treaty the possibility of invoking a court against violations of the treaty stipulations such as the treaties concluded by the Principal Allied and Associated Powers with Poland, signed on June 28, 1919, and with Czechoslovakia, signed on September 10, 1919;

(3) Treaties concluded between two States concerning a canal or a strait stipulating that the canal or the strait shall be open to vessels of all nations, as for instance, the Hay-Pauncefote Treaty between Great Britain and the United States of 1901;

(4) The Peace Treaty of Versailles contains in Article 109 provisions in favour of Denmark; in Article 358 provisions in favour of Switzerland, although all the three States were not contracting parties to the treaty;

(5) The Peace Treaty with Italy (signed on February 10, 1947) contains in Article 76 provisions in favour of "any of the United Nations which broke off diplomatic relations with Italy and which took action in

co-operation with the Allied and Associated Powers," without being contracting parties to the treaty.

Pacta Sunt Servanda.—It is a doctrine borrowed from the Roman Law and has been adopted as a principle governing treaties in Internaional Law. According to this doctrine, the parties to a treaty are bound to observe its terms in good faith. The observance of understandings, agreements and treaties between nations, observed Cordell Hull, constitutes the foundation of international order. It is just that States taking over certain obligations must perform them. According to Fenwick : "Philosophers, theologians and jurists have recognised with unanimity that unless the pledged word of a State could be relied upon, the relations of the entire international community would be imperilled and law itself would disappear."

The Permanent Court of International Justice has consistently held that the provisions of municipal law cannot prevail over those of treaty. The Court observed in the case concerning the *Treatment of Polish National in Danzig* : "A State cannot adduce as against another State its own constitution with a view to evading obligation incumbent upon it under International law or treaties in force." Again, it was observed in the *Free Zone case* : "It is certain that France cannot rely on her own legislation to limit the scope of international obligations." The same view was repeated in the *Greco-Bulgarian Communities* by the Permanent Court of International Justice in its advisory opinion : "It is a generally accepted principle of International Law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."

In this connection, the observation of Lauterpacht are pertinent. He says : "The rule that compacts must be kept is certainly one of the bases of the legal relations between the members of any community. But at the same time the notion that in certain cases the law will refuse to continue to give effect to originally valid contracts is common to all systems of jurisprudence."

Article 26 of the Vienna Convention on the Law of Treaties, 1969, specifically embodies the doctrine of Pacta Sunt Servanda when it lays down that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Amendment or Modification of Treaties.—The subject of amendment or modification of treaties may be studied under the two heads, viz., bilateral and multilateral treaties.

Bilateral Treaties.—As regards bilateral treaties, the traditional principle enshrined in Art. 39 of the Vienna Convention on the Law of Treaties, 1969, provides that a treaty may be amended by agreement between the parties. The rules laid down in Part II of the Convention apply to such an agreement unless the treaty itself lays down the procedure of amendment or revision of the treaty.

Under customary law, no benefit accrues to a fourth State which is a State that draws benefit indirectly out of the right created in favour of a third State.

Multilateral Treaties.—Article 40 of the Vienna Convention on the Law of Treaties provides the rule with regard to amendment of multilateral treaties as under :

40. "1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs :

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in :

(a) the decision as to the action to be taken in regard to such proposal; and

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

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

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

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

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

Termination of Treaties.—Treaties may terminate on any of the following grounds :

(a) On expiry of the specified period for which a treaty was concluded;

(b) Where the main object of the treaty is fulfilled : In case of treaties imposing no continuing obligations, they cease to operate on the fulfilment of the object;

(c) A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. A material breach of a treaty consists in a repudiation of the treaty not sanctioned by the Vienna Convention on the Law of Treaties, 1969, or the violation of a provision essential to the accomplishment of the object or purposes of the treaty;

(d) By mutual consent of the parties to the treaty. The parties to a treaty are its masters and, therefore, International Law does not lay any difficulties in their way if, by mutual consent, they wish to terminate the treaty, or the treaty grants a unilateral right of denunciation to any or all of the parties thereto;

(e) Non-performance of certain essential conditions : If the treaty grants a unilateral right of denunciation to one or all of the consenting States in case of failure of certain essential conditions, the treaty comes to an end on the happening of such a contingency;

(f) When that obligations of the treaty becomes incompatible with the Charter of the United Nations : Article 103 specifically provides that in the event of a conflict between the obligations of the members of the United Nations and their obligations under any other agreement, their obligations under the Charter shall prevail;

(g) When a war breaks out between the contracting parties : The modern view, however, is that the outbreak of war does not necessarily bring a treaty to an end. It was observed by Cardozo, J. in *Techt* v. *Hughes*

that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected;

(h) When one of the contracting parties is extinguished by annexation or merger. The treaty between U.S.A. and Tripoli ceased to exist when the latter was annexed by Italy in 1912.

(i) *Force Majeure* and impossibility of Performance : In the Russian Indemnity Case (1912) between Russia and Turkey, the Permanent Court of Arbitration held that the exception of *vis major* could be pleaded in international as well as in private law. International law must adapt itself to political necessities. While agreeing with the contention of Turkey that the obligation of a State to carry out treaties must give way if the very existence of the State should be in danger and the observance of the international duty is self-destructive on the part of the State concerned, Russia argued that Turkey had from 1881 to 1902 been faced with financial difficulties of the utmost seriousness and yet during that period Turkey was able to obtain loans at favourable rates to redeem other loans and to pay off a large part of its public debt. The Court agreed with this contention of Russia and held that the existence of the State of Turkey was not imperilled by the enforcement of the payment of a small sum of about six million francs due to the Russian claimants or seriously compromised its internal or external situation. The exception of *force majeure* raised by Turkey was accordingly negatived.

The rule with regard to supervening impossibility of performance is enshrined in Art. 61 of the Vienna Convention on the Law of Treaties, which reads as under :

61. "1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Doctrine of rebus sic stantibus.—The doctrine of *rebus sic stantibus* connotes that when the existence or the development of a State stands in unavoidable conflict with its treaty obligations, the latter must give way for self-preservation and development in accordance with the growth and the vital requirements of the nation. It is "a tacit condition, said to attach to all treaties, that they shall cease to be obligatory as soon as the state of facts and condition upon which they were founded has substantially changed."

Thus, every treaty implies a condition that the contracting party should have the right to demand release from the obligations imposed by the treaty should, due to change of circumstances, the continued existence of the State as an international person be threatened.

With regard to revision of treaties, Article 19 of the Covenant of the League of Nations (1920) provided as follows :

"The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

The Charter of the United Nations does not contain a provision analogous to Article 19 of the Convention relating to the revision of treaties. The relevant provision in the Charter is Article 103 which reads thus :

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

Part V of the Vienna Convention on the Law of Treaties (1969) deals specifically with the invalidity, termination and suspension of the operation of treaties. It contains a variety of safeguards to protect the stability of the treaty structure, as the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles. Article 42 carries out the intention of the International Law Commission to subject all challenges of the continuing force of treaty obligations to the rules of the Convention. The termination of a treaty, its denunciation or suspension, or the withdrawal of a party may take place under Article 42, part (2) only as a result of the application of the provisions of that treaty, or of the Convention. Article 43 is a cautionary rule which makes clear that a State that sheds a treaty obligation does not escape any similar obligation to which it is subject under International Law independently of the treaty.

Doctrine of Jus Cogens.—Lastly, a treaty may be declared void if it conflicts with a peremptory norm (called *jus cogens*) of general international law. Article 53 of the Vienna Convention on the Law of Treaties, 1969, lays down that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, which is a norm accepted and recognised by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. On an objection raised to the claim of invalidity of the treaty by any other party, the parties will have to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice as enshrined in Art. 33 of the U.N. Charter.

CHAPTER XXII

INTERNATIONAL ORGANISATIONS

Historical Background of International Organisations

At the outset, it may be pointed out that the concept of world community developed and extended in response to the needs of European countries. It came into existence for the protection of their economic, political and military interests. The concept of world community had been deeply ingrained in the traditions of European countries when International Law was taking its modern shape. In the beginning, it was largely a moral concept which, in due course of time, implied a bond of unity among different European States for the fulfilment of their various interests. In this context, the great diplomatic conferences of Osnalruck and Munster may be cited, which heralded the development of rudimentary and imperfect international organisations. In addition to these and other political conferences, numerous international conferences met from time to time for the regulation of economic and social interests of European countries. It was the beginning of the new concept of world community, which took concrete shape in later years of nineteenth century.[1]

The Congress of Westphalia was undoubtedly an important event in the development of international organisation, as it was an evolution of modern State system. The Peace Conference of Westphalia was held in 1648. This community was enlarged in 1721 with addition of other European States, which could not be represented in the Peace Conference of Westphalia. The United States of America was admitted to this community of nations in 1783, and increase in its membership grew after attainment of independence by South and Central American States in early nineteenth century.

The second important event in this direction was the Congress of Vienna (1814-15) which met to deal with the European political problems which remained after the defeat of Napoleon. This Congress laid the foundations of a political and international system which for a century shaped the course of European and to some extent of world affairs. The Vienna settlement was reinforced by the Quadruple Alliance of Austria, Great Britain, Prussia and Russia. This alliance became quintuple after the addition of France in 1818.

The third important conference in this context was the Treaty of Paris in 1856, wherein for the first time a non-Christian State, the Ottoman Empire, was admitted to participate in the conference of European States. Later on, Balkan States were admitted to participate in this community. By the close of nineteenth century, other non-Christian States like Japan, Persia, China and Siam were also admitted to this community.

The First Hague Conference of 1899 was the fourth important step in this direction, which was attended among others, by five leading European Powers, France, Austria, Great Britain, Prussia and Russia. This conference was indeed a landmark in the history of international relations. In this conference, the

1. Vide, Dr. S.P. Gupta, "International Organisation" pp. 1-4 1st Edition, (1997).

appearance of Latin American and Far Eastern States was a negligible factor due to their weak political and economic stability.

The other important step in this direction was the second Hague Conference of 1907, which was attended by forty-four States, as against twenty-six in the First Hague Conference of 1899. The States included particularly the entire family of nations. The final Act of this Conference expressed unanimous acceptance of "the principle of compulsory arbitrations", and added to announce that the assembled States succeeded in evolving a lofty conception of the welfare of the humanity.

Yet another important conference took place in London in 1909. The Declaration of London was signed on February 26, 1909. At the close of the Conference, chief points of dispute between belligerents and neutral States were discussed. There were sharp conflicting interests of the leading Powers, so the Declaration could not be ratified and the subjects were left to be decided on the basis of uncertain customary rules of International Law.

As a result of Treaty of Versailles signed on June 28, 1919, by both Allied and Associated Powers, the Covenant of the League of Nations, came into existence. The significance of the Covenant of the League of Nations was in the changes that were effected in the organisation of the community of nations and the amendments were effected in the substantive and procedural parts of International Law. The balance of power system was repudiated in the collective responsibility assumed by all members of League of Nations for future peace and security of the world community. Under the auspices of League of Nations, several treaties of peace were enforced for fundamental changes in the structure of the society of nations and relations with its component parts. Hence, in Europe, the boundaries of almost all the States were enlarged and a number of new States were also created. For example, Albania advanced from the condition of wardship of Great Powers to the status of an independent State. Poland was also created from the territory taken from Germany, Austria and Russia. Czechoslovakia was formed of Austrian and Hungarian territory.

The colonies of Germany were apportioned among the victors under the system of mandates supervised by the League of Nations. Besides these, many constructive provisions were inserted in several treaties for the protection of minorities, the facilitation of international transportation and protection of social interests of world community.

The last important international organisation which has been established is the United Nations Organisation. This organisation is the ultimate result of the Conference of "Three Big Powers" at Dumbarton Oaks in Washington in February, 1945. The "Three Big Powers", *i.e.*, United States of America, Great Britain and Russia, agreed to have a conference of the United Nations at San Francisco on April 25, 1945, to prepare a Charter of the United Nations alongwith the lines proposed at Dumbarton Oaks.

However, the San Francisco Conference met and adopted on June 26, 1945, the Charter of United Nations after necessary modifications in the original proposals. The Charter was thereupon submitted for formal ratification to the signatory States in accordance with their respective constitutional procedures. The statute of the International Court of Justice was annexed to the Charter and it formed an integral part of the Charter. The Charter after being adopted initially by fifty-one signatory States and ratified by 26 member States, came into

force on October 24, 1945. With the adoption of U.N. Charter, the historical background of the world community has come to an end. Now the membership of U.N.O. has risen to 190 member-States and this organisation is working quite pertinently for international peace and security of world community as also for the economic and social development of mankind. In the preamble of the Charter it has been proclaimed that "We the peoples of the United Nations determined : to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained, and

to promote social progress and better standards of life in larger freedom,

And for these ends :

to practise tolerance and live together in peace with one another as good neighbours; and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that the armed forces shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

Have resolved to combine our efforts to accomplish these aims."

To sum up, the United Nations is working hard to achieve the above objectives of its preamble in the best interest of the world community for over fifty years since its inception. No doubt, there is no alternative of the United Nations for improving the lot of the mankind.

Definition of International Organisation

An international organisation is a "forum of cooperation of sovereign States based on multilateral international agreement and comprising a relatively stable range of participants, the fundamental feature of which is the existence of permanent organs with definite competences and powers acting for the carrying out of common aims."[1] "International organisation is the process by which States establish and develop formal, continuing international structures for the conduct of certain aspects of their relationships with each other. It represents a reaction to the extreme decentralisation of the traditional system of international relations and the constantly increasing complexes of the interdependence of States.[2]

An international organisation connotes a conglomeration of independent States for the fulfilment of certain purposes which are defined in the treaty or agreement.

1. Wojeiech Morowiecki "Some Problems connected with the--organs of International Organisation", International Organisation, Vol. xix, No. 4, p. 913.
2. S.J.R. Bilgrami, International Organisation, p. 1.

Oppenheim very aptly observes that the essential objects of a general political organisation of States cannot differ radically from those normally pursued by the State. They cannot be confined to the obligation to abstain from recourse to violation or to participation in the collective effort to suppress unlawful resort to force. They must cover, if they are to be effective in the long run, both the duty of States to submit their disputes with other States for determination in accordance with law and the legislative competence of the organised society of States to modify and to supplement existing law by reference to the requirements of justice and social progress. For law which is static and unalterable tends to become an instrument of oppression and, after a time, a danger to peace. Finally, although International Law is primarily a law regulating the rights and duties of sovereign and independent States, the political organisation of mankind must give effect to the most fundamental of all legal and political principles, namely, that the individual human being is the ultimate unit of all law. This means that it must be considered an essential purpose of the organised society of States to assist in securing—and, in the long run, to secure—the freedom of the individual, in all its aspects, by means of comprehensive and enforceable obligations binding upon the members of the Organisation."[1]

Oppenheim further observes very succinctly that "none of the essential objects of international organisation can be secured without the surrender of what are often regarded as vital attributes of the sovereignty of States in the international sphere. These include the faculty to resort to war or, if the latter has been prohibited or renounced, the legal power to determine with finality the legitimacy of resort to war in alleged self-defence; the right to refuse to submit disputes for binding adjudication in acordance with law; the right to decline to accept changes in the law validly decreed by the appropriate organs of the international community; and the right of the State to consider the treatment—and the well-being-of the inhabitants of its territory as a matter falling exclusively within its domestic jurisdiction and not subject to effective control on the part of the organised international community....It may be a matter of controversy whether those rights, the abandonment of which is essential to the fulfilment of the true function of a political organisation of States, are inherent in a rationally conceived notion of the sovereignty of the State. The adoption of the view that they are inseparable from sovreignty as generally understood leads, of necessity, to the conviction that an adequate organisation of the society of States must safeguard the true independence and the very survival of States by means of a curtailment of their sovereignty, and that it must therefore be supernational in character. That conclusion found no expression in the Covenant of the League of Nations; neither is its cogency acknowledged to any appreciable extent in the Charter of the United Nations."[2]

An international organization is an organization with an international membership, scope, or presence. There are two main types :

International non-governmental organizations (INGOs) non-governmental organizations (NGOs) that operate internationally. These may be either :

International *non-profit organizations*. Examples include the *International*

1. Oppenheim, L. : International Law, Vol. 1, p. 371.
2. Oppenheim, L. International Law, Volume I. p. 371.

Olympic Committee, World Organization of the Scout Movement, International Committee of the Red Cross and Midecins Sans Frontihres.

International *corporations*, referred to as *multinational corporations*. Examples include The *Coca-Cola Company, Sony, Nintendo, McDonalds*, and *Toyota*.

Intergovernmental organizations, also known as **international governmental organizations (IGOs)** : the type of organization most closely associated with the term 'international organization', these are organizations that are made up primarily of *sovereign states* (referred to as *member states*). Notable examples include the *United Nations* (UN), *Organization for Security and Co- operation in Europe* (OSCE), *Council of Europe* (CoE), *European Union* (EU; which is a prime example of a *supranational organization*), European Patent Organisation and *World Trade Organization* (WTO). The UN has used the term "intergovernmental organization" instead of "international organization" for clarity.

In addition, *Global Public Policy Networks (GPPNs)* may be considered a third category. These take various forms and may be made up of states and non-state actors. Non-state actors involved in GPPNs may include : intergovernmental organizations, states, state agencies, regional or municipal governments, in partnerships with non-governmental organizations, private companies, etc.

Criteria of legal personality in International Organisations

According to Brownlie, the criteria of legal personality in organisations may be summarized as follows :

(1) a permanent association of States, with lawful objects, equipped with organs;

(2) a distinction, in terms of legal powers and purposes, between the organization and its member States;

(3) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more States."[1]

He further observes that an organisation may no doubt exist and yet lack the organs and objects necessary for legal personality, i.e., the British Commonwealth. Similarly, a multilateral convention may be institutionalized to some extent, making provision for regular conferences, and yet not involve any separate personality. Further, "an institution may lack the features of an 'organization' and yet have legal personality on the international plane. Thus, the 'Contracting Parties' of the General Agreement on Trade and Tariffs have some legal personality, partly by reason of the exercise by them of a quasi-judicial function in the complaint procedures between contracting parties. Moreover, a formal representation may concentrate too much on 'international legal personality', ignoring the powers of organizations, and the institutions like the GATT to make local law contracts such as leases of buildings. In practice, the latter competence may flow from the international legal personality.[2]

Privileges and Immunities of International Organisations.—The legal capacities of a body corporate conferred by Order in Council to which the United Kingdom or its government and one or more sovereign powers are members necessitate conferment of certain privileges which generally are : (1)

1. Ian Brownlie : Principles of Public International Law, Third Edition, p. 679.
2. *Ibid*, pp. 680, 681.

Immunity from suit and legal process; (2) inviolability of official archives and premises of the organisation as are accorded under the Vienna Convention on Diplomatic Relations to a diplomatic mission; (3) exemption or relief from taxes, other than customs duties and taxes on the importation of goods; (4) exemption from customs duties and taxes on the importation of goods imported for the official use of the organisation in the United Kingdom; (5) exemptions from prohibitions and restrictions on importation or exportation in the case of goods imported or exported by the organisation for its official use and on publication of the organisation; and relief under arrangements made by the Secretary of State by way of refund of car tax paid on any vehicles and value added tax paid on the supply of any goods or services.[1]

In the United Kingdom, various organisations enjoy such privileges on their being accorded the status of a body corporate by Order in Council, i.e., the African Development Fund, the Asian Development Bank, the Central Treaty Organisations, the Council of Europe, the European Space Research Organisation, the Inter-American Development Bank, the International Atomic Energy Agency, the International Bank for Reconstruction and Development and the International Monetary Fund, the International Court of Justice, the International Refugee Organisation, the North Atlantic Treaty Organisation, the Organisation for Economic Cooperation and Development, the South-East Asia Treaty Organisation, the United Nations, the Western European Union, the World Intellectual Property Organisation and the specialised agencies of the United Nations : the Food and Agriculture Organisation, the International Civil Aviation Organisation, the International Labour Organisation, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organisation, the Universal Postal Union, the World Health Organisation and the World Meterological Organisation.

Shortcomings in international Organizations

At present there are, however, vital shortcomings in international organisations too as conceived by the present trend of development of international organisation. The end of the cold war and the collapse of Marxism in Eastern Europe have made their impact on traditional power equilibrium in South-East Asia and the Far East. The Soviet empire has crumbled. In the Gulf war and Iraq's annexation of Kuwait, the nations witnessed a tug of war among themselves, and the United States of America with the support of France and the United Kingdom had its day with the token concurrence of the Security Council. It may be stated that the United Nations Secretary General, Javier Perez de Cuellar, had described the American naval blockade of Iraq as a "breach of the U.N. Charter". The United Nations Security Council refused to lift the sanctions against Iraq even though the Iraqi population was suffering great agony due to these sanctions. The United States, Britain and France have been able to pressurise the Council into continuing the 'unjust' sanctions.[2]

The powerful United States of America continues to impose economic embargo against Havana (Cuba). Cuba has been under a U.S. embargo for more than 30 years, and a law signed by President George Bush in October 1992, tightens the economic noose, inasmuch as it seeks to apply U.S. legislation to

1. Halsbury's Laws of England, Fourth Edition, Volume 18, para. 1597.
2. Ibid, para. 1598.

other countries. Under the Cuban Democracy Act of 1992, aimed at speeding a transition to democracy in that country, foreign-based subsidiaries of U.S. firms, which have hitherto been able to trade with Cuba, might now be liable to prosecution. Also ships used in trade with Cuba are barred from visiting U.S. ports for six months after sailing from Cuba. The Cuban economy is already in dire straits as a result of upheaval in the former Soviet Union and other previously communist countries which had provided aid and trade benefits.

Before adverting to a detailed discussion of the League of Nations and the United Nations in separate chapters, it may at this stage be useful to discuss their constitution and structures, along with the 12-nation E.E.C. and other assemblage of sovereign or international bodies.

The League of Nations

The League of Nations primarily owed its origin, in the first instance, to private initiative. After the First World War, however at the Peace Conference the Covenant of the League of Nations was adopted by the Conference on April 28, 1919. It formed Part I of the Treaties of Peace with Germany, Austria, Hungary, and Bulgaria.

The original members of the League consisted of those States and Dominions enumerated in the Annex to the Covenant, either as Signatories of the Treaty of Peace or as States invited to accede to the Covenant which had acceded to the Covenant on or before March 2, 1920.

The two principal political organs of the League were the Assembly and the Council, assisted by the permanent Secretariat. Two other institutions, viz., the International Labour Organisation and the Permanent Court of International Justice, were also there. The Assembly and the Council were assisted in their task by three technical organisations, viz., the Economic and Financial Organisation, the Organisation for Communications and Transit and the Health Organisation, and by permanent and temporary advisory commissions. The principal administrative organ of the League was the Secretariat.

Under the provisions of Article 10 of the Covenant, the members of the League undertook to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council was to advise upon the means by which this obligation could be fulfilled.

The establishment of the League of Nations enlarged the scope of mutual relations of the members and placed an embargo in their obligations towards the League.

The League of Nations, however, failed for various reasons. From its inception the propounders of the League were careful not to insert any clause which might interfere with their individual sovereignty. In its very early history, the League was crippled by the withdrawal of the United States of America and the non-admittance of Russia and the adversaries of the Allies of the First World War during the critical formative years.

The United Nations

The name 'United Nations' was devised by President Franklin D. Roosevelt and was first used in the "Declaration by United Nations" of January

1, 1942, during the Second World War, when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers.

The United Nations Charter was drawn up by the representatives of 50 countries at the United Nations Conference on International Organization, which met at San Francisco from April 25 to June 26, 1945. The Charter was signed on June 26, 1945, by the representatives of the 50 countries; Poland, not represented at the Conference, signed it later and became one of the original 51 Member States.

The United Nations officially came into existence on October 24, 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom and the United States and by a majority of other signatories; October 24 is celebrated each year as United Nations Day.

Structure of the organisation

The Charter has established six principal organs of the United Nations, viz., the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat.

Intergovernmental agencies related to the United Nations

The intergovernmental agencies related to the United Nations by special agreements are separate, autonomous organizations which work by the United Nations and each other through the co-ordinating machinery of the Economic and Social Council.

Sixteen of the agencies are known as "specialized agencies", a term used in the United Nations Charter. They report annually to the Economic and Social Council. They are the following :

International Labour Organization (ILO),
Food and Agricultural Organization of the United Nations (FAO),
United Nations Educational, Scientific and Cultural Organization (UNESCO),
World Health Organization (WHO),
World Bank/International Bank for Reconstruction and Development (IBRD),
International Development Association (IDA),
International Finance Corporation (IFC),
International Monetary Fund (IMF),
International Civil Aviation Organization (ICAO),
Universal Postal Union (UPU),
International Telecommunication Union (ITU),
World Meterological Organization (WMO),
International Maritime Organization (IMO),
World Intellectual Property Organization (WIPO),
International Fund for Agricultural Development (IFAD), and
United Nations Industrial Development Organization (UNIDO).

The General Agreement on Tariffs and Trade (GATT) is a multilateral

agreement which lays down rules for international trade.

Besides the specialized agencies, there are also functional Commissions and sessional, standing and *ad hoc* committees. The functional Commissions are the following :

UNRWA (United Nations Relief and Works Agency for Palestine Refugees in the Near East),

UNCTAD (United Nations Conference on Trade and Development),

UNICEF (United Nations Children's Fund),

UNHCR (United Nations High Commissioner for Refugees),

WFP (Joint UN/FAO World Food Programme),

UNITAR (United Nations Institute for Training and Research),

UNDP (United Nations Development Programme),

UNIDO (United Nations Industrial Development Organization),

UNEP (United Nations Environment Programme),

UNU (United Nations University),

United Nations Special Fund,

World Food Council,

UNCHS (Habitat) (United Nations Centre for Human Settlements),

UNFPA (United Nations Fund for Population Activities),

Some of the sessional standing and *ad hoc* committees are :

UNDOF (United Nations Disengagement Observer Force),

UNFICYP (United Nations Peace-keeping Force in Cyprus),

UNIFIL (United Nations Interim Force in Labanon),

UNMOGIP (United Nations Military Observer Group in India and Pakistan),

UNTSO (United Nations Truce Supervision Organization in Palestine).

The aforesaid sessional, standing and *ad hoc* committees fall under the Military Staff Committee.

Other International Organisations

Academay of European Law
Actionaid
Asian Aid Organization
British Council
Care International
Childreach
Club Diplomatique International
Direct Relief International
European Union
Finnish Red Cross Organization
Foreign Policy Association
Ford Foundation
Global Markets
Greenpeace International

Heritage Foundation
Inter Parliamentary Union (IPU)
Intergovernmental Oceanographic Commission (IOC)
International Bureau of Chambers of Commerce (IBCC)
International Development Association (IDA)
International Indian Economic Association
International Institution for the Unification of Private Law (Unidroit)
International Labour Organization
International Monetary Fund (IMF)
International Organization for Migration (IOM)
International Organization for Standardization (ISO)
International Youth Foundation
Network and Systems Professionals Association (NaSPA)
Nobel Foundation
North Atlantic Treaty Organization (NATO)
Nuclear Age Peace Foundation
Oneworld
Organization for Economic Cooperation and Development (OECD)
Overseas Development Council
Overseas Private Investment Corporation
Paris Commission
Population Council
South Centre
Soil and Water Conservation Society
South Asian Association for Regional Cooperation (SAARC)
UNDP
Union of International Associations
United Nations
United Nations Children's Fund (UNICEF)
United Nations Conference on Trade and Development (UNCTAD)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
United Nations Industrial Development Organization (UNIDO)
Urban and Regional Information Systems Association (URISA)
Water for People
World Bank
World Citizen Foundation
World Economic Forum
World Food Programme
World Health Organization (WHO)
World Trade Organization (WTO)
World Wildlife Fund (WWF)

ZONTA International

Privileges and Immunities

The Charter of the United Nations stipulates that the organization is to enjoy in the Territory of each of the member States such privileges and immunities as are necessary for the fulfilment of the purposes, and that representatives of member States and official of the organisation are similarly to enjoy such immunities as are necessary for the independent exercise of their functions. In 1946, the General Assembly adopted a Convention on the privileges and Immunities of the United Nations, which provides immunity from jurisdictions, inviolability of premises and archives, currency and fiscal privileges, freedom of communication, and privileges and immunities of the organization personnel. In 1947, the General Assembly likewise approved a convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, which is on similar lines.[1]

The International Court of Justice in its decision in the *Reparation for Injuries Suffered in the Service of the United Nations*[2] pronounced that the United Nations has a degree of international legal personality sufficient to enable it, *inter alia*, to present an international claim in respect of injuries done to one of its servants. This conclusion, arrived at very largely on the basis of the capacity of the United Nations, under its charter and in practice, to make treaties, effectively terminated a controversy over the personality of international organizations, namely that they are not States, not assimilable to those normal subjects of International Law, but they nevertheless may and do enjoy rights and bear obligations under international law consistently with their purposes and function, and to that extent are subjects of International law.[3]

It was further held in the aforesaid case that "the Organisation is an international person. That is not the same thing as saying that it is a State, which it certainly is not, and that its legal personality and rights and duties are the same as those of a State. Still less is the same thing as saying that it is a 'super State', whatever the expression may mean..... What it does mean is that it is a subject of International rights and duties and that it has capacity to maintain its rights by bringing international claims."[4]

The Organization of American States

The Organization of American States (OAS) was established at a meeting at Bagota in 1948, with the Pan American Union—the headquarters staff of an organization of the American Republics for the protection of commerce—as its secretarial body. The OAS provides technical services to the members in economic, legal and cultural fields. It has a number of specialised organisations affiliated with it. These organizations are coordinated by the Pan American Union and co-operate with the corresponding agencies of the United Nations.

European Economic Community

The founding father of the European Economic Community marked by the Treaty of Rome on March 25, 1957, aimed to create a strong and united Europe out of the ashes of World War II. The Community has concrete political and

1. Halsbury's Laws of England, Fourth Edition, Vol. 18, para. 1595.
2. ICJ. 1949, 174.
3. Halsbury's Laws of England, Fourth Edition, Vol. 18, para 1595.
4. ICJ. 1949, 174.

economic structures. A Parliament elected by universal suffrage, and exceutive branch (The European Community), a twice-yearly summit meeting, a Court of Justice, a common currency (the European Currency Unit, or ECU), a prosperous agriculture and joint scientific programme. EEC began with six members and has now 12 members. The European Common Market, which is developing a new world power, may even be mightier than the United States. On December 11, 1991, at Maastricht (Netherland) the European Community agreed to a far-reaching plan to create a single currency, European currency by January 1, 1991, and to adopt a European Central Bank to be introduced as early as 1997. The treaty has opened the prospect of a common European defence, with the Western European Union military pact eventually implementing device of the EC political union.

The Commonwealth

The Commonwealth of Nations is a unique political formation consisting of independent States which were once the colonies of British Empire. It is neither a State nor federation : it has no written constitution, no parliament of its own, no government of its own, no central defence forces or executive power. It is a voluntary association of independent sovereign States, each responsible for its own policies, consulting and cooperating in the common interests of their peoples and in promotion of international understanding and world peace. It is a product of history and development, grown, not designed, and the relationship between its members is woven by immobile thread which binds them together.

The Commonwealth is an international association and not like the United Nations or the Organization of American States, an international organization. Not being the International Organization, the Commonwealth has no charter containing jurisdiction and responsibilities, nor has it a structured hierarchy of councils and committees that reach decisions on political and other international issues by formal debate and majority vote. It does not have a continuing executive structure.[1]

1. The Commonwealth : Reference Papers, External Affairs, Canada.

INTERNATIONAL INSTITUTIONS

CHAPTER XXIII

I. THE LEAGUE OF NATIONS

Its origin.—The League was established under the Treaty of Versailles concluded between the Allied and Associated Powers and Germany on June 28, 1919. A proposal to establish an institution for the purpose of preserving the peace was made to the Inter-Allied Conference at Paris on January 25, 1919, and in accordance with a resolution adopted at the Conference, a Commission, with President Wilson as the head, was constituted to prepare a draft constitution, for the organization. At the Peace Conference, a number of drafts were considered and the Covenant was adopted by the Conference on April 28, 1919. Accordingly, the League was established in 1920 under a Covenant of 26 Articles, forming Part I of the Peace Treaty of Versailles and other peace treaties. The formation of the League was point 14 of President Wilson's Fourteen Points, but the U.S. Congress refused to ratify the Treaty of Versailles, which kept U.S.A. outside the League.

Members.—The members of the League consisted of the Allies signatories to the Peace Treaties who subsequently ratified their treaties, e.g., the British Empire, Italy, Japan, China, etc., the neutral States which originally acceded to the Covenant of the League, i.e., Switzerland, Norway, Spain, Persia, etc., and the States admitted to membership of the League in accordance with the provisions of Article 1 of the Covenant.

Constitution.—The working machinery of the League consisted of the Assembly, the Council and the Secretariat.

The Assembly could deal at its meeting with any matters falling within the sphere of the League or affecting the peace of the world.

The Council was the executive of the League. It dealt at its meetings with any matter within the sphere of action of the League or affecting the peace of the world, but besides it had some matters within its exclusive cognizance, such as the confirmation of staff; appointment made by the Secretary-General; the formulation of plans for the reduction of armaments; expulsion of a member for violating the terms of the Covenant; the treatment and supervision of the mandated territories, etc. Its decision usually had to be unanimous except in matters of procedure or where otherwise provided. The Council met normally three times a year. The League Council was an authority of an eminently political character. The Permanent Court of International Justice in its Advisory Opinion in the *Mosul case* (1925) likened it to a diplomatic conference.

The Secretariat was a permanent body established at Geneva.

Main Functions and Objects of League of Nations

The following were the main functions and objects of the League of Nations according to its Covenant :

(1) The first and foremost function and object of the League was to promote international co-operation and to achieve international peace and security. (Preamble of the Covenant).

(2) The next important function which the League performed, was to settle international disputes amicably and without resort to war. (Articles 12 to 16).

(3) The other important function of the League was the reduction of national armament to the lowest point consistent with national safety. (Article 19).

(4) Yet another important function of the League was to maintain international relations between Member States. (Article 11).

(5) Last, but not the least, important function of the League was "to preserve as against external aggression the territorial integrity and existing political independence of all Members of the League of Nations. (Article 10).

The Maintenance of World Peace.—The avoidance of war by the peaceful settlement of disputes was the main objective of the League, and with a view to achieving that objective various provisions were inserted in the Covenant. Article 8 of the Covenant recognized that the maintenance of peace required the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations, and for this purpose required the Council to formulate plans for such reduction for the consideration and action of the several Governments. Under Article 10, members of the League undertook to respect and preserve against external aggression the territorial integrity and existing political independence of all members of the League. This Article constituted a general territorial guarantee as against external aggression of the territorial arrangements of the peace settlement of the Treaty of Versailles. Articles 11 to 17 of the Covenant contained the scheme for achieving the peaceful settlement of dispute. Article 12 of the Covenant enjoined upon the members not to employ force for the settlement of a dispute, but to submit the matter either to arbitration or judicial settlement or to inquiry by the Council. If the League or the arbitrators failed to reach a unanimous decision within six months after the submission of the dispute, the disputing nations could not resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council. Article 14 enabled the Assembly or the Council to refer any dispute or question to the Permanent Court of International Justice for an advisory opinion. Article 16 provided that if any member of the League resorted to war in violation of the Covenant relating to arbitration, judicial settlement, or inquiry by the Council, it should *ipso facto* be deemed to have committed an act of war against all other members of the League, who should thereupon immediately sever all trade or financial relations and prohibit all intercourse between their nationals and the nationals of the Covenant-breaking State. Under Article 17, provision was also made for the settlement of a dispute between a member of the League and a non-member, in which case an invitation was to be issued to the non-member State to accept the obligation of membership in the League for the purposes of such dispute, but if it refused to accept the same by resorting to war against a member of the League, the provisions of Article 16 of the Covenant were made applicable as against the State taking such action.

Article 15 of the Covenant authorised the League Council to make

recommendations on reference of a dispute likely to lead to a rupture which was not submitted to arbitration or judicial settlement in accordance with Article 13. It is true that even a unanimous report of the Council was not binding upon the parties. It was, however, emphasized by the Permanent Court of International Justice in the *Mosul case* (1925) that Article 15 set out the minimum obligations which were imposed upon States and the minimum corresponding powers of the Council. There was nothing to prevent the parties from accepting obligations and from conferring on the Council powers wider than those resulting from the strict terms of Article 15, and in particular from substituting, by an agreement entered into in advance, for the Council's power to make a mere recommendation, the power to give a decision which, by virtue of their previous consent, compulsorily settled the dispute.

Intimately connected with Article 10 of the Covenant guaranteeing the territorial integrity of a State against aggression was Article 19, which reads as follows :

> "The Assembly may from time to time advise the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

Although the scope of this Article was very comprehensive, it failed to achieve the desired object. In the first place, there was no legal obligation upon the members to follow the advice tendered by the Assembly. And, in the second place, as Lawrence observes, "The Article was of use only as a means of testing opinion. The revision of a treaty could not be done unilaterally and required the unanimous verdict of the Assembly."

Article 20 of the Covenant abrogated all obligations or understandings between members *inter se* which were inconsistent with the terms thereof.

Article 21 provided that the Covenant did not affect the validity of international engagements, such as treaties of arbitration or original understandings like the Monroe Doctrine, for securing the maintenance of peace.

Article 22 referred to the system of Mandates, which has already been discussed earlier in a separate chapter.

Position of the League.—The League of Nations was not a super-State and possessed no sovereign legislative power. For the enforcement of its decision, it depended entirely on the goodwill of the governments of the States who were its members. The whole structure of the League had at its root the consent of the members. The provisions contained in the Covenant of the League amply protected the freedom of the members, as they required unanimity of decision of the Council or the Assembly in most important matters. They also permitted the members to withdraw from the League on the happening of certain contingencies.

The League was an association of States whereby they mutually limited their freedom of action in certain matters with a view to promoting international co-operation and achieving international peace and security. It was certainly neither a federation nor a confederation, inasmuch as each member reserved to itself complete freedom to regulate its external affairs and the League could not exercise control over the member States beyond what they had willingly and by

consent surrendered to the League. But here again, the decisions of the League were merely recommendatory in nature and required in most of the cases unanimity of decisions of the member-States. It could not also be termed a State. It lacked the necessary characteristics of a State inasmuch as, although a permanently organised society, it did not occupy a certain territory over which it had the supreme authority.

Defects and Weaknesses of League of Nations

The main defects and weaknesses of the League were as follows :—

(1) One of the main defects of the Covenant of the League was that all decisions of the Council were to be taken with unanimity. As the States were divided among groups, it was not possible to decide matters unanimously. The unanimity principle incorporated with the covenant proved to be detrimental to the working of the League of Nations.

(2) Yet another important defect of the League was that it could not completely prohibit war. The Covenant of the League of Nations permitted League-Members to resort to war under certain situations. The Covenant provided that the Member-States were firstly under the obligation to settle their disputes through arbitration, judicial settlement or enquiry by the Council. The Covenant provided that if the problem was not solved through these methods, the Members could resort to war after lapse of three months. It meant that war was not completely prohibited under the Covenant of the League of Nations.

(3) Non-participation of United States of America to the League of Nations, was another important weakness of the Organisation. Hence, League of Nations remained an organisation limited to European countries only.

(4) Another important defect of the League was with regard to constitutional amendment of the Covenant. It provided that if any amendment of the Covenant was not acceptable to a Member-State, it would cease to be its Member. This provision was fatal to the organisation, as many Member-States ceased to be Members of the League of Nations.

(5) There was provision under the Covenant of the League for the withdrawal of membership. They could withdraw from the League after two years' notice. This provision proved fatal to the League. In the beginning, there were sixty-two Members, but in due course of time the membership of the League was reduced to thirty-two only.

(6) The Council of the League was not so competent as to settle amicably the disputes among the Members.

(7) The League of Nations could not check Big Powers from attacking and exploiting small States.

(8) The League failed miserably and could not perform its primary functions of maintaining international peace and security which was one of the foremost functions and objects of the League of Nations.

Causes for the failure of the League.—The World War ended in 1919 by

a Treaty of Peace with Germany known as the Treaty of Versailles, in the forefront of which was the Covenant of the League of Nations. The Covenant was signed and afterwards acceded to by every power in the world except China, Russia and defeated Germany and her allies. President Wilson had signed the Versailles Treaty, including the Covenant of the League of Nations, thereby making the U.S.A. a founder member of the League. The United States Senate, however, decided to withhold the ratification of this accession and kept the U.S.A. outside the League, apparently because the Congress was not prepared to consent or guarantee the territorial settlements in Europe.

There was a wide cleavage between the conquerors and the vanquished States of the World War of 1914-18 and the onerous terms imposed on the defeated Germany reduced the chance of the successful working of any world organization. From its inception, the propounders of the League were careful not to insert any clause which might interfere with their individual sovereignty. The inevitable consequence was that in its very early history the League was crippled by the withdrawal of the United States of America and the non-admittance of Russia and the adversaries of the Allies of the First World War during the critical formative years. "What brought the international order of 1919 to its downfall was not the refusal of the United States to join the League of Nations, but the policies pursued by the great powers, the United States included, inside and outside the League of Nations."

The League was part of the Treaty of Versailles and bound up with its fulfilment. All the powerful nations that joined the League in the early days did so in the sense that they wanted something to buttress existing treaties and existing territorial settlements. Every member of the League was absolutely pledged to guarantee the territorial integrity and political independence of every other member on the basis of the map drawn up at Paris by the victorious powers.

The League of Nations Disarmament Conference failed to achieve its object. Germany by repudiating the military clauses of the Treaty of Versailles began to arm herself and increase the military strength. A pious resolution by the League declaring that Germany had committed a breach of the Treaty of Versailles was of no avail.

When Germany joined the League in 1925, the prospects of the successful working of the League had improved, but after the establishment of Hitler's dictatorship in 1933, Germany left the League again. In 1931, the League failed to prevent Japanese aggression against China in Manchuria. The League, no doubt, condemned the violation of the obligations of the Covenant on the part of Japan, but this led to the withdrawal of Japan from the League and the latter kept mum. In the year 1934, Russia joined the League and the League gathered some momentum, but this accession of strength was only ephemeral. In 1935, Italy invaded Abyssinia and in September of that year, Abyssinia appealed to the League under Article 10 of the Covenant. That article obliged the members to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. When the League resorted to economic and financial sanctions against Italy, it found itself hampered by the fact that the various constituent members did not fulfil their obligations; the action of the League to enforce peace upon the aggressor failed. Italy withdrew from the League and could not be prevented from conquering

Abyssinia as the League confined its sanctions to a restriction of trade and could not proceed with military sanctions. Rhineland was re-occupied by Germany in 1936. The annexation by Germany of Austria in 1938, and despite the Munich appeasement, Czechoslovakia in 1939 could not be opposed by the League. The League stood helpless when Russia invaded Finland in 1939, "and the League manifested its impotent displeasure and frustration by expelling the Soviet Government. That seems to have been the last important activity of the League." From the Polish seizure of Vilna to the German invasion of Czechoslovakia, observes Smith, "There was an almost unbroken crescendo of successful lawlessness. This dismal failure of the League in securing peace to the innumerable people all over the world resulted in the reversion of nations to the old policy of pacts, alliances and blocs with a view to maintaining the balance of power instead of placing reliance on the League. Faith in the possibility of a world ruled by law dwindled to the vanishing point."

All important decisions of importance in the League required unanimity. There was no clear demarcation of functions between the Assembly and the Council. The Council had only recommendatory power and could not enforce its decisions by military sanctions. The League was not a super-sovereign State and could not take collective measures, the necessary concomitant for the successful working of any world organisation. The League was an association of States and did not lay emphasis on the needs of the peoples of the world. There was unwillingness on the part of States in general to assume international obligations in the common interests. There were successive deadlocks over disarmament. The injustice meted out to the conquered States at the Treaty of Versailles was still fresh in their minds as the provisions of the treaty were very oppressive in their nature and the League did not provide for the revision of treaties except by the unanimous decision of the member-States. Prof. Oppenheim has described that a member could also be expelled or cease its membership by refusing to assent to the amendments ratified by the Council and a majority of the members of the Assembly and the result was that the recalcitrant member could not be forced to abide by the decisions of the League. Then judicial settlement by the Permanent Court of International Justice was not made compulsory and the member-States were allowed to violate International Law or imperil peace and security of the world with impunity. There was no provision to deal effectively with the aggression committed by any big power which could protect the victim.

Finally, it has been said that the League of Nations failed because it had no teeth. This is true as far as it goes. The main reason for the failure of the League was that its members did not implement the principles it stood for. They declined to honour their commitments.

The formal dissolution of the Organization took place in 1946 in Geneva, but luckily the United Nations had already assumed its place.

CHAPTER XXIV

II. THE UNITED NATIONS

Its Genesis.—We have seen earlier that by the year 1938, the League of Nations had almost become a defunct body. The obstacles which it had to face on account of the intransigence of Japan, Italy and Germany proved insurmountable due to the complacent attitude of big powers in not entangling themselves in matters which did not affect them directly. These big powers reverted to the old policy of pacts, alliances and blocs with a view to maintaining the balance of power. The Second World War started in the year 1939. It exhibited the lawless conduct on the part of Germany and her allies and the usual restraints of rules of warfare vanished. As the horrors and ruthless destruction brought about by the war increased, the idea of establishing a new world organization for the preservation of peace and promoting international co-operation gained importance. The term "United Nations" was suggested by Franklin Delano Roosevelt. It was first used in the Declaration by United Nations of January 1, 1942. At the San Francisco Conference, it was unanimously adopted as the name of the new international organisation in tribute to the late President of the United States.

The following may be summed up as the steps that led to the formation of the United Nations :

(1) London Declaration.—The London Declaration was signed on June 12, 1941, at St. Jame's Palace by the representatives of Britain, Canada, Australia, Newzealand and South Africa and of the several exiled Governments. The document declared against separate peace and stated that the only true basis of enduring peace was the willing co-operation of free peoples in a world in which, relieved of the menace of aggression, all might enjoy economic and social security and that it was their intention to work together, and with other free peoples, both in war and peace, to that end.

(2) Atlantic Charter.—In August, 1941, President Franklin D. Roosevelt and Prime Minister Winston Churchill met in conference on board the *Prince of Wales* in the Atlantic Ocean. They signed a declaration known as the Atlantic Charter on August 14, 1941, which condemned the use of force and territorial aggrandisement and envisaged security from aggression and freedom to choose the form of Government to the peoples. The two signatories stated "that after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want."

(3) United Nations Declaration.—Then follows the United Declaration signed by the representatives of 26 States on January 1, 1942, at Washington. This Declaration subscribed to the principles embodied in the Atlantic Charter, each nation pledging itself to employ its full resources against the enemy. Each Government pledged itself to co-operate with the Governments signatory

thereto and not to make a separate armistice or peace with the enemies.

(4) Moscow Declaration.—In the Moscow Declaration of 30th October, 1943, the Foreign Ministers of the United Kingdom, the United States, Russia and China recognised the necessity of establishing at the earliest possible date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security.

(5) Teheran Declaration.—A month later on December 1, 1943, President Roosevelt, Premier Joseph Stalin and Prime Minister Churchill declared at Teheran that they were sure that their concord would win an enduring peace. They recognised fully the supreme responsibility resting upon them and all the United Nations to make a peace which will command the goodwill of the overwhelming mass of the peoples of the world and banish the scourge and terror of war for many generations.

(6) Dumbarton Oaks Conference.—With a view to translating the principles of the Atlantic Charter and the Moscow and Teheran Declarations into action, conversations were held at a mansion known as Dumbarton Oaks in Washington, D.C. in September, 1944, between the representatives of the Governments of Great Britain, the United States, Russia and China. The conference concluded on October 7, 1944, when the proposal for the structure of the world organization was published. It was the first blue-print of the United Nations Organization.

According to the Dumbarton Oaks proposals, the key body in the United Nations for preserving world peace was to be the Security Council on which the "Big Five", *viz.*, China, France, the U.S.S.R., the U.K. and the United States, were to be permanently represented. The voting procedure in the Council was, however, not specified in the proposals.

(7) Yalta Conference.—In February, 1945, Prime Minister Churchill, President Roosevelt and Premier Stalin met at Yalta, U.S.S.R., in the Crimea. They expressed their resolve upon the earliest possible establishment with their Allies of a general international organization to maintain peace. They believed that this was essential, both to prevent aggression and to remove the political, economic and social causes of war through the close and continuing collaboration of all peace-loving peoples.

(8) The San Francisco Conference.—Finally, the delegates of 50 nations met at San Francisco between April 25 and June 26, 1945. Working on the Dumbarton Oaks proposals, the Yalta agreement and the amendments thereto as suggested by various Governments, the Conference hammered out the Charter of the United Nations and the Statute of the International Court of Justice. The Charter was passed unanimously and was signed by all the representatives on June 26, 1945. The Charter of the United Nations came into force on October 24, 1945, when the five original members, *viz.*, China, France, the U.S.S.R., the United Kingdom and the United States and a majority of the other signatories filed their instruments of ratification. October 24 has since been celebrated as United Nations Day. The only one State of the United Nations not present at the Conference was Poland, although it was one of the original signatories of the Declaration by United Nations of January 1, 1942. Space was reserved on the document of the Charter for Poland to sign in due course as one of the originating members. This brought to 51 the number of States entitled to sign.

The Charter since its adoption has remained unchanged, except for the enlargement of the Security Council and the Economic and Social Council.

The Charter of the United Nations is a multilateral treaty. While it is the basic constitutional document of the Organisation, it also establishes or restates the rights and duties of the signatory States. It is a declaration of great faith by the nations of the earth-faith that war is not inevitable, faith that peace can be maintained.

"The U.N. Charter consists of rules for an organisation of States and for the limits of action on the part of their governments. These rules are cast in the form of legal obligations, binding on States and accepted as such by their governments. The U.N. Charter itself is described by jurists as a multilateral convention, a treaty that makes binding laws."[1]

Its objects.—The objects of the United Nations are set forth in its Charter. Shorn of all unnecessary details, the preamble to the Charter reads :

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations, large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practise tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure.....that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims.
>
> "Accordingly, our respective Governments....have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations."

The objects are further elaborated in Article I of the Charter which says that the purposes of the United Nations are to maintain international peace and security, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and to be a centre for harmonising the actions of nations in the attainment of these common ends.

Membership.—Admission to the United Nations is regulated by the provisions of its Charter. The members of the United Nations consist of the original members as provided in Article 3 and the members admitted in accordance with Article 4 of the Charter. Under Article 3 of the Charter, the original members of the United Nations consist of all the 51 States which participated in the San Francisco Conference of 1945 or which previously signed the Declaration of the United Nations of January 1, 1942, and ratified the Charter. Under Article 4 of the Charter, the members are admitted to the United Nations by a decision reached by a two-thirds majority of the General Assembly

1. The United Nations in the 1990's by Peter R. Baehr & Leon Gordenker, p. 3.

on the recommendation of the Security Council, for which recommendation a majority of nine members of the Council, including the concurring votes of its permanent members, is necessary.

Article 4 of the Charter lays down that membership in the United Nations is open to all other peace-loving States, which accept the obligations contained in the Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. The Charter does not lay down any condition of membership other than that the new members must be peace-loving States. The term "peace-loving States" has nowhere been defined in the Charter. Article 4 of the Charter further envisages that such States, before they are admitted to the United Nations Organisation, are, in its judgment, able and willing to carry out the obligations contained in the Charter. It is thus clear that no State has under the provisions of the Charter a right to be admitted as a member. The whole thing is left to the members of the General Assembly and primarily to the Security Council to exercise their judgment in good faith to arrive at the conclusion whether the State seeking admission is peace-loving and whether it is able and willing to carry out obligations of the Charter.

A careful reading of Article 4 of the Charter will show that it contemplates the fulfilment of the following five conditions for admission of a State to the United Nations, namely, that the applicant must : (i) be a State; (ii) be peace-loving; (iii) accept the obligations of the Charter; (iv) in the judgment of the Organization, be able to carry out those obligations; and (v) again, in the judgment of the Organization, be willing to carry out those obligations. These conditions which are the pre-requisities for admission of a State to the United Nations, were emphasised by the International Court of Justice in its Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations*. The Court observed that a member must, while exercising its right to vote, have regard only to the qualifications of a candidate for admission as set out in Article 4 of the Charter, and not take into account extraneous political considerations.

In the *Competence of the General Assembly for the Admission of a State to the United Nations*, the International Court of Justice opined that the admission of a State to membership in the U.N., pursuant to Paragraph 2, Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent member upon a resolution so to recommend.

New admissions must be made by the concurring votes of the permanent members of the Security Council. The U.S.S.R. at the outset vetoed all individual applications for admission of new members sponsored by the West and counter-proposed block entries of nominees of both the East and the West. The cold war had kept out of the United Nations for long several States on account of the veto exercised by either of the two blocks. The United Nations, however, changed in recent years in the sense that the number of its members then increased from 51 to 178, with substantial representation of Asian and African States in the world organization who constitute more than half of its membership. There has been a horizontal extension of the membership of the family of nations. The majority of the States are not European, but represent former colonies of the western world in Latin America, Asia and Africa.

At its resumed forty-sixth session on 2nd March, 1992, the General Assembly admitted nine States to membership of the United Nations, the nine being eight former Republics of the Soviet Union and San Marino, thus bringing to 175 the total number of United Nations member States. The General Assembly resuming its forty-sixth session on 22nd May, 1992, admitted Slovenia, Croatia and Bosnia-Herzegovina—three former Yugoslav republics to United Nations membership, bringing the total number of member-States to 192. The United Nations membership has more than tripled since its founding in 1945.

China's admission to the U.N.—Ever since the mainland of China was overrun by the Communists, they had aspired for a seat in the United Nations. At the end of the Second World War, the five major allied powers—Britain, France, United States, U.S.S.R. and China—had been rewarded with a special status, in the form of a permanent seat in the Security Council. The membership of the Security Council bestowed certain special privileges and a bigger voice in the affairs of the world. Although international power patterns took many new shapes over the post-war years, the permanent members of the Security Council remained the same. The Communist government of China extended its authority all over the mainland, and the Chiang-Kai-shek junta was forced out of China to their last outpost in Taiwan island, the Taiwan government retaining its seat as representative of the entire China people, mostly by American patronage. This was of course an anachronism and had to be removed. In October, 1971, the Nixon Administration of the United States, as a part of its endeavour to make up with the Peking Government, relented and proposed to admit Communist China in the U.N., at the same time allowing Taiwan to continue. This stand, however, was negatived. The Albanian resolution, passed by the General Assembly on October 25, 1971, restored all its rights to the People's Republic of China and recognised the representatives of its Government as the only legitimate representatives of China to the United Nations and expelled the representatives of Chiang-Kai-shek from the place which they had occupied at the U.N. and in all the organizations affiliated to it. The new Chinese delegation took its seat in the United Nations General Assembly on November 15, and in the Security Council on November 23, 1971.

P.L.O. and the United Nations.—In October, 1974 the General Assembly of the United Nations invited the Palestine Liberation Organization (PLO) to take part in its debate on the Palestine question opening on November 4, 1974. The vote was 105 in favour to 4 against, with 20 abstentions.

On the 22nd of November, 1974, the General Assembly adopted two resolutions on the "Question of Palestine", one reaffirming the inalienable rights of the Palestine people in Palestine, including the right to national independence; and the other granting observer-status to the Palestine Liberation Organization (PLO) in the Assembly's work and in all international conferences convened under its auspices. Israel reacted bitterly to the decision and stated that the sun seemed to have set in the United Nations. The principal objection raised against the resolution was that observer-status was traditionally granted only to States.

On the 10th of November, 1975, the United Nations General Assembly passed a resolution entitled "Question of Palestine" and requested the Security Council to adopt measures to enable the Palestinian people to exercise their inalienable national rights in accordance with the General Assembly resolution

226 (XXIX) adopted on 22nd November, 1974. The Assembly urged that the Palestine Liberation Organization (PLO) be invited to participate in all the conferences on the Middle East held under United Nations auspices and asked that steps be taken to secure participation of the PLO in the Geneva Peace Conference of the Middle East.

In a historic evolution of the West Asia problem, the Security Council on March 22, 1976, seated the Palestine Liberation Organisation (PLO) as well as Israel at the Council table to participate in the debate on the developments in Israel occupied Jerusalem and the West Bank of Jordan. The move to seat PLO with the status of a member State was made by two members of the Islamic countries in the Council and was approved by eleven votes in favour, one against and three abstentions.

US barred from closing PLO office.—On April 26, 1988, the World Court at The Hague ruled against the United States attempt to unilaterally shut down the Palestine Liberation Organisation's mission in New York. The ruling implicitly condemned the US move to close the PLO mission to the United Nations by supporting the UN position that the dispute must be submitted to independent arbitration.

The Court comprising 15 Judges, being the judicial arm of the United Nations, unanimously held that the United States of America as a party to the headquarters agreement of June 26, 1947, is under an obligation to enter into arbitration of the dispute between the United States of America and the United Nations. The so-called headquarters agreement, a pact between the Truman Administration and the United Nations, specifies that the disputes emanating from the functioning of its New York headquarters are subject to arbitration by a three-member pannel.

The Reagan Administration had rejected independent arbitration in the case as premature, noting that the PLO case was currently under review by a federal court in the United States.

On June 29, 1988, a Federal Judge, Mr. Edmund Palmieri of the Federal District Court in Manhattan dismissed the Reagan administration's law suit seeking to close the mission under Anti-Terrorism Act passed by U.S. Congress in 1987.

On August 29, 1988, the United States, which had sought to close the mission after Congress declared PLO a "terrorist organisation" in 1987, decided not to contest the New York court's ruling that the anti-terrorism legislation adopted by Congress did not apply to the PLO which was maintaining its mission in the U.N. since 1974.

The Constitution of the United Nations.—The following are the main organs of the United Nations : (1) The General Assembly; (2) The Security Council; (3) The Secretariat; (4) The Trusteeship Council; (5) The Economic and Social Council; and (6) The International Court of Justice.

1. The General Assembly.—The General Assembly, sometimes called the nearest thing to a "parliament of man", is the main deliberative organ. It consists of all members of the United Nations, each represented by five delegates. Rule 21 of the Rules of Procedure of the General Assembly reads :

> "The delegation of a Member shall consist of not more than five representatives and five alternative representatives, and as many advisers,

technical advisers, experts and persons of similar status as may be required by the delegation."

The General Assembly elects a President, 21 Vice-Presidents and the Chairman of the Assembly's seven main Committees, since reduced to six by a U.N. General Assembly's resolution dated August 17, 1993, who hold office till the close of the session at which they are elected. The General Assembly meets in regular annual sessions beginning each year on Tuesday in September and continues until mid-December. In addition to its regular sessions, the Assembly may meet in such special sessions as occasion may require. Special sessions can be convoked by the Secretary-General at the request of the Security Council or of a majority of the members of the United Nations. At the start of each regular session, the Assembly elects a new President, 21 Vice-Presidents and the Chairman of the Assembly's seven Main Committees. To ensure equitable geographical representation, the Presidency of the Assembly dates each year among the five groups of States—African, Asian, Eastern European, Latin American, and Western European and other States.

Functions and Powers.—The functions of the General Assembly are laid down in Articles 10 to 17 of the Charter. The Assembly may initiate discussion on any question within the scope of the Charter and recommend to the members of the United Nations or to the Security Council or to both on any such questions. It may discuss any questions relating to the maintenace of international peace and security brought before it by any member of the United Nations or by the Security Council or by a non-member State and make recommendations with regard to any such questions to the State or States concerned or to the Security Council or both. Oppenheim observes that although the Assembly is not invested with legislative powers and its recommendations are not legally binding, they provide an important instrument for making the weight of the public opinion of the world bear upon the members of the United Nations.

The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. It can recommend measures for the peaceful adjustment of any situation, which is likely to impair the general welfare or friendly relations among nations.

Article 13 of the Charter specially provides that the General Assembly shall initiate studies and make recommendations for the purpose of : (a) promoting international co-operation in the political field and encouraging the progressive development of International Law and its codification; and (b) promoting international co-operation in the economic, social, cultural, educational and health fields and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Assembly is accordingly responsible for discharging the functions and powers of the United Nations with respect to international economic and social co-operation. The Economic and Social Council works under its authority. Agreements negotiated by that Council to bring specialized inter-governmental organizations in the economic, social, cultural and health fields into relationship with the United Nations are subject to approval by the Assembly. The Assembly is empowered to make recommendations for co-ordinating the policies and activities of these specialized agencies.

Article 12, however, limits the functions of the Assembly, inasmuch as it

provides that while the Security Council is exercising in respect of any dispute or situation, the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.

Other functions which have been assigned to the General Assembly are with respect to the international trusteeship system, including the approval of the trusteeship agreements for areas not designated as strategic. It considers the Secretary-General's summaries and analysis of information transmitted by members administering non-self-governing territories not placed under the trusteeship system, and is assisted in this consideration by a Special Committee established by it for the purpose.

The functions and powers of the United Nations General Assembly as set out in the Charter may be summed up as follows :

(i) to consider and make recommendations on the general principles of co-operation for maintaining international peace and security, including disarmament;

(ii) to discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, to make recommendations on it;

(iii) to discuss, with the same exception, and make recommendations on any question within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;

(iv) to initiate studies and make recommendations to promote international political co-operation, the development and codification of international law, the relation of human rights and fundamental freedoms and international collaboration in the economic, social, humanitarian, cultural, education and health fields;

(v) to make recommendations for the peaceful settlement of any situation which might impair friendly relations among nations;

(vi) to receive and consider reports from the Security Council and other United Nations organs;

(vii) to consider and approve the United Nations budget and establish the financial assessment of Member States;

(viii) to elect the non-permanent members of the Security Council and the members of other United Nations Councils and organs and, on the recommendation of the Security Council, to appoint the Secretary-General.

Pursuant to its "Uniting for Peace" resolution of November, 1950, the Assembly may also take action if the Security Council fails to act, owing to the negative votes of a permanent member, in a case where there appears to be a threat to the peace, breach of the peace or act of aggression. The Assembly can consider the matter immediately with a view to making recommendations to Members for collective measures to maintain or restore international peace and security.[1]

Voting Procedure.—Each member of the General Assembly has one vote. Decisions of the General Assembly on important questions, *e.g.*, recommendation with respect to maintenance of international peace and

1. U.N. Newsletter, dated 18th September, 1993.

security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of the members of Trusteeship Council, the admission of new members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of members, questions relating to the operation of the trusteeship system and budgetary questions require a two-thirds majority of the members present and voting. Decisions on other questions including the determination of additional categories of questions to be decided by a two-thirds majority, require only a majority of the members present and voting.

"Uniting for Peace Resolution."—The U.N. Charter was framed with the underlying idea that there shall be unity of great powers. It certainly existed at the time when the Charter came into force. It was however found later that that unity was not discernible. The U.N. police force which was provided by the Charter was to be placed under the control of the Security Council, on which sat the Super Powers with their right of veto. If, therefore, the Great Powers did not agree to stand against aggression, there was the likelihood of the U.N. system for enforcing peace by police power to break down. To tide over this difficulty, the United States brought into the General Assembly a resolution called "Uniting for Peace." On November 3, 1950, the General Assembly adopted the resolution, which provided *inter alia* as follows : "If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately, with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force, when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations."

Contents of Uniting for Peace Resolution, 1950

The uniting for Peace Resolution on November 3, 1950, contained the following provisions :—

(1) A special emergency session of the General Assembly can be called by the nine affirmative votes of Security Council to that effect or by majority of the members of the General Assembly.

(2) If the Security Council fails to prevent any aggression or to take any action in respect of breach of peace, the General Assembly may consider this matter.

(3) This resolution empowered the General Assembly to take collective measures including the use of the armed forces for the maintenance of peace and security.

(4) A 14-Member Peace Observation Commission was established to supervise conflict areas and to submit report to the General Assembly in that regard. It may, however, be noted that this Commission could go to the conflict area when the State concerned gives its consent in this connection.

(5) Each Member was asked under the resolution to maintain certain elements within its armed forces fully equipped so far the same could be available to the United Nations at its demand.

(6) A 14-Member Collective Measures Committee was also established under the resolution so as to study and report the matters relating to international peace and security.

Validity of the Uniting for Peace Resolution

The validity of the Uniting for Peace Resolution, 1950, has been criticized and challenged by some jurists, particularly of the Communist countries. Russian jurist, Andrassy, challenged this resolution from the very beginning on the ground that this resolution is inconsistent with the provisions of this Charter. According to his views, Article 24 of the Charter conferred upon the Security Council the primary responsibility for the maintenance of peace and security and only the Security Council is empowered to use armed forces for this purpose. The views of Russia are not proper as under Article 10 of U.N. Charter, the General Assembly is empowered to consider any matter within the scope of the U.N. Charter. Besides this, Article 24 as referred by Russia, simply provides primary responsibility for the maintenance of international responsibility for the maintenance of international peace and security will be of Security Council only. But the term, "primary responsibility" does not mean that if Security Council fails to perform its responsibility, the responsibility of United Nations as a whole does not end there. Jurist, Juraj Andrassy has said, "No provision of the Charter, not even Article 24 would allow the conclusion that the responsibility of the organisation as a whole is ended in case of inability or unwillingness of the Security Council to take prompt and effective action."

Miss Gutteridge, another jurist, has expressed her view that the United Nations is capable of doing legal developments according to the needs and circumstances. The United Nations can do so, if it fulfils two tests : (1) The legal development should not be against the provisions of the U.N. Charter; and (2) it should be for the attainment of the purposes contained in Article 1 of the U.N. Charter.

On the basis of the two tests, it would not be wrong to say that Uniting for Peace Resolution is a valid resolution which is not inconsistent with the provisions of the U.N. Charter.

Stephen S. Goodspeed has pointed out that "The decline of the Security Council and the consequent rise of the General Assembly to the role of prominent organs of the United Nations, is probably the most striking constitutional change that has been experienced by the organisation."

With the successive failures of the Security Council to perform the functions entrusted to it under the Charter, there was constant growth of the powers of General Assembly. The main cause of the failure of Security Council to perform its functions was the exercise of veto by the permanent members. Besides this, General Assembly performed certain functions which were approved by the International Court of Justice thereby leading to the enhancement of the powers and functions of the General Assembly. The International Court of Justice upheld the establishment of the Administrative Tribunal as a subsidiary organ of the United Nations and rejected criticism of

certain member States about its establishment by General Assembly. The Court upheld the validity of the Administrative Tribunal as well as the binding force of its decision upon the member States of the United Nations.

Besides this, the International Court of Justice upheld in certain cases expenses of the U.N.—the validity of the expenses incurred by the General Assembly for sending United Nations Emergency force in Egypt in 1956, and also for sending U.N. Emergency force in Congo in 1961, to maintain international peace and security. The Court, in its advisory opinion in 1962, upheld the validity of the expenses incurred by the General Assembly on both the situations. The International Court of Justice clarified that the powers of the General Assembly under Article 17 of the Charter to apportion the expenses of the organisation among the members and thereby indirectly upheld the validity of the Uniting for Peace Resolution adopted by the General Assembly.

The Uniting for Peace Resolution equipped necessary powers to the General Assembly in 1991 during Gulf War. The General Assembly assumed powers to undertake important functions for maintaining international peace and security in Iraq and Kuwait, otherwise there would have been danger of aggression and breach of peace on the soil of Kuwait. It is pertinent to note that in taking necessary action by the General Assembly for the maintenance of international peace and security, the co-operation of permanent members is essential. The General Assembly has in fact done commendable functions in this direction and has been able to maintain law and order in the areas of conflict. Prof. Goodrich has aptly remarked that even for the successful functioning of the General Assembly, the co-operation of permanent members of the Security Council is essential. But due to absence of unanimity of permanent members, the Uniting for Peace Resolutions adopted by the General Assembly are quite relevant and valid as they have been passed to fulfil the purposes of the United Nations.

Procedure

The annual sessions of the General Assembly may be convened either by the Security Council or by the majority of the State- Members. The General Assembly is entitled to formulate its own rules and procedures. The General Assembly is also empowered to establish subsidiary organs for the performance of its functions. The session of the General Assembly begins with the discussion on the report of the Secretary-General on the work of the organisation. Each member is represented in the General Assembly and can send five representatives. The General Assembly is a big body and it has formed certain main and other Committees through which it performs its main functions. The Committees of the General Assembly are of following types : (1) Main Committees; (2) Procedural Committee; (3) Standing Committee; and (4) *Ad hoc* Committees.

The main Committees of the General Assembly generally consider the agenda of the General Assembly and prepare recommendations for the General Assembly. Each Member of the United Nations is entitled to have its representative in the main Committees. Following are the main Committees of the General Assembly : (i) Political and Security Committee; (ii) Economic and Financial Committee; (iii) Social, Humanitarian and Cultural Committee; (iv) Trusteeship Committee including non-self Governing Territories; (v)

Administrative and Budgetary Committee; and (v) Legal Committee. In addition to these, there is a special Political and Security Committee.

Evaluation of the performance of General Assembly

The General Assembly has performed important functions in the social, economic and cultural fields and also in the field of human rights. Besides this, uniting for Peace Resolutions adopted by the General Assembly, have played important roles in the maintenance of International peace and security. Dr. Nagendra Singh, an eminent jurist and ex-judge of International Court of Justice has observed, "That the United Nations General Assembly has not only assumed for itself a position of pre-eminence among the organs of the United Nations, but has also become the symbol of democratisation in the world community of States inasmuch the Security Council with its veto system and permanent seat for the Great Powers has yielded place in many respects to the Democratic organ of the General Assembly which is based on the egalitarian principle of one State—one vote."

The International Court of Justice has held in the case of "Effect of Awards of Compensation made by the United Nations Administrative Tribunal" that the General Assembly can establish an administrative tribunal whose decisions may be binding upon itself. D.B. Bowett has pointed out that "By and large, the Assembly has sought to regulate its action by reference to those purposes and principles and has been understood by the narrower questions of legal interpretation of Specific Article of the Charter." Judge Alwarez has observed that "The General Assembly is tending to become an international legislative power. In order that it may actually become such a power, all that is needed is that Governments and public opinion should give it full support. Public opinion is important factor which comes into play in the new international law."

The Gulf War of 1991 and the process of breaking up of the Soviet Union are likely to bring about revolutionary changes in the United Nations. The majority of United Nations Members are now demanding greater democratisation of the world body. If the demand succeeds, the General Assembly is the only organ of the organisation which can best represent the wishes, hopes and aspirations of the overwhelming majority of the members of the United Nations. The procedure and functions of the General Assembly should therefore be revised suitably to meet the new situations.

Ouster of South Africa from U.N. Assembly Sessions.—On September 30, 1974, the General Assembly of the United Nations voted—by a vote of 98 in favour to 23 against with 14 abstentions—not to accept the credentials of the South African delegation and called on the Security Council to review the relationship between the United Nations and South Africa in the light of Pretoria's constant violation of the principles of the Charter and the Universal Declaration of Human Rights. The Charter contains provisions under which the Security Council may initiate measures for suspension or expulsion of a member State, and the Assembly in passing the resolution embarked on a new move.

A resolution was subsequently moved in the Security Council by African States to expel South Africa from the world organization for its continued adherence to racialism and defiance of the U.N. Charter. On October 30, 1974, the resolution requiring the Security Council to recommend expulsion of South Africa to the General Assembly failed to secure its passage, it having been

smothered by a triple veto in the Security Council from the United States, United Kingdom and France.

On November 12, 1974, the General Assembly of the United Nations took a momentous decision to oust South Africa from the 29th session of the Assembly for pursuing policies based on racial discrimination and refusal to relinquish control over Namibia. The ouster was approved by the Assembly when it upheld, by a vote of 91 to 22, with 19 abstentions, a ruling given by the Assembly President, Mr. Abdel Aziz Bouteflika of Algeria, that South Africa was not entitled to sit in the Assembly as its credentials had already been rejected. On November 13, South Africa recalled its United Nations ambassador and condemned the decision to bar the Republic from the world body's General Assembly. South Africa also withheld its more than one million U.S. dollars contribution to the U.N. budget which was due to be paid before December 30, 1974.

The United Nations General Assembly, on the opening day of its debate on the question of Namibia, on March 2, 1981, rebuffed South Africa by rejecting its credentials by an overwhelming majority, 112 in favour of rejection, 22 against and six abstentions. The United States-led West European countries and Canada voted against rejection of credentials. South Africa was ejected from the Assembly for the third time in six years. After it was barred in 1974, the Pretoria delegation reappeared in the Assembly in 1979 and was sent out on the recommendations of a credentials committee after its presence was challenged by the African group. The South African Foreign Minister, Mr. Oik Botha said that UN decision not to allow South Africa to take its seat was scandalous and revengeful. A number of delegations in explaining their opposition to the recommendation of the Credentials Committee stated that while they continued to deplore the policies of *apartheid* pursued by the Government of South Africa, they considered that the Committee had exceeded its legal power in refusing to accept the credentials of that Government.

On September 4, 1981, the UN General Assembly voted 117-22, with six abstentions to expel the South African delegation from its emergency session on South-West Africa or Namibia.

The ouster or expulsion of a UN member by the General Assembly is, however, not warranted by the Charter. The Assembly and its credentials committee have no power under the Charter to inquire into the matter of representation.

With the doing away of *apartheid* laws and ushering in democracy in the White minority regime, South Africa took its place in a United Nations institution, *viz.*, the Conference on Disarmament, on May 21, 1992, 18 years after its expulsion from the U.N. body by a decision of the General Assembly.

On 16th July, 1992, the Security Council concluded its two-day meeting on South Africa with the adoption of a resolution inviting the Secretary-General to appoint, as a matter of urgency, a Special Representative to recommend measures which would assist in bringing an effective end to violance in that country, and in creating conditions for negotiations leading towards a peaceful transition to a democratic, non-racial and united South Africa.

The State President, Mr. F. W. De Klerk, soon cleared the way for U.N. observers to be sent to South Africa for the purpose of observing the proposed

mass action campaign.

Six Main Committees.—By adopting its resolution on August 17, 1993, the General Assembly reduced the number of its Main Committees from seven to six. The six Main Committees are : (1) The Disarmament and International Security Committee; (2) The Economic and Financial Committee; (3) The Social, Humanitarian, and Cultural Committee; (4) The Special Political and Decolonization Committee; (5) The Administrative and Budgetary Committee; and (6) The Legal Committee.

There are also a General Committee, composed of the President and 21 Vice-Presidents of the Assembly and the Chairpersons of the seven (now six) Main Committees; which makes recommendations to the Assembly about the adoption of the agenda, the allocation of items and the organization of work, and a Credentials Committee, appointed by the President at each session. The latter Committee reports to the Assembly on the credential of representatives.

U.N.'s Financial Crunch—Member Dues

As of 31st May, 1995, the U.N. was owed an overall total of $ 2.754 billion by Member States. Of this amount, $904.3 million is for the regular budget and $ 1.85 billion is for peace-keeping operations.

The United States—the largest debtor—owed $ 1.179 billion.

A. Top 5 Debtor States (Overall)

1. United States	$ 1.18 billion
2. Russian Federation	$ 598.75 million
3. Ukraine	$ 217.03 million
4. South Africa	$ 113.91 million
5. France	$ 81.43 million

B. Top 5 Debtor States (Regular Budget)

1. United States	$ 527.15 million
2. South Africa	$ 61.12 million
3. Ukraine	$ 52.28 million
4. Russian Federation	$ 40.53 million
5. Brazil	$ 25.88 million

C. Top 5 Debtor States (Peace-keeping)

1. United States	$ 652.18 million
2. Russian Federation	$ 558.22 million
3. Ukraine	$ 164.45 million
4. France	$ 81.43 million
5. South Arica	$ 52.80 million

According to the Secretary-General, Boutros-Ghali, the United Nations is bankrupt and the situation requires urgent attention. The Organisation's cash resources did not meet either current needs or current obligations.

U.S. debt to U.N. eroding its credibility.—U.S. arrears of about $ 1.5 billion in dues to the United Nations seriously hampered the Clinton Administration's efforts to reform international peace-keeping operations. The U.S. failure to pay its dues has led two adverse effects. The United Nations is left so short of funds that it is forced to borrow heavily from its peace-keeping

budget to meet day to day expenses, leaving nothing to finance peace-keeping reforms. Secondly, Washington's influence has waned among other U.N. members, making them increasingly reluctant to support U.S. views about reforms.

The financial crisis has undermined the ability of the United States and the United Nations to carry out some peace-keeping reforms, the State Department study says. Furthermore, given its role in the financial crisis, the United States is not a credible advocate for some financial reforms.

With the U.N. forced to borrow from its peace-keeping budget, member nations are reluctant to contribute troops because the world body is unable to reimburse them.

India is among 48 member States of the United Nations which have so far paid in full their contributions to the world body's regular budget this year. The international organisation has 185 members, the biggest defaulter is the United States which owes almost $ 1.3 billion on regular and peace-keeping accounts. At present, one-fourth of the budget comes from the United States of America.

India's assessed contribution to the budget was $3,301,745 and it was the 37th country to pay this amount in full. Among the members who have fully paid, the maximum contribution is by France whose assessed amount is more than $ 68 million. It is followed by Italy with over about $ 56 million and Canada $ 35 million.

2. The Security Council.—The Security Council initially consisted of eleven members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics (and now Russia after the collapse of the USSR), Great Britain and the United States of America are five permanent members, while six non-permanent members were elected by the General Assembly for a term of two years. Under the amendment adopted by the General Assembly on the 17th December, 1963, and which came into force on the 31st Agusut, 1965, the Security Council shall consist of 15 members and the General Assembly shall elect ten other U.N. members to be non-permanent members of the Security Council. In the election of non-permanent members due regard is specially paid to the contribution of members of the United Nations to the maintenance of international peace and security and also to equitable geographical distribution.

Under Article 27 of the Charter, each member of the Security Council has one vote. Decisions of the Security Council on procedural matters are made by an affirmative vote of nine members; and decisions on all other members are made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that in decisions concerning the pacific settlement of disputes, whether under Chapter VI or under Article 52, paragraph 3 (reference of a dispute to regional settlement), any permanent or non-permanent member, if a party to the particular dispute under consideration, must abstain from voting.

The Presidency of the Security Council is held in turn by the members of the Security Council in the English alphabetical order of their names. Each President holds office for one calendar month.

There are three standing committees of the Security Council : The Committee of Experts (established in 1946, to examine the provisional rules of procedure of the Council and any other matters entrusted to it by the Council); the Committee on the Admission of New Members; and the Committee on Council Meetings Away from Headquarters (established on 11th January, 1972). Each is composed of representatives of all Council members.

Powers and Functions of the Security Council.—The performance of almost all legally important functions of the United Nations is conferred upon the Security Council acting either exclusively or in consultation with the General Assembly. The primary responsibility for the maintenance of international peace and security has been conferred by the members of the United Nations on the Security Council. The Security Council is an organ of the United Nations. It has more or less to perform the work of an executive nature. It, therefore, acts on behalf of the United Nations and under Article 25 of the Charter, the members of the United Nations have undertaken to accept and carry out the decisions of the Security Council.

Pacific and Compulsive Settlement of Disputes.—The Security Council performs dual functions. It investigates disputes under Chapter VI of the Charter and it takes action with respect to breaches of the peace under Chapter VII. Under Chapter VI the Security Council, when it deems necessary, calls on the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, to seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Should the parties to a dispute of the nature referred to above fail to settle it by the means indicated, the Security Council decides whether to recommend appropriate procedures or methods of settlement or whether to recommend the actual terms of settlement. The Security Council may also investigate any dispute or situation which might lead to international friction either of its own motion or on reference being made by a member of the United Nations, by a non-member who is a party to the dispute, or by the General Assembly or by the Secretary-General. The various activities of the Security Council hitherto undertaken in the direction of pacific settlement of disputes relate to calling upon the Netherlands and Indonesia to cease hostilities in 1947, Good Offices Commission in the Indonesian case pursuant to a resolution of the Security Council of the 25th August, 1947, appointment of a mediator and subsequently a commission of conciliation with regard to the question of Palestine and its efforts to reach an amicable settlement in the Indo-Pakistan dispute.

Under Chapter VII, the Security Council determines the existence of any threat to the peace, breach of the peace or act of aggression and makes recommendation or decides what measures shall be taken to maintain or restore international peace and security. The measures that may be taken by the Security Council fall within the purview of enforcement action and are of two kinds. The first consists of measures not involving the use of armed force as provided in Article 41. The Security Council may call upon, under the provisions of this article, the members of the United Nations to apply such measures as interruption of economic relations and of means of communications and the severance of diplomatic relations. The second kind of measures is applied under Article 42 when the measures provided for in Article 41, as mentioned above, prove inadequate and may consist of such action by air, sea

or land forces as may be necessary to maintain or restore international peace and security, including blockade. With a view to carrying out these obligations all members of the United Nations have undertaken to make available to the Security Council, on its call and in accordance with special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. Article 45 of the Charter provides for Military Staff Committee, composed of the Chiefs of Staff of the five permanent members to advise and assist the Security Council in regard to military aspects of enforcement action. In order to enable the United Nations to take urgent military measures, members have also undertaken to hold immediately available national air-force contingents for combined international enforcement action.

Twice in its history the Security Council authorised military enforcement measures by the United Nations. The first instance was in the Korean war in 1950; and the second was in the Persian Gulf in 1990. Military force has, however, frequently been used by the United Nations for the purpose of peace-keeping, something not visualized earlier in the Charter. This was first devised to bring about an end to the 1956 hostilities in the Middle East. The use of military force by the United Nations both for enforcement and peace-keeping purposes is "essential to a world order in which international security is heavily dependent on the Security Council."[1]

United Nations Peace-keeping Forces

The U.N. Peace-keeping forces originated in 1948 when the U.N. Security Council sent observers to monitor a truce in Palestine between Israel and the surrounding Arab States. Since that time the U.N. peace-keeping forces have been involved in numerous operations around the world, helping to maintain or re-establish peace in areas that have been the scene of armed conflicts. The successful completion of the largest peace-keeping operation in the history of the United Nations—the United Nations Transitional Authority in Cambodia (UNTAC)—and the establishment of five new peace-keeping missions in response to situations in Haiti, Georgia, Liberia and Rwanda, highlighted the Security Council's precedent-setting year of 1993.

In 1988, the United Nations had five peace-keeping operations deployed. In 1992, the number was eleven. In March, 1995, it was sixteen.

Over the same period, the number of military personnel deployed has risen from 9,570 to 62,333. The number of civilian police deployed has risen from 35 to 1169.

The number of countries contributing military and police personnel has risen from 26 to 74; and the United Nations' Annual budget for peace-keeping has risen from $ 230 million to approximately $ 3.6 billion today.

Beyond quantitative changes, there have been qualitative changes of even greater significance.

Most of today's conflicts take place within States. They are fought not only by Armies but also by irregular forces. Civilians are the main victims. Humanitarian emergencies are common places. State institutions often have

1. The U.N. in a New World Order, by Bruce Russett and James S. Sutterlin, c/o The Reference Shelf—The United Nations' Role in World Affairs; edited by Donald Altschiller, p. 25.

collapsed.

The demands go beyond traditional peace-keeping. Recent operations have demobilized troops, promoted national reconciliation, restored effective government and organised and monitored elections.

Civil operations are as important as military operations.

United Nations peace efforts have become more expensive, more complex and more dangerous.

The U.N. peace-keeping forces intervene in a conflict, according to the guidelines of the U.N. Secretary-General, Dag Hammarskjold, issued in 1956, in a conflict with the permission of the disputing parties, achieve its goals by means of negotiation and persuasion rather than violence and taken orders only from the U.N. Security Council. Further, the peace-keeping forces may use arms only in self-defense. The forces have to be supported financially by all the member nations of the United Nations. These principles still hold good today.

With the introduction of U.N. peace-keeping forces, both observer groups and military troops despite regional conflicts in many parts of the world, the United Nations has played a significant role in preventing serious confrontations between East and West.

Functions of Peace-keeping Forces

Peace-keeping forces perform a non-coercive mission. They are not designed to restore order to stop the fighting between rival enemies, but are deployed following a cease-fire agreement. They have no offensive role in the conflict and act as a buffer between hostile forces. They carry out observations tasks, viz., detecting violations of cease-fires and supervising troop withdrawal. They also perform humanitarian activities, such as medical facilities, assisting with electricity and water and providing transportation.

CURRENT U.N. PEACE-KEEPING OPERATIONS

There are currently 15 UN peace operations deployed on four continents.

These include 14 peacekeeping operations, and one special political mission in Afghanistan. These are all led by the Department of Peacekeeping Operations (DPKO).

Africa

UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)
African Union-UN Hybrid Operation in Darfur (UNAMID)
UN Mission in the Sudan (UNMIS)
UN Operation in Côte d'Ivoire (UNOCI)
UN Mission in Liberia (UNMIL)
UN Mission for the Referendum in Western Sahara (MINURSO)

Americas

UN Stabilization Mission in Haiti (MINUSTAH)

Asia and the Pacific

UN Integrated Mission in Timor-Leste (UNMIT)

UN Military Observer Group in India and Pakistan (UNMOGIP)
UN Assistance Mission in Afghanistan (UNAMA)*

Europe

UN Peacekeeping Force in Cyprus (UNFICYP)
UN Interim Administration Mission in Kosovo (UNMIK)

Middle East

UN Disengagement Observer Force (UNDOF)
United Nations Interim Force in Lebanon (UNIFIL)
UN Truce Supervision Organization (UNTSO)

* Please note UNAMA is a special political mission, directed and supported by DPKO.

DEPARTMENT OF PEACEKEEPING OPERATIONS

The Department of Peacekeeping Operations (DPKO) is dedicated to assisting the Member States and the Secretary-General in their efforts to maintain international peace and security.

DPKO provides political and executive direction to UN Peacekeeping operations around the world and maintains contact with the Security Council, troop and financial contributors, and parties to the conflict in the implementation of Security Council mandates. The Department works to integrate the efforts of UN, governmental and non-governmental entities in the context of peacekeeping operations. DPKO also provides guidance and support on military, police, mine action and other relevant issues to other UN political and peacebuilding missions.

The DPKO traces its roots to 1948 with the creation of the first UN peacekeeping missions : UN Truce Supervision Organization (UNTSO) and UN Military Observer Group in India and Pakistan (UNMOGIP). Up to the late 1980s, peacekeeping missions were operated through the United Nations Office of Special Political Affairs. The official DPKO was formally created in 1992 when Boutros Boutros-Ghali took office as Secretary-General of the United Nations.

DPKO has four main offices :

The Office of Operations

The main role of the Office of Operations is to provide political and strategic policy and operational guidance and support to the missions.

The Office of the Rule of Law and Security Institutions (OROLSI)

OROLSI was established in 2007 to strengthen the links and coordinate the Department's activities in the areas of police, justice and corrections, mine action, the disarmament, demobilization and reintegration of ex-combatants and security sector reform.

The Office of Military Affairs (OMA)

OMA works to deploy the most appropriate military capability in support of United Nations objectives; and to enhance performance and improve the efficiency and the effectiveness of military components in United Nations Peacekeeping missions.

Policy Evaluation and Training (PET) Division

PET Division provides an integrated capacity to develop and disseminate policy and doctrine; to develop, coordinate and deliver standardized training; to evaluate mission progress towards mandate implementation; and to develop policies and operational frameworks for strategic cooperation with various UN and external partners.

Voting Procedure in the Security Council.—Each member of the Security Council has one vote. Decisions of the Security Council on procedural matters are made by an affirmative vote of nine members, including the concurring votes of the permanent members. In these cases the permanent members' affirmative vote is necessary in favour of a particular decision, otherwise that decision is blocked or vetoed and falls through.

Veto Right.—It was originally planned at the San Francisco Conference that special responsibilities for the maintenance of international peace and security lay on the Five Great Powers. President Roosevelt, who was most responsible for mooting the idea of a world organization in the last days of the Second World War, thought that it was essential for the great powers to pull together in the post-war period and this could be achieved only if they co-operated and did not fight each other. He foresaw that it was not possible for great powers like the U.S.A., U.S.S.R. to come into an assembly where a number of small countries could just come together and by the sheer force of majority ask them to do this or that. He realised that they were differently constituted and that there was difference in their economic and social systems. It was a very difficult thing for great nations to take a risk of that sort and, therefore, the veto became essential in that state of the world, otherwise there could not be the United Nations at all. So they accepted that as representing a certain unfortunate reality. The veto, therefore, meant that the United Nations could not or should not try to coerce any of the Big Powers, because if they tried to do so by voting strength, that power could veto it. It meant, in other words, that any attempt to coerce a great power inevitably meant a world war and the idea was to avoid that world war and keep the dispute and conflict on the level of the conference table and not the field of battle. The justification for affording this special or exceptional status to the five members, *viz.*, that of permanence and special voting right, lies to adopt Jessup's phrase, in the "inescapable fact of power differentials."

Under the Charter, no enforcement action is possible except through the Security Council. In the Security Council the great powers have got the veto right and consequently enforcement action against a great power is totally excluded. Kelson observes that the veto right of the five permanent members of the Security Council, which places the privileged powers above the law of the United Nations, established their legal hegemony over all other members of the Organization and thus stamps on it the mark of an autocratic or aristocratic regime. He further observes that the Charter proclaims as its first principle the sovereign equality of all its members. There is an open contradiction between the political ideology of the United Nations and its legal constitution. And this contradiction may completely paralyse the great advantage that the Charter tried to gain over the Covenant by conferring upon the Security Council a power almost equal to that of a government.

At the San Francisco Conference, the Four Sponsoring Powers, *viz.*, Great

Britain, the United States, Russia and China, issued a joint Interpretative Statement pleading for retention of the veto, adding at the same time that the Great Powers would not use their powers 'wilfully' to obstruct the operations of the Security Council. The hopes have no doubt been belied. Starke sums up the following as being "subject to the right of exercise of the veto :—(a) the actual decision whether a question to be put to the vote is one of procedure or of substance (and if a permanent member should veto such a decision, there arises 'double veto'); (b) any executive action; (c) a decision to carry out any wide investigation of a dispute. But the mere preliminary discussion of a subject, decision on purely preliminary points, and the hearing of statements by a State party to a dispute would not be within the scope of the veto."

In order to curb the effect of veto, the General Assembly at its 302nd Plenary Meeting on November 3, 1950, resolved against the views of the U.S.S.R. that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations.

In the *Competence of the General Assembly for the Admission of a State to the United Nations*, M. Alvarez, in his dissenting opinion observed that "to decide that the right of veto may be freely exercised in every case in which the Security Council may take action would mean deciding that the will of a single Great Power could frustrate the will of the other members of the Council and of the General Assembly, even in matters other than the maintenance of peace and security; and that would reduce the U.N.O. to impotence."

Double Veto.—Under Article 27, each member of the Security Council has one vote. Decisions of the Security Council on procedural matters are made by an affirmative vote of nine members. Decisions of the Security Council on all other (that is, substantive) matters are made by an affirmative vote of nine members, including the concurring votes of the permanent members, except that any member must abstain from voting in decisions concerning the pacific settlement of a dispute to which it is a party. A negative vote by a permanent member on a matter which is not procedural (that is a substantive matter) is popularly referred to as a 'veto'. In practice, a permanent member's voluntary abstention from voting on a substantive question is not regarded as a 'veto'. It was the absence of the Soviet Union, one of the permanent members, from the Security Council that enabled the latter to adopt the three resolutions on Korea, dated the 25th June, the 27th June, and the 7th July, 1950. The legality of this practice was confirmed by the International Court of Justice in the Advisory Opinion of June 27, 1971, on the *Legal Consequences of the Continued Presence of South Africa in Namibia (South-West Africa)* wherein it had ruled that the Security Council resolution of 1970 declaring illegal the continued presence of South

Africa in South-West Africa was not invalid by reason of the abstention from voting of its two permanent members.

A noteworthy feature of the voting procedure in the Security Council is the distinction drawn between procedural matters on the one hand and matters of substance on the other. The text of the Charter does not define either of the two categories. A set of interpretative rules was drawn up in the form of an agreed Statement by the Great Powers in 1945 in answer to a questionnaire of 23 items. The San Francisco Conference did not take any formal action on that Statement, with the result that the same, though binding in practice, has no legal authority on any organ of the United Nations. Accordingly, the matters which are prominently procedural fall within a narrow range, these including the time and place of Security Council meetings, the setting up of subsidiary organs, the adoption of rules of procedure, invitations to members of the United Nations as represented on the Council or such other organization and steps whch are necessary to enable the Security Council to function continuously. The Interpretative Statement did not, however, limit the procedural matters which were exempt from the operation of the veto. But the limit has been set by a different rule which has come to be known as 'Double Veto', an expression which, like the term 'veto', is not to be found in the text of the Charter at all. Where a permanent member should use the veto on the actual decision whether a question to be put to the vote is one of procedure or of substance, there arises a double veto. As has been lucidly explained by Andrew Martin and John B.S. Edwards, "in borderline cases, the preliminary question, whether a matter is procedural, is itself subject to the veto. In fact, that rule turns the veto into what has been rightly called a 'double veto'; first a negative vote is cast to prevent the Council from treating a question as procedural, and a vote is then cast for the second time to defeat the substance of the motion."

The complications arising out of the use of the double veto evoked serious consideration by the General Assembly in 1948, and it recommended to the Security Council to accept the procedural character of at least 45 types of decision with a view to exempting them from the operation of the double veto. That recommendation was, however, not accepted by the Security Council, with the result that "the veto can be lawfully cast in every field outside the short list of questions which were deemed procedural by the Interpretative Statement of June, 1945."

Self-Defence.—Article 51 of the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Such measures taken in self-defence are to be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. But this right of self-defence arises only : (1) in case of an armed attack (and must not be used for any other violation), and (2) the absence of assumption of responsibility by the Security Council. Thus, an alarming military concentration by a neighbouring State would not justify the State whose peace is threatened to resort to force by the process of self-defence. It will only entitle it to report such concentration, as is likely to affect or threaten international peace and security,

to the Security Council. Anticipatory self-defence is not warranted by the provisions of Article 51 of the Charter, although the general practice of States points the other way.

The Charter, therefore, forbids any use of force on the part of the individual members except for the exercise of the right of self-defence against an armed attack.

Legal Status of the Organization.—The United Nations is an organization of sovereign nations—not a world Government. It provides the machinery to help to find solutions to disputes on problems. It does not legislate, in the sense of enacting laws that nations must accept. But in the meeting rooms and corridors of the United Nations, representatives of most countries of the world—great and small, rich and poor, with varying political views and social systems—have a voice and vote in shaping policies of the international community on a broad range of issues.

Kelsen observes that the United Nations possesses juridical personality in the field of International Law as well as in the field of the national law of the Member States, and as such is capable of being a subject of legal duties and legal rights, of performing legal transactions, and of suing and being sued at law. The United Nations has the power to enter into those international agreements which it is authorised by special provisions of the Charter to conclude. The Security Council has almost the character of a Governmental body. Under Article 26 of the Charter, it has been empowered to formulate plans to be submitted to the members of the United Nations for the establishment of a system for the regulation of armaments. Then, Article 104 confers on the Organization the right to enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. Article 43 provides for agreements between the Security Council and the members of U.N. for making available to the Security Council armed forces, assistance and facilities for the purposes of maintaining international peace and security. Article 81 authorises the U.N. to exercise jurisdictional and legislative powers with regard to territories under the trusteeship agreement.

The organization enjoys in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes. Representatives of members of the United Nations and officials of the Organization also enjoy such privileges and immunities as are necessary for the independent exercise of their function in connection with the Organization.

The Convention of 1946 on the Privileges and Immunities of the United Nations provides as follows : The United Nations shall possess juridical personality. Its property and assets shall enjoy immunity from legal process except when that immunity is waived. The premises and archives of the United Nations shall be invoilable and its property and assets shall be free from all direct taxes and customs duties. In regard to its official communications, the United Nations shall enjoy treatment in the territory of each member State which is no less favourable than that accorded by the government of that member to any other Government. The representative of members, officials of the United Nations, and experts on mission of the United Nations shall enjoy privileges and immunities as are necessary for the independent exercise of their functions. And, lastly, the United Nations may issue United Nations *laissez-passer* to its officials which shall be recognized and accepted as valid travel documents

by the member States.

It was observed by the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* that the "Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is the same thing as saying that it is a 'super-State', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of International Law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims." It is a juristic person *sui generis*."

The International Court of Justice has held that the United Nations is a legal entity, separate and distinct from the member States. While it is not a State nor a super-State, it is an international person, clothed by its members with the competence necessary to discharge its functions.

Relation of the United Nations Assembly with the Security Council.—The Security Council has almost the character of a Governmental body. It is concerned primarily, as observed by Oppenheim, with preserving and maintaining international peace and security. The General Assembly, on the other hand, is largely a deliberative organ concerned with the totality of matters coming within the scope of the United Nations. The Security Council has the exclusive jurisdiction with regard to any dispute or situation which is likely to endanger the maintenance of international peace and security. The General Assembly, no doubt, receives and considers under Article annual reports from the Security Council with regard to the measures that the latter has decided upon or taken to maintain international peace and security. But Oppenheim remarks that the Charter does not contemplate that in receiving and discussing such reports, the General Assembly shall pass judgment upon the activities of the Security Council in a manner amounting to an assumption of concurrent jurisdiction in the matter of settling dispute or to a subordination of the Council to the overriding authority of the Assembly.

With regard to many matters, the Assembly works in conjunction with the Security Council, e.g., admission and expulsion of members, the appointment of the Secretary-General and election of the Judges of the International Court of Justice.

The Security Council is an almost continuously functioning body, while the General Assembly consisting of a large number of members meets only in regular annual sessions or in special sessions convoked by the Secretary-General at the request of the Security Council or a majority of the members of the United Nations. By virtue of the nature of work that they perform, the delegations of members of the U.N. who come to attend the session of the Assembly are composed mostly of political persons, while the Security Council consists of diplomats and officials. The Assembly debates assume the character of parliament, while the Security Council meetings look like diplomatic meetings.

The Assembly consisting of 185 nations is more representative and focuses greater attention to the weight of public opinion than the 15-member Security Council.

The passage of the 'Uniting for Peace' resolution in 1950 has, however, drastically altered the relationship originally intended to be established by the Charter between the Security Council and the Assembly and has enabled the Assembly to wield wide powers when because of the lack of unanimity of the permanent members, the Security Council fails to exercise its primary responsibility for the maintenance of international peace and security, in any case where there appears to be a threat to peace, breach of the peace, or acts of aggression.

Enlargement of Security Council.—In March, 1997, a key resolution for enlarging the Security Council was presented before the U.N. General Assembly authored by Malaysia. The resolution proposes that the Security Council be expanded to twenty-four members from the present fifteen with the addition of five more permanent and four non-permanent members. Of the five permanent members, two were to belong from industrialised States and three from the developing nations. They were to be permanent but would not have veto power like the present permanent members. The four non- permanent members would belong one each from Africa, Asia, Latin America and Eastern Europe.

The U.S. representative suggested twenty-one instead of twenty-four members so that the Council would not become unwieldy.

It may be recalled in this connection that a slight enlargement in the membership of the Security Council had taken place in 1963, from eleven to fifteen. This was done in view of the increased membership of the United Nations itself. In 1963, Article 27 of the Charter was amended to provide that procedural matters in the Security Council would require only an affirmative vote by any nine members; but the Security Council's decisions on all other matters required affirmative vote of nine members which included the concurring votes of the permanent members.

With the efflux of time and the increased membership of the United Nations, the U.N. organisation and distribution of powers and privileges need changes in the Charter of the United Nations. It may be recalled in this connection that even Pt. Jawaharlal Nehru, in his address to the General Assembly in 1961, first initiated the idea of restructuring the Security Council with equitable representation to newly independent Asian and African countries. At the commemorative sessions of UN's 50 years of existence, attended by 142 heads of States and Governments, P.V. Narsimha Rao, the then Prime Minister of India, in his speech referred to the real issues that loomed before the U.N., *viz.*, nuclear disarmament, poverty, under-development and international terrorism.

The then External Affairs Minister, I.K. Gujaral, on January 3, 1997, while delivering a lecture on India's role in world affairs at Nehru Centre in Mumbai, stressed the need to have more representatives on the Security Council of the United Nations in order to enhance its legitimacy and effectiveness. He said that strengthening the United Nations is the important foreign policy objective of the United Front Government. He said that while the membership of the United Nations has increased greatly, the voice of the newly sovereign States in decision making still remains unheard. He said that there is an imbalance in the authority and weight of its structures and organs. The role and authority of the General Assembly, the sole universal organ of the United Nations, also needs to be reaffirmed so that its voice finds greater resonance in other bodies. He observed

that expanding the United Nations by including especially the developing countries is a must and they should have adequate representation in permanent as well as non-permanent members' category.

On February 5, 1998, India was reported to have demanded expansion of the Security Council. India had demanded the inclusion of developing States among permanent members of the United Nations Security Council without any delay saying the Western Nations should have the knowledge about the problems or agenda of the third world countries.

Law in the United Nations.—The Charter of the United Nations accepts the lofty principles of International Law and envisages justice and tolerance, the equal rights of men and women, respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, respect for the obligations arising from treaties and other sources of International Law and equal rights of all nations, both great and small. The operative article of the Charter, however, belives any such high expectations.

The Charter subordinates the majesty of law to the right of absolute power afforded to the Big Five. It establishes the supremacy of the big powers and relegates the smaller nations to the background. Article 2 (1) of the Charter no doubt bases the Organization on the principle of the sovereign equality of all its members but the various provisions virtually in the result authorise only the great powers to deal with one another on an equal footing.

Professor Smith observes that the doctrine that supreme power is above all law finds expression in the Charter in two ways, which may be described as the positive and the negative expression of the same principle. According to him, "all power is vested in the Security Council and can be exercised by seven (and after the amendment of Article 27 of the Charter, nine) members of the Council, provided that these include all the "Big Five". Assuming that a majority so constituted can be obtained, the Charter imposes no legal limits whatever upon what the Council may do. This is the positive expression of its principle. In its decision the Council is not bound to observe any rule of law or to respect the provisions of any treaties..... The decisions of the Council, in so far as it can agree upon any decisions, will not be controlled by law, but will be themselves the source of law. Law thus becomes the voice of power, and the procedure of Munich, if not the actual decision, is now consecrated by the Charter of the United Nations." The above is, however, subject to the condition that this power becomes powerless if it is not unanimous.

"The negative aspect of the doctrine finds expression in the so-called 'veto', the principle that no positive action can be taken against a Great Power without its own consent." The principle of unanimity reminiscent of the League Covenant and other international proceedings can no longer be invoked except by the Big Five who are permanent members of the Council. If the Big Five can secure the support of two (and, now after the amendment of Article 27 of the Charter, four) other members of the Security Council, all the remaining members of the United Nations are deprived of the protection to be heard in any debate which may affect their interest, but beyond this they have no control, and the whole body of members is pledged to support and enforce any decision at which the Council may arrive.

U.N. and the League.—The Covenant of the League of Nations was part of the Treaty of Versailles and was bound up with its fulfilment. All the

powerful nations that joined the League in the early days did so in the sense that they wanted something to buttress existing treaties and existing territorial settlements. The birth of the United Nations is not related to the treaty of peace imposed upon the vanquished nations, but relates to the determination of the peoples of the United Nations to save succeeding generations from the scourge of war.

Apart from their origin, the purposes of both the League and the United Nations are fundamentally the same, *viz.*, to preserve international peace and security by encouraging settlement of disputes among nations by amicable means without resort to force.

The League of Nations was first conceived in order that "the principle of public right takes precedence over the individual interests of particular nations." President Woodrow Wilson conceived the League of Nations as "the eye of the nations to keep watch upon the common interest, an eye that does not slumber, an eye that is everywhere watchful and attentive." The idea of a world organization as originally conceived at the time of the formation of the League of Nations is far more firmly established by means of the United Nations than it ever was in the years of the League of Nations.

In the United Nations, there are six principal organs, *viz.*, the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat, while the League had only three principal organs, *viz.*, the Assembly, the Council and the Secretariat. The League, therefore, primarily confined itself to political activities, while in the U.N. more emphasis has been laid on the economic, social, cultural, and humanitarian matters which are so intimately related to the happiness of the mankind. The present organization lays emphasis on the development of human personality and the preservation of the fundamental right of the individuals. The United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Bank for Reconstruction and Development and the International Monetary Fund are all designed to secure economic, social and cultural unity of mankind. The preamble to the UNESCO—"Since wars begin in the minds of men, it is in the minds of men that foundations of peace must be laid",—further lends countenance to the humanitarian character of the U.N.

Under the Charter, decisions of the General Assembly on important questions require a two-thirds majority of the members present and voting, while decisions on other matters require only a majority of the members present and voting. In the Security Council, decisions on procedural matters require only an affirmative vote of nine members, while decisions on all other matters require an affirmative vote of nine members including the concurring votes of the permanent members. In the League, all decisions of importance required unanimity as the nations were unwilling to surrender any portion of their sovereignty. The voting procedure in the United Nations is, therefore, a distinct improvement upon the League.

It is no doubt true that the veto right of the big powers may obstruct the activities of the Organization. The same was true also in the case of the League with the provision of unanimous decision. The veto right of the big powers prevents any enforcement action against them. It substantiates the doctrine that supreme power rested in the Security Council though the Big Five is above all

law. It has, however, to be remembered that the decisions of the Council of the League had merely the advisory or recommendatory character as the members of the League not represented on the Council were not obliged to carry out the decision of the Council. Further, the Covenant contemplated the unanimity of all its members, while the Charter requires the unanimity of the permanent members of the Security Council only.

Although the Charter does not expressly recognise formal international personality of the United Nations in the international sphere, it in fact treats the United Nations as an entity separate from that of its members. While the Covenant referred to the members of the League, the Charter speaks of the United Nations as such.

Unlike the Council of the League and the Assembly, there is a clear demarcation of functions between the Security Council and the General Assembly. The members of the United Nations have conferred on the Security Council the primary responsibility for the maintenance of international peace and security. There was no such clear-cut demarcation of functions between the Assembly and the Council of the League and as such the League was weak and lacked the characteristics of any world organization which could successfully maintain international peace and security. The Security Council, though having more restricted functions than the Council of the League, possesses more powerful means of enforcing its decisions.

With regard to enforcement measures, there is a considerable difference between the League and the United Nations. The United Nations can take enforcement actions even in case of threat to international peace; the League, on the other hand, was limited in its powers to take actions only when the member States had gone to war in breach of their covenants. The Security Council has been authorised to take actions even to the length of using armed force or operations by air or sea and to call upon the members of the United Nations to make available to the Security Council on its call armed forces, assistance and facilities, including right of passage, for the purpose of maintaining international peace and security. There were no armed forces at the disposal of the League and even its decisions were mere recommendatory. Consequently, a recalcitrant member could not be forced to carry out the decisions of the League.

There is a striking difference between the Charter of the United Nations and the Covenant of the League of Nations. The Covenant was characterised by a complete decentralisation of the procedure for the application of enforcement measures. Article 16 of the League left it to its members to decide whether another member had violated its obligations under the Covenant and whether enforcement measures not involving the use of armed force shall be applied. The Covenant did not impose upon the members any obligation for the use of armed force. It only authorised the Council to make recommendations. The Charter, on the other hand, has centralised both the decision as to the question whether there existed a threat to the application of the enforcement measure whether involving or not involving the use of armed force and has imposed upon the member the obligation to carry out this decision.

With regard to self-defence, the League of Nations did not mention anything about the right of individual or collective self-defence. All that the Covenant provided was contained in Article 15, paragraph 7, which reads :

"If the Council fails to reach a report which is unanimously agreed to by

the members thereof, other than the representatives of one or more of the parties to the dispute, members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice."

Article 51 of the Charter is explicit on this point. It clearly defines the scope and extent of the right of self-defence and recognizes the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. It has, however, to be emphasised that the right of self-defence, individual or collective, arises only in case an armed attack occurs and not in case of military concentration on the border and continues till the Security Council has taken the measures necessary to maintain international peace and security. Such self-defence measures have to be reported to the Security Council immediately.

The Charter of the United Nations does not preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that they are consistent with the purposes and principles of the United Nations. There was no such provision in the Covenant of the League of Nations beyond what was stated in Article 21 of the covenant that nothing therein was deemed to affect the validity of international engagements such as treaties of arbitration or regional understanding like the Monroe doctrine for securing the maintenance of peace.

The Charter of the United Nations has placed emphasis on human right and fundamental freedoms of mankind and on international economic and social co-operation with a view to the promotion of higher standards of living, full employment and conditions of economic and social progress and development, solutions of international economic, social, health and related problems and international cultural and educational co-operation, and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, language or religion. The Covenant of the League of Nations did not make such provisions, it being concerned only with "the preservation of the territorial *status quo* of 1919."

The elaborate provisions for the establishment of a military Staff Committee with a view to advising and assisting the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, did not find place in the Covenant of the League of Nations.

As regards the system of sanctions, as indicated earlier, the same was decentralised under the provisions of the Covenant of the League of Nations, inasmuch as each member of the League—and not the League Council—was bound and entitled to determine for itself whether a breach of the Covenant had occurred. There was no obligation on the members with regard to military sanctions; Article 16 of the Covenant merely recommended to the several Governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the Covenant of the League of Nations as the decision to employ military force rests with the Organization, which decision is binding on all members of the United Nations. It more explicitly than the Covenant provides for the

enforcement of the obligation not to have recourse to force.

The League of Nations was essentially, as remarked by Goodrich and Hambro, European in its concern and operated under the influence of 19th century ideas including that of white man's special responsibility for less fortunate peoples. The United Nations is a far more representative body of the world and has established beyond doubt that it is impossible to impose colonialism even if a country tried it on a weak country.

With regard to withdrawal from the two Organizations, the Covenant provided for voluntary withdrawal in case a member of the League voted against and refused to ratify an amendment. Members of the United Nations, however, do not cease to be members in case of their refusal to ratify an amendment to the Charter but are bound by such an amendment.

A few words about the Trusteeship Council may also be stated. Under the Covenant of the League, there existed the mandate system, which was devised as a substitute for annexation of the territories which the Allies had conquered from Germany and Turkey during the World War. The special organ of the system was a permanent commission, which consisted of experts appointed by the Council and were not representatives of the Governments. Under the Charter, there is the trusteeship council composed of members administering trust territories, who are all permanent members of the Security Council and elected members of the General Assembly. Thus, only members of the United Nations can be members of the Trusteeship Council. Further, the new system of trusteeship discards the rigid obligation imposed by the Covenant upon the administration of the mandated territories for the trust territories are now administrated under agreements negotiated with the trustee States.

Viewed from any point of view, the conclusion is irresistible that the United Nations is a distinct improvement upon the League of Nations.

3. The Secretariat.—The Secretariat generally follows the model of the League secretariat. The Charter attaches very great importance to the secretariat for on the proper execution of the work entrusted to it, depens, to a large extent, the smooth functioning of the Organization. It works for the other organs of the United Nations and administers the programmes and policies laid down by them. The secretariat comprises a Secretary-General and such staff as the Organization may require. The Secretary-General is the chief administrative officer of the Organization and is appointed by the General Assembly upon the recommendation of the Security Council. The Secretary-General acts in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council and of the Trusteeship Council. He makes an annual report to the General Assembly on the work of the Organization. Besides all the functions, he is also authorised to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of the international peace and security. Article 100 of the Charter provides that with a view to guaranteeing the international character of the secretariat, the Secretary-General and the staff in the performance of their duties shall not seek or receive instructions from any Government or from any other authority external to the Organisation. As international civil servants, they work for the Organization as a whole; each takes an oath not to seek or receive instructions from any Government or outside authority. Article 97 of the Charter provides that the Secretary-General shall be appointed by the General Assembly upon the

recommendation of the Security Council, which must be made by an affirmative vote of nine members including the concurring votes of the permanent members of the Council. The usual term of office is five years and reappointment is possible.

The staff is appointed by the Secretary-General under regulation established by the General Assembly but the paramount consideration that governs the employment of the staff is the necessity of securing the highest standards of efficiency, competence and integrity.

The Secretary-General and all Assistant Secretaries-General enjoy full diplomatic immunities. The officials of the United Nations are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. They are exempt from taxation on the salaries and emoluments paid to them by the United Nations.

The Secretariat, an international staff of more than 16,000 men and women from some 150 countries, carries out the day-to-day work of the United Nations both at headquarters in New York and in offices and centres around the world.

Secretary-General of the United Nations.—The current Secretary-General is *Ban Ki-moon* of *South Korea*, who took office on 1st January, 2007. His first term will expire on 31st December, 2011, and he will be eligible for reappointment.

An election was held in 2006 to succeed *Kofi Annan*, whose second term as *Secretary-General* of the *United Nations* expired on 31st December, 2006. Seven candidates were officially nominated for the position.

The *United Nations Security Council* conducted a series of unofficial straw polls between 24th July, and 2nd October. *South Korean Foreign Minister, Ban Ki-moon* emerged as the front-runner, and the only candidate with the support of all five permanent members of the Security Council, each of whom has the power to *veto* candidates. Following the final straw poll, all the candidates withdrew except for Ban. The Security Council conducted a formal vote on 9th October, and forwarded its choice to the General Assembly, which elected Ban on 13th October.

On 1st January, 2007, Ban Ki-moon of the Republic of Korea became the eighth Secretary-General of the United Nations, bringing to his post 37 years of service both in Government and on the global stage.

At the time of his election as Secretary-General, Mr. Ban was his country's Minister of Foreign Affairs and Trade. His long tenure with the Ministry included postings in New Delhi, Washington D.C. and Vienna, and responsibility for a variety of portfolios, including Foreign Policy Adviser to the President, Chief National Security Adviser to the President, Deputy Minister for Policy Planning and Director-General of American Affairs. Throughout this service, his guiding vision was that of a peaceful Korean peninsula, playing an expanding role for peace and prosperity in the region and the wider world.

Mr. Ban received a bachelor's degree in international relations from Seoul National University in 1970. In 1985, he earned a master's degree in public administration from the Kennedy School of Government at Harvard University. In July 2008, Mr. Ban received an honorary Doctoral Degree from Seoul National University.

Administrative Tribunal of the United Nations.—The United Nations created its own administrative tribunal and its statute was adopted by the

General Assembly on 24th November, 1949. The Tribunal comprises seven members of different nationalities elected by the General Assembly. It is competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the secretariat of the United Nations or of the terms of appointment of such staff members. Applications may be made by staff members, their legal successors in case of their death, and any other person entitled to rights under any contract or terms of employment. The Tribunal's jurisdiction is limited in the sense that it is not open to it to call in question the exercise of administrative direction, unless there is a misuse of power. The Tribunal has a wider discretion in respect of permanent appointments, inasmuch as the staff regulations place greater restriction upon the power of the Secretary-General to terminate the appointments of permanent staff of the Organization.

Article 11, paragraph 1, of the Statute further provides that if a member State, the Secretary-General or the person in respect of whom the judgment has been rendered by the Tribunal objects to the judgment on the ground that the Tribunal has exceeded its jurisdiction or competence, or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such member State, the Secretary-General or the person concerned may make written application to the Committee established by paragraph 4 of this Article asking the Committee to request an advisory opinion of the International Court of Justice.

4. The Trusteeship Council.—The United Nations has established under its authority an international trusteeship system for administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. The trusteeship system applies to the following territories, which may be placed thereunder by means of trusteeship agreements :

(1) territories now held under mandate;
(2) territories which may be detached from enemy States as a result of the Second World War; and
(3) territories voluntarily placed under the system by States responsible for their administration.

The basic objectives of the trusteeship system are to further international peace and security, to promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence, to encourage respect for human rights and for fundamental freedoms for all without any distinction as to race, sex, language or religion and to ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals.

Article 86 of the United Nations Charter lays down that the Trusteeship Council shall consist of the following Members of the United Nations administering Trust Territories; Permanent members of the Security Council which do not administer Trust Territories; and as many other members elected for a three-year term by the General Assembly as will ensure that the

membership of the Council is equally divided between United Nations Members which administer trust territories and those which do not. As the number of administering countries has decreased, so has the size of the Council. There are now only five members; the United States (administering State) and the other permanent members of the Security Council (China, France, the Soviet Union and the United Kingdom).

The Trusteeship Council regularly meets twice a year to examine the annual reports submitted on the territories by the Administering Authorities and to carry out its other supervisory functions. The supervisions and administration of trust territories are in the hands of the Trusteeship Council.

The Trusteeship Council acts under the authority of the General Assembly or, in the case of a "strategic area", under the authority of the Security Council.

Powers and Functions.—The powers and functions of the Trusteeship Council under the authority of the General Assembly are to consider reports submitted by the administering authority, accept petitions and examine them in consultation with the administering authority, provide for periodic visits to the respective trust territories and take those and other actions in conformity with the terms of the trusteeship agreements. Its function is also to formulate a questionnaire on the political, economic, social and educational advancement of the inhabitants of each trust territory and such questionnaires shall form the basis of the annual reports to the General Assembly by the administering authority.

One of the Trusteeship Council's main functions is to examine the annual reports submitted by the administering authorities presenting a comprehensive picture of the political, economic, social and educational progress in the trust territories and then to make recommendations to the administering authorities. There is a clause in the Charter relating to provisions concerning trusteeship which provides for the despatch of periodic visiting missions to the territories—a step forward since the days of the mandate system.

The Question of South-West Africa.—In 1947, the South African Government informed the United Nations that it had decided not to proceed with the incorporation of South-West Africa into the Union, but would maintain the *status quo* and administer the territory in the spirit of the mandate. It undertook to submit reports on its administration for the information of the United Nations. The first of these reports was submitted to the second Assembly Session, which referred it to the Trusteeship Council.

In 1949, the Council notified the General Assembly that the Union Government had decided not to submit any further reports on its administration of South-West africa.

Court's opinion in 1950.—The Assembly in 1949 asked the International Court of Justice for an advisory opinion on South-West Africa. Handing down its advisory opinion on July 11, 1950, the International Court of Justice unanimously found that South-West Africa is a territory under the international mandate assumed by the Union of South Africa on December 17, 1920. The Court further found that the Union continued to have international obligations under the League of Nations Covenant and mandate, including the obligations to transmit petitions from the territory, and that the provisions of Chapter XII of the Charter applied to it in the sense that they provided a means whereby

the territory might be brought under the trusteeship system. However, the Court found that the Charter did not impose a legal obligation on the Union Government to place the territory under trusteeship. Nevertheless, it held that the Union, acting alone, was not competent to modify the territory's international status. Such competence rested with the Union acting with the consent of the United Nations.

The status of South-West Asia, Africa, placed under the Union's administration by a League of Nations mandate in 1920, has been an issue between the Union and the United Nations since dissolution of the League in 1946.

Case filed by Ethiopia and Liberia against South Africa for declaration re-mandate over South-West Africa.—On November 4, 1960, Ethiopia and Liberia asked the International Court of Justice to declare, among other things, that South Africa had modified the terms of the mandate over South-West Africa and that it had a duty forthwith to cease the practice of apartheid in South-West Africa.

South-West Africa was the only mandated territory which had not become independent or been put under a United Nations trusteeship.

South Africa raised preliminary objections to the hearing of the case, the first two objections being that the mandate treaty lapsed on the dissolution of the League of Nations and that Ethiopia and Liberia had no right to bring the case because they were no longer members of the League. South Africa contended that the United Nation's founders, including South Africa, did not have a tacit understanding that the U.N. would supervise mandates, not converted into trusteeship; that the United Nations did not consider itself an automatic successor in law to League functions and only took over League functions by special arrangement; and that there had been no special arrangement that allowed the United Nations to take over supervision of mandates, not converted into trusteeships. In fact, after the dissolution to the League, the United Nations rejected South Africa's proposals to incorporate South-West Africa into South Africa and, in turn, South Africa refused to submit a trusteeship agreement.

The Court on December 21, 1962, rejected the objection from South Africa, ruling by 8 votes to 7, that it was competent to deal with the case. It also ruled that South Africa's mandate over South-West Africa—which South Africa claimed did not add up to formal treaty arrangement—was in law an international undertaking with the character of a treaty or convention.

On 18th July, 1966, the International Court of Justice by a single vote threw out the suit to end South Africa's control on neighbouring South-West Africa. The Court ruled by the casting vote of the President, Sir Percy Spender of Australia (the other 14 members of the Court voting 7 : 7), that the two suing powers, *viz.*, Ethiopia and Liberia, had established no legal right to bring the suit to break the old League of Nations mandate under which white-ruled South Africa administers the territory.

The judgment was severely criticised, inasmuch as it skirted a decision on the main issue, *viz.*, human rights. Judge Jessop, in his dissenting opinion, declared that the judgment was 'completely unfounded in law'. The Afro-Asian State ascribed the majority view of the Court as an indication of its colonial

attitude.

On December 17, 1974, the U.N. Security Council unanimously called upon South Africa for commitment to withdraw from Namibia (South-West Africa).

World Court's advisory opinion on the Status of South-West Africa.—The International Court of Justice in its advisory opinion on the *Legal Consequences for State of the Continued Presence of South Africa in Namibia (South-West Africa)* ruled on June 21, 1971, that it considered South Africa's presence in South-West Africa to be illegal and that it should withdraw from the territory immediately.

Strategic Areas.—In the trusteeship agreement, there may be designated a strategic area or areas forming part of the trust territory. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment are exercised by the Security Council. The Security Council may, without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the U.N. under the trusteeship system relating to political, economic, social and educational matters in the stragetic areas.

Self-Government for Trust Territories.—Eleven trust territories were placed under the trusteeship system through individual agreements between the United Nations and the administering member States. By 1984, all but one, *viz.*, the Pacific Islands, also known as Micronesia, designated as a "strategic area", and administered by the United States, had obtained independence or chosen to join other neighbouring independent States, and the work of the Trusteeship Council in this regard appeared to have been accomplished. The Trusteeship Council expressed the hope that the Micronesians would take all necessary steps to establish, after termination of the trusteeship, an all Micronesian entity.

The Special Committee on Decolonisation on 20th August, 1981, considered trust territory of Pacific Islands and adopted a report on Micronesia. By adopting the report, the Committee took note of the trusteeship agreement concluded between the United States, as administering authority, and the Security Council with regard to that territory and reaffirmed the importance of ensuring that the people of the trust territory fully and freely exercise those rights and that the obligations of the administering authority are duly discharged.

On December 22, 1990, the Security Council voted to terminate the trusteeship agreement for three of the four entities comprising the trust territory of the Pacific Islands, which had been administered by the United States since 1947. The entities were the Federated States of Micronesia and the Marshall Islands and the Northern Mariana Islands. The fourth entity—Palau, however, became the 185th member of the United Nations General Assembly on December 15, 1994.

5. The Economic and Social Council (ECOSOC).—The international peace and security depends not only upon the faithful compliance of obligations imposed by the U.N. but also upon the successful handling of international economic, social and other cognate matters. With this end in view, the United Nations has established under the authority of the General Assembly the Economic and Social Council. It seeks to build a world of greater prosperity, stability and justice. It co-ordinates the economic and social work of the "United Nations family" of organizations. The Council is composed of 54 (and before the

amendment of Article 61, 27) members of the United Nations elected by the General Assembly for three years. In December, 1971 the U.N. General Assembly adopted a resolution to amend Article 61 of the Charter so as to increase the number of members from 27 to 54. The amendment came into force on September 24, 1973, on its ratification by two-thirds of the members, including all the permanent members of the Security Council.

Functions and Powers.—The Economic and Social Council is the main organ of the United Nations in the sphere of international economic and social co-operation. The functions of the Economic and Social Council are : (1) to serve as the central forum for the discussion of international economic and social issues of a global or inter-disciplinary nature and the formulation of policy recommendations on those issues addressed to member-States and to the United Nations system as a whole; (2) to make or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters and to make recommendations with respect to any such matters to the General Assembly, to the members of the United Nations and to the specialised agencies concerned; (3) to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all; (4) to prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence; and (5) to all international conferences on matters within its competence.

The Economic and Social Council is also entrusted with the task of co-ordinating the activities of the specialised agencies, through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the members of the United Nations. The Council may take appropriate steps to obtain regular reports from the specialised agencies and may communicate its observations on these reports to the General Assembly. It has also to assist the Security Council upon its request. It has to set up commissions in economic and social field and for the promotion of human rights. There are regional economic commissions dealing with special problems in particular areas.

Economic and Social Progress

Under Chapter IX of the U.N Charter, provisions have been made for the attainment of economic and social progress. In this Chapter which is entitled as "International Economic and Social Co-operation", the framers of the Charter have tried to fulfil one of the objectives of the preamble, *i.e.*, "to employ international machinery for the promotion of the economic and social advancement of all peoples." In fact it is one of the important duties of the United Nations to improve the standard of living of the people, to provide opportunities of full employment and to encourage social and economic development. It is the duty of the United Nations to encourage the achievement of international co-operation in the solution of social, economic, educational, cultural and health related problems. Article 55 of the Charter provides that with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among the nations based on respect for the principle of equal rights and self-determination of the people, the United Nations shall promote :

(a) higher standards of living, full employment and conditions of

economic and social progress and development;

(b) solution of international economic, social, health and related problems, and international cultural and educational co-operation, and

(c) universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Under Article 56 of the Charter, all Members have pledged themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55.

For the attainment of these objectives, the General Assembly in 1961 declared the United Nations Development Decade. In order to achieve appropriate and balanced economic and social development and for the proper utilisation of economic materials and human resources, the United Nations prepares plans and tenders advice to the Member-States. For the achievement of these objectives, the United Nations has convened conferences and conventions and has launched many programmes. It has also established certain institutions, the most important among them, are as follows :

(1) The United Nations Conference on Trade and Development (UNCTAD).—It was established as a permanent subsidiary organ of the General Assembly in 1964. Its first conference was held in Geneva in 1964 and the second conference was held in 1968 at Delhi. The main objective of UNCTAD is to encourage international trade for economic development.

(2) The United Nations Development Programme.—The United Nations Development Programme performs important functions of assisting the under-developed and developing States in the stage prior to the investment of capital and provides technological facilities.

(3) The United Nations Industrial Development Organisation.—It was established by the General Assembly on January 1, 1967. Its function is to establish co-ordination among the works of industrial agencies.

(4) The United Nations World Food Programme (UNWFP).—It was started in 1963 in collaboration of the United Nations and Food and Agriculture Association. It performs the important task of encouraging social and economic development by giving assistance in the form of foodstuff, etc.

(5) United Nations Children Emergency Fund (UNICEF).—It was established by the General Assembly on December 11, 1961. Its chief objective is to improve the lot of children all over the world.

(6) United Nations High Commissioner for Refugees.—It was established by the General Assembly on January 1, 1961. Its main function is to give legal protection to the refugees and to provide them material assistance.

All above-mentioned institutions carry on their objectives with the assistance of the General Assembly in collaboration of the Economic and Social Council. Their purpose is to provide economic and social progress to the International Community.

Regional and Security Arrangements.—The Covenant of the League of Nations did not affect the validity of international engagements, such as treaties of arbitration or regional understanding like the Monroe doctrine, for securing the maintenance of peace. The Charter of the United Nations makes similar provisions with regard to regional arrangements. Article 52 (1) provides :

"Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

Regional arrangements are treaties having a regional character. The term "regional agencies" denotes international agencies established by regional arrangement.

Article 52 clearly establishes the principle of regionalism "as opposed to that of universality."

The Charter of the United Nations confers upon regional arrangements or agencies the function of achieving pacific settlement of local disputes before the dispute is referred to the Security Council. Regional arrangements or agencies may also act as an organ of the United Nations in the enforcement action, inasmuch as the Security Council has been authorised to utilize such regional arrangements or agencies for enforcement action under its authority. The Security Council has to be kept informed at all times of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

The conclusion of regional defence pacts and alliances, *e.g.*, the North Atlantic Treaty Organisation (NATO), the Council of Europe, the Mediterranean Defence Organization (MEDO), the South-East Asia Treaty Organization (SEATO) and the Pan-American Organization, on one side, or the Cominform and other Communist State alliances, on the other, emergence of the Afro-Asian bloc of neutral States in the international sphere as a third independent for constitute new developments in the field of International Law.

The regional arrangements, observes Hans, J. Morgenthau, which have been widely hailed as steps towards strengthening the United Nations, towards realizing the intentions of the Charter, and towards enhancing peace and security are, in actuality, developments that "run counter to the function envisaged by the Charter in view of the anticipated continuing unity of the great powers. They are the very negation of these functions. For they stem from the realization that the unity of the great powers, upon which the operation of the United Nations was predicated, is unattainable under present world conditions."

Non-Self-Government Territories.—Under Article 73 of the Charter, members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not attained a full measure of self-government recognise the principle that the interest of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the Charter, the well-being of the inhabitants of these territories, and to that end to ensure their political, economic, social and educational advancement, to develop self-government, to further international peace and security, to promote constructive measures of development and to transmit regularly to the Secretary-General for information purposes statistical and other informations of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible. Such information after being summarized and analysed by the Secretariat, is studied

by a committee appointed by the General Assembly. This committee, known as the Committee on Information from Non-Self-Governing Territories, may make specific recommendations to the General Assembly, designed to speed the progress of dependent peoples towards self-government and independence. In 1946, eight member States—Australia, Belgium, Denmark, France, the Netherlands, New Zealand, the United Kingdom and the United States—enumerated the territories under their administration which they considered as non-self-governing territories and undertook to send information on them to the United Nations. Spain, which became a member of the United Nations in 1955, began transmitting information in 1961 on the territories under its administration. The Assembly eventually widened the committee's terms of reference to include the examination of political and constitutional information and urged administering members to provide such information. In 1963, the Assembly decided to dissolve this committee and to transfer its function to the Special committee of 24 on decolonisation.

On December 14, 1960, the General Assembly adopted a resolution embodying the Declaration on the granting of independence to colonial countries to the effect that all peoples have the right of self-determination; and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Under Article 73(e) of Chapter XI of the Charter, the administering States have agreed to transmit regularly to the United Nations "statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible." The interpretation of this chapter has proved to be a controversial issue at several sessions of the General Assembly.

Southern Rhodesia (Zimbabwe).—In 1890, Zimbabwe was declared a British protectorate. In 1953, Zimbabwe, then known as Southern Rhodesia was incorporated in the Federation of Nyasaland (Republic of Italy) and Northern Rhodesia (Republic of Zambia). After the collapse of the Federation, 280,000 European colonialists under the leadership of Ian Smith seized power in Rhodesia in 1963. In November, 1965, the Minority regime in Southern Rhodesia unilaterally declared its independence from the United Kingdom, despite warnings by the United Kingdom and the United Nations that such action would be illegal. Both the General Assembly and the Security Council subsequently condemned the Rhodesian authorities for their action.

In a unanimous decision on April 6, 1976, the Security Council expanded the mandatory sanctions against Southern Rhodesia, after affirming that the situation in the territory constituted a threat to international peace and security.

On March 14, 1978, the Security Council approved a resolution declaring illegal and unacceptable any internal settlement reached under the auspices of the Smith regime and calling on States not to recognise any such agreement. The Council asked the United Kingdom to take prompt effective measures to bring a speedy end to the illegal regime.

On May 29, 1979, Rhodesia's first black Prime Minister, Abel T. Muzorewa, a United Methodist Bishop and leader of the United African National Council (UANC), was sworn in to office by Zimbabwe-Rhodesia's first black President, Joseph Gumede, thus ending 90 years white rule in the former British colony. Mr. Gumede was earlier elected president by the Rhodesian senate, a large

ceremonial body controlled by Muzorewa's majority rule elections. Mr. Muzorewa took over from Mr. Ian Smith, the White Prime Minister, who had led Rhodesia's break from Britain fourteen years ago.

Under that system, the Whites who constituted 4 per cent of the population had 28 seats in a 100-member legislature. The White colonialists were to be elected by Whites only, with powers to block constitutional changes. The police, army, judiciary and the higher echelons of the civil service would be in the hands of the White ministers in the cabinet. The economic power would still remain in the hands of the Whites.

The first Commonwealth summit ever held on African soil opened on August 1, 1979, in Lusaka, with a plea by its chairman, the Zambian President Dr. Kenneth Kaunda, for weapons of peace. The British Prime Minister, Mrs. Margaret Thatcher, after talks with key Commonwealth leaders, agreed that a new constitution should be drafted and fresh elections held in Zimbabwe Rhodesia, and a six-nation consulting committee to pursue the new initiative was also set up. The pact provided for Britain to draft a new constitution urgently, which would drastically curtail white-minority influence in the current black-dominated Zimbabwe Rhodesia, administration, call a constitutional conference with the Zimbabwe Rhodesian leaders and guerilla chiefs and supervise fresh elections.

The Crown rule was restored in Rhodesia on December 12, 1979, after a lapse of 14 years, by appointment of a new Governor, Lord Soames, preparatory to the colony's legal independence. Prior to his appointment, Muzorewa's government had voted itself out of office and passed a bill handing over power to the Governor for a transition through a cease-fire in the war, elections and independence.

On March 4, 1980, as a result of the elections, the militant Black leader and the leftwing guerilla Chief, Mr. Robert Mugabe, won 57 of the 80 seats reserved for Blacks in the first 100-members Zimbabwe Parliament, Mr. Joshua Nkomo secured 20 seats and the outgoing Premier Bishop Abel Muzorewa got only three seats.

The Organisation of African Unity in a statement noted that the 77 seats out of 80 obtained by the Patriotic Front underscored the OAU stand that the Patriotic Front was the sole and legitimate representative of the people of Zimbabwe. Twenty seats were reserved for the Europeans in the 100-seat chamber. The constitution expressly forbids a coalition between the white Rhodesia, Front Party and any one Black party as that would clearly give the Europeans a too powerful hold in the government.

Rhodesia, the African El Dorado now called Zimbabwe, triumphantly stepped into the realm of freedom on the midnight of April 17/18, 1980, under the leadership of Robert Mugabe. Free from shackles of nine decades long white dominion, Zimbabwe, former Rhodesia, emerged independent amidst great rejoicing. Rev. Banana was sworn in as the president by the British Governor, Lord Soames, the first Government of African elected by a popular vote, was formally installed after years of struggle against racial oppression. With Zimbabwe's independence, South Africa remained the last bastion of racism.

Namibia.—South-West Africa (now called Namibia), is the only one of seven African Territories once held under the League of Nations mandate system which was not placed under the International Trusteeship System. It was

formerly a German colony, having been made over to the League of Nations after the Germans lost in the World War I. The International Court of Justice in an advisory opinion given in 1950, held that South Africa continued to have international obligations for the Territory and that the United Nations should exercise supervision over its administration. South Africa did not, however, accept this opinion. The General Assembly in October, 1966 terminated the mandate which South Africa had held over this Territory and declared that South Africa had failed to ensure the moral and material well-being and security of the indigenous inhabitants. At a special session in May, 1967, the Assembly set up an 11-member Council to administer the Territory until it achieved independence. South Africa, however, refused to recognize the Assembly decision as valid and continued to administer the Territory. Because of South Africa's refusal to co-operate in carrying out United Nations resolutions, the Council for Namibia had been unable to enter the Territory or discharge many of the functions entrusted to it.

On November 4, 1977, the United Nations made history when the Security Council unanimously passed a resolution calling upon all States to cease supplying arms and related materials to South Africa. This was the first time that the Council claimed an arms embargo on any State. The resolution declared that the acquisition of arms by the Pretoria regime constituted a threat to the maintenance of internal peace and security.

The ninth special session of the U.N. General Assembly on Namibia was held in New York from April 24 to May 3, 1978, and on May 3, 1978, the Assembly while concluding its special session expressed its full support for armed liberation struggle of Namibian people under the leadership of South-West Africa People's Organization (SWAPO), its sole and authentic representative. It reiterated that Namibia was the direct responsibility of the United Nations until genuine self-determination and national independence were achieved in the territory and strongly condemned intensified preparation by South Africa to impose in Namibia a so-called internal settlement.

The emergency special session of the United General Assembly on Namibia was convoked on 3rd September, 1981, and it voted 117-22 with six abstentions to expel the South African delegation from its emergency session. The members spoke supporting the immediate implementation of the U.N. plan for Namibia's freedom. On September 14, 1981, the U.N. General Assembly called on the Security Council to impose comprehensive mandatory sanctions against South Africa for its failure to grant independence to Namibia (South-West Africa) by 117 votes to none, with 25 abstentions, the countries abstaining included the United States, Great Britain and France. The United Nations Council for Namibia held a series of extraordinary plenary meetings at Arusha (United Republic of Tanzania) in May, 1982 and adopted a Declaration and Programme of Action on Namibia. In this Programme, the Council for Namibia urged all member States not to recognise any puppet groups, illegal entities or any internal settlement of the question of Namibia, and reiterated that the free and fair elections under the supervision and control of the United Nations, were an essential prerequisite to the full implementation of the United Nations negotiated settlement on the question of Namibia.

The five Western Nations, the U.S.A., Britain, France, Canada and West Germany, spearheading negotiations aimed at independence for Namibia

(South-West Africa) successfully concluded the first phase of their efforts. They along with other interested parties reported on July 12, 1982, to the United Nations Secretary-General Mr. Javier Perez de Cuellar, that all parties now accepted certain basic principles for the creation of a constitution and a Constituent Assembly in Namibia. Representatives of the five Western nations devised a two-phase negotiating approach under the guidelines set by the United Nations Resolution 435. The first phase, now agreed to, involved the guidelines for a constitution for an independent Namibia followed by the election of a constituent assembly that would actually write the charter and adopt it. The second phase involved the actual setting up of international supervised elections.

The supervision of the election which was initially to be held in March-April, 1983, according to the proposal was to be carried out by 6000 strong United Nations Transition Assistance Group (UNTAG) Force, ensuring that neither SWAPO nor the South-African army violate the cease-fire. Pretoria, however, raised an irrelevant point about the withdrawal of the Cuban troops from Angola. The United States decided to back the South African stand. Now Angola is a sovereign State and has a right to request another country for stationing troops in its territory. The raising of this issue was, therefore, illogical. Further, cease-fire under UNTAG supervision should dispel all fears about the potentiality of Cuban soldiers in Angola helping the SWAPO guerillas in any manner whatsoever.

The agreement envisaging independence for Namibia and peace in Angola was signed in the Congolese capital of Brazzaville on December 13, 1988. Namibia would begin transition to independence from April 1, 1989, and an estimated 50,000 Cuban troops would put out of Angola over a period of 27 months.

The long-awaited Brazzaville protocol was signed by Angola, Cuba and South Africa after more than seven months of United States-brokered talks that had collapsed in the Congolese capital sometime back. The accord is the first in 40 years of international efforts to prise the uranium-and-diamond-rich desert territory of Namibia which is also known as South West Africa, from South African control.

Namibia, with a largely Black population of about 1.2 million people, had been ruled by Whites since 1884 and by South Africa since World War First. Botha said that the agreement would oblige Pretoria to begin implementing a 10-year-old United Nations blue-print for Namibian independence on April 1. The plan, Security Council Resolution 435, provides for the U.N. supervised independence in Namibia within seven to 12 months. In return, Botha said, Cuba would withdraw 3,000 of its 50,000 troops from Angola by April 1, a total of 25,000 by November 1 next year and the rest in prescribed stages up to the end of June, 1991. He said that the accord, hammered out in eight months of U.S. mediated negotiations would be formalised by a treaty to be signed in New York shortly.

On December 22, 1988, Angola, Cuba and South Africa signed an agreement at the United Nations, paving the way for Namibian independence and Cuban withdrawal from Angola.

The United Nations Security Council unanimously established a U.N. Angola Verification Mission (UNAVEM) to monitor withdrawal of 50,000 Cuban

troops from Angola in 31 months beginning April 1, 1989. The 15-nation Council did so by acting on the recommandation of the Secretary-General, Javier Perez de Cuellar, on December 20, 1988. Cuba and Angola agreed that 3,000 Cuban troops would leave Angola beginning January and before April 1, 1989. Cuba and Angola signed the troop withdrawal agreement on December 22, in the light of South Africa's undertaking to implement the 1978 Namibian independence plan. Under the agreement, Cuban troops would begin pulling out of Angola on April 1—the day Namibia is set to become a free nation—and be completely withdrawn in 27 months. The UNAVEM would be under the command of a Brigadier-General, to be appointed by the Secretary-General in consultation with Council members, and include 170 military observers and 20 civilian personnel.

An advance group of UNAVEM officers—nearly 20 of them—would be despatched to the Angolan capital of Luanda as early as January 3, 1989, to monitor the withdrawal of 3,000 Cuban troops. The remainder—some 400 officers—would leave for Luanda around March 20, 1989.

The Trilateral agreement was signed by Foreign Ministers—Mr. Afonso Van Dunem of Angola, Ms. Isidora Octavia Malmierca of Cuba and Mr. R.F. Botha of South Africa.

The United States called it a momentous development.

The world's new independent nation, Namibia, was born shortly after midnight on March 21, 1990, as Namibia's flag was raised and the national anthem was sung before a jubilant crowd. The U.N. Secretary-General, Javier Perez de Cuellar, sworne in Namibia's first President, Sam Nujoma.

Namibia became the 160th member State of the United Nations on 23rd April, 1990.

U.N. resolutions on Zionism.—On October 17, 1975, the U.N. General Assembly's Social Committee approved an Arab resolution calling Zionism racism in the face of an American warning that the proposal placed the work of the United Nations in jeopardy. On November 10, 1975, amidst opposition from the United States and the Western blood, the U.N. General Assembly approved a controversial resolution, sent by its Social Humanitarian Committee, that equated Zionism with racism and racial discrimination. In the 142-nation Assembly, 32 countries abstained on the resolution which was sponsored by some Arab countries in an attempt to further isolate Israel on the issue of illegal occupation of Arab territories. The resolution adopted on October 17, by the Committee, was ratified by 75 votes to 35.

U.N. Assembly revokes resolution on Zionism.—The United Nations General Assembly, acting on an American move, revoked on December 16, 1991, its 16-year old resolution equating Zionism with racism. "The era which produced Resolution 3379 has passed into history", United States delegate Lawrence Eagleburger, pronounced as the 166-nation Assembly voted 111-25 with 13 abstentions, revoking the November, 1975 resolution that "Zionism is a form of a racism." India which had backed the adoption of the 1975 resolution supported the 85-nation American move for its revocation, making clear, however, that it in no way reflected a dilution of New Delhi's support for the Palestinian cause.

Revision of the Charter.—Article 108 of the Charter permits the amendment of the Charter by a vote of the two-thirds of the members of the

General Assembly and ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council. Article 109 also provides that a general conference of the members of the United Nations for reviewing the Charter may be held at any time by an affirmative vote of two-thirds of the members of the General Assembly and by a vote of nine members of the Security Council and that if such a conference has not been held before the 10th annual session of the General Assembly, the proposal to call such a conference shall be placed on the agenda of that session, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

On the 17th of December, 1963, the United Nations General Assembly adopted, in accordance with Article 108 by an overwhelming majority of 97 to 11 a resolution for amendments to Articles 23, 27 and 61 of the United Nations Charter so as to expand the membership of the Security Council from 11 to 15 and another resolution to expand the membership of the Economic and Social Council (ECOSOC) from 18 to 27. The amendments came into force on 31st August, 1965. The resolution proposed an increase in the strength of the non-permanent members of the Security Council from six to ten and also provided for a majority of nine to pass a resolution in the Security Council instead of seven.

The second change in the Charter was consequential on the earlier amendments, and Article 109(1) was amended by the General Assembly Resolution of December 20, 1965, which entered into force on June 12, 1968, so as to increase from seven to nine the number of votes required for concurrence by the Security Council in the convening of a general conference for the purpose of reviewing the Charter.

On December 20, 1971, the U.N. General Assembly adopted yet another resolution to amend Article 61 of the Charter so as to increase the number of members of the Economic and Social Council from 27 to 54. The amendment came into force on 24th September, 1973, on its ratification in accordance with their respective members of the Security Council as required by Article 108 of the Charter.

In any general revision of the pre-atomic Charter, the factors which would necessitate consideration for revision are with regard to : (1) the veto power of the Big Five enshrined in Article 27(3) of the Charter which has obstructed the operation of the Security Council; (2) Matters falling within the domestic jurisdiction of a State under paragraph 7 of Article 2 so as to embody a clause that this principle shall not prejudice the application of preventive or enforcement action under Chap. VII and matters which are the subjects of international obligations including the observance of, and respect for, human rights and fundamental freedom; (3) Membership clause under Article 4, so as to provide that membership in the United Nations may be open to any State willing to undertake the obligation of such membership without the intervention of Big Power pressures; (4) Compulsory jurisdiction of the International Court of Justice to hear appeals from judgments of municipal courts adjudicating upon maritime captures during war; (5) Participation of a non-member State in the discussion of the Security Council, without vote, as provided in Article 32 of the Charter, even in the Security Council's investigation of a situation which might be of vital interest to such non-member;

(6) Fixing of definite time limit for the granting of independence to each non-self-governing territory under Article 76(b), and to place the former mandated territories compulsorily under the trusteeship under Article 77(a) and colonial possession under Article 76(c) of the Charter; (7) Abolition of the distinction between ordinary and strategic trust territories and both to be administered under the supervision of the General Assembly by amending Articles 83 and 85(1) of the Charter; (8) Suitable provision so as to ban mighty concourse of colonial powers in the name of regional security envisaged under Article 52 of the Charter; (9) Clear declaration of the powers which the member States might be willing to grant to the United Nations with a view to removing the vagueness in different provisions of the Charter; (10) Definition of procedural matters by inserting an interpretation clause in Article 27 of the Charter; (11) Admission of Taiwan—a viable nation of 15 million people—which was expelled after over 25 years of active and often constructive membership in the world body on the admission of the People's Republic of China, and all other political units exercising sovereign powers and recognised diplomatically by some members of the United Nations; (12) Weighted voting—The system of voting bears no relation to the size and population of member-States or to other such factors. In order to improve the representative character of the Assembly, there might be introduced some system of weighted voting so that smaller nations like Iceland or Island of Fiji with smaller world responsibility might not carry the same voting rights there as China or India; and, lastly, (13) Increasing the number of permanent seats on the Security Council to six and allotting one to India which is now the leading democratic power in Asia.

Conclusion.—As observed by the Secretary-General of the United Nations, Javier Perez de Cuellar in his 1987 Report on the Work of the Organization over the past year, in the midst of continuing regional strife and economic and social hardship, there have been occasions in which a greater solidarity among nations was evident in addressing serious problems with global implications, within the multilateral framework of the United Nations. Countries of desparate political orientations and economic systems have begun to deal with problems of an interdependent world with a new pragmatism in awareness of the dangers of immobility. This can provide a basis for broadened multilateral co-operation and increased effectiveness of the United Nations. It is as if the sails of the small boat in which all the people of the earth are gathered had caught again, in the midst of perilous sea, a light but favourable wind.

There is a concerted move to bring peace to the tormented world. The Gulf War is nearing its end. Iran having accepted the U.N. call for cease-fire with Iraq, hectic efforts are being made to resolve the stalemate in further peace efforts. A four-nation agreement on a basic set of principles that would free Namibia from 73 years of South African rule and provide for the withdrawal of Cuban troops from neighbouring Angola was reached at New York.

At Geneva the Non-Aligned Movement represented by five countries—Sri Lanka, Yugoslavia, Mexico, Peru and Indonesia—at the United Nations have formally asked the United States, Soviet Union and Britain to amend the 1963-partial test ban treaty and turn it into a comprehensive treaty that would outlaw underground nuclear tests. Testing in the atmosphere and at sea is already banned. The U.N. General Assembly has approved a resolution calling for the partial test ban treaty to be made total. Only the U.S., Britain and France had voted against it.

In South-East Asia, the warring factions in Kampuchea resumed peace talks. The two-day ASEAN ministerial conference reaffirmed ASEAN's determination to work towards the realisation of a zone of peace, freedom and neutrality in South-East Asia. The United States is also pulling its diplomatic punches for a political settlement of the Kampuchean issues.

In Afghanistan, the Soviets had intervened in December, 1979 and on April 14, 1988, Pakistan and Afghanistan formally signed a U.S. and Soviet guaranteed accord in Geneva that would lead to a pull out of all Soviet troops from Afghanistan within a maximum of nine months from May 15, 1988.

The outbreak of peace simultaneously pervades the Persian Gulf, Kampuchea, Angola and Afghanistan.

December 22, 1988, was perhaps one of the proudest moments for officials in the UN's tower block at the New York headquarters, when two major agreements were signed by South-Africa, Angola and Cuba, to pave the way for Namibia's independence. The tripartite agreement provided for the carrying out of UN Resolution 435, approved 10 years ago on Namibia's independence. The other agreement signed by Angola and Cuba provided for the withdrawal of all Cuban troops from Angola in stages over 27 months, beginning on April 1, 1989.

One problem the United Nations continues to face is the financial crisis. The world body is currently owed some $ 1,754 billion for both the regular budget and peacekeeping operations. The largest debtors are the United States and the Russian Federation.

All organizations around the U.N.O., like the International Labour Organization, the International Court of Justice, the International Monetary Fund, the World Health Organization and the United Nations Educational, Scientific and Cultural Organization are a great success and redound to its credit. The United Nations plays a key role in the co-operative efforts to tackle long-term social and economic problems. It has been doing tremendous job in the social and economic fields and it has a completely new approach to human existence. It has made member-nations aware of the dimensions of socio-economic problems, like population, food, trade and industry, urbanisation, etc.

The work of the United Nations today, in fact, touches virtually all aspects of international economic and social life. "Political problems, however, account for only part of the work of the United Nations. The importance of international co-operation to spur economic and social development has been increasingly recognised over the years. The United Nations is engaged in many fields of activity which did not even exist in 1945—such as applications of space technology, peaceful uses of atomic energy, potential resources of the sea-bed, and protection of the human environment."

In his Report on the work of the Organization submitted to the United Nations in September, 1992, the new Secretary-General, Boutros-Ghali, stated that the power struggle of the cold war decades and its underlying assumption that history is the unfolding of a struggle between two competing systems had permeated in international relations so far and made the original promise of the Organization extremely difficult to filfil. With the end of the bipolar era and the opening of new chapter in history, States see the United Nations once again as

an instrument capable of maintaining international peace and security, of advancing justice and human rights, and of achieving, in the words of the Charter, "social progress and better standards of life in larger freedom." The United Nations is now action-oriented, and it is in its power to bring about a renaissance—to create a new United Nations for a new international era.

The U.N. Charter is a testament of human faith in the future of mankind, and so long as that faith endures, civilization must continue to grow and evolve.

Fiftieth year of the United Nations

The Secretary-General, Boutros-Ghali, in his message on the occasion of the International Day of Co-operation on July 1, 1995, observed : "In this, the fiftieth year of the United Nations, we note with satisfaction that one of the closest and oldest of our collaborators, the International Co-operative Alliance, is celebrating its centenial. Recognizing that co-operatives in their various forms are becoming an indispensable factor in the economic and social development of all countries the United Nations General Assembly has proclaimed the first Satudary of July, starting from this year, as International Co-operative Day."

The Security Council passed a landmark of sorts on June 23, 1995, when it adopted its 1,000th resolution since the founding of the U.N. in 1945. It occurred incidental, as the organisation was about to celebrate the 50th anniversary of the signing of the U.N. Charter in San Francisco on June 26, 1945.

Resolution 1,000 (1995), as it is officially called, dealt with the renewal of the 1,175-member U.N. force in Cyprus, which has been helping keep peace between the Greek and Turkish Cypriots since 1964.

As the U.N. body responsible for international peace and security, the 15-member Council has its hands full these days.

But while some resolutions over the past 50 years have dealt with issues of war and peace, many concerned fairly routine matters such as recommending U.N. membership for newly independent States. The world organisation, which began with 51 members, now has 185. The first resolution was adopted on January 25, 1946.

In his message for United Nations Day on 24th October, 1995, the Secretary-General observed :

"Fifty years is a tiny drop in the stream of the centuries. But no other institution in history has gathered together so many political communities. No other has survived so many storms. No other has built such a promising foundation for the future as has the United Nations.

In the United Nations was born the concept of peace-keeping, a permanent contribution to the age-old search for peaceful solutions. In the United Nations was heard, proudly and clearly, the voices of the poorest of the poor. Here the difficult issues of development have received the most productive attention.....

".....The United Nations provides the focus for a common global effort. Here is the World Organisation created to serve all peoples. Here is the machinery we can transform into a responsive instrument essential to the realization of humanity's finest hopes."

Statement of the President of the General Assembly[1]

Following is the text of the statement of the President of the General

1. Extract from the U.N. Newsletter, dated 8th July, 1995.

Assembly, Amara Essy (Côte d'Ivoire) at the ceremony commorating the fiftieth anniversay of the signing of the U.N. Charter :

"26th June, 1945, was a day of hope. The world was rising from the long night of war. The veterans of that war were gathered in this room. Today, too, is a day of hope. We ourselves are veterans of another war, the cold war. We too, must be the architects of a better world. Fifty years on, the future is once again in our hands.

"This anniversary is an opportunity for us to rejoice in past success and confront future challenges.

"The Charter, conceived at Saint James' Palace in London, nourished out on the high seas, shaped in Washington, Moscow, Teheran, Dumbarton Oaks and Yalta, and given final form here in San Francisco, was designed to usher in a peaceful, just and prosperous world, a world founded no longer on force but on law.

"On this day 50 years ago, 51 flags floated over San Francisco. Today, 185 national emblems salute us—dazzling proof that the architects of the Charter were not mistaken. Their vision of freedom inspired the vast process of decolonization in Africa, Asia and elsewhere. And today we stand here as equal representatives of every continent on the globe.

"Of course not all our expectations have been met. The Security Council was long paralyzed by the cold war. Collective security has by and large remained a dream. For the United Nations Organization is what the world's nations want it to be. As former Secretary-General, Javier Perez de Cuellar once said, the United Nations are the reflection of the world.

"But 50 years have gone by, and the United Nations has endured. It remains the essential—and indeed the only—forum for exchange among ideologies and cultures. Today the organization is more vital than ever. Age has not withered the Charter. The passing of a world once split into contending power blocs has fanned new hopes. But the world is experiencing rapid change. New problems have arisen, and they affect us all—drugs, disease, the physical destruction of our planet. And the peoples of the world still yearn for peace, freedom, justice and well-being.

"Today we all rejoice in the rebirth of the United Nations.....

"The founding fathers of the Organisation place equal stress on the maintenance of peace and on economic development. They asserted the indissoluble link between human rights and economic and social progress. And the Charter assigned to the various international institutions a clear role—that of furthering the economic and social advance of all people.....

"We are here today as the emissaries of our peoples. The Charter belongs to them. We are proud of the task they have entrusted to us. Let us set out together on the high road to tomorrow."

Secretary-General's Report on the Work of the Organization

The United Nations is responding flexibily to global change and the changing needs of the international community, according to Secretary-General Boutros-Ghali's Annual Report on the Work of the Organization. In that Report, he said that calls for reform testified to the recognition by more people than ever before that the United Nations was a truly indispensable element in world

affairs. He also identified three immediate problems, which must be effectively addressed if the Organization were not to be irreparably damaged as the mechanism for progress.

The Secretary-General stressed that the safety and integrity of United Nations personnel in the field must be respected. When lightly armed peace-keepers or unarmed aid workers were threatened, taken hostage, harmed or killed, the world must act. The credibility of all United Nations peace operations was at stake; to preserve it, personnel must be protected as they carried out their duties.

The Organization's finances must be placed on an adequate and sustainable footing, he continued. The financial crisis continued to deepen because Member States delayed payment of their assessed contributions. Without substantial additional major contributions before the end of the year, the Organization's cash balance would be dangerously low. The crisis had a direct impact on efficiency and made effective management more difficult. Calls for ever-greater United Nations effectiveness under conditions of financial penury made no sense.

The Secretary-General noted that funds for development were drying up. That was a consequence of the end of the Cold War, of the competing demands of peace-keeping and development from scarce resources, and of donor fatigue. The willingness to spend money on containing conflicts, while necessary and admirable, was not enough. Without funding for development, the cycle of strife, stand-off and more strife would continue. To break that cycle, sustainable human development must be instituted everywhere. A new vision of development, and a universal commitment to it, was indispensable for world progress, he concluded.

50th General Assembly opens in New York

The 50th U.N. General Assembly opened in New York on 19th September, 1995. Following are extracts from the opening statement by the President of the Fiftieth Session of the U.N. General Assembly Diogo Freitas Do Amaral (Portugal).

"The United Nations has averted what many considered inevitable; the conflagration of a third world war. The United Nations played a major role in preventing a military conflict between East and West, which have been fatal for mankind.....

"Three very significant facts demonstrate how the international community has given a positive assessment of the action of the United Nations over the past 50 years. First, the five Nobel prizes received by the organization or by an individual or body associated with it; Second, the increase in membership of the organization, from 50 in 1945 to 185 in 1995. And if there has been a more than a three-fold increase in the membership, it must mean that the great majority of the world's countries see more merits and advantages in the United Nations than imperfections and shortcomings; Third, the decision to organize this coming October a major meeting that will be attended by more than 150 heads of States or governments from all over the world....

"I have already spoken of world peace which, fortunately, has lasted for 50 years in spite of the many local or regional conflicts that it has not been possible to avoid. However, even here, in this very difficult matter of war and peace, the United Nations can take pride in having contributed decisively to the significant progress made in the field of disarmament and the non-proliferation of nuclear weapons, as well as to the conduct or conclusion of successful peace processes as, for example, in Cambodia, El Salvador, Nicaragua, Eritrea, Mozambique and (we hope) in Angola.

"Secondly, the United Nations has done more than any other institution to proclaim and seek to guarantee in practice the primacy of international law, and we all acknowledge that, without the rule of law, humanity can know neither peace nor freedom nor the security of life and property that are indispensable to the normal existence of people living in civilized societies.....

"Thirdly, the United Nations has indisputably to its credit the attention and importance that it has given to human rights. It was the United Nations that made those rights universal; it was the United Nations that induced Member Countries to accept, through their recognition of human rights, that the State exists to serve man, and that it is not man who exists to serve the State.....It is the United Nations that is today in the forefront of efforts to secure respect for the "third-generation" fundamental rights, with particular emphasis on the rights related to the protection of nature and the environment, an area where, for the first time in the history of mankind, it is no longer a question of merely recognizing or creating the rights of individuals vis-a-vis other individuals or vis-a-vis the State; mechanisms are beginning to be created that will culminate in the recognition of the rights of animals and of nature itself in relation to the depredations committed by man.

".....It is, surely, for all decent and civilized persons a source of great pride and satisfaction that it has been possible (thanks once again to the United Nations) to elaborate and implement a number of international conventions that uplift mankind and have become permanent milestones and a legitimate source of pride during the first 50 years of the United Nations, I refer in particular to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and other cruel, inhuman or degrading treatment or punishment. What would mankind be without these basic texts ? And would any of them exist without the efforts of the United Nations ?

"To the United Nations we owe the universal awareness that ours is a world of equal men, each enjoying the same fundamental rights to human dignity.....

"Fourthly, the United Nations is fully entitled to claim the lion's share of the credit for another of mankind's major victories in the twentieth century—decolonization and the end of apartheid. That the number of Members States of the organization has risen from 50 to 185 is due largely to decolonization, which put into practice the principle of self-determination of peoples, set out in article 1 of the Charter of the United Nations. And that the unacceptable apartheid regime has come to an end in South Africa is due largely to the fact that it is condemned by the United Nations, pursuant to paragraph 2 of the Preamble and Article 55(c) of the Charter.

"It is interesting to note that both decolonization and the end of apartheid were brought about by leaders from the most diverse political sectors, clear proof that the ideals of the character of the United Nations are neither partisan, nor ideological, nor even religious—they are purely and simply

humanitarian—and that it is enough to believe in the dignity of each human being and to respect that dignity in practice to be an active and conscientious member of the United Nations.

"Fifthly, the United Nations has, particularly since the end of the cold war, helped to consolidate and complete the process of internal democratization in several countries that have decided of their own free will to move from a single-party to a multi-party system. The United Nations cannot tell any Member State what form of government it must adopt in its political constitution. But the United Nations can and must help those that decide on their own to embark on a process of democratisation. And this has been done successfully in more than 45 countries through electoral assistance and other modalities. Those who believe, as I do, in the superiority of the pluralist democratic model cannot but welcome this development.

"Sixthly and lastly, I should like to draw your attention to one of the most relevant and positive aspects of the United Nations which is generally overlooked by the organization's critics and even by impartial observers. I refer to the highly commendable work done by many of the United Nations specialized agencies and bodies to promote the economic, social and cultural development of the world's poorest and neediest countries."

The U.N. Secretary-General in his statement on the International Day of Peace on 19th September, 1995, observed :

"In a few hours from now the General Assembly will meet. This will be a historic session. The United Nations completes a half century. The world once more, cries out for peace. And for the economic and social development that peace alone can assure.

The toll of the bell is but a heart-beat long. Like a heart-beat, its message is vital. It speaks of life and energy. It speaks of serenity and contentment. It speaks of physical and spiritual strength. It speaks of the passion that great causes command. It speaks of our ability to fulfil them if we have the will.

Let that be our pledge and resolve today. Let us keep our goal clear and simple, like the song of the bell. Let us work for peace with the strength and clarity of this great sound."

Golden Jubilee Session.—At age 50, the United Nations found itself broken, facing a financial crisis that threatened everything from internal reforms to peace-keeping. Owed three billion dollars from members, the Organization was out of money. The United States is the biggest debtor at $ 1.4 billion, followed by Russia with about 5,00,000 dollars and the Ukraine with about 2,38,000 dollars. The United States paid some of the debt it owed the United Nations three days before the U.N. General Assembly began its 50th anniversary special session by sending the U.N. a cheque for $ 151 million but stated that it was putting a cap on the U.N. budget not to exceed 2.51 billion dollars over two years.

More than 150 Presidents, Prime Ministers, Kings and Princes converged on U.N. headquarters on October 22 to 24 to celebrate the world organisation's jubilee. The biggest gathering of world leaders in history opened at the United Nations on October 22, 1995, to mark the 50th anniversary of the world body with a three-day commemoration sessions of the 185-member General Assembly. President of Portugal Freitas Do Amaral, who is the president of the U.N.

General Assembly this year presided over the golden public session by appealing to the world leaders to think about the reform of the U.N. and its future. "The destiny of U.N. is in your hands", he told the dignitaries.

U.N. Secretary-General welcomes the Heads of States.—The U.N. Secretary-General, Dr. Boutros-Ghali, welcoming the heads of States and Governments and other representatives from 185 member States said if they could not solve the UN's financial crisis by the end of this year, they should give serious consideration to calling a special session of the General Assembly to face it. He warned that the UN could no longer play its role unless it was given the resources required to accomplish the tasks imposed.

A U.N. fact sheet said that arrears of dues from Member States totalled 3.2 billion dollars. Unless member States acted quickly to pay their overdue budget assessments, the U.N. would begin shutting down. There was no alternative. By law, it is prohibited from operating at a deficit or borrowing commercially, it said.

Dr. Boutros-Ghali described globalization and the threat of fragmentation as the twin challenge the world faces and which the United Nations if given the resources is uniquely qualified to tackle.

U.S. President Bill Clinton calls for sweeping reforms.—The 50th anniversary commemorative session of the U.N. General Assembly kicked off on October 22, with the United States asserting "we still need the United Nations as we enter the next century." "At the dawn of a new century, so full of promises, we still need the U.N. for another 50 years and more and you can count the U.S.". President Bill Clinton, who was the first speaker said while calling for sweeping reforms in the world body. He announced new initiatives including a proposal for a counter-terrorism Act and urged more States to ratify existing anti-terrorism treaties and "work with us to shut down grey markets" where terrorists and criminals obtain arms and false documents.

Mr. Clinton said that he had directed his administration to put on notice nations that tolerate money laundering by criminal enterprises which are moving vast sums of ill-gotten gains through the international financial system with absolute purity. "We must not allow them to wash the blood off the profits" from laundering of drug money by organised crime", he said.

Mr. Clinton promised help to the countries which would join in the effort but threatened sanctions against those unwilling to co-operate. He wanted every country to join in negotiating a declaration on international crime and citizen safety and called for an effective international police force partnership against criminal organisations. He also called for intensified action against drug cartel and destruction of drug corps. "We in consumer nations like the United States must decrease the demand for drugs", he said.

Expressing his determination to ensure that the United Nations fully meets its financial obligations to the U.N., President Mr. Clinton said : "I am working with Congress on a plan to do so." At the same time, Mr. Clinton called for sweeping reforms in the world body including elimination of bureaucratic fiefdoms and obsolete agencies.

He also spoke about the permanent extension of the nuclear proliferation treaty and the efforts taken to curb drug trafficking. He spoke about the new initiatives to fight international drug trafficking and fight terrorism. He

suggested that there should be declaration on international crime and citizen's safety.

Prime Minister Rao calls for wiping out nuclear weapons.—Prime Minister Narasimha Rao in his speech at a special commemorative meeting of the United Nations General Assembly late in the night of October 24 held nuclear weapon States directly responsible for proliferation and called for credible steps for complete elimination of all nuclear weapons within a stipulated time-frame. "When some possess those weapons for an indefinite time, it becomes a tempting objective for others too, leading consequently to proliferation, which is impossible to police for all times", the Prime Minister said in his speech. He pointed out that there could be no security for anyone in a world bristling with nuclear weapons. He reitereated India's commitment for complete elimination of nuclear weapons. Mr. Rao's statement was significant because India is not a signatory to the Nuclear Non-Proliferation Treaty (NPT) which was permanently extended this April at a conference organised by the U.N.

Mr. Rao said : "The world's great danger today is the spread of terrorism. When sponsored and supported by States, terrorism becomes another means of waging war. The international community must therefore resolve to combat this menace since it threatens the very basis of peaceful societies."

Showing support to the U.N. system Mr. Rao said that despite the critics, the world body's successes have been many. On an objective appraisal the U.N. remains humankind's beacon of hope. The combined U.N. family has made commendable efforts for the overall well-being of mankind, he said.

The Prime Minister said that if the relevance of the U.N. is to continue, "we will need to address the root causes of what afflicts humankind. Looking into the causes even casually, nuclear weapons still loom large, nowhere near abolition. Poverty and under-development are pervasive in many continents. International terrorism haunts the innocent. Harmony in pluralistic societies, whose number is the largest, is being disrupted by increasing fundamentalist trends based on exclusivism and intolerance, in many cases hatred", he said.

The Prime Minister strongly advocated adequate presence of developing countries in the Security Council. He said that the U.N. today included much larger number of independent sovereign States 'either in apperance or in outlook'. He also favoured the objective criteria for the extension of the U.N. so that the nations of the world must feel that their stakes in global peace and prosperity are factored into the U.N. decision making.

"We have the task of making the U.N. truly and effectively the global respository of humankind's aspirations. Right thinking nations and people working together have in the past achieved miracles."

Mr. Rao said, "the realities today are trans-ideological. The crying need of a vast majority of the nations is all round development. This has to be priority one for a long time. We need a vision of global harmony and co-operation, transcending many atavistic tendencies." He said that the message of Mahatma Gandhi, the apostle of peace and non-violence could lead the world to a safe heaven in the coming millennium.

On the last day of speeches, Pakistan Prime Minister, Benazir Bhutto, raised Kashmir issue. Representative of the Mohajir Quami Movement gave gory details of Pakistani atrocities in Sindh.

Mohajirs settled in the United States and Canada had sent two petitions separately to the Presidents of the Security Council and the U.N. General Assembly after all their appeals to Pakistan's President, Farooq Leghari, and Army Chief, Gen. Abdul Waheed, evoked no response. The appeal depicted murders, killings and torture of Mohajirs at the hands of police, para-military rangers and intelligence agencies of the Government.

Bangladesh Prime Minister, Begum Khaleda Zia, was more direct in her tirade against India. "When we are assembled here to celebrate the founding of this august body, over 40 million people of my country are facing poverty and destruction owing to deprivation of our due share of the Ganges water by India through unilateral withdrawal of Farakka. The Farakka barrage has become an issue of life and death for us", Ms. Khalida Zia lamented.

In his address at the golden jubilee commemorative session of the United Nations, Mr. Rao said, "I am deliberately keeping bilateral matters out of this short intervention."

Declaration by U.N. General Assembly's Special Session

After four long days of short speeches by over 180 heads of State and Government, the 50th anniversary session of the U.N. ended with the adoption of a resolution that reconciles conflicts without solving them. The resolution promises to give the 21st century "a United Nations equipped, financed and structured" to serve the world's people. It proposes the expansion of the U.N. Security Council to "enhance its representative character."

The seven-page, 17-paragraph draft was adopted, not without hiccups, at New York on the 25th October in the morning with all conflicting points of view duly incorporated and yet hoping to carry forward the post-cold war U.N. role as admumbrated by Secretary-General, Boutros Ghali. It entails "conflict prevention", preventive diplomacy, peace-building and peace-keeping."

Its commitment to rid the world of all weapons of mass destruction expressed in terms of "arms control, limitation, disarmament and nuclear non-proliferation" is without a time frame; and it reflects the western view of preventing "the spread of nuclear weapons" as a prelude to total disarmament demanded by Indian and the nuclear have-nots. Again, the declaration affirms "the right of self-determination of all peoples" but clarifies that it should not be construed as "authorising or encouraging any action that would dismember or impair.....the territorial integrity or political sovereignty of sovereign and independent States."

The draft gives expression to diverse aspects of human rights including minority rights, children and women's rights and also those of migrants and refugees.

On the controversial question of U.N. reforms, the first halting step has been taken. The Security Council will be expanded in a manner which would accommodate a few more nations—Japan and West Germany for certain and two more to provide representation to Africa and South America. The operative words are "working efficiency" and "representative character." But the reform on this count may not come about for quite some time as "important differences on key issues" persist and need further discussion.

The U.S. and Russia, the top two defaulters with the largest debt to the U.N., have been told along with many others that their payment obligations

must be met on time and in full and the U.N. General Assembly will apportion each member country's share. There is a promise to economise and improve operative efficiency.

India's position on terrorism received endorsement by the United Nations General Assembly's special commemorative meeting, which warned the member States against any attempt to dismember or impair territorial integrity or political unity of the sovereign States in the name of self-determination. In a declaration adopted at the end of the three-day special commerative meeting (SCM) late in the night on October 24, 1995 it said that States should not be broken in the name of self-determination. "The legitimate action to realise the inalienable right of self-determination shall not be construed as authorising or encouraging any action that would dismember the sovereign States", it said. It said that the working of the Security Council should be reviewed to make it more efficient and transparent and enhance its representative character.

The meeting condemned terrorism in all its forms and manifestations. It resolved to defeat terrorism along with transnational organised crime, trade in arms and the productions, consumption and trafficking of illicit drugs.

Referring to its achievements regarding prevention of global conflicts during the past 50 years, the declaration said that the United Nations must enhance the capabilities of the U.N. in conflict prevention, preventive diplomacy, peace-keeping, disarmament and peace-building. It stated that the U.N. will promote methods and means for peaceful settlement of disputes.

It stressed the need to revitalise the General Assembly and strengthen the working of the economic and social council. These and other changes, within the United Nations system, should be made if we are to ensure the United Nations of the future to serve well the people in whose name it was established. The declaration resolved to promote equitable and rule-based predictable and non-discriminatory multilateral trading system and a framework for investment, transfer of technology and knowledge as well as enhanced co-operation in areas of development, finance and debt as critical conditions for development.

It called for greater attention to enhance the benefits of the process of globalisation for all the countries and special measures to integrate the economies of the least developed countries and African nations into the world economy.

Referring to the "unacceptably wide" gap between the developed and developing countries, it expressed concern over the fact that one-fifth of the world's population lived in extreme poverty and called for extraordinary measures by countries including strenghtened international co-operation to address the problem.

The member States reiterated their commitment to provide human rights, equal participation of women in all spheres and protect the right of child. They called for protecting vulnerable groups like the aged, disabled, migrant workers and the indigenous people.

The countries expressed their determination to implement and respect international laws and settle disputes by peaceful means besides encouraging widest possible ratification of international treaties.

CHAPTER XXV

COLLECTIVE SECURITY

The term, "Collective Security" means the joint measures undertaken by all the States of the world or of a particular geographical region in order to prevent a threat to the peace, or to suppress the acts of aggression. The system of "collective security" is formalised legally through a treaty among the States. Although the concept of "collective security", had not been emphatically mentioned in the Covenant of League of Nations, but the League had the credit of starting the concept of Collective Security on the international arena.

Theory of Collective Security

Collective security can be understood as a security arrangement in which all states cooperate collectively to provide security for all by the actions of all against any states within the groups which might challenge the existing order by using force. This contrasts with self-help strategies of engaging in war for purely immediate national interest. While collective security is possible, several prerequisites have to be met for it to work.

Sovereign nations eager to maintain the status quo, willingly cooperate, accepting a degree of vulnerability and in some cases of minor nations, also accede to the interests of the chief contributing nations organising the collective security. Collective Security is achieved by setting up an international cooperative organisation, under the auspices of international law and this gives rise to a form of international collective governance, albeit limited in scope and effectiveness. The collective security organisation then becomes an arena for diplomacy, balance of power and exercise of soft power. The use of hard power by states, unless legitimised by the Collective Security organisation, is considered illegitimate, reprehensible and needing remediation of some kind. The collective security organisation not only gives cheaper security, but also may be the only practicable means of security for smaller nations against more powerful threatening neighbours without the need of joining the camp of the nations balancing their neighbours.

The concept of "collective security" forwarded by men such as *Michael Joseph Savage, Martin Wight, Immanuel Kant, and Woodrow Wilson*, are deemed to apply interests in security in a broad manner, to "avoid grouping powers into opposing camps, and refusing to draw dividing lines that would leave anyone out."[16] The term "collective security" has also been cited as a principle of the *United Nations*, and the *League of Nations* before that. By employing a system of collective security, the UN hopes to dissuade any member state from acting in a manner likely to threaten peace, thereby avoiding any conflict.

The Covenant of the League of Nations provided legal provisions in this respect as discussed under :—

Covenant of League of Nations and Collective Security

(1) Guarantee against Aggression.—Article 10 of the Covenant of League

of Nations provided that "the members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled."

(2) Action in case of Threat of War or War.—Article 11 of the Covenant provided that "Any war or threat of war, whether immediately affecting any member of the League or not, is hereby declared a matter of concern to the whole League and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."

(3) Disputes to be submitted to settlement.—According to Article 12 of the Covenant, "the members of the League agree that, if there should arise any dispute between them likely to lead to rupture, they will submit the matter either to arbitration or to judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or judicial decision or the report by the Council."

(4) Implementation of the award or the judicial decision.— Article 13(4) of the Covenant provided that "the members of the League also agree that they will carry out in full good faith any award or decision that may be rendered and they will not resort to war against a member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to effect thereto."

(5) Sanctions.—The Covenant of the League of Nations contained important sanctions under Article 16(1) which provided that "should any member of the League resort to war in disregard of its Covenant under Articles 12, 13 and 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which thereby undertake immediately to subject to the severance of all trade, financial relations, the prohibition of all intercourse between their nationals and the nations of Covenant breaking state, and the prevention of all financial, commercial or personal intercourse between the nations of the Covenant breaking state and the nationals of any other state, whether a member of the League or not."

Further, Article 16(4) of the Covenant provided that "Any member of the League which has violated any Covenant of the League may be declared to be no longer a member of the League by a vote of the Council concurred in by the representatives of all the other members of the League represented thereon."

To sum up, the League of Nations made the first important effort to adopt the system of Collective Security in the International Community for the maintenance of International peace and security.

United Nations and Collective Security

It may be noted that elaborate provisions have been made under the United Nations Charter for introducing the system of Collective Security, which are detailed below :—

(1) It has been provided in the Preamble of the Charter that "to save succeeding generations from the scourge of war, which in our life time has brought untold sorrow to mankind and for this end, "to unite our strength to maintain international peace and security."

(2) One of the purposes of the United Nations described under Article 1

of the Charter is "to maintain international peace and security, and to that end, to take "effective collective measures" for the prevention and removal of threats and suppression of acts of aggression or other breaches of peace and to bring out peaceful means, and in conformity with the principles of justice in International Law, adjustment or settlement of international disputes or situation which might lead to a breach of peace."

(3) According to Article 2(4) of the Charter, "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations."

(4) According to Article 2(5) of the Charter, all members shall give United Nations every assistance in any action it takes in accordance with the Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

(5) Pacific settlement of Disputes.—Article 33 of the Charter provides that, "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." It has been further provided that, 'the Security Council' shall, when it deems necessary, call upon the parties to settle their disputes by such means. It has been further provided under Article 37 that if the continuance of any dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

(6) Binding force of Security Council decisions.—According to Article 25 of the Charter, members of the United Nations have agreed to accept and carry out the decisions of the Security Council in accordance with the present Charter.

(7) Enforcement or Preventive Action.—Following are the main provisions of enforcement or preventive action regarding the system of Collective Security under the Charter :—

(a) Under Article 39 of the Charter, it has been provided that "the Security Council 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.

(b) According to Article 41, the Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

(c) Article 42 of the Charter provides that should the Security Council consider that measures provided for in Article 41, would be inadequate or have proved to be inadequate, it may take such action

by air, sea, or land forces as may be necessary to maintain or restore international peace and security, such action may include demonstrations, blockade and other operations by air, sea or land forces of Members of United Nations. This is the most important provision so far as the Collective Security is concerned, because it empowers the Security Council to use even armed forces for the maintenance of international peace and security. According to Article 43 of the Charter, all members of the United Nations in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage necessary for the purpose of maintaining international peace and security.

(d) Under Article 47 of the Charter, it has been provided that there shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirement for the maintenance of international peace and security the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
It may, however, be noted that the provision of Article 47 could not be implemented till date, as such, this provision has become defunct.

(e) Under Article 49 of the Charter it has been further provided that the Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

(8) Measures for Individual or Collective Self- defence.—Article 51 of the Charter provides that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by the Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or to restore international peace and security."

In view of the above provisions under the Charter, it can be clearly said that the United Nations has a forceful system of Collective Security. Had the constitutional provisions of the Charter been properly implemented, the United Nations would have been more successful to maintain international peace and security in every situation. But the conflict and non-co-operation among super-powers have made these constitutional provisions not so forceful as to be effective in all situations.

However, in a number of cases, successful use of collective security has been adopted by the United Nations.

Gulf-War (1991).—The matter of Gulf-war is an excellent recent example of collective security, which is described as under :—

Iraq and Kuwait are two neighbouring countries of Persian Gulf. These two countries of the Persian Gulf were members of the United Nations. Iraq was

the original member, while Kuwait got U.N. membership in 1963, after it got independence in 1961. On August 2, 1990, Iraqi tanks and troops invaded and occupied Kuwait and subjugated its sovereignty. The Emir of Kuwait fled to Saudi Arabia for shelter. A week after occupation, Kuwait was annexed and later on it was made part of Iraq.

Iraqi occupation was condemned severely by the Security Council. On August 9, 1990, the Security Council adopted a resolution by which it decided that annexation of Kuwait by Iraq under any form, is null and void. The resolution called upon all states, international organisations and Specialised Agencies not to recognise that annexation of Kuwait and refrain from any action or dealing with Iraq. It also demanded that Iraq rescind its action purporting to annexation of Kuwait. On August 25, 1990, the Security Council adopted another resolution wherein those states which were deploying maritime forces to the area to use such measures commensurate to the specific circumstances under the authority of Security Council to halt all inward or outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of provisions relating to shipping. The Security Council called upon states to ensure mandatory sanctions with maximum use of political and other diplomatic measures, which may culminate in withdrawal of forces from Kuwait.

On September 25, 1990, the Security Council imposed more sanctions against Iraq. It decided that all states should deny permission to take any aircraft destined to land in Iraq and Kuwait whatever its states of registration, to overfly its territory.

It may be noted that the striking feature of the resolutions imposing sanctions under Article 41 of the Charter is the voting pattern of the permanent members. Unanimity of all permanent members in adoption of these resolutions was historic. Their unanimity exhibited their commitment to act effectively in order to maintain international peace and security, which had been made at the time of framing of the charter, was still firm and strong. They condemned the Iraqi invasion over Kuwait and were determined to see the Iraqi withdrawal of forces from Kuwait. Ultimately, with the help of U.N. forces in the leadership of United States, the annexation of Kuwait was repulsed and the territory of Kuwait was freed from Iraqi invasion. The territory of Kuwait was restored to Emir of Kuwait, who had taken shelter in Saudi Arabia.

Security of GCC members collective responsibility, indivisible - Ambassadors to Ban.—United Nations : The Ambassadors of the Gulf Cooperation Council (GCC) to the UN explained to Secretary-General Ban Ki-moon the reasons why the Kingdom of Bahrain dealt with the "criminal acts" perpetrated by protesters during the last few weeks and why their governments rushed to its support, by sending troops.

"The serious deterioration of the situation in the Kingdom of Bahrain, resulting from regrettable criminal acts that constituted clear and genuine threats to the safety of its citizens and residents, as well as to its economic and social life, have compelled the Government of the Kingdom of Bahrain to act to fulfill its primary responsibilities to re-establish and maintain security in its territory," the GCC Ambassadors wrote in a letter to Ban.

They represent Kuwait, Saudi Arabia, Qatar, the United Arab Emirates, Oman and Bahrain.

The letter was in response to Ban who said last week that he was "troubled by the growing violence in the Kingdom of Bahrain that has left many people injured over the past few days," and noted "with concern" that troops from the Kingdom of Saudi Arabia and the United Arab Emirates under the auspices of the Gulf Cooperation Council have reportedly entered the territory of Bahrain.

The Ambassadors argued that "in parallel, maintaining security and stability in the Member States of the GCC is a collective responsibility, based on complementarily and solidarity and on the principle that the security and stability of Member States of the GCC is indivisible, in accordance with the relevant covenants and collective security agreements." "The threat to the security and stability of any member state of the GCC is considered to represent a threat to the security and stability of all Member States of the GCC," they added in their letter to Ban who repeatedly criticized the Bahraini Government for quelling the protests in Manama's Pearl Square and called for a "meaningful and broad-based national dialogue." The Ambassadors said the demonstrators, whose right to peaceful protest is fully guaranteed, have "persistently declined the offer of an open, inclusive and comprehensive national dialogue and instead chosen to disrupt the livelihoods of the entire population, blocking main highways, damaging infrastructure and institutions, including places of worship, schools and hospitals, and seriously violating the human rights of the Kingdom of Bahrain's citizens and residents, including the right to life while threatening their safety, and undermining the economic and social life of the country." "While willingly authorizing all peaceful protests, the Government cannot stand by passively as the interests of the population, including economic and financial interests, are put in jeopardy," the Ambassadors argued.

They explained that the "temporary deployment of the GCC 'Peninsula Shield Force' in Bahrain is fully in line with the regional agreements on the collective security of the GCC countries, and responded to the explicit and sovereign invitation of the Government of the Kingdom of Bahrain." They insisted that the role of the 'Peninsula Shield Force' is to protect the official and private premises of departments and other vital institutions in Bahrain and that they are not engaged in any action against the demonstrators, which remains the responsibility of the Bahraini security forces.

They also stressed that the GCC is fully committed to all international instruments regulating relations among nations and rights and duties within each nation and that its presence in the Kingdom of Bahrain, as exemplified by the 'Peninsula Shield Force,' aims at safeguarding the common interests of all Bahraini citizens, "irrespective of their political or other affiliations." They concluded that the GCC actions during this period will be "confined to those necessary for the maintenance of security, civil peace and the rule of law, and will at all times be guided by the principles of human rights."

Conclusion.—It may, however, be noted that the above mentioned provisions contained in the Charter, have empowered the U.N. Security Council to exercise adequate powers and authority to enforce collective security system in the places of conflict for the maintenance of international peace and security. It all becomes possible only when there is unanimity among permanent members of the Security Council. In the past, we find that due to rivalry and cold war between United States and U.S.S.R., it was not found possible to co-operate for maintaining international peace and security. But in the case of

Gulf War (1991), the unanimity of the permanent members of the Security Council in dealing with the crisis, was tremendous. Had they not remained unanimous, the Gulf situation would have been entirely different. The truth is that the principle of unanimity of permanent members of the Security Council, is the dire need of the crisis- situations to restore international peace and security by the United Nations.

The United Nations has seen a great upheaval during its life of about 60 years. At the time of framing of the Charter, there was great agreement between the super states. But soon after the signing of the Charter, there cropped up basic disagreements between the East and West Blocks. The East Block was represented by Soviet Russia while, the West Block was represented by United States. Their groupism resulted in the substantial failure of the collective security-system. Therefore, it became apparent that the great hopes entertained during the framing of the Charter, would never become a reality. On many occasions, U.N. Security Council failed to perform its primary responsibility of maintaining international peace and security, due to use of veto by the permanent members. So, on many occasions, many disputes brought before Security Council were compromised, postponed or otherwise prevented from leading to serious international crisis. But it does not mean that the Security Council did not play any useful and effective role of maintaining international peace and security. No doubt, the Security Council has played a quite useful role in defusing disputes that would have led to international explosions. In the cases of Korea, Congo, Palestine and Arab- Israeli conflicts *etc.*, its role was commendable. Now, due to the demise of cold-war, it is expected that the whole international community, will rise to the occasion and play a positive and effective role of maintaining international peace and security by creating confidence and understanding among themselves.

CHAPTER XXVI

DISARMAMENT

The idea of international control and reduction of military forces was earlier mooted at a Peace Conference convened by the Czar of Russia in the year 1899. A Committee of experts appointed under the aegis of the Peace Conference failed in its efforts to reach an agreement on the reduction of armies and navies. Another Peace Conference convened in 1907 also failed to arrive at any agreement on reduction of arms.

(a) The League of Nations.—The First World War brought to the fore the urgent need of achieving disarmament. Article 8 of the Covenant of the League recognised that the maintenance of peace required the reduction of national armaments to the lowest point consistent with national safety. The League Council was required to formulate plans for such reduction for consideration and action of several Governments. A Commission was to be constituted to advise the Council on execution of the required agreements.

After the First World War, disarmament was mainly applied to the vanquished nations, *viz.*, Germany and Japan, who were considered to have committeed aggression. Even the 1945 Postdam Declaration envisaged the complete disarmament and demilitarization of Germany and the elimination of control of all German industry that could be used for military production.

A Commission appointed in 1921 laid down the principles that no plan could work unless every nation joined and that the nations must help any country that might be attacked. Those principles were accepted by the League Assembly in 1922 and the draft of a proposed treaty of mutual assistance was prepared in 1923 on the basis of full disclosure of military secrets, universality of membership, collective security, etc. It was difficult for the nations of Europe to agree on such an ambitious plan contained in the draft treaty.

(b) Geneva Conference.—In 1932, a conference of sixty-one nations met in Geneva which agreed on prohibition of certain weapons such as bombs dropped from airplanes or balloons and the necessity of arms limitations, of international supervision of arms business and of publicity of arms budgets. The different nations, however, failed to implement their agreement into action. The League gave up its effort to promote disarmament when it found that Germany was making frantic efforts for re-armament.

(c) The United Nations.—Disarmament talks started in right earnest after the conclusion of the Second World War, both within and outside the United Nations. Article 26 of the Charter of the United Nations has authorised the Security Council to formulate plans to be submitted to the members of the United Nations for the establishment of a system for the regulation of armaments. The discovery of atom bombs soon after the signing of the Charter and just before the conclusion of the Second World War gave added importance to the question of disarmament.

Article 2(4) of the U.N. Charter stipulates a formal war prohibition—"All

members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations." This prohibition, however, leaves aside action taken in self-defence, U.N. enforcement actions or actions taken by regional organization. It, therefore, has the effect mainly of halting individual wars.

Atomic Energy Commission.—The United Nations General Assembly adopted on January 24, 1946, a resolution establishing a Commission on Atomic Energy for making proposals for the control of atomic energy for peaceful purposes and for effective safeguards by way of inspection to protect the violations and evasions on the part of the States.

On September 11, 1947, the Commission submitted its second report to the Security Council and outlined specific proposals on the functions and powers of an international agency for the control of atomic energy which expressed the following basic principles :

(i) Decisions concerning the production and use of atomic energy should not be left in the hands of nations.

(ii) Policies concerning the production and use of atomic energy which substantially affect world security should be governed by principles established in the treaty or convention which the agency would be obliged to carry out.

(iii) Nations must undertake in the treaty or convention to grant the agency rights of inspection of any part of their territory, subject to appropriate procedural requirements and limitations.

(d) Regulation and Reduction of Armaments.—On December 14, 1946, the General Assembly recommended that the Security Council consider essential practical measures for an early general regulation and reduction of armaments and armed forces. The Assembly also recommended that the Security Council accelerate measures to have armed forces placed at its disposal, as provided for in Article 43 of the Charter. In pursuance of the above, the Security Council set up a Commission for Conventional Armament on February 13, 1947. On August 12, 1948, the Commission approved two resolutions. The first resolution suggested that weapons of mass destruction should be defined to include automatic explosive weapons, radioactive material weapons, lethal, chemical and biological weapons. The second resolution envisaged that a system for the regulation and reduction of armaments and armed forces should embrace all States and that to put such a system into effect, there must be international confidence and security, but the regulation and reduction of armaments and the existence of confidence are reciprocal.

In a white paper on the disarmament talks between the United States, Soviet Union, Britain, France and Canada, the British Government declared on July 17, 1957, that substantial advances had been made in the four months of negotiations in London. It indicated how all delegates to the sub-committee accepted the idea of working not for a comprehensive disarmament plan, but for a partial agreement. It said that the West and the Soviet Union had reached general agreement on the following :

1. That the United States and Soviet Union should initially reduce the manpower in their force to 25,00,000 while Britain and France would

each observe a maximum ceiling of 7,50,000;

2. During the first stage, while these reductions were being made, all States should also reduce their arms by exchanging lists of armaments to be kept in depots under the supervision of an international control organ;
3. That there should be some reduction in military budgets;
4. That there should be some system of inspection to safeguard against surprise attack, both by means of aerial photographic survey and by use of ground observations post.
5. All appeared to agree on the need for a partial rather than a comprehensive disarmament agreement.

There yet seemed no agreement, the white paper added, on how to suspend tests or how to achieve nuclear disarmament.

By the end of 1957, the disarmament negotiations had resulted in tentative agreement with regard to the principle that any suspension of nuclear tests should be subject to international inspection and that aerial and ground inspection should be regarded as a means of protection against surprise attack. But no agreement could be reached with regard to the cut-off in the production of fissile material for nuclear weapons, reduction of existing military stocks of fissile material after the cut-off, exchange of information on military expenditure and international inspection and control generally. The Soviet Government pleaded for an absolute ban on the use of nuclear weapons, for the elimination of nuclear weapons altogether, for the elimination of foreign military base and for reduction of forces of the four major Powers stationed in Germany and in the North Atlantic Treaty Organization and Warsaw Pact areas.

Rapacki Plan.—On the 14th of February, 1958, the Polish Minister of Foreign Affairs, Adam Rapacki, put forward detailed Polish proposals for a nuclear-free zone in Central Europe in continuation of the proposals which he had first presented on the 2nd of October, 1957, to the General Assembly of the United Nations. He proposed that the de-nuclearised zone in Central Europe should include the territory of Poland, that the de-nuclearised zone in Central Europe should include the territory of Poland, Czechoslovakia, German Democratic Republic and German Federal Republic. In this territory nuclear weapons would neither be manufactured nor stock-piled. The equipment and installations designed for their servicing would not be located there. The States included in this zone would undertake the obligations neither to manufacture, maintain nor import for their own use and not to permit the location on their territories of installations and equipment designed for servicing nuclear weapons including missile launching equipment. The four Powers, *viz.*, France, the United States, Great Britain and the U.S.S.R., would undertake the obligations not to maintain nuclear weapons in the armaments of their forces stationed on the territories of States included in this zone and not to transfer in any manner and under any reason whatosever nuclear weapons for installations and equipment designed for servicing nuclear weapons to governments or to other organs in this area.

The NATO Supreme Commander in Europe General Norstad opposed the creation of a nuclear-free zone in Central Europe as that would endanger NATO strategy and the defence of Western Europe. The plan was rejected by Britain,

the U.S.A. and France as well as by other NATO countries. The U.S.S.R. Government, however, supported the establishment of an atom-free zone in Central Europe. The Governments of the Czechoslovakia Republic and the German Democratic Republic also welcomed the Polish proposal.

Revised Rapacki Plan.—In order to meet the objections raised against the proposals made on the 14th of February, 1958, the Polish Minister introduced a number of changes in his earlier plan in November, 1958. He observed that, in accordance with these changes which had been agreed to by other Warsaw Treaty countries, they were prepared to consider the implementation of the Polish Plan in two stages. In the first stage, a ban would be introduced on the production of nuclear weapons in the territories of Poland, Czechoslovakia, the German Democratic Republic, and the German Federal Republic. An obligation would also be undertaken within the proposed zone to renounce the equipment with nuclear weapons of armies which did not yet possess them. At the same time, appropriate measures of control would be introduced. This might be said to amount to freezing nuclear armaments in the proposed zone.

The Polish Foreign Minister, M. Rapacki, envisaged a conference on the plan where an agreement could be reached by the parties concerned. He regarded as the parties directly concerned to be : (i) the four countries in the proposed de-nuclearized zone, viz., Poland, Czechoslovakia, Eastern Germany and Western Germany; (ii) the four Great Powers, viz., Britain, France, the Soviet Union and the U.S.A. and (iii) those other countries which maintained armed forces on German territory viz., Belgium, Canada and Denmark.

Antarctic Treaty.—The "Antarctic Treaty" of 1959 demilitarized Antarctica, and accordingly, prevents nuclear weapons from being placed there.

The establishment of a scientific station in, or despatch of a scientific expedition to, Antarctica may, however, ultimately lead 'to setting up its national flag by a country engaged in the task of its exploration, which may be the forerunner of international complexities.

Partial Nuclear Test Ban Treaty, 1963.—The partial nuclear test ban treaty signed by the Government of the United States of America, Great Britain, the Union of Soviet Socialist Republics and other countries was described by President Kennedy as a shaft of light cut into the darkness of the East-West cold war. It has been an important step in the history of international co-operation and understanding. Though the test ban is of a limited character, the fact that it has been initialled is bound to generate an amount of goodwill and understanding which may lead to a complete test ban. Credit is due to all the three big powers, *viz.*, U.S.A., Great Britain and the U.S.S.R. for the sanity with which they approached the task.

The relevant provisions of the treaty are as follows :—

The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics hereinafter referred to as the original parties proclaiming as their principal aim the speediest possible achievement of an agreement in general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons, seeking to achieve the discontinuance of all test

explosions of nuclear weapons for all time, determined to continue negotiations, and desiring to put an end to the contamination of man's environment by radioactive substances, have agreed as follows :—

Article I.—(1) Each of the parties to this treaty undertakes to prohibit, to prevent, not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control :

(a) In the atmosphere, beyond its limits, including outer space, or under water including territorial water or high seas; or

(b) In any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted.

It is understood in this connection that the provisions of this sub-paragraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including such explosions underground, the conclusion to which, as the parties have stated in the preamble to this treaty, they seek to achieve.

(2) Each of the parties to this treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion, or any other nuclear explosion anywhere which would take place in any of the environments described, or have the effect referred to in paragraph one of this article.

Article II.—(1) Any party may propose amendments to this treaty. The test of any proposed amendment shall be submitted to the depository Governments, *viz.*, U.S.A., Great Britain and the U.S.S.R., which shall circulate it to all parties to this treaty. Thereafter, if requested to do so by one-third or more of the parties, the depository Governments shall convene a conference to which they shall invite all the parties, to consider such amendment.

(2) Any amendment to this treaty must be approved by a majority of the votes of all the parties to this treaty, including the votes of all the original parties. The amendment shall enter into force for all parties upon the deposit of instruments of ratification by a majority of all the parties, including the instruments of ratification of all the original parties.

Article III.—(1) This treaty shall be open to all States for signature. Any State which does not sign this treaty before its entry into force in accordance with paragraph (3) of this article may accede to it at any time.

(2) The treaty shall be subject to ratification by signatory States.

(3) This treaty shall enter into force after its ratification by all the original parties and the deposit of their instruments of ratification.

This treaty shall be registered by the depository Governments pursuant to Article 102 of the Charter of the United Nations.

Article IV.—This treaty shall be of unlimited duration. Each party shall, in exercising its national sovereignty, have the right to withdraw from the treaty, if it decides that extraordinary events, related to the subject-matter of this treaty have jeopardised the supreme interest of its country. It shall give notice of such withdrawal to all other parties to the treaty three months in advance.

The treaty came into force on October 10, 1963. It was originally signed by the Big Three Powers in Moscow on August 5, 1963. Nearly a hundred countries had signed the treaty when it came into effect in October, 1963. China, France and Albania have, however, not signed the partial nuclear test ban treaty.

The Moscow Test Ban Treaty and the agreement on reduction of fissionable materials output for nuclear weapons, announced by the Soviet Union and the United States in 1964, marked the first step on the path to disarmament.

China and France have not only refused to sign the treaty but have conducted many nuclear tests from time to time in defiance of various U.N. resolutions and world opinion. Deep concern and anxiety have been expressed at the contamination being brought about by continuing atmospheric nuclear testing by China and France in violation of the Partial Nuclear Test Ban Treaty.

Nuclear Non-Proliferation Treaty, 1968.—On June 12, 1968, the United Nations General Assembly commended by 95 votes against 5 with 21 abstentions, the nuclear non-proliferation treaty—NPT—hoping for the widest possible adherence. Australia, Israel, South Africa and Pakistan, among those voting for the resolution, specifically reserved their positions on signing the treaty. Albania, Cuba, Tanzania and Zambia voted against the resolution. Countries with considerable nuclear significance like India, Argentina, Britain and Spain abstained from voting. Even Australia, which is near nuclear country, and Israel, credited with having nuclear technological capacity and a big beneficiary from American aid, made reservations regarding signing the treaty. France, the fourth nuclear weapon power and member of the Security Council, abstained on the resolution, neither commending the three power NPT draft nor condemning it. She declined to sign the treaty.

The vote on the treaty came on June 12, 1968, seven weeks after the General Assembly resumed its 22nd session to consider the agreement negotiated over a period of four years in the General Disarmament Committee. The treaty was signed on July 1, 1968, and entered into force on March 5, 1970. Of the 110 signatories to the Treaty, 23 did not ratify it. They included countries like Japan, Egypt and five members of the EEC, West Germany and Italy being among them. China, France, India, Pakistan, Brazil, Argentina, Cuba, Albania, Israel, Spain and South Africa did not sign the treaty.

On March 9, 1992, China signed the Nuclear Non-Proliferation Treaty. China was the only permanent member of the United Nations Security Council not to have signed the treaty so far.

India, however, maintains that the NPT is discriminatory in favour of the nuclear weapons States and it has, therefore, not been possible for India to become a signatory.

Under the treaty, the nuclear powers agree not to transfer nuclear weapons or control over them to any recipient whosoever or to provide assistance in producing weapons to a non-nuclear weapon country (Article I); and the non-nuclear countries agree neither to receive the weapons nor manufacture them (Article II). The 'have not' signatories to the treaty are thus permanently barred from entering into the nuclear club, while it gives full liberty to the 'haves' of developing and multiplying their nuclear weapons. Nothing in the Treaty shall affect the inalienable right of all the parties to the treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this treaty (Article IV). The nuclear powers have pledged to make available their nuclear know-how to

the non-nuclear weapon States in the many fields of using nuclear energy for peaceful purposes. Safeguards for preventing diversion of peaceful nuclear establishment to military use are to be worked out in negotiation with the International Atomic Energy Agency.

Article V of the Treaty provides for appropriate measures to ensure that potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear weapon States party to the treaty; but the provision imposes no legal obligation on the nuclear powers to provide the services or afford a guarantee to the non-nuclear States that such services will be available.

The greatest drawback of the treaty is that it has left the issue of control and inspection unsolved. Without control and inspection it would be difficult to find out to what extent the individual member countries who are signatories are faithfully observing the terms of the treaty. The treaty is in fact full of reservation. It will only enable the nuclear powers to lay down the law for the non-nuclear powers, while they themselves give no guarantee of nuclear disarmament, partial or complete, on their own part.

The signatories to the treaty will, no doubt forfeit their freedom to develop their own nuclear deterrent; but the nuclear protection assured to them may, at the time of need, prove to be a mirage fraught as it is with various political factors including differences between the two old adversaries now friends in a clever nuclear non-proliferation treaty.

After the passage of the above resolution in the United Nations, Britain, United States and Soviet Union also sought an early meeting of the Security Council to consider the question of security assurances to countries signing the nuclear non-proliferation treaty and to give them in effect a nuclear umbrella. They tabled a draft resolution in which they agreed to act immediately in accordance with the United Nations Charter in the event of nuclear aggression or threat of such aggression against a non-nuclear State which has signed the nuclear non-proliferation treaty.

At a meeting of the U.N. Security Council held on June 17, 1968, the United States, Soviet Union and Britain made identical declaration of their intention to act through that body to counter any threat of nuclear aggression against non-nuclear signatories to the Nuclear Non-Proliferation Treaty. The three powers declared that "any State which commits aggression accompanied by the use of nuclear weapons or which threatens such aggression must be aware that its actions are to be countered effectively by measures to be taken in accordance with the United Nations Charter to suppress the aggression or remove the threat of aggression." The resolution passed by the Security Council on June 19, 1968, recorded the assurance of the three nuclear depository powers and reiterated the U.N. Charter's provisions. The declaration did not impose any additional responsibilities on them other than those already assumed under the U.N. Charter.

On June 19, 1968, the Security Council adopted the U.S.-U.S.S.R.-U.K. resolution by 10 votes to nil with five abstentions (Algeria, Brazil, France, India and Pakistan) whereby the three nuclear weapons powers pledged themselves to seek immediate Security Council action in the event of nuclear aggression or threat of aggression against a non-nuclear weapon State and further pledged themselves to provide assistance pending Security Council action to any State

that is a party to the N.P.T.

The treaty brought to the fore wide difference of views between States, the adherents and non-adherents of the treaty, on the ground of its discriminatory character, violation of the U.N. Charter and the credibility gap existing even among its supporters. The two other nuclear powers, *viz.*, France and China, dissociated themselves from the treaty, the former seeking more intensive atomic weapons test and the latter denouncing it as 'nuclear colonialism'. In the circumstances, the treaty was not expected to achieve its aim of arresting the proliferation of nuclear weapons.

On May 18, 1974, India exploded a peaceful nuclear device in the Pokaran range in Rajasthan'a Thar desert. She, however, reiterated her policy of developing nuclear energy only for peaceful and economic purposes for the welfare of her people.

The nuclear non-proliferation treaty has been a dismal failure to achieve its aims and objectives, inasmuch as it has failed to prevent either horizontal (among States) or vertical (qualitative and/or quantitative intra-State) proliferation as also to provide for balanced rights and obligations for all parties. The treaty, contrary to its deceptive title, has nothing to do with non-proliferating nuclear weapon. Increased bilateral and international co-operation in the vast field of the useful uses of nuclear energy, as stipulated in Articles 4 and 5 of the treaty, remains unfulfilled. Developing countries among the treaty parties have been denied the promised access to advanced nuclear technology and equipment. Research programmes in nuclear micro-explosions have been hampered on the ground that they might lead to weapon-related know-how. The working of the treaty has further demonstrated that it is discriminatory against the non-nuclear weapon States. The treaty while not ensuring the non-proliferation of nuclear weapons has only stopped the dissemination of weapon to non-nuclear weapon States without imposing any curbs on the continued manufacture, stockpiling and sophistication of nuclear weapons by the nuclear weapon State. The treaty, in fact, has tended only to disarm the unarmed.

The treaty barred countries without nuclear weapons from acquiring them although the nuclear powers were not barred from spreading their weapons amongst their allies.

China still siding Pak, N. plan—U.S.—A senior State Department Official of the United States testified at a Senate hearing on April 11, 1997, that China was continuing to aid Pakistan's nuclear weapons programme and also selling components for chemical weapons to Iran. Mr. Robert Einhorn, Deputy Assistant Secretary of State for Non-proliferation, told a Senate Governmental affairs sub-committee on international security and proliferation that Beijing had been boldly defying protests by Washington at such blatant violations of agreements and treaties. Einhorn told the committee that China had become the number one supplier of conventional weapons to Iran, outpacing Russia. Einhorn added that the administration strongly suspected that China continued to ship M-11 missile components to Pakistan, despite pledging in 1994 not to do so. "Concerns about transfers of missile-related components, technology and production technology persist, raising serious questions about the nature of China's commitment to abide by the Missile Technology Control Regime (MTCR) guidelines", he said.

Apart from the M-11 missile, China has also aided Pakistan's atomic weapons programme by supplying 5,000 ring magnets in violation of the non-proliferation treaty.

James Lilley, a former U.S. ambassador to Beijing, told the committee that China had erected a "Facade of Deception" in the form of numerous arms companies. The network makes the job of tracking arms shipments difficult for the U.S. intelligence agencies.

Outer Space Treaty.—An international treaty barring military activities in outer space and prohibiting States from placing weapons of mass destruction in orbit around the earth installing such weapons on the moon and other celestial bodies was unanimously approved by the U.N. General Assembly in December, 1966 and was signed on January 27, 1967. The treaty specifically provides that the moon and other celestial bodies must be used exclusively for peaceful purposes. It eventually came into force on October 10, 1967.

As already stated, the principles governing the activities of the States in the exploration and use of space are set out in the international treaty commended to States by the General Assembly in 1966. Besides this instrument which came into force in 1967, there is an agreement on the rescue and return of astronauts and the return of objects launched into outer space, under which parties agree to procedures for aiding the crews of spacecraft in the event of accident or emergency landing. Current efforts in space law are concentrating on an agreement governing liability for damage caused by objects launched into outer space, which the Committee on Peaceful Uses of Outer Space is attempting to draft. On November 12, 1974, the U.N. General Assembly unanimously adopted a resolution governing the activities of States in the exploration and use of outer space; the resolution sets forth the Convention on Registration of Object launched into outer space. A State launching a space object is required to register with the Secretary-General the name of the launching State (s), the designator of the space object, the date and location of the launch, the basic orbital parameters and the general function of the space object.

Second U.N. Conference on Exploration and Peaceful Uses of Outer Space.—The first U.N. Conference on the Exploration and Uses of Outer Space had been convened in 1968. Since then there have been great advances in space technology—man has been to the Moon and has robot vehicles, have sent back pictures and data from other planets. The amazing exploits of astronauts and cosmonauts have made great and uncommon contributions to scientific knowledge.

The second U.N. Conference on Exploration and Peaceful Uses of Outer Space (UNISPACE '82) opened on 9th August, 1982. The U.N. Secretary-General, Mr. Javier Perez de Cuellar, said while opening the conference that like all technology, space provided man with a tool; a tool that can be used for the common good or for the benefit of a privileged few. But space technology is a tool of immense versatility and great power. He said that international co-operation in the utilisation of outer space will not only benefit humanity at large but will further decrease the areas of international confrontation.

In his inaugural address to the Conference, Mr. Rudoolf Kirschlager, President of Austria, said that the findings of space science and technology in the last decade and a half had developed in a most extraordinary and

impressive manner. Yet, what would this scientific progress mean if it were accompanied by new additional threats to world peace ? Technology as a source of economic and social progress should contribute towards lessening that gap between the rich and the poor nations. This tenet, beyond doubt, also held true for space science and technology and he hoped that the conference would also make progress in that direction.

In a statement to the conference, following his election, the Foreign Minister of Austria, Mr. Willibald Pahr, said that it would be wrong to perceive international co-operation in outer space exclusively as a matter concerning only the major space powers.

The Prime Minister of India, Mrs. Gandhi, in her message urged the scientists and the world leaders, to ensure that differences existing on earth are not extended into space and let there be peace in space so that all humanity can benefit. In his statement in general debate at UNISPACE '82 on August, 11, Dr. Satish Dhawan, Chairman of Indian Space Research Organisation, said that India has trained a few thousand young men and women in space activities and designed and launched six satellites, two of them by an Indian launcher. Co-operation from advanced countries can play an important role in speeding up the assimilation of advanced technology. An issue of major concern to all nations is the possible escalation of arms race into outer space, which would be a tragedy. India was firmly against the militarisation and stationing of offensive weapons of any kind in space.

In its ultimate result, the U.N. Conference on uses of outer space failed to yield any tangible results. The United States and Britain belied the expectation of forging a consensus against militarisation of space and evolving a mechanism for an equitable and universal sharing of its resources for developmental purposes. They tried to block any discussion of the military aspect of space technology, urging that this was an issue for the disarmament forum of the U.N. The pious resolution passed at the end of the conference simply reiterated the conference's concern over the militarisation of outer space. Another resolution called for efficient and economic use of the geostationary orbit and the radio-reliance. The proviso added to the resolution has put the major powers, the space-haves, at a tremendous advantage inasmuch as they alone have the necessary resources and skill to utilize the outer space to their best advantage.

The Star Wars programme, in so far as laboratory research on anti-ballistic missiles is concerned, may not violate arms control treaties but when it is contemplated to deploy ABM systems for the defence of the United States and its European allies, it clearly violates arms control treaties.

Arms Control Treaties on Outer Space.—The following are the arms control treaties in relation to outer space, *viz.*,

(1) Limited Test Ban Treaty or Partial Test Ban Treaty of 1963.—This treaty calls on each party to undertake to prohibit, prevent, and not carry out any nuclear weapons test explosions at any place or control in the atmosphere or beyond its limits, including outer space. One hundred and eleven countries have ratified the treaty.

(2) Outer Space Treaty, 1967.—This treaty calls on each of the parties to undertake not to place in orbit around the earth, or station in outer space in any other manner, any objects carrying nuclear weapons or any kinds of weapons

of mass destruction. It also provides that the moon and other celestial bodies shall be used by the parties exclusively for peaceful purposes. It further prohibits establishment of military bases, installation, and fortification, the testing of any type of weapons, and the conduct of military manoeuvres on celestial bodies.

The treaty is mainly confined to peaceful uses of the Moon.

In December, 1979, the General Assembly adopted a resolution which commended the Moon Agreement. The Moon Agreement has so far been ratified by only three countries—Chile, Philippines and Uruguay—and needs ratification by at least five countries to come into force.

(3) Treaty on the Non-Proliferation of Nuclear Weapons (1968).—Each party to the Treaty has undertaken to pursue negotiations in good faith on active measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

(4) Accidents Measures Agreement, 1971.—Under the agreement, each party has undertaken to maintain and improve its organizational and technical arrangements to guard against the accidental or unauthorised use of nuclear weapons under its control.

(5) Treaty on the Limitation of Anti-Ballistic Missile (ABM) System, 1972.—The agreement stipulates that both the United States of America and the Union of Soviet Socialist Republics, the parties to the agreement undertake not to start construction of additional fixed land-based inter-continental ballistic missile (ICBM) launchers after July 1, 1972.

(6) Prevention of Nuclear War Agreement, 1974.

(7) Convention on Registration of Objects Launched into Outer Space, 1975.

(8) Moon Agreement.—The agreement has not yet come into force.

U.S., U.S.S.R. talks at Geneva in January, 1985.—The U.S. Secretary of State, George Shultz, and Soviet Foreign Minister, Andrei Gromyko, had a talk on January 7 and January 8, 1985, at Geneva with a view to cutting back nuclear weapons and preventing an arms race in space. The talk materialised after a 13-month hiatus in efforts by the super powers to reduce their armouries since the Russians had walked out of Geneva negotiations in November, 1983 in protest over U.S. deployment of new missile in Western Europe. Moscow had since then been insisting that Washington abandon its space antimissile research programme known as the Strategic Defence Initiative (SDI) and antisattelite weapons, to clear the way for nuclear arms talks.

Under the terms of the agreement hammered out in two days of talks in the Swiss city, the two super powers committed themselves to negotiating a complex of questions concerning space and nuclear arms—both strategic and intermediate-ranges. The objective would be to work out effective agreements aimed at preventing an arms race in space and terminating it on the earth. The agreement represented a compromise which takes in both Soviet concern over U.S plans for controversial "star wars" space-based missile defence programme and Washington's determination to bring Moscow back to negotiation on intermediate and long-range nuclear weapons.

Six-Nation Summit (1985).—The Six-Nation Summit on Nuclear

Disarmament held in New Delhi on 28th January, 1985, recalled its earlier joint statement of May 22, 1984, calling upon the nuclear weapons States to bring their arms race to a halt and reiterated their appeal for an all-embracing halt to the testing, production and development of nuclear weapons and their delivery systems. Two specific steps which required special attention were the prevention of an arms race in outer space and comprehensive test ban treaty. The joint statement issued by the six nations from four continents, viz., India, Argentina, Mexico, Greece, Sweden and Tanzania, urged that outer space must be used for the benefit of mankind as a whole, not as a battle-ground of the future.

Peaceful Uses of Seabed.—Another field of concern for the U.N. is the peaceful use of the seabed and the ocean floor beyond the limits of national jurisdiction. In 1969, the General Assembly declared that until an international agency was established, no State shall exploit the resources of the seabed and ocean floor beyond national jurisdiction.

In 1958, Geneva Convention on the High Seas laid down the procedure for the laying of submarine cables and pipelines on the bed of the high seas. It makes the breaking or injuring of such cable or pipeline a punishable offence and affords all States reasonable freedom to lay such systems on the seabed. The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the subsoil thereof was signed on February 11, 1971. It came into force in May, 1972. The treaty prohibits the placement of nuclear weapons, other weapons of mass destruction, as well as structure and launching installations designed for storing, testing or using such weapons on the seabed and the ocean floor beyond the parties' 12-mile coastal seabed zone.

Treaty of Tlateloco.—The 1967-treaty prohibiting nuclear weapons in Latin America came into force in 1969. It reflects the first example of a nuclear-weapon-free zone in a populated region of the world and is an important development which gives a ray of light in the field of disarmament. Known as the treaty of Tlateloco, it was, in a sense, an offspring of the United Nations. In 1963, the General Assembly had first given its blessing to the idea of creating a nuclear free zone in Latin America. It was hoped that with additional signatures and ratifications of the treaty, it would be possible to ensure that none of the States of the area would manufacture or acquire nuclear weapons and that the nuclear-weapons Powers would not station, deploy, use or threaten to use such weapons against any of the States of Latin America. U Thant said that the States of the region had taken a first important step towards disarmament and the expansion of the peaceful use of nuclear energy, and had given the world some novel ideas concerning control. He hoped that the system involved would provide a model for other nuclear-weapon-free zones and for additional measures of global disarmament. Despite past Assembly appeals only two of the five nuclear powers (the United Kingdom and the United States) signed the protocol on prohibition of nuclear weapons in Latin America.

Seabed Treaty, 1972.—On 7th December, 1970, the United Nations General Assembly adopted a resolution by which it commended the treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof. The treaty while recognizing the common interest of mankind in the progress of the exploration and use of the sea-bed and the ocean floor for peaceful purposes

and preventing nuclear arms race on the sea-bed and the ocean floor for maintaining world peace, provides that the States Parties to this Treaty undertake not to emplant or emplace on the sea-bed zone (i.e., beyond a 12-nautical mile coastal 'sea-bed'), any nuclear weapons or any other type of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons. The above undertaking shall also apply to the sea-bed zone, except that within such seabed zone, they shall not apply either to the coastal State or to the seabed beneath its territorial waters. The States Parties to this Treaty further undertake not to assist, encourage or induce any State to carry out activities referred to above and not to participate in any other way in such actions. In order to promote the objectives of the treaty, each State Party has been given the right to verify through observation the activities of other States Parties to the treaty on the sea-bed and the ocean floor and in the subsoil thereof.

In a resolution on the Treaty Prohibiting Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on Sea-bed and Ocean Floor, the General Assembly at its 32nd session welcomed the positive assessment of the Treaty by the review conference held in Geneva in June, 1977. It also invited all States that had not done so, particularly those possessing nuclear weapons and other weapons of mass destruction to ratify or accede to the treaty as a significant contribution to international confidence.

Article 88 of the United Nations Convention on the Law of the Sea, 1982, lays down that the High Seas shall be served for peaceful purposes.

U.N. Convention on the Prohibition of Bacteriological (Biological) and Toxin Weapons and on their Destruction.—The United Nations' 26th General Assembly commenced in 1971 the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. The signatories undertake not to develop, acquire or stockpile biological weapons, and pledge to destroy such agents or divert them to peaceful purposes, not later than nine months after the convention enters into force. On April 10, 1972, the representatives of the United States of America, U.S.S.R., Britain and 44 other countries signed the convention. The convention, which entered into force in 1975, constitutes a step on the road to general disarmament and represents the first agreement providing for complete destruction of all existing bacteriological and toxin weapons.

The question of banning chemical weapons—which has foundered on the ancient shoals of verification—was, however, still engaging the attention of the Conference of Committee on Disarmament (CCD). Pending agreement on such a treaty, the General Assembly urged all States to refrain from any further development, production or stockpiling of those chemical agents for weapons purposes, which because of their degree of toxicity have the highest lethal effects and not usable for peace for peaceful purposes.

The Third Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stock-piling of Bacteriological (Biological) and Toxin Weapons and on their Destruction held in Geneva from September 9 to September 27, 1991, adopted by consensus a final Declaration, in which participants stated that the use of biological weapons is "repugnant to the conscience of mankind." The Declaration states that elimination of both chemical and biological weapons would facilitate the

achievement of general and complete disarmament. The Conference welcomed regional initiatives that would lead to wiser accession to the Convention as well as those dealing with the renunciation of weapons of mass destruction, including biological weapons. The Conference noted with concern the increasing gap between the developed and developing countries in biotechnology, generic engineering, microbiology and other related areas. It urged all States Parties to actively promote international co-operation and technological transfer on an equal and non-discriminatory basis and considered that the establishment of a world data bank under U.N. supervision might be a suitable way for facilitating the flow of information in those fields.

The Conference also established an *ad hoc* group of governmental experts to identify and examine potential verification measures from a scientific and technical standpoint to help close a gap which presently exists in the Convention.

Another positive development came with the United Kingdom's decision to withdraw its reservation to the Geneva Protocol of 1925, under which it had retained the right to retaliate in kind if biological weapons were used against it.

A Fourth Review Conference is to be held in Geneva not later than 1996. Issues to be considered are the impact of scientific and technological developments relating to the Convention, the relevance of a chemical weapons ban to the effective implementation of the biological weapons Convention, and the effectiveness of co-ordinate confidence-building measures.

Convention on the Physical Protection of Nuclear Material, 1979.—Representatives of 58 States and one organization, European Atomic Energy Community, participated in the drafting of a convention on the Physical Protection of Nuclear Material. The drafting committee completed the consideration of the convention at the headquarters of the International Atomic Energy in Vienna in October, 1979 and the meeting recommended that the text of the convention be transmitted for information to the 23rd General Conference of the International Atomic Energy Agency. The convention was opened for signature from 3rd March, 1980, at the headquarters of the International Atomic Energy Agency in Vienna and at the headquarters of the United Nations in New York.

In the preamble, the convention emphasized the need for international co-operation to establish effective measures for the physical protection of nuclear material.

The convention applies to nuclear material used for peaceful purposes while in the international nuclear transport.

States parties shall co-operate and consult, as appropriate, with each other directly or through international organizations with a view to obtaining guidance on the design, maintenance and improvement of systems of physical protection of nuclear material in international transport.

Each State party shall make the offences contained in Article 7 of the Convention, *viz.*, the intentional commission of an act without lawful authority which constitutes the receipt, possession, use or disposal of nuclear material, a theft or robbery of nuclear material, etc. punishable by appropriate penalties.

The SALT I Agreements.—The SALT I (Strategic Arms Limitation Talks I) negotiations owe their origin in a message by President Johnson in January, 1964

to the Eighteen-Nation Disarmament Committee (ENDC) proposing a verified freeze of the nuclear and characteristics of strategic nuclear offensive and defensive vehicles. The proposal was initially rejected by the Soviet Union; but only on July 1, 1968, at the signing of the NPT, Johnson announced that the United States and the Soviet Union had agreed to enter in the nearest future into discussion on the limitation and the reduction of both offensive and defensive strategic weapons. The first session of SALT opened in Helsinki on November 17, 1969. The term SALT is generally designed to describe the entire set of negotiations from November, 1969 to May, 1972 when the SALT I agreements were concluded; SALT II describe the second phase of the SALT negotiations beginning in Geneva on November 21, 1972.

In the SALT I negotiations, four agreements were signed, these being : (1) the Treaty between the United States of Amercia and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (the ABM Treaty); (2) the Interim Agreement between the United States of America and the Union of Soviet Socialist Republic on Certain Measures with respect to the Limitation of Strategic Offensive Arms (the Interim Offensive Arms Agreements); (3) the Agreement on the Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics (the Accident Measures Agreement); and (4) the Agreement between the United States of America and the Union of Soviet Socialist Republics on Measures to improve the U.S.-U.S.S.R. Direct Communication Link (the Revised Hot Line Agreement). The ABM Treaty (Treaty on the Limitation of Anti-Ballistic Missile Systems) and the Interim Agreement on Certain Measures with respect to the Limitation of Strategic Offensive Arms (SALT I) were signed at Moscow on May 26, 1972, and entered into force on October 3, 1972, while the Accident Measures Agreement and the Revised Hot Line Agreement were executive agreements signed at Washington on September 30, 1971, and entered into force the same day.

It is said that the deterrence concept—threat of massive retaliation—is implicit in the SALT I agreements.

(1) U.S.-Soviet Treaty on Arms Limitation, 1972.—On May 26, 1972, President Nixon and the Soviet leaders signed a treaty on the issue of limiting strategetic nuclear arms. The U.S.-Soviet Treaty on the Limitation of Anti-Ballistic Missile (ABM) systems stipulates that proceeding from the premise that nuclear war would have devastating consequences for all mankind, each party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of the treaty. Each party undertakes not to deploy ABM systems for the defence of the territory of its country and not to provide a base for such a defence, and not to deploy ABM systems for defence of an individual region except as provided for certain situations specified below.

For the purposes of this treaty, an ABM systems or their components except that (a) within one ABM system deployment area having a radius of 150 kilometres and centered on the party's national capital, a party may deploy : (1) not more than one hundred ABM launchers and not more than one hundred ABM interceptor missile at launch sites, and (2) ABM radars within not more than six ABM radar complexes, the area of each complex being circular and having a diameter of not more than three kilometres.

The above limitations shall not apply to ABM system or their components used for deployment or testing and located within current or additionally agreed test ranges. Each party may have not more than a total of 15 ABM launchers at ranges.

ABM systems or their components in excess of the numbers or outside the areas specified in this treaty, as well as ABM systems or their components prohibited by this treaty, shall be destroyed or dismantled under agreed procedure within the shortest possible period of time.

The treaty paved the way for other agreements leading to general disarmament, it being the first concrete move to end the strategic armaments race, which now constitutes a threat of nuclear conflict. It opened the opportunity for a new and more constructive U.S.-Soviet relationship, characterized by negotiated settlement of differences, rather than by the hostility and confrontation of decades past. The Secretary-General, Kurt Waldheim, viewed it as a major step in the direction of halting and reversing the arms race, particularly the nuclear arms race and hoped that it would lead to reduction of weapons arsenals and thus promote general and complete disarmaments.

Under the ABM treaty, both the U.S.A. and U.S.S.R. renounced the right to building certain defences. This itself was a great achievement. It restricted in a certain measure the arms competition. It also had a political effect, inasmuch as it established the new basic principles of relation between the U.S.A. and U.S.S.R.

The arms treaty still left the door to a nuclear arms race. The five-year freeze only limited the number of inter-continental missiles each country can stock, but it leaves each party free to increase the explosive power or add to the number of war-heads to which each rocket can deliver. Further, the agreement refers only to land-based or submarine-carried missiles, leaving out strategic bombers.

The United States and the Soviet Union only accepted the strategic arms parity between themselves and decided to stabilize arms equation between themselves as super-powers.

(2) Interim Offensive Agreement and Protocol.—This agreement, which was signed on May 26, 1972, stipulates that both the United States of America and the Union of Soviet Socialist Republics, the parties to the agreement, undertake not to start construction of additional fixed land-based inter-continental ballistic missile (ICBM) launchers after July 1, 1972. The parties further undertake to limit submarine-launched ballistic missile (SLBM) launchers and modern ballistic missile submarines to the numbers operational and under construction on the date of signature of this interim agreement. The agreement was to remain in force for five years unless replaced earlier by an agreement on more complete measures limiting strategic arms. As with the ABM Treaty, each party has the right to withdraw from the agreement upon six months' notice if it decides that extraordinary events related to the subject-matter of the agreement have jeopardised its supreme interests.

(3) The Accident Measures Agreement or the 1973 Agreement on the Prevention of Nuclear War.—Each party, *viz.*, U.S.S.R. and U.S.A., undertook to maintain and improve its existing organizational and technical arrangements to guard against the accidental or unauthorised use of nuclear weapons under its

control and to notify each other immediately in the event of detection by missile warning systems or with related communication facilities, if such occurrences could create a risk of outbreak of nuclear war between the two countries.

(4) The Revised 'Hot Line' Agreement.—Under the agreement the 'Hot Line'—the establishment of a Direct Communications Link, designed to permit rapid Soviet-American Communications 'in times of emergency' initially signed in June, 1963—was upgraded through use of satellite communications.

Disarmament decade.—The 1970s were proclaimed a "Disarmament Decade" by the twenty-fourth session of the U.N. General Assembly in the hope that concerted efforts would be made during the coming years to end the nuclear arms race, eliminate weapons of mass destruction, and agree on a treaty for general and complete disarmament under strict and effective international control. Negotiations in the United Nations bodies and elsewhere have already led to a number of collateral measures in the field of arms limitation and disarmament including treaties on preventing the spread of nuclear weapons, prohibiting nuclear tests in the atmosphere, outer space and under water, banning emplacement of nuclear weapons on the sea-bed, banning nuclear weapons on the moon or in orbit around the earth, and, most recently, banning biological weapons. But the partial steps have not reversed the arms race, which grows ever more perilous. The arms race not only is a danger in itself; it diverts enormous resources and energy for peaceful, economic and social pursuits to unproductive and uneconomic military purposes.

Moscow Summit, 1974, and Partial Test Ban Pact.—On July 3, 1974, the U.S. President, Mr. Richard Nixon, and the Soviet Communist Party leader, Mr. Leonid Brezhnev, signed agreements in Moscow on a partial ban on underground nuclear testing, i.e., Treaty on the Limitation of Underground Nuclear-Weapon Tests (Threshold Test-Ban Treaty) and giving up their options for a second ballistic missile defence system in their countries. It was a threshold ban, inasmuch as it prohibited only those underground tests above a particular level, set in the treaty at 150 KT. The partial test ban of underground nuclear test was to take effect from March 31, 1976. The ban which is to effect, to begin with, tests having a yield exceeding 150 kilotons, specially excludes tests carried out for peaceful purposes.

The leaders were agreed on limiting potential danger to mankind from possible means of warfare based on scientific and technical advance in environmental modification techniques. This had apparently relevance to such means as defoliation employed by the U.S. in Vietnam which outraged public opinion.

Mr. Nixon and Mr. Brezhnev agreed to aim for a 10-year compact limiting offensive nuclear weapons but abandoned the search for a permanent accord. The two sides decided to temporarily abandon the idea of full and permament agreement in order to get the Strategic Arms Limitation Talks (SALT) working again.

Vladivostok Pact on Guidelines.—On November 24, 1974, President Ford and Secretary of State, Henry Kissinger, scored a breakthrough in Strategic Arms Limitation talks with the Soviets and got a U.S.-Russian agreement on guidelines for a ten-year "cap on the arms race." A joint statement issued by President Ford and Soviet Communist Party leader, Leonid Brezhnev, at the end of a 24-hour summit in the Soviet Union's Pacific port of Vladivostok

announced that they had reached agreement on the key terms of a new pact limiting strategic arms from 1975 to 1985. The agreement would mean that a cap had been put on the arms race for a period of ten years.

President Gerald R. Ford and Soviet Communist Party General Secretary, Leonid I. Brezhnev, agreed on a limit in numbers for such offensive nuclear weapons as missiles launched from land, sea and air bombers and multiple warhead missiles. The ceilings—2,400 intercontinental ballistic missiles, submarine launched missiles and heavy bombers out of which 1,320 can be armed with multiple independently targetable warheads—are well below the force levels which would otherwise have been expected over the next 10 years.

Both sides acclaimed the agreement as a considerable big step forward in giving a new impulse and more enduring perceptive to detente and curbing the arms race. The agreement put a firm lid on the strategic arms race and created a solid base from which future arms reduction could be made and negotiated.

In accordance with the understanding reached at Vladivostok, the American and Soviet delegations to SALT resumed discussion in Geneva on January 31, 1975. The two sides were to work out technical details of the Vladivostok accords. The SALT talks were expected to result in a new agreement in 1975 on limiting strategic offensive arms through December 31, 1985, but remained deadlocked. At the end of December, 1978 talks between the Soviet Foreign Minister and U.S. Secretary of State were reported to have resulted in agreement on a number of basic outstanding issues, and the details of new strategic arms limitation agreement (SALT II) were being finalized which would last till 1985.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.—In December, 1976 the General Assembly of the United Nations approved the Convention which was opened for signature and ratification on 18th May, 1977, at the United Nations office at Geneva. On that date, 34 countries signed the agreement. The Convention, which is of unlimited duration, provides that each State party undertakes not to engage in military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effect as the means of destruction, damage or injury to any other State party. Environmental modification techniques are defined as any technique for changing—through deliberate manipulation of natural process—the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space. Under the provisions of the Convention, the States parties have undertaken to facilitate, and have the right to participate in, fullest possible exchange of scientific and technological information on the use of environmental modification techniques for peaceful purposes.

U.S.-Soviet Treaty on on-site Inspection.—On April 8, 1976, the Soviet Union and the United States reached preliminary agreement on the inspection of peaceful nuclear explosions conducted by either of the two countries. The talks had begun in September, 1974 and the question of inspection had held up ratification of the Nuclear Weapons Limitation Treaty which was initialled in 1974 and should have come into force on March 31, 1976. The preliminary agreement, which was to be discussed by both governments before being signed and ratified, cleared the way for the ratification of the 1974-treaty. It was felt that the treaty should be complemented by a treaty on peaceful nuclear explosions

so that military explosions were not passed off as peaceful explosions. The treaty, when fully signed and ratified, would speed up the advance of peaceful nuclear explosions and their use in scientific and economic development.

U.S.-Soviet Treaty on Underground Nuclear Explosions for Peaceful purposes (Peaceful Nuclear Explosion Treaty), 1976.—On May 28, 1976, the United States and the Soviet Union signed a treaty limiting the size of peaceful nuclear explosions. The treaty signed in simultaneous ceremonies at the White House and the Kremlin, by President Gerald Ford and Soviet Party Chief, Leonid Brezhnev, for the first time provides for on-site inspection of nuclear explosions. It limits the size of any single underground nuclear explosions to 150 kilotons—more than seven times the power of the bomb which devastated Hiroshima in 1945. The pact is a companion to the one signed two years ago which limits the size of nuclear weapons explosions.

Special Session of the U.N. General Assembly on Disarmament.—The U.N. Generaly Assembly opened a high-level special (tenth) session on disarmament at its headquarters on May 23, 1978, in an effort to slow down an arms race costing the world almost 400 million dollars a year. The world has been spared global conflict for more than 30 years, although it has not been spared an ominous build-up of nuclear and conventional weapons—an arms race that affects practically every corner of the globe and consumes a disproportionate share of its energies and resources.

The biggest spenders in the arms race are Soviet Union and the United States. Then come China, France, the Federal Republic of Germany and the United Kingdom. It is estimated that the United States and the Soviet Union already have in their arsenals enough explosive power to wipe out the whole of life on earth, not just once, but many times over the equivalent of about 1,350,000 bombs, the size of the nuclear bomb that destroyed the town and people of Hiroshima, Japan, in 1945. By early 1978, more than 100 States including three nuclear Powers had ratified the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). But NPT has not put an end to the nuclear arms race. Only the nuclear weapons States can do that : China, France, the Soviet Union, the United Kingdom and the United States. Only they can stop the vertical proliferation of nuclear weapons. Only they can prove to the rest of the world that real security lies in disarmament, not in the horizontal and vertical proliferation on nuclear weapons.

Addressing the Assembly, the U.N. Secretary-General, Dr. Kurt Waldheim, said that this unprecedented session was the largest, most representative meeting ever convened to consider the problem of disarmament. Mr. Lazar Mojsov (Yugoslavia), President of the special session, observed in his opening address that military expenditures in the world now exceeded the aggregate sum of all financial resources which the world spends for all forms of education and shortly would also exceed the total sum spent for health services. The Soviet Foreign Minister, Mr. Anderi A. Gromyko, pointed out the immediate choice facing mankind : "Either to halt and reverse arms race and thus ensure durable peace and possibility to solve economic development problems or to allow the machines of war to continue expanding, robbing people of their national wealth and pushing the world towards a catastrophe." The American Vice-President, Mr. Walter Mondale, said that the U.S. was committed to reversing armaments build-up and reducing their trade, to further substantial

reduction in nuclear weapons and stricter limitations on modernisation and new types of delivery vehicles. The Indian Prime Minister demanded of the international community a total commitment of disarmament and reaffirmed India's refusal to accept discriminatory treaties and proposals which favoured the nuclear weapon powers.

After a five-week session, the 149-member United Nations General Assembly, sitting at the World Disarmament Conference, concluded its session on 1st July, 1978. It approved a recommendatory resolution purporting to move the world to save itself from endemic wars and devastation and in eventual holocaust. The final document's recommendation calls for a cutback in military budgets, to provide money for economic development of the poor countries, *viz.*, the vast majority of the United Nations membership. It urges reduction in sales of conventional arms. It calls on the nuclear powers to give up testing underground—in 1963, three of them, U.S.A., U.K. and U.S.S.R. agreed to stop testing in space, atmosphere and under water—with a view to halting further development of nuclear weapons. It also calls on the nuclear powers to reduce and eventually to eliminate completely all nuclear weapons. It also calls for an expansion of the Geneva committee and the termination of the Soviet American co-chairmanship in an attempt to get France and China to work on it.

The final document adopted at the special session on disarmament, without a vote, was designed to lay the foundations of an international disarmament strategy aiming at general and complete disarmament. The document consists of introduction, declaration, programme of action and a section of inter-governmental machinery for disarmament negotiations and deliberation.

One of the major points of agreement during the session concerned arrangements for a disarmament negotiating body in Geneva. Under the agreement, the "Committee on Disarmament" was to be opened to the nuclear weapon States, and to 32 to 35 other States chosen in consultation with the President of the thirty-second session of the General Assembly. It was decided to have a rotating chairman, thereby ending the monopoly previously enjoyed by the Super Powers. The present Geneva negotiating body, Conference of Committee on Disarmament, was established in 1962 as 18-Nations Disarmament Committee. It currently has 31 members and its two co-chairmen are from the United States and the Soviet Union.

The Assembly also decided to establish a Disarmament Commission composed of all United Nations members. A successor to Commission of the same name established by the Assembly in 1952, the reconstituted body is to make recommendations on various disarmament problems, follow-up work of the special session, consider the elements of a comprehensive disarmament programme and report annually to the Assembly.

The Introduction states that accumulation of weapons, particularly nuclear weapons, today constitutes much more a threat than protection for the future of mankind, adding that time has come to abandon use of force in international relations and to seek security in disarmament through a gradual but effective process beginning with a reduction in the present level of armaments.

The Declaration, which forms another part of the final document, urges that resources released through disarmament be used to promote well-being of all peoples and improve economic conditions of the developing countries.

Enduring international peace and security cannot be built on accumulation of weapons by military alliances nor be sustained by a precarious balance of deterrence or doctrine of strategic superiority. Genuine and lasting peace can only be realized through effective implementation of security system provided for in the Charter and speedy and substantial reduction of arms and armed forces.

Convention on the Physical Protection of Nuclear Material, 1979.—Representatives of 58 States and one organization, European Atomic Energy Community, participated in the drafting of a Convention on the Physical Protection of Nuclear Material. In the preamble, the Convention emphasizes the need for international cooperation to establish effective measures for the physical protection of nuclear material. The Convention applies to nuclear material used for peaceful purposes while in international nuclear transport. The Convention was opened for signature in March, 1980.

Convention on Prohibition or Restrictions on the Use of certain Conventional Weapons.—On April 10, 1981, the "Convention on Prohibition or Restrictions on the use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects" was opened for signature. The instrument is a significant step forward in efforts by the international community to prohibit or at least restrict the use of specially cruel and inhumane conventional weapons. It was a practical expression to the renewed commitment by member States to the objectives outlined by the United Nations General Assembly in the Final Document of its special session devoted to Disarmament (1978).

The 1979 Treaty on the Limitation of Strategic Offensive Arms (SALT II).—The Strategic Arms Limitation Talks (SALT I), which had begun in November, 1969, was signed by the United States and the Soviet Union on May 26, 1972. The SALT II agreement was signed by President Jimmy Carter and Soviet President, Lenoid Brezhnev, at Vienna on June 18, 1979. It aims to lessen danger of nuclear destruction. It imposes the first important restraints on the race to build new systems and improve existing ones—the so-called qualitative nuclear arms race. As observed by Secretary Vance, the treaty will establish equal ceilings on the strategic forces of the Soviet Union and the United States and, when ratified by Senate, it will become the cornerstone for still further limits in SALT III. Mr. Carter termed it a victory for peace but warned that the threat of a nuclear holocaust still hung over them. Mr. Brezhnev declared : "We are helping to defend the most sacred right of every man—the right to live." He said that the SALT-II treaty was a major step forward along the road of overall improvement of Soviet-American relations and, consequently, of the international climate.

The SALT-II Agreement is composed of three parts, *viz.*, a treaty, which will be in force until December 31, 1985; a protocol to the treaty, which will be in force until December 31, 1981, covering certain issues not yet ready for long-term agreement; and a joint statement of principles for future negotiations which constitutes a set of guidelines for the SALT-III negotiations.

Breaking of SALT-II Treaty.—The SALT-II treaty of 1979, signed in Vienna by the late Soviet Union leader, Leonid Brezhnev, and former U.S. President, Jimmy Carter, was never ratified by the Senate, but both sides had agreed to abide by it even after it formally expired in December, 1985.

Second Special Session of U.N. General Assembly on Disarmament.—Delegates of 157 Government and representatives of scores of private anti-war groups gathered at the United Nations on June 7, 1982, for a five-week special session of the General Assembly to promote the goal of disarmament, conscious of a threat from conventional weapons as also advanced new armaments employed in current conflicts. The Assistant Secretary-General, head of the U.N. Centre for Disarmament, told a pre-Assembly news conference that the annual global arms bill for all types of weapons and military equipment totalled 600 billion dollars, and if the trend was not reversed, the sum would be 900 billion dollars a year by the turn of the century—if the world had not already been destroyed by nuclear warfare against which there was no defence.

The Secretary-General, Javier Perez de Cuellar, while opening the special session, said that the time had come for mankind to put an end to the madness and immorality of the arms race.

The special United Nations session on disarmament admitted defeat on July 10, 1982, in its efforts to produce a comprehensive programme for arms reduction and control. The 157-nation assembly at its final meeting approved unanimously a report of its *Ad Hoc* Committee on that date as the "concluding document" of the special session. All sides felt that the report was limited in its scope and felt far short of the goals set for the five-week session. In its conclusions, the Assembly report noted that a programme of action agreed by the first special session on disarmament in 1979 had remained largely unimplemented. The document stated that a number of important negotiations either had not begun or had been suspended, and efforts in the committee on disarmament and other forums had produced little tangible result. It noted, however, some progress in certain negotiations, inasmuch as bilateral negotiations in the nuclear field had been initiated.

The Assembly while adopting without a vote the reports in its *Ad Hoc* Committee as the "concluding document" of the special session, expressed regret that it was unable to adopt the Draft Comprehensive Programme of Disarmament as well as a number of other items on its agenda. The Assembly expressed the view that the discussion of disarmament problems which the special session had undertaken, and the active interest showed by peoples all over the world, would "provide a powerful impetus to member States to redouble their efforts in the cause of disarmament."

U.S. signs N-Pact with China.—The United States and China signed a nuclear pact on July 23, 1985, the first day of the Chinese President Li Xiannians' official visit. The framework agreement was identical to the document initiated 15 months ago during President Reagan's trip to Beijing and contained no written assurances nor safeguards against diversion of American nuclear materials and technologies, ostensibly for peaceful purpose, to military use or re-transfer to third countries, like Pakistan. Chinese technicians and nuclear experts have been spotted in the past in the Pakistani uranium centrifuge enrichment facility at Kahuta, supposedly providing help in making a bomb. This last fact and generally the concern about proliferation, which the Sino-American understanding did nothing to still, generated a lot of opposition in the U.S. Congress in 1984.

Geneva Summit on Arms Accord.—The U.S. President, Ronald Reagan,

and Soviet leader, Mikhail Gorbachev, opened in Geneva on November 19, 1985, the first summit between the two super-powers since President Jimmy Carter and President Leonid Brezhnev met in Vienna in 1979. It ended on November 21, without major breakthrough, but in a mood of unexpected optimism for better U.S.-Soviet relations. There was no visible shift on the key issues, but the two sides did agree to speed up their arms talks and to meet again in the nearest future. In a joint statement issued after two days of negotiation, the two leaders acknowledged that serious differences persisted between them on vital issues, but affirmed that any conflict between the USSR and the USA could have catastrophic consequences. They said that they would not seek to achieve military superiority and emphasized the importance of preventing any war between them. They agreed to accelerate the work of the on-going disarmament talks in Geneva between the two sides with a view to accomplishing the tasks set down in the joint U.S.-Soviet agreement of January, 1985, namely to prevent an arms race in space and to terminate it on earth, to limit and reduce nuclear arms and enhance strategic stability.

They agreed about the need to improve U.S.-Soviet relations and the international situation as a whole.

The two sides affirmed their commitment to the treaty on non-proliferation of nuclear weapons and in further enhancing the effectiveness of the treaty *inter alia* by enlarging its membership.

On chemical weapons, the two sides agreed to intensify bilateral discussion on all aspects of a chemical weapons ban and initiate a dialogue on preventing the proliferation of chemical weapons.

The two leaders reached bilateral agreement on cultural exchanges, air safety in the North Pacific and Research on solar technology.

On November 21, the Soviet leader, Mikhail Gorbachev, expressed disappointment over the super power summit's failure to reach an agreement on limiting the arms race to which the Soviet side had given top priority. He said that the U.S. President, Ronald Reagan's, Strategic Defence Initiative (SDI) known as the 'Star Wars' programme remained the main stumbling block in the decision on limiting nuclear and conventional arms. He reiterated the Soviet offer to cut its medium-range nuclear force in Europe by 50 per cent if the SDI was abandoned.

Britain, US sign Star Wars agreement.—On December 6, 1985, Britain and the United States signed an agreement to participate in the U.S. strategic defence initiative, becoming the first American rally to join the $26-billion programme known as "Star Wars." The agreement was signed by U.S. Defence Secretary, Caspar Weinberger and Britain Defence Secretary, Michael Heseltine. Mr. Weinberger said that British participation in "Star Wars" offered a significant opportunity to expand the frontiers of scientific research. Under the agreement Mr. Weinberger said that there would be "the fullest and frankest exchange permitted under the laws of our countries." Britain and the United States had sketched out a package of 18 areas in which some 30 British firms could concentrate on "Star Wars" research. Among the areas studied for British participation was a so-called "rail-gun", a space-based electro-magnetic device which would fire metal "smart rocks" along two rails or rods connected to a powerful electric supply. Other areas of possible British involvement would be beams reflected off space-orbitting mirrors towards incoming laser missiles, and

particle beams-streams of atoms accelerated to nearly the speed of sound to knock out warheads.

The U.S. was negotiating similar agreements with several other European countries, including West Germany and Italy.

U.S.-Bonn Pact on "Star Wars."—Germany signed two agreements with the United States on March 27, 1986, clearing the way for its participation in the strategic defence initiative popularly known as 'star wars' programme. The two agreements, "Memorandum of Understanding" and "Joint Understanding of Principles" were signed in Washington amid protest by opposition parties and sharp differences within Chancellor Helmut Khol's centre-right coalition.

The "Memorandum of Understanding" set guidelines for participation by West German firms in research on Strategic Defence Initiative (SDI) and the "Joint Understanding of Principles" regulates general technology transfer between the two countries.

Israel embraces 'Star Wars' plan.—The Israel Defence Minister, Mr. Itzhak Robin, and the U.S. Defence Secretary, Mr. Caspar W. Weinberger, signed an agreement on May 6, 1986, making Israel the third country to embrace formally the United States Star Wars programme.

Japan joins "Star Wars" programme.—On July 21, 1987, Prime Minister Yashuiro Nakasone of Japan approved a document to be signed in Washington by U.S. Secretary of State for Defence and Japan's ambassador. With the signing of the document, Japan would become the fifth U.S. ally after Britain, West Germany, Italy and Isarel to join SDI research programme designed to build a space-based defence using futuristic technology to destroy incoming Soviet Nuclear missiles.

Pak-China N. Pact.—On September 15, 1986, China and Pakistan signed a nuclear co-operation agreement at Beijing. The agreement expresses the desire of the two countries for extensive co-operation in the peaceful use of nuclear energy for the welfare and prosperity of their peoples.

The Chinese Premier, Zhao Ziyang, said that China would neither advocate, encourage nor practise the proliferation of nuclear weapons despite its view that the nuclear non-proliferation treaty was discriminatory.

The document stated that China and Pakistan—both member-States of the International Atomic Energy Agency (IAEA)—would place their co-operative projects under IAEA safeguards in accordance with international practice.

NATO Warsaw Accord.—The 35-nation Stockholm talks between East and West to reach final agreement on ways to avoid accidental war in Europe came to a successful end on September 21, 1986. The agreement came at the end of over two years of tortuous negotiations on new rules for the notification, inspection and observation of military exercises. It covers all of Europe from the Atlantic to the Urals and is the first major arms control agreement since 1979. The 35 participants included the U.S.A., Canada and all the European States, except Alabania. The conference on "Confidence and Security-Building Measures and Disarmament in Europe" began in January, 1984, at the height of East-West tension. The final agreement came during a last private bargaining round between NATO and the Warsaw Pact.

The Stockholm accord will force countries to give advance notice of all manoeuvres above the level of an army division. The aim is to make the military

situation in Europe more predictable.

Reagan and Gorbachev meeting at Reykjavik.—The U.S. President, Ronald Reagan, and Soviet leader, Mikhail Gorbachev, met in the Icelandic capital of Reykjavik on October 11 and 12, 1986. They were reported to be near agreement on "deep cuts" in long-range nuclear weapons and elimination of medium-range missiles from Europe. While they were close to a major agreement on nuclear disarmament, the summit broke down on October 12 over the U.S. refusal to yield on its "Star War" research.

The Soviet proposal was reduced to the following : the two sides consolidate the ABM treaty of unlimited duration by assuming an equal pledge that they shall not use the right to break out of the treaty within the next ten years. Simultaneously, the U.S.S.R. suggested that all ABM requirements be strictly observed within these ten years, that the development and testing of space weapons be banned and only research and testing in laboratories be allowed. The U.S.S.R. was aware of the commitment of the American Administration and the President to the SDI. Apparently, Russian consent to its continuation and to laboratory tests offered the President an opportunity to go through with research and eventually to get clear what the SDI is, what it is about.

The American Administration and the President insisted to the end that America should have the right to test and study everything involved in SDI not only in laboratories but elsewhere, including outer space. But who would agree to that ? remarked Gorbachev. And then it turned out that they were about to take most important historic decisions, inasmuch as until then the previous agreements ABM, SALT-I and SALT-II dealt only with a limitation of arms, and now it was to be considerably cut. But since the U.S. Administration was out, having come to believe in its technological advantage, to break through via the SDI to military superiority it had gone to burying these almost concluded agreement, on which they had already reached understanding. The U.S. side thus wrecked that decision. Gorbachev told the President that they were missing a historic opportunity. Their positions have never been so close.

There was all round disappointment with the outcome of the summit. Commentators said that the Soviets were pragmatic and they offered a great deal and made dramatic gestures but Mr. Reagan ignored all that and remained committed to placing laser weapons in space.

Delhi Declaration.—The Delhi Declaration was signed by Mikhail Gorbachev and Rajiv Gandhi on November 27, 1986. The Declaration reiterated that "today humanity stands at a crucial turning point in history. Nuclear weapons threaten to annihilate not only all that man has created through the ages, but man himself and even life on earth. In the nuclear age, humanity must evolve a new political thinking, a new concept of the world that would provide credible guarantees for humanity's survival."

The Declaration set forth the following principles for building a nuclear-weapon free and non-violent world, viz., 1. Peaceful co-existence must become the universal norm of international relations; 2. Human life must be recognised as supreme; 3. Non-violence should be the basis of community life; 4. Understanding and trust must replace fear and suspicion; 5. The right of every State to political and economic independence must be recognised and respected; 6. Resources being spent on armaments must be channeled towards

social and economic development; 7. Conditions must be guaranteed for the individual's harmonious development; 8. Mankind's material and intellectual potential must be used to solve global problems; 9. The 'balance of terror' must give way to comprehensive international security; and 10. A nuclear weapon free and non-violent world requires specific and immediate action for disarmament.

It can be achieved through agreement on : complete destruction of nuclear arsenals before the end of this century; banning of all weapons of mankind; banning of all nuclear weapons test; prohibition of the development of new types of weapons of mass destruction; burning of chemical weapons and destruction of their stock-piles; and reducing the levels of conventional arms and armed forces.

Agreement on Co-operation in the Exploration and Use of Outer Space for Peaceful Purposes between U.S.S.R. and U.S.A.—On April 15, 1987, an agreement was signed during the three-day visit of U.S. Secretary of State, George P. Shultz to the Soviet Union between the United States of America and the Union of Soviet Socialist Republics concerning Co-operation in the Exploration and Use of Outer Space for Peaceful Purposes. The two parties agreed that they shall carry out co-operation in such fields of space science as solar system exploration, space astronomy and astrophysics, earth sciences, solar-terrestial physics, and space biology and medicine. They agreed to co-operate by means of mutual exchange of scientific information and delegations meeting of scientists and specialists and exchange of scientific equipment where appropriate.

Pact between U.S. and U.S.S.R. to notify military activities.—The foreign ministers of the Soviet Union and the United States signed in Washington an agreement on September 15 reaffirming the desire of the two nations to reduce and eliminate the risk of a nuclear war through mistake, miscalculation or accident. They pledged to notify each other of their military activities which if misinterpreted could lead to nuclear war. The agreement envisages setting up in Moscow and Washington a national nuclear risk reduction centre. The centres, to be connected with a special facsimile communications line, will be used to notify planned ballistic missile launches carried out beyond national territory in the direction of the other side. They will also notify missile launches posing danger to shipping or air traffic. The new link will be in addition to the 'hotline' between the Kremlin and the White House used by the CPSU General Secretary and the U.S. President in emergencies.

U.S.-Soviet Pact on N-Missile.—On September 18, 1987, President Mr. Ronald Reagan announced that the United States and the Soviet Union had reached an agreement in principle on the elimination of all their medium range missiles world-wide—the first time any established force of nuclear weapons is to be reduced. The "agreement in principle" between Moscow and Washington envisages elimination of all their Intermediate Range Nuclear Missiles (INM) in three to five years.

The U.S. Secretary of State, George P. Shultz, said later that the two super powers still differed on certain aspects of a missle treaty. He specifically mentioned the American Strategic Defence Initiative (SDI), popularly called "Star Wars", and said : "We will never agree to restrictions that will make it harder to pursue the Strategic Defence Initiative."

The 1987-Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate Range and Shorter-Range Missile (The INF Treaty).—On December 8, 1987, the United States and the Soviet Union signed a treaty to eliminate medium-range nuclear weapons from Europe as a major step towards the distant goal of ridding the world of the menace of a nuclear war. The historic intermediate-range nuclear forces (INF) agreement was signed by President Ronald Reagan and the Soviet leader, Mr. Mikhail Gorbachev. Under the treaty to be ratified by the U.S. Senate and the Supreme Soviet, both sides are to destroy all their landbased medium-range nuclear missile capable of travelling between 500 and 5000 kilometres. The agreement which after two failed summits in Geneva (1985) and Reykjavik (1986) between the two leaders looked an impossible goal to reach, was signed at the White House.

The agreement will eliminate more than 2,800 shorter and medium-range missiles bearing some 3,800 nuclear weapons, the reductions to take place over three years. The treaty—first ever between the super powers to reduce nuclear arsenals—was signed at the conclusion of the opening session of the summit meeting between Mr. Reagan and Mr. Gorbachev.

For the U.S. the agreement would mean scrapping of Pershing missiles stationed in West Germany and Tomahawk cruise missile in Britain, West Germany, Italy and Belgium. On its side, the Soviet Union would eliminate silo-based SS-4 rockets, SS-20, SS-12 and SS-33 missiles.

The main Soviet Union missile, the SS-20 carries three warheads, each of which has a destructive force equivalent to 150 kilotons of TNT. The American missiles carry one warhead each.

Talks on limiting both sides' missiles began in Geneva in December, 1981. The Soviets walked out in 1982 and the talks only resumed in March, 1985.

"We can be proud of planting this sapling that will probably one day grow into a mighty tree of peace", the Soviet leader, Mr. Mikhail Gorbachev, said after he and the U.S. President, Mr. Ronald Reagan, signed the treaty on December 8, 1987, to eliminate the intermediate range nuclear missiles in Europe.

Mr. Reagan said that the treaty was an excellent example of the reward of patience. He recalled that in 1981 he had proposed eliminating medium range missiles in Europe. "For the first time in history, the language of arms-control was replaced by the language of arms reduction," he said. "This required a dramatic shift in thinking. We have made this impossible vision a reality. The importance of this treaty transcends numbers", said Mr. Reagan." This agreement contains the most stringent verification procedure in arms-control history."

Mr. Gorbachev called for the leader to continue moving towards "an era of demilitarisation of human life."

START.—The three-day super-power summit between the United States President and Soviet leader concluded at Washington on December 10, 1987, on a note of success and optimism, with an unprecedented joint declaration by the big two to outline the Strategic Arms Reduction Treaty (START) within six months. The proposed treaty to be signed in Moscow would mean cutting by 50 per cent the most dangerous nuclear arsenal of long range missiles.

An agreement was reached on a ceiling of not more than 1600 strategic offensive delivery systems, 6000 warheads, 1540 warheads in 154 heavy missiles,

the agreed rule of account for heavy bombers and their nuclear armament, and an agreement that as a result of the reductions, the aggregate throw-weight of the Soviet Union's intercontinental ballistic missiles (ICBMs) and sea-launched ballistic missiles (SLBMs) will be reduced to a level approximately 50 per cent below the existing level, and this level will not be exceeded by either side.

The summit agreed that the pact will be recorded in six months in Moscow, when Mr. Reagan pays his summit visit in a mutually satisfactory manner.

However, United States President, Ronald Reagan, and Soviet leader, Mr. Mikhail Gorbachev, failed to achieve a breakthrough on issues like the Afghan problems and human rights violations. The statement recorded at the end of the summit itself acknowledged that serious discords still remain in the dialogue.

The two super-powers agreed that the nuclear club must not expand. The 4800-word statement said among other things : "The President and the General Secretary reaffirmed the continued commitment of the United States and the Soviet Union to the non-proliferation of nuclear weapons, and in particular to strengthening the treaty on the non-proliferation of nuclear weapons.

"The two leaders expressed satisfaction at the adherence since their last meeting of additional parties to the treaty and confirmed their intent to make, together with other States, additional efforts to achieve universal adherence to the treaty.

"The President and the General Secretary expressed support for international co-operation in nuclear safety and for efforts to promote the peaceful uses of nuclear energy, under further strengthened IAEA (International Atomic Energy Agency) safeguards and appropriate export controls for nuclear materials, equipment and technology.

"The two leaders agreed that bilateral consultations on non-proliferation were constructive and useful, and should continue.

"The two leaders expressed their commitment to negotiation of a verifiable, comprehensive and effective international convention on the prohibition and destruction of chemical weapons."

Kremlin Summit.—The fourth five-day Gorbachev-Reagan Kremlin summit began in Moscow on May 29, 1988, with a pledge by both the leaders to work for better relations. On May 31, 1988, the Soviet Union and the United States agreed to give advance notice about launching of intercontinental range sea and ground missile for testing purposes. The Soviet Foreign Minister, Mr. Eduard Shevardnadze, and the U.S. Secretary of State, Mr. George Shultz, also signed in Kremlin an agreement providing for joint verification testing of nuclear weapons at Nevada and at Semipalatinsk that summer. The two countries reached an understanding that they will give at least a 24-hour notice of the time, place and intended target of the intercontinental ballistic missiles and the submarine launched ballistic missiles tests. The notice would be given through the Nuclear Risk Reduction Centres.

The two Super Powers also signed a three-year (1989-1991) cultural agreement for the exchange of writers, sportsmen and others from various fields.

The Soviet Union and the United States also ratified a series of agreements concerning sea rescue, nuclear energy, space and fishing. Mr. Shultz and the

Soviet Vice-Premier signed an agreement on co-operation in the fields of transportation and technology research.

The fourth summit ended on June 1, with the two leaders, U.S. President Mr. Ronald Reagan, and the Soviet leader, Mr. Mikhail Gorbachev, exchanging documents on the ratification of the INF treaty and pledging to move towards a treaty on strategic arms reduction. Mr. Gorbachev said that the exchange of documents meant that the era of nuclear disarmament had begun. Mr. Reagan said that he and the Soviet leader had made important progress towards a sweeping new nuclear arms control treaty during their Kremlin summit. Verification was one of the most important and most difficult issues for them and Mr. Reagan was pleased to report progress in that area too.

Mr. Gorbachev advanced a four-point compromise formula that would have the superpowers go ahead with the START treaty on condition that they would exchange date on SDI through expert meetings and mutual visits to SDI test sites, swap information on strict observance of the 1972 ABM-treaty, take on-site inspection to ensure non-violation of the pact and follow prescribed procedures for settlement of doubts. Mr. Gorbachev said that the Soviets could not rely on Mr. Reagan's assurances of making its SDI data available to them when space weapons were ready to be deployed, especially when Americans were objecting to verification procedures for checking if any particular warship carried nuclear cruise missile. He also indicated that there was no meeting of minds on the other point concerning cruise missiles launched from heavy bombers.

Third U.N. General Assembly Special Session on Disarmament.—The third special session of the U.N. General Assembly on Disarmament began in New York on May 31, 1988. The first special session on disarmament held at the United Nations in 1978 was a remarkable success and the final document which was adopted by consensus gave the biggest priority to elimination of nuclear weapons. The second session took place in 1982 when the consenus of the first session was diluted to such an extent that no agreement was possible, despite the arms control negotiations between the United States and the Soviet Union.

Addressing the Assembly's disarmament session, the United Nations Secretary-General, Javier Perez de Cuellar, said on 31st May, that the meeting was taking place at a most opportune time. By striking coincidence, President Ronald Reagan and General Secretary Gorbachev were engaged in a dialogue in Moscow partly in the context of the reduction of strategic nuclear weapons. Speaking about priorities in arms limitations and disarmament, the Secretary-General said that it seemed to him that the highest importance in the field of disarmament should be given to the reduction of nuclear weapons, of armed forces and conventional weapons, the conclusion of the international convention on complete prohibition and elimination of chemical weapons, the prevention of arms race in the outer space and the cessation of nuclear tests.

Addressing the Third Special Session of the U.N. General Assembly on Disarmament on June 2, the Chinese Foreign Minister, Qiam Qichen, while noting that arms race was still going on, emphasised that the United States and the Soviet Union were specially responsible for disarmament and should take the lead in drastically reducing their arsenals, especially their nuclear weapons. He summed up China's position and propositions on disarmament as follows : As the nuclear arms race poses a general, grave threat to world peace and

security, nuclear disarmament should be given top priority in the reduction of all types of armament; the ultimate goal of nuclear disarmament is the complete prohibition and thorough destruction of all nuclear weapons; the two super powers that bear a special responsibility should take the lead in putting an end to the testing, manufacturing and deploying of all types of nuclear weapons and in drastically reducing and eliminating all types of nuclear weapons each of them has deployed in any region at home and abroad; pending the realisation of the goal of total elimination of nuclear weapons, all nuclear States undertake not to be the first to use nuclear weapons and not to use nuclear weapons against non-nuclear weapons States or nuclear free zones; an international convention on the complete prohibition and thorough destruction of chemical weapons should be concluded at an early date; and an international agreement on the complete prohibition of space weapons should be concluded at an early date.

India and five other countries, viz., Sweden, Mexico, Greece, Argentina and Tanzania, formally proposed setting up of a disarmament verification system within the United Nations framework as their initiative gathered more support in the special session of the General Assembly.

The Prime Minister of India, Mr. Rajiv Gandhi, in an address to the special session of the U.N. General Assembly devoted entirely to disarmament, on June 9, 1988, unfolded the time-bound action plan while encompassing the entire spectrum of nuclear as well as conventional disarmament. The comprehensive plan outlined in three phases (covering the period 1988-2010) was for more wideranging than the six-nation disarmament initiative in which Mr. Gandhi was actively involved along with the leaders of five other countries. It envisages first that there should be a binding commitment by all nations to eliminate nuclear weapons, in stages, by the year 2010. Secondly, all nuclear weapons States must participate in the process of nuclear disarmament—all other countries must also be part of the process. Thirdly, to demonstrate good faith and build the confidence, there must be tangible progress at each stage towards the common goal. Fourthly, changes were required in doctrines, policies and institutions to sustain a world free of nuclear weapons. Negotiations should be undertaken to establish a comprehensive global security system under the aegis of the United Nations.

In Stage I the INF treaty must be followed by a fifty per cent. cut in Soviet and U.S. strategic arsenals. All production of nuclear weapons and weapons grade fissionable material must cease immediately. A moratorium on the testing of nuclear weapons must be undertaken with immediate effect to set the stage for negotiation on a Comprehensive Test Ban Treaty.

In an impressed plea for universal disarmament, Mr. Gandhi said that "in this nuclear age, the insane logic of mutually assured destruction will ensure that nothing survives, that none lives to tell the tale, that there is no one left to understand what went wrong and why." Mr. Gandhi also saw the emergence of a new danger; the extension of the nuclear arms race into outer space. In a veiled reference to America's 'Star Wars', he said that "the ambition of creating impenetrable defences against nuclear weapons has merely escalated the arms race and complicated the process of disarmament. This has happened in spite of the grave doubts expressed by leading scientists about its very feasibility."

Mr. Gandhi said that international law already bans the use of biological

weapons. Similarly, action must be taken to ban chemical and radiological weapons.

The U.N. General Assembly's third special session on disarmament ended in dramatic last-minute failure on June 26, with the United States being accused of "wrecking" it by obstructing a declaration outlining a new programme for global disarmament. It failed to achieve consensus on a final set of recommendations contained in the concluding Document setting out new aims and priorities in the field of disarmament.

The Secretary-General of the United Nations expressed regret that the third special session had not been able to reach agreement on a concluding statement, "and that basic, national positions were not amenable to a compromise text." He noted the expressed feeling that the process of multilateral disarmament through the United Nations had to be pursued, and said that the fact that attempts to formulate a common strategy had not yet succeeded should be viewed in the overall perspective of efforts that would continue to that end, in various United Nations organs, including the General Assembly.

On the whole, efforts of nations at the third U.N. General Assembly session to negotiate the intractable issue of disarmament at the conference table had not been entirely wasted. The member-States signified their interest on disarmament issues and the session reaffirmed the international concern about disarmament.

Soviet President's unilateral declaration for reduction in Soviet armed forces.—On December 7, 1988, the Soviet President, Mr. Gorbachev, in his address to the 43rd session of the U.N. General Assembly announced a unilateral reduction in his country's armed forces by half a million troops and a cut in conventional arms unconditionally over the next two years. He announced reducing Soviet armed force by half-a-million men, hauling back tank divisions and troops from Asia and Europe and substantially cutting conventional weapons. "By agreement with our Warsaw Treaty allies," he said, "We have decided to withdraw by 1991 six tank divisions from the G.D.R., Czechslovakia and Hungary, and to disband them." Assault landing troops and several other formations and units, including assault crossing units with their weapons and combat equipment, will also be withdrawn from the groups of Soviet forces stationed in those countries. "It is now quite clear that building up military power makes no country omnipotent", Mr. Gorbachev declared. "What is more one-sided reliance on military power ultimately weakens other components of national security." The Soviet leader said that tens of thousands of tanks, as well as troops would be withdrawn from East European countries, as well as from Soviet Europe, and that other forces would be pulled out of Mongolia and Asia in a major drawdown of the Soviet military machine.

Saying that he was living up to a pledge to switch from an offensive to a defensive force structure, Mr. Gorbachev told the world body that his nation will "maintain our country's defence capability at a level of reasonable and reliable sufficiency so that no one might be tempted to encroach on the security of U.S.S.R. and our allies." But he said, "The use of threat of force no longer can or must be an instrument of foreign policy."

Malta Summit.—On December 3, 1989, Presidents Mikhail Gorbachev and George Bush, hailed their first summit as the start of new era in U.S.-Soviet relations but made it clear that substantial differences remained on naval arms control and Central America. Winding up two days of talks on a Soviet liner

berthed off Malta, Bush and Gorbachev spoke warmly of how the encounter had improved understanding of each other's views even though they had made no political breakthroughs.

In his State of the Union address to Congress, President George Bush, proposed that the U.S. and the Soviet Union cut their troop strength down to 1,95,000 each in Europe. Agreement on this approximate figure had broadly been reached at the Malta summit in December, 1989.

On February 10, 1990, the Soviet Union and the U.S. announced agreement to eliminate most of their chemical weapons. A joint statement on chemical weapons ban was issued at the end of the four-day visit of U.S. Secretary of State James Bakers to Moscow who said that the two sides had succeeded in working out a mutually acceptable draft that could be signed by Presidents Mikhail Gorbachev and Mr. George Bush during their summit in June, 1990.

Bush-Gorbachev Summit

On May 31, 1990, the Soviet President, Mikhail Gorbachev, and President George Bush began their four-day summit in Washington. Mr. Bush hailed Mr. Gorbachev saying that at last the long era of confrontation was giving way to Europe whole and free.

On June 1, 1990, President, George Bush, and Soviet President, Mikhail Gorbachev, signed a whole bunch of agreements, although basic differences over the Soviet crack-down in Lithuania and the question of the status of a unified Germany defied a meaningful solution. The two Presidents signed a bilateral agreement that would dramatically reduce and destroy a major portion of both nations stockpiles of chemical weapons.

The pacts finally signed included :

—Chemical weapons; Commits the two sides to halt production of chemical weapons up to 80 per cent by 2002.

—Nuclear testing : Improves verification of two treaties from the 1970s that limits nuclear explosions to 150 kilotons.

—Peaceful use of atomic energy; Updates and expands on co-operation begun in 1973.

—University student exchanges : Expands under-graduate exchanges to 1,500 for each country by 1995.

The U.S. conceded to Moscow the right to continue upgrading its most powerful nuclear missile, the SS-18. The U.S. concession made possible a framework agreement on strategic arms reduction.

NATO, WARSAW Pact Nations sign treaty to end cold war

On November 19, 1990, the heads of 24 NATO and Warsaw Pact nations at the historic Paris summit, signed a landmark treaty slashing their cold war arsenals in Europe. The treaty, the most far-reaching on non-nuclear disarmament ever negotiated, contains tens of thousands, of conventional weapons to scraphead and reverses the biggest arms build-up in history. It thus formally ends the cold war.

The treaty took NATO and Warsaw Pact negotiations 21 months to complete. It limits each alliance to 20,000 tanks and 6,800 combat planes. The treaty includes a complex verification regime to prevent cheating, including

hurdles of inspection of military units, some of them at very short notice.

The signing of the treaty was the highlight of a 34-nation summit of the Conference on Security and Co-operation in Europe (CSCE) in Paris. The summit, which included the United States, Canada and all European States except Albania, aimed at ending decades of East-West confrontation and laying the groundwork for a new European order.

START Treaty signed

On July 31, 1991, Gorbachev and George Bush signed the historic Stragtegic Arms Reduction Treaty to reduce their strategic nuclear arsenals by about 30 per cent, in the St. Vlamidir Hall of the Grand Kremlin Palace at Moscow. The treaty is the first ever to bring about the real reduction in superpower long-range (intercontinental) nuclear arsenals the two specially built to cause heavy damage to each other. Though the cuts fall far short of the 50 per cent aimed at by the superpowers when they started talks in 1982, the two Presidents considered the treaty to be historic treaty—the first treaty that significantly reduces the most dangerous and destablising nuclear forces.

The treaty limits the strategic nuclear delivery vehicles (SNDVs) to 1,600 each. The SNDVs comprise deployed submarine-launched ballistic missiles (SLBMs) and their launchers and heavy bombers.

The treaty valid for 15 years provides for complex verification procedure, including on-site inspection, short notice inspection and suspect site inspection.

Major cut in U.S. N-arsenal

On September 27, 1991, President Bush ordered a sweeping unilateral reduction in U.S. nuclear strength in response to changes in Moscow that he called an 'unparalleled opportunity' to make the world safer. The President undertook several steps unilaterally, without waiting for a complementary Soviet commitment. He grounded all U.S. strategic bombers and took them off the alert status after more than 30 years. He also removed from alert status all missiles covered by the Strategic Arms Reduction Treaty (START). Mr. Bush ordered removal of all nuclear weapons from surface ships including 400 nuclear Tomshawk missiles and bombs carried on aircraft carriers. The President also directed the return and destruction of thousands of short-range nuclear missiles and nuclear artillery shells from overseas bases.

Britain joined the United States on September 28, in promising to scrap short-range nuclear missiles, but said that it was pressing ahead with a plan to update its nuclear submarine fleet to maintain a minimum deterrent. The Defence Secretary, Tom King, said that the British Government planned to destroy its short-range and battlefield nuclear weapons and would cease to carry nuclear depth bombs abroad naval vessels. Under the proposals, Britain's 12 lance short-range nuclear missile launchers would be destroyed along with around 70 missiles. He, however, added that Britain remained committed to a planned replacement of its Polaris nuclear submarine fleet with the more modern Trident system during the 1990s.

Gorbachev announces big cut in N-arsenal

President Mikhail Gorbachev announced sweeping cuts in Soviet nuclear arsenal in response to the initiative by U.S. President, George, Bush and proposed expanding the reduction to include more types of weapons. On

October 5, 1991, he announced one-year moratorium on nuclear tests and called on the US to reciprocate. Mr. Gorbachev matched Mr. Bush's offer to reduce the U.S. army strength by 5,00,000 men by announcing a cut of 7,00,000 in Soviet armed forces.

Following were the proposals on tactical weapons :

All nuclear artillery ammunition and nuclear warheads for tactical missiles will be destroyed;

Nuclear warheads of anti-aircraft missiles will be removed from the army and stored in central bases; part of them will be destroyed; all nuclear mines will be eliminated;

All tactical weapons will be removed from surface ships and multipolars submarines—these weapons, as well as weapons from ground-based naval aviation will be stored; part of them will be destroyed.

Thus the Soviet Union and the United States are taking reciprocal radical measures leading to the elimination of tactical weapons;

Moreover we propose that the United States remove on a reciprocal basis from the navy and destroy tactical nuclear weapons; also on a reciprocal basis, we could remove from active units front (tactical) aviation all nuclear ammunition (bombs and aircraft missiles) and store them.

Drastic cuts in US-Russian N-arms.—On January 28, 1992, U.S. President, George Bush declared the United States as the winner in the cold war and then unilaterally announced drastic changes in America's strategic nuclear force and a cut in the U.S. military budget. In his State of the Union Address, he promised further reduction in the U.S. arsenal if the Commonwealth of Independent States (CIS), the former Soviet Union, agreed to eliminate all its land-based multiple ballistic missiles. His unilateral arms reduction plan included shutting down further production of the B-7 'Stealth' bomber, costing about $1 billion a piece, cancellation of the small intercontinental ballistic missile programme, ceasing production of new warheads for the sea-based ballistic missiles and new production of peace-keeping missiles and an end to the procurement of any more advance cruise missiles. If the CIS agreed to eliminate all the land-based multiple ballistic missiles, the President said that the U.S., in turn, would get rid of all its peace-keeping missiles, reduce the number of warheads on its Munuteman missiles to just one and reduce the number of warheads on its sea-based missiles by about one-third and convert a substantial portion of its strategic bombers to primarily conventional use.

In Moscow, just hours after President Bush's speech, Russian President Boris Yeltsin announced that Russia has taken off alert about 600 strategic and sea-based nuclear missiles and sharply curbed the production of long-range nuclear bombers. President Yeltsin revealed a ten-point disarmament plan, with an objective of liquidating all nuclear, biological and chemical mass destruction weapons. He told Mr. Bush of Russia's readiness to develop and jointly operate a Global Defence System instead of the US Strategic Defence Initiative (SDI) popularly known as "Star Wars," and proposed creating an internal agency for ensuring nuclear arms reduction. Mr. Yeltsin said that Russia as successor to the Soviet Union will cut down the number of strategic nuclear missiles, to the level set by the START Treaty. He also proposed to set up an international nuclear arms control agency, which in the long run should control the whole cycle of

nuclear process from mining to the burial of nuclear waste. Mr. Yeltsin also said that 130 land-based SILO launchers for ICBM and missile launchers on six nuclear submarines have been liquidated or are ready for dismantling. He announced scrapping of plans for modernisation and development of several strategic weapons and to end by the year 2000 production of weapons grade plutonium.

Ukraine committed to START.—In May, 1992, the Ukrainian President, Leonid Kravchuk, committed his country to the Strategic Arms Reduction Treaty after talks with President George Bush, easing U.S. worries about long-range missiles in the Ukraine. But President George Bush said that there was still work to be done to convince the three other Republics that inherited nuclear missiles from the former Soviet Union to join the treaty, which President Bush had signed last year with former Soviet President, Mikhail Gorbachev.

In the first meeting between U.S. President and a freely elected President of the independent Ukraine, President Kravchuk also pledged that all tactical weapons or short-range nuclear arms would be removed from his country by July 1, 1992.

For his part, President Bush threw open the doors to trade with the new country of 53 million, granting Ukraine $ 110 million in credits to buy American agricultural products and taking steps to grant favourable treatment to Ukrainian exports.

The START slashes the number of long-range nuclear missiles the superpowers have aimed at each other.

President Bush said that they had reached agreement but indicated that the US wanted to reach a similar accord with other nuclear-armed republics—Kazakhastan, Belarus and Russia—before the protocol was signed.

Ukraine has 176 strategic nuclear weapons, 130 of which are targeted for destruction under START.

Ukraine signed an agreement with Russia in April, 1992 pledging to move its tactical nuclear weapons to Russia for destruction.

Agreement on Strategic Arms cut between George Bush and Boris N. Yeltsin

The United States President, George Bush, and Russian President, Boris N. Yeltsin, at the end of their two-day summit in Washington agreed on June 18, 1992, to reduce their nuclear warheads from the current level of 21,000 to between 6000 and 7,000 by the year 2003. Mr. Bush announced that the reductions to be carried out in two phases, would be completed not later than the year 2003 and perhaps as early as the year 2000 if the U.S. was able to assist Russia in the stipulated destruction of the ballistic missile systems. The agreement on dramatic reduction in strategic arms goes beyond the levels set in the Strategic Arms Reduction Treaty (START) signed between Mr. Bush and Mr. Mikhail Gorbachev in Moscow in July, 1991. The new agreement includes a decision to eliminate land-based multiple-warhead ICBMs, politically the most dangerous nuclear weapons in that these could be used for pre-emptive first strikes. As a token of good faith, Mr. Yeltsin had announced even prior to the signing of the agreement that his country had begun de-activating the giant SS-18 missiles, which are trained on the US and are 400 times more powerful than the bomb which was dropped on Hiroshima. These welcome developments

take the world out of the aptly-named nighmare scenario of MAD (mutually assured destruction).

Big Five accord on non-proliferation.—The five permanent members of the U.N. Security Council—the United States, Russia, China, Britain and France—called on May 29, 1992, upon all countries which are not yet parties to the Nuclear Non-Proliferation Treaty to adhere to it and broadly observe the guidelines of the Missile Technology Control Regime.

The text on conventional arms transfers says, among other things, that the Permanent Five,

> "Reaffirming the inherent right to individual or collective self-defence recognised in Article 51 of the Charter of the United Nations, which implies that States have the right to acquire means of legitimate self-defence.....
>
> "Reaffirming their commitment to seek effective measures to promote peace, security, stability and arms control on a global and regional basis in a fair, reasonable, comprehensive and balanced manner,
>
> "Noting the importance of encouraging international commerce for peaceful purposes,
>
> "Determined to adopt a serious, responsible and prudent attitude of restraint regarding arms transfers, declare that, when considering under their national control procedures conventional arms transfers, they intend to observe rules of restraint and to act in accordance with the following guidelines :

1. They will consider carefully whether proposed transfers will—(a) promote the capabilities of the recipient to meet needs for legitimate self-defence; (b) serve as an appropriate and proportionate response to the security and military threats confronting the recipient country; (c) enhance the capability of the recipient to participate in regional or other collective arrangements or other measures consistent with the Charter of the United Nations or requested by the United Nations.
2. They will avoid transfers which would be likely to—(a) prolong or aggravate an existing armed conflict; (b) increase tension in a region or contribute to regional instability; (c) introduce destabilising military capabilities in a region; (d) contravene embargoes or other relevant internationally agreed restraints to which they are parties; (e) be used other than for the legitimate defence and security needs of the recipient State; (f) support or encourage international terrorism; (g) be used to interfere with the internal affairs of sovereign States; and (h) seriously undermine the recipient State's economy.

The interim guidelines related to weapons of mass destruction (chemical and biological as well as missiles and nuclear weapons) say, among other things, that the five countries :

> "Determined to work towards maintaining world peace and freeing mankind from the threat of weapons of mass destruction."
>
> "Affirming that international non-proliferation efforts should not prejudice the legitimate rights and interests of States in the exclusively peaceful uses of science and technology for development."
>
> "Recalling the announcement made by each of the parties of its

commitment to or support for the Missile Technology Control Regime (MTCR)."

"Recalling their respective positions on the application of International Atomic Energy Agency safeguards to nuclear co-operation with other non-nuclear-weapons States."

"Calling upon States that have not yet done so to accede to the treaty on the non-proliferation of nuclear weapons."

"Declare that they will observe and consult upon the following guidelines :

1. Not assist, directly or indirectly, the development, acquisition, manufacture, testing, stockpiling or deployment of nuclear weapons by any non-nuclear-weapons State;
2. Promptly notify the International Atomic Energy Agency of the export to a non-nuclear-weapons State of any nuclear materials, equipment, or facilities and place them under IAEA safeguards;
3. Exercise restraint in the transfer of sensitive nuclear facilities, technology, and weapons-usable material having in mind existing international practice and not export for peaceful purposes equipment, material, services or technology which could be used in the manufacture of nuclear-weapons-usable material except when satisfied that such exports would not contribute to the development or acquisition of nuclear weapons or to any nuclear activity not subject to safeguards;
4. Not assist, directly or indirectly, in the development, acquisition, manufacture, testing, stockpiling or deployment of chemical weapons by any recipient whatsoever;
5. Not export equipmen , material, services or technology which could be used in the mar ufacture of chemical weapons except when satisfied, for example, by recipient country guarantees or confirmation by the recipient, that such exports would not contribute to the development or acquisition of chemical weapons;
6. Strictly abide by the provision of the convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, undertake to maintain and support efforts for enhancing the effectiveness of the convention and implement in earnest the confidence-building measures adopted by the third review conference of the parties to the convention;
7. Not export equipment material, services of technology which could be used in the manufacture of biological weapons except when satisfied, for example, by recipient country guarantees or confirmation by the recipient, that such exports would not contribute to the development or acquisition of biological weapons;
8. In considering whether to authorise the export for permitted purposes of the relevant items which might be of use in the manufacture of weapons of mass destruction, take into account :
   A. The capabilities, objectives, policies and practices of the recipient, and any related proliferation concerns;

   B. The significance and appropriateness of the items to be transferred;
   C. An assessment of the proposed end-use, including relevant assurances by the Government of the recipient State and control on re-transfer;
9. Maintain export control systems in accordance with their national laws or regulations to enable these guidelines to be effectively implemented;
10. Work together to increase the effectiveness of export controls pursuant to these guidelines.

START II signed

U.S. President, George Bush, and Russian President, Boris Yeltsin, signed in Moscow on January 3, 1993, the most sweeping Strategic Arms Reduction Treaty (START II) to slash their nuclear weapons by two-thirds in the next ten years and hailed it as a treaty of hope for mankind dreaming of disarmament. The START-two agreement becomes the backbone of the system of guarantees for global security. Heavy multi-warhead international missiles, such as Russian SS-18s and American MX missiles, will be entirely eliminated. However, the accord will leave the United States with a major superiority in sea-launched ballistic missiles. This factor has deeply antagonised Mr. Yeltsin's conservative opposition in the Russian Parliament.

Under the treaty by the year 2003, or 2,000 if Russian economy improved to pay for the cost of destruction, the two countries are to eliminate some 17,000 of the 21,000 weapons they amassed in the last 300 years of cold war race to acquire an awesome power to destroy the other. While the treaty envisages that the U.S. and Russia will not have more than 3500 warheads each by the year 2003, it can come into force only after being ratified by the legislatures of the two countries. Another condition is the approval of the earlier START treaty (START I) signed in July, 1991 by President Bush and then Soviet President, Mr. Mikhail Gorbachev, by Ukraine, Kazakhistan and Belarus—the former Soviet Republics that still have nuclear weapons on their soil. Only Russia and Kazakhistan have so far ratified the START I treaty signed between President Bush and former Soviet leader, Mikhail Gorbachev, in 1991.

Mr. Yeltsin said that expert calculations have determined that it would be cheaper for Russia to eliminate the warheads specified in the treaty rather than maintain them in readiness. Apart from that the treaty signified the end of an era and the beginning of a new epoch of trust in relations between the United States and Russia. "The treaty will help replace the psychology of distrust and reinforce co-operation", he said and added that the change of administration in the United States did not result in a pause in high-level contacts between the two countries.

Salient features of the START II

The following are salient features of the Arms Reduction Treaty (START II) signed on January 3, 1993, by the Presidents of the United States and Russia, Mr. George Bush and Mr. Boris Yeltsin according to the Russian Foreign Ministry.

By January 1, 2003, the total quantity of nuclear warheads on strategic offensive armaments of Russia and the United States inter-continental ballistic

missiles, submarine-based ballistic missiles and heavy bombers will amount to 3,000-3,500 units.

This means the nuclear arsenals of the sides will be reduced by approximately two-thirds in comparison with their current level (over 20,000 units) or halved on comparison with the level co-ordinated by the START I treaty.

—All intercontinental ballistic missiles with independently targeted warheads shall be eliminated to remove from the States' nuclear armaments the most destabilising element, which contributes to the provoking of a pre-emptive or counterforce nuclear strike.

—Each of the sides shall reduce the number of nuclear warheads at their submarine-based ballistic missiles to a level of 1,700-1,750 units. This is a two-time reduction in comparison with the START-I treaty, of the military component of the US strategic offensive weapons amounting to 3,456 nuclear warheads.

—Limits shall be put on nuclear warheads with which heavy bombers of the sides can be equipped. The limit varies from 750 to 1,250 units of nuclear warheads of any type, either air launched long range cruise missiles, or short range cruise missiles or nuclear bombs. Thus, an essentially new rule of count shall be introduced.

If under the START-I treaty the nuclear warheads' count on heavy bombers was of relative character, (for instance, ten warheads are counted on US heavy bombers equipped for air launched long range nuclear cruise missiles, (meanwhile, some types of heavy bombers are technically capable of carrying up to 20 warheads) and the United States under this treaty theoretically had an opportunity to increase at the expense of its heavy bombers the real (not counted) number of nuclear warheads by 2,000-2,500 units, the START-II treaty eliminates this possibility and cuts, the US arsenal of air launched nuclear systems.

Reductions and limitations of strategic offensive armaments will be achieved in two stages.

At the first stage, during seven years after the START treaty enters into force, each of the sides will reduce its strategic offensive armaments so that :

—Its overall level of strategic offensive armaments' warheads does not exceed 3,800-4,250 units.

—The quantity of warheads on intercontinental ballistic missiles with independently targeted fractionated warheads does not exceed 1,200 units.

—The quantity of warheads on heavy intercontinental ballistic missiles does not exceed 650 units.

—The quantity of warheads on submarine-based ballistic missiles does not exceed 2,160 units.

At the second stage, before January 1, 2003, all other measures to achieve strategic offensive armaments limits established for the sides will be done.

—The START-II treaty also carries provisions to regulate the order of re-equipment of reduced or limited components of strategic offensive armaments.

For instance, each of the sides has the right to lessen the quantity of

warheads counted on intercontinental ballistic missiles with independently targeted fractionated warheads (with the exception of heavy missiles) up to one warhead, or submarine-based ballistic missiles of existing types.

This provision is of an essential importance for Russia. It is known, Russian strategic forces include such intercontinental ballistic missiles with independently targeted fractioned warheads as SS'19 each carrying six warheads.

Under the START-II treaty, the Russian side has the right to re-equip 105 SS'19 intercontinental ballistic missiles with independently targeted fractionated warheads to intercontinental ballistic missiles with one warhead.

—Under the START-II treaty, each of the sides has the right to re-equip its intercontinental ballistic missiles' silos launchers to silos accommodating single-warhead missiles.

This provision is of special importance for Russia, since the emptied heavy missile silos launchers can be re-equipped for silos launchers for one-warhead intercontinental ballistic missiles with the observation of certain procedures.

—Finally, the START-II treaty envisages the sides' right to reorient up to 100 heavy bombers for the fulfilment of non-nuclear tasks. These aircraft will not be counted in the overall fixed levels.

This provision was included on the proposal of the US, which has more than once used its heavy bombers for the fulfilment of the above-mentioned non-strategic functions.

To exclude a possibility of vagueness in treaty limitations, Russia insisted on special notes on a strict regime for this group of heavy bombers. So, the US side can return a re-oriented heavy bomber to the nuclear category no more than once. Any procedure connected with the re-orientation of a heavy bomber, will be carried out under reliable control.

—While signing the START-II treaty, Russia and the United States begin building a basement of qualitatively new relations in the military-strategic sphere.

Parameters of reductions and limits envisaged by the document naturally go with the two countries' desire to keep the strategic balance at the dramatically lowered level to guarantee the provision of strategic stability and predictability of the development of the situation on the two centuries' junction.

—The treaty also takes into account such an important thing as obligations of Belarus, Kazakhistan and Ukraine to join the treaty on non-proliferation of nuclear arms as non-nuclear states.

Convention to destroy chemical weapons, 1993

The Chemical Weapons Convention was signed in Paris on January 13, 1993, and subsequently by India and over 120 States. It aims at destroying all chemical weapons and production facilities declared by them. It is an historic treaty to rid the world of chemical weapons, the first-ever prohibition of an entire class of weapons of mass destruction. The nations signatory to the treaty are required to destroy stockpiles of chemical weapons and the factories that produce them within ten years of ratification.

The convention does not prohibit research into the development, production and acquisition of means of protection against chemical weapons.

Chemical weapons are defined as toxic chemicals and their precursors, except for purposes not prohibited by the convention, viz., research, medical, pharmaceutical and other peaceful applications and in quantities not justifiable for civil purposes. This comprehensive criterion has been chosen to include future hitherto unknown chemical weapons agents. It also covers binary or multicomponent chemical systems, old and abandoned chemical weapons as well as sholla, bombs, mines, rockets.

The convention does not prescribe any procedure for the destruction of chemical weapons, but it has to be environment-friendly, acceptable and irreversibly render such weapons unusable. However, it says that chemical weapons should not be destroyed by sea-dumping, land burial or open-pit burning.

Within 30 days after the entry into effect of the convention, signatories have to declare their possession or non-possession of chemical weapons, chemical stockpiles and production facilities since January 1, 1946.

Only three countries—the U.S., the former Soviet Union and Iraq—have admitted the possession of chemical weapons. The Iraqi chemical weapons arsenal was being destroyed in compliance with U.N. resolution 687. The U.S. and former Soviet Union, with stockpiles of nearly 30,000 tonnes and 40,000 tonnes respectively, committed in a bilateral agreement of 1990 to reduce their stockpiles to 5,000 tonnes each by the year 2002. However, in May 1991, the U.S. renounced its intention to keep a two per cent retaliatory reserve of its stockpiles.

According to western analysis, more than 20 States—China, Egypt, Ethiopia, Iran, Israel, Libya, Myanmar, North Korea, Syria, Taiwan, and Vietnam among them possess chemical weapons. Countries like Angola, Argentina, Cuba, India, Indonesia, Laos, Pakistan, Somalia, South Africa, South Korea and Thailand too are suspected of possessing or of attempting to acquire chemical weapons.

The United States estimates that elimination of its chemical weapons stocks may cost eight billion dollars and it has earmarked $25 million to Russia to begin tackling removal of its stocks.

The treaty requires signatories to confirm whether they have chemical weapons and to destroy their stocks and weapon-making facilities within ten years after 65 nations ratify the accord. The treaty represents a revolution in arms control because of its unprecedented verified mechanisms. The rules allow the country to demand a spot inspection of another country for chemical weapons. Searches must take place within five days, and international inspectors will cordon off a suspect site within 48 hours to prevent materials from being moved.

Iraq, the only nation besides the United States and Russia, that admits to having chemical weapons, has refused to sign the treaty. The Arab countries and North Korea could face embargoes on chemical weapons as a way of compelling them to sign. Most Arab States including Iraq decided not to sign in protest over Israel's refusal to endorse the nuclear non-proliferation treaty. Four Arab nations—Morocco, Algeria, Mauritania and Tunisia—were among the 65 States signed by the end of the opening session.

U.S. Secretary of State, Lawrence Eagleburger, urged Arab nations to sign,

saying such a move would be a step towards eliminating weapons of mass destruction from West Asia.

Tripartite Pact to destroy nuclear weapons in Ukraine

On January 14, 1994, the Ukraine President, Mr. Leonid Kravchuk, joined the Russian President, Mr. Boris Yeltsin, and the U.S. President Mr. Bill Clinton, in signing a historic pact to dismantle the nuclear weapons inherited by Ukraine from the former Soviet Union. In exchange for dismantling of strategic nuclear missiles and shipping of about 1800 nuclear warheads to Russia for reprocessing the bomb plutorium, Ukraine will get massive economic and technical aid from the United States. Besides, Russia will also write off its huge debt of more than 300 billion U.S. dollars for Russian gas and oil and in future would sell them to KIEV at concessional rates.

Under the tripartite agreement, 176 long-range missiles and over 1500 nuclear warheads which Ukraine inherited from the Soviet Union will be scrapped. The agreement besides calling for dismantling the world's third largest nuclear arsenal with 176 missiles and more than 1,500 warheads, calls upon Ukraine for transfer of its key components to Russia in the shortest possible time. The most sophisticated weapons, 46 SS-24 strategic missiles are to be deactivated within the next ten months.

The agreement has been a big step towards nuclear disarmament. The accord highlights—N-missiles in Ukraine to be dismantled; the N-warheads will be surrendered to Russia; U.S. to write off $30 bn. of Ukraine's oil and gas; and U.S.-Russia not to target each other with N-missiles.

Legality of Nuclear Weapons : Debate at the World Court

In November, 1995, the legality of nuclear weapons had been initiated at the Hague in response to the requests from the World Health Organisation (WHO) and the U.N. General Assembly for a non-binding advisory opinion on whether or not the threat or use of nuclear weapons is permissible in any circumstances.

Non-nuclear countries (Australia, Costa Rica, Egypt, Indonesia, Iran, Malaysia, Mexico, New Zealand, the Philippines, Qatar, Samoa, Zimbabwe, the Marshall Islands, the Solomon Island and Sen Marino) opined that atomic weapons are instruments of mass destruction like treaty-banned chemical and biological weapons whose effects are uncontrollable and indiscriminate and, therefore, are illegal. Non-member countries argued that protection of civilians, the environment and succeeding generations from the effects of warfare ruled out any use of nuclear weapons.

The nuclear States in reply said that no treaty expressly prohibits nuclear weapons and its use depends on the circumstances which cannot be prejudged.

Non-nuclear countries also maintained that while there is no treaty explicitly banning the use of nuclear weapons, a 'customary' prohibition akin to common law standard has emerged based upon scores of General Assembly resolutions over three decades, the Nuclear Non-Proliferation Treaty (NPT), regional nuclear-free zones, and a 50-year practice of non-use in war since Hiroshima and Nagasaki.

On July 8, 1996, the World Court rejected the World Health Organisation's request to rule on the legality of nuclear weapons. The United Nations Court

said that it had no jurisdiction because WHO, a U.N. agency, can only deal with issues of public health and not international law. In dismissing the WHO's request, the President of the Court Mohammed Badjoui said that the World Health Organisation was not empowered to seek an opinion outside the scope of its jurisdiction.

On a plea from the General Assembly, the 14-Judge World Court later on, on a similar request, on a reference proclaimed on July 8, 1996, that the threat or use of nuclear weapons would generally be contrary to the rules of International Law applicable in world conflict. At the same time, the Court was unable to conclude definitively whether a threat or use of these weapons would be "lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". The trapeze verdict came with the casting vote of President Mohammed Badjoui after the other Judges were divided equally on the issue. The verdict appeared to be a decisive victory for the nuclear weapons powers, especially the United States, Britain and France who had warned the Court during the hearing late in 1995 that even a non-binding advisory opinion would undermine the ongoing nuclear disarmament negotiations. The developing countries which had sponsored the General Assembly resolution clearly had a set-back at the Hague Court.

The Court held unanimously that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. A threat or use of nuclear weapons should be compatible with the requirements of International Law applicable in armed conflicts, particularly those dealing with the principles and rules of International Humanitarian Law.

The Court further held unanimously that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international surveillance. It also felt that there was no specific authorisation or prohibition of the threat or use of nuclear weapons in either customary or international law.

The biazarre record of nuclear tests is led by USA itself (being the first country ever to use the nuclear bomb and today's greatest spokesman on the Comprehensive Test Ban Treaty) with 1,030 tests followed by the former Soviet Union (715), France (210), Britain (45) and China (45). India had conducted a solitary test in the Pokharan way back in mid-seventies. India's strident voice for a world free from nuclear war found eloquent expression in such stalwarts as Jawaharlal Nehru, V.K. Krishna Menon and Indira Gandhi. India has always stood for total nuclear disarmament and taken the resolute stand that any treaty or agreement that detracts from this foolproof clause would heighten international tension.

In a judgment, the International Court of Justice has declared unanimously that Article VI of the NPT which came into force in 1970 is binding on all the nuclear powers while the five nuclear powers averred before the Court that they did not consider themselves bound by any judgment of the World Court.

Comprehensive Test Ban Treaty : India vetoes test ban treaty.—On August 20, 1996, at Geneva the Conference on Disarmament concluded negotiations on a global nuclear test ban treaty, opening the way for a formal signing ceremony despite India's objections. India vetoed the treaty which raised the question about why a country which had initially mooted the

proposal for banning nuclear weapons tests back in 1954, signed the Partial Test Ban Treaty prohibiting testing in the open in 1963, although it conducted a peaceful nuclear test in May, 1974 and refrained from holding another test since then, should reject a move in that direction. Indian ambassador, Arundhanti Ghosh, said that the fault lay with the five declared nuclear weapons powers, who rejected India's proposed wording committing them to agree on a time-table for negotiating the elimination of their arsenals. The pending treaty would still permit the nuclear powers to continue developing nuclear weapons with computers and other advanced technology even without further nuclear test explosions, Ms. Ghosh said. According to the Conference procedure, the treaty could be forwarded to the U.N. General Assembly after having been signed by the five nuclear powers—Britain, China, France, Russia and the United States and the three threshold countries, India, Israel and Pakistan. India, it is apparent, has stuck to its objection that the test of the Comprehensive Test Ban Treaty did not include a time table for nuclear disarmament. India said that its version of a Comprehensive Test Ban Treaty (CTBT) was that it should be securely anchored in a global disarmament contract and linked through treaty language to the elimination of nuclear weapons in a time-bound framework.

CTBT goes to UN Assembly.—The responsibility for sanctioning the complete (nuclear) test ban treaty (CTBT) passed to the U.N. General Assembly after the disarmament conference accepted defeat on August 22, 1996. The conference plenary session thus missed its last chance to produce a treaty document by extending the ban on nuclear tests to underground explosions. Russia justified New Delhi's demand for a time-bound universal nuclear disarmament but felt its realisation would take a long time.

India asserted in the clearest possible terms that it opposed the draft Comprehensive Nuclear Test Ban Treaty (CTBT) as it did not represent a genuine and irreversible step towards nuclear disarmament. A CTBT should be securely anchored in a global disarmament contract and linked, through treaty language, to elimination of nuclear weapons in time-bound framework and end all atomic weapons development either explosive-based or non-explosive based, India's ambassador to the U.N. Prakash Shah said.

Addressing a well attended Press Conference at the United Nations headquarter on August 30, 1996, the permanent representative, Ambassador Prakash Shah, rejected the suggestion that India was opposing draft CTBT as it wanted to be the sixth member of the nuclear club along with the United States, Britain, Russia, France and China. India, he said, is the only country which has voluntarily observed moratorium on nuclear tests for 22 years after its only underground nuclear explosion in 1974. "Our opposition to this document has nothing to do with our policy of continuing moratorium that is being voluntarily observed; it is not linked to whether India wants to have explosion or not," he added.

India reiterated that it will sign the Treaty after the Nuclear Five agree on a time-table for total removal of nuclear weapons.

U.S. President, Bill Clinton, stressed the need for further reducing nuclear weapons and ratifying the Comprehensive Nuclear Test Ban Treaty (CTBT) stalled by India's veto at the U.N. sponsored Conference on Disarmament (CD) in Geneva in the third week of August, 1996. "Now we must enforce and ratify without delay, measures that further reduce nuclear arsenals banish poison gas

and ban nuclear tests once and for all," Mr. Clinton remarked, without naming India, Mr. Clinton, in his speech, did appreciate India's concerns when he spoke about "reducing nuclear arsenals".

U.N. adopts CTBT despite India's dissent.—With a vote of 158 to 3, with five abstentions, the U.N. General Assembly adopted a Comprehensive Test Ban Treaty (CTBT) on September 10, 1996 and requested the Secretary-General as depository of the Treaty to open it for signature. India stood firm and voted against the 'unequal' Comprehensive Test Ban Treaty even after Washington had warned New Delhi against conducting nuclear tests in defiance of the 'institutional community will'.

Australia brought the CTBT text to the U.N. for adoption, after India vetoed it at the Conference for Disarmament at Geneva. The treaty seeks to ban all nuclear weapon explosions both in the atmosphere and underground and set up a worldwide monitoring system to verify compliance and mechanism to inspect suspected violations.

India declared that it will never sign the treaty in its present form thus preventing it from becoming a law. The treaty makes it mandatory on all 44 countries with nuclear capability including India, Pakistan and Israel to sign and ratify it to make it operational. India's arch rival Pakistan voted in favour of the treaty but said that it would not sign it because of what it called its concern over New Delhi's 'nuclear ambitions'. The United States and its supporters on the CTBT welcomed the approval of the treaty as a major step towards international peace and disarmament.

The treaty was approved by 158 States to three. While Bhutan and Libya alongwith India voted against an Australian resolution for treaty's adoption and its opening for signing, Cuba, Lebanon, Mauritius, Tanzania and Syria abstained from voting, Nineteen were absent or did not vote. Among them were Burundi, Dominion Republic, Gambia, Iraq, Niger, North Korea, Somalia and Zambia.

The United States while asserting that it was committed to the CTBT warned India and the countries who opposed the treaty against conducting nuclear tests in defiance of "the will of the international community".

In a hard-hitting speech in the General Assembly just before it approved the treaty, India's disarmament negotiator, Ms. Arundhanti Ghosh, declared, "India will never sign this unequal treaty. Not now, not later." Ms. Ghosh said that the treaty would not help in disarmament but would rather result in big five atomic powers hegemony over nuclear weapons. Reiterating India's demand for a time frame for a complete disarmament she said that the treaty "will encourage a nuclear weapon technology race". The treaty by banning nuclear test explosions and failing to prevent laboratory simulations was "not only flawed but is a dangerous one" and also favoured the five nuclear powers, namely, U.S., France, China, England and Russia. Ms. Ghosh stated that the CTBT had strayed from the initial mandate and was being forced on the world community without the stipulated consensus in Geneva. She pointed out that Article 14 of the Treaty dealing with entry into force was contrary to fundamental norms of international law. The provision makes ratification by India and 43 other countries essential for the treaty to come into force.

Most non-nuclear weapon States shared India's apprehensions and reservations about the nuclear test ban treaty even though they officially voted

for it. Malaysia's U.N. Ambassado,r Razali Ismail, told the resumed session of the General Assembly on September 10, 1996, that the fact that the attempts by many non-nuclear States to incorporate a commitment to disarmament in the preamble to the Comprehensive Test Ban Treaty (CTBT) were effectively blocked by the nuclear weapons States raised questions about the latter's attitudes and intentions, particularly the seriousness of their commitment on nuclear disarmament. He said that many non-nuclear States shared this suspicion when the Nuclear Non-Proliferation Treaty (NPT) was indefinitely extended last year, which his country was against. He said that his country found the draft treaty "essentially flawed" because it was deficient in scope and fell short of their expectations as well as those of many countries. It did not place itself within the overall process of nuclear disarmament. He called the entry-into-force provision "a major, perhaps, fatal flaw of the draft which will only serve to render it legally inoperative. He said that although his country was not a member of the 61-nation Disarmament Conference that deliberated on the treaty for two-and-a-half years, he recognised that bringing the CTBT directly to the Assembly after it had failed to set a consensus at the Conference was an irregular procedure that "might undermine the competence of the conference, a specialised body". But he obliquely urged the country or countries staying out of the treaty to rethink their responsibility not to precipitate a nuclear arms race between them.

Indonesia, another non-aligned country, spoke of what it called an "obvious and major flaw" in the treaty that it would allow the improvement of arsenals and related technologies through laboratory-scale testing. The country's ambassador to the U.N., Mr. Nugroho Wisnumruti, said : "Numerous tests have provided the nuclear weapons States with enough knowledge that they are no longer dependant upon explosions". He added that the draft also evaded the question of nuclear disarmament as if CTBT is an end in itself and not predicated upon follow-up measures towards the elimination of all nuclear weapons. "The entry-into-force provision, he said, was also problematic because it had introduced an element of doubt and placed the future of the treaty in jeopardy."

Sri Lanka's Ambassador, H.L. De Silva, told the General Assembly that he considered the failure of nuclear States to make "a firm and clear commitment to nuclear disarmament and the total elimination of all nuclear weapons in the preamble of the text to be a serious shortcoming."

Signing of Test-Ban Pact.—The U.S. President, Mr. Bill Clinton, signed the Comprehensive Test Ban Treaty (CTBT) shortly after it was opened for signature, on September 24, 1996. He was the first head of State to sign the treaty which calls for an end to all nuclear tests. The other declared nuclear powers, Russia, France, Britain and China, also signed the treaty at the United Nations. Sixty-five countries signed the treaty on September, 14 and fifteen signed later in the week on September 26, 1996.

Concept of Indian Ocean as a Zone of Peace.—On December 16, 1971, on the initiative of Ceylon and other member nations bordering the Indian Ocean, including India, the U.N. General Assembly declared the Indian Ocean together with the air space above and the ocean floor subjacent thereto 'a zone of peace.' The Assembly also called for consultation between the countries bordering the Indian Ocean and other powers, with the aim of halting escalation and

expansion of the military presence of the great powers in the Ocean eliminating from the area all military bases and disposition of nuclear weapons.

The General Assembly of the United Nations adopted on December 16, 1971, a resolution declaring the Indian Ocean a peace zone. It proclaimed the Indian Ocean together with the air space above and the ocean floor subjacent thereto for all times as a zone of peace. It called on the Great powers to enter into immediate consultation with the littoral States of the Indian Ocean with a view to halting the further escalation and expansion of their presence in the Indian Ocean and eliminating them from the Indian Ocean all bases, military installations and logistical supply facilities, the disposition of nuclear weapons of mass destruction and any manifestation of Great Power military presence in the Indian Ocean conceived in the context of Great Power rivalry.

On December 15, 1972, the U.N. General Assembly re-affirmed its earlier declaration that the Indian Ocean is a zone of peace and set-up a 15-nation *ad hoc* committee to suggest practical measures to promote the concept.

On April 23, 1973, the U.N. General Assembly adopted a formal declaration on making the Indian Ocean a zone of peace. On December 6, 1973, the U.N. General Assembly urged all countries to recognise the Indian Ocean as a zone of peace.

The open sea lying beyond the limits of the territorial waters of States cannot be subject to a right of sovereignty; but the idea of peace zone may, however, necessitate placing of some restrictions on the principle of complete freedom of the high seas, such as prohibiting warships from traversing the Ocean, and even restrictions on the littoral States to desist them from maintaining large armies and bases. Further, the United Nations will have to create an effective and impartial enforcement machinery, which may require a token naval force with ability to prevent the violation of the peace zone. There might also be a treaty between powers, big and small, to neutralise the Indian Ocean region, which will ultimately wean away the area from any intense military competition from among the prospecting competitors.

In June, 1975 the Ford administration reaffirmed its interest in expanding U.S. military facilities on Diego Garica—an Archipelago which is 1000 miles west of Cochin—in view of the strategic importance of the Indian Ocean in international trade. The U.S. administration has maintained that the Soviet Union has bases at Berbera in Somalia, Um Qasr in Iraq and Aden in South Yemen, that over half the world's seaborne oil is in transit through the Indian Ocean and that Iran and Pakistan were looking up to the U.S. for protection in the area.

On June 27, 1975, the chairman of the 18-nation U.N. Committee on the Indian Ocean, Mr. Hamilton S. Amersinghe of Sri Lanka, deplored the unhelpful attitude of the four permanent members of the Security Council—the United States, Britain, France and the Soviet Union—to the Committee's work on evolving measures for preserving the Ocean as a zone of peace.

In December, 1976, the General Assembly adopted a resolution, on a report from the committee on the implementation of the General Assembly's 1971-Declaration of the Indian Ocean as a Zone of Peace, which would request the *ad hoc* committee on the Indian Ocean and littoral countries and hinterland States of the Indian Ocean to continue their consultations in order to formulate

a programme of action which will lead to the convening of a conference on the Indian Ocean. The 32nd session of the U.N. General Assembly (October-Decemeber, 1977) reaffirmed its resolve on declaring Indian Ocean as a zone of peace. In October, 1978, the United States and the Soviet Union were reported to have agreed on a framework for an agreement to stabilise the size of their naval forces in the Indian Ocean. No agreement was reached on the number of ships each would keep in the region, nor on what geographic area specifically made up the Indian Ocean. In December, 1978, the U.N. General Assembly approved a resolution calling for further steps towards setting up Zone of Peace in the Indian Ocean.

A two-week meeting of countries of the Indian Ocean region began in New York on 2nd July, to review the Development since the 1971 Declaration of the Indian Ocean as a 'Zone of Peace' and pave the way for convening of a conference on the implementation of the Declaration. The 40-nation Indian Ocean *ad hoc* committee seeking to implement the 10-year old declaration reported in November, 1982, that the United Nations conference to find ways of making the Indian Ocean a zone of peace, set initially for 1981 and then put off to 1983 at the instance of the United States of America and some other new members who would not meet until 1984.

The United Nations Indian Ocean panel ended its latest session on July 22, 1983, without reaching an agreement on holding an international meet on making the Indian Ocean a zone of peace. The conference which was intended to suggest ways to implement the 1971-declaration of the Indian Ocean as a zone of peace, had already been deferred twice and was tentatively set for 1984. The U.N. General Assembly, however, in view of the rigid attitude of the two super powers both with regard to the 'peace zone' idea and the larger consultations in it, suggested to the *ad hoc* committee in December, 1983, to make decisive efforts to hold the conference in Colombo in the first half of 1985.

In July, 1985, India resisted an American suggestion that a long-delayed conference on making the Indian Ocean a peace zone be held without the United States participation. It was the first time that the Americans suggested such a step since the conference was proposed over five years ago. It was highly necessary that the conference to be successful should be attended by the great powers and major maritime users.

The long-delayed U.N. Conference that would establish the Indian Ocean as a zone of peace ran into further problems and could not be held even in 1988, seven years after it was first scheduled to be held even in 1981. Western posers have not been enthusiastic about holding the conference and the move for the Conference has got bogged down.

The original declaration attacked the United States installation in the region and demanded their dismantling. The Soviet intervention in Afghanistan has since led to an impasse. Meanwhile to the consternation of the nations of the area there has been an escalation in great power presence in the Indian Ocean. The continuous expansion of bases like Diego Garcia indicated that they were meant to be permanent fixtures. Such developments have led to a new dimension of insecurity.

Despite repeated calls by the U.N. General Assembly from 1972 to make the Indian Ocean a zone of peace and the great powers to refrain from increasing their military presence in the region, a naval build up has gone on

increasingly unmindful of the protest from the littoral and hinterland States of the Ocean. The two superpowers have viewed the Ocean as an area of increasing importance to shipping especially traffic in oil; and with the loss of Iran as a regional policeman for the United States and the West, the United States is keen to protect its strategic interest by intrusion of warships into the Indian Ocean and to turn Diego Garcia, gifted by Great Britain to the United States in 1973, into a super-base for full operational use by warships including submarines, aircraft and communication monitors.

It may be recalled that towards the end of 1965, Great Britain, which had embarked on a policy of decolonisation of its overseas possessions, established territorial hegemony over a handful of islands, namely Chagos Archipelago with its principal island Diego Garcia and three other coral islands Aldabra, Farquhar and Desroches, with a total population of 1500 Creoles of Mauritian and Seychelles extraction. She named this new colony as the British Indian Ocean Territory (BIOT). While granting independence to Mauritius, Britain struck a deal of purchasing the Chagos Archipelago for 2.5 million pounds sterling; Aldabra, Farquhar and Desroches, dependencies of the Syschelles, were purchased from that country for half a million pounds sterling. In early 1966, the United States of America entered into an agreement with Britain, as a partner in BIOT. The Anglo-American agreement covered a period of 50 years, and under the terms of the agreement the islands were made available as bases, anchorages, fuelling stations and communication centres in a joint defence agreement. In December, 1966, Britain agreed to transfer its jurisdiction over Diego Garcia and the other islands of BIOT to the U.S.A.

The Mauritian Government of the newly elected Prime Minister, Amerood Jugnauth, has now intensified its campaign of seeking the return of the Chagos Archipelago from the United States to Mauritius. Towards the end of October, 1982, the Mauritian Government banned the sale of vegetables and other essential supplies by its people to the United States forces stationed in the Indian Ocean.

Diego Garcia has become the symbol of American earnest to sustain a military presence in the area. By now the United States quietly has built up an arsenal of military supplies on the Indian Ocean Island of Diego Garcia and the Pentagon is making plans to create floating storage depots elsewhere around the world. The United States is increasing stockpiles of war materials on the strategic Indian ocean Islands of Diego Garcia to strengthen its ability to defend vital gulf oil wells.

The Indian Ocean, especially Diego Garcia, has become full of nuclear bases posing a threat to all the nearby countries; and, as observed by the late Prime Minister of India, Mrs. Indira Gandhi, the nuclear bases and the presence of fleets of many nations in the Indian Ocean has converted it into an area of growing tension and threat to all the nearby States.

Fissile Material Cut-off Treaty

The **Fissile Material Cutoff Treaty** (FMCT) is a proposed international *treaty* to prohibit the further production of *fissile* material for nuclear weapons or other explosive devices. The treaty has not been negotiated and its terms remain to be defined. According to a proposal by the *United States*, fissile material includes *high-enriched uranium* and *plutonium* (except plutonium that is

over 80% Pu-238). According to a proposal by Russia, fissile material would be limited to weapons-grade uranium (with more than 90% U-235) and plutonium (with more than 90% Pu-239). Neither proposal would prohibit the production of fissile material for non-weapons purposes, including use in civil or naval nuclear reactors.

In a 27th September, 1993, speech before the UN, President Clinton, called for a multilateral convention banning the production of fissile materials for nuclear explosives or outside international safeguards. In December, 1993, the UN General Assembly adopted resolution 48/75L calling for the negotiation of a "non- discriminatory, multilateral and international effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices." The Geneva based *Conference on Disarmament* (CD) on 23rd March, 1995, agreed to a establish a committee to negotiate "a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices.". However, substantive negotiations have not taken place.

In 2004, the United States announced that it opposed the inclusion of a verification mechanism in the treaty on the grounds that the treaty could not be effectively verified. On November 4, 2004 the United States cast the sole vote in the First Committee of the *United Nations General Assembly* against a resolution (A/C.1/59/L.34) calling for negotiation of an effectively verifiable treaty. The *Bush Administration* supported a treaty but advocated an ad hoc system of verification wherein states would monitor the compliance of other states through their own national intelligence mechanisms.

On April 5, 2009, U.S. President, *Barack Obama*, reversed the U.S. position on verification and proposed to negotiate "a new treaty that verifiably ends the production of fissile materials intended for use in state nuclear weapons." On May 29, 2009, the CD agreed to establish an FMCT negotiating committee.

However, *Pakistan* has repeatedly blocked the CD from implementing its agreed program of work, despite severe pressure from the major nuclear powers to end its defiance of 64 other countries in blocking international ban on the production of new nuclear bomb- making material, as well as discussions on full nuclear disarmament, the arms race in outer space, and security assurances for non-nuclear states.

THE LAW OF INTERNATIONAL INSTITUTIONS

CHAPTER XXVII

I. THE PERMANENT COURT OF ARBITRATION

Origin of Permanent Court of Arbitration

The Permanent Court of Arbitration owes its origin to two Conventions on the Pacific Settlement of International Dispute of 1899 and 1907. The first Convention (Hague Peace Conference of 1899) envisaged the organization of a Permanent Court of Arbitration with an international Bureau at The Hague to serve as its Secretariat and a Permanent Administration Council.

As on August 2009, 109 countries were party to these conventions.

Its Structure.—The structure of the Permanent Court of Arbitration embraces three institutions, *viz.*, (1) the panel of members of the Court, (2) an Administrative Council, and (3) an International Bureau.

Panel of Members.—Each of the States who was a party to either of the two Conventions of 1899 and 1907 is entitled to name at most four members "of known competence in questions of International Law, of the highest moral reputation, and disposed to accept the duties of arbitrator." Their appointments are for a period of six years and are renewable. Out of the list of the persons so designated by the States, which is duly notified to all the States parties to the Convention, the parties to a dispute are free to select the members of a tribunal. In case of disagreement on the selection of arbitrators, each of the parties was to appoint two, and the four thus selected were to appoint an umpire, all being chosen from the same list. The Second Convention, i.e., the Hague Conference of 1907 made some improvements in the scheme and provided for summary procedure in disputes about matters of secondary importance. Each of the parties at variance was to appoint two arbitrators as before, but only one could be its national, or chosen from among the persons selected by it as members of the Permament Court of Arbitration.

Administrative Council.—This Council consists of the Minister of Foregin Affiars of the Netherlands as president and of the diplomatic representatives accredited at The Hague by the States to the Convention.

Bureau.—The Bureau of the Court is established in the Peace Palace at The Hague and consists of the Secretary-General of the Permanent Court of Arbitration and a small staff. The Bureau conducts the administration and is in charge of the archives. It also carries on communications relating to the creation of Tribunals.

Finances.—The expenses of the Tribunal are borne by the contracting States in the fixed proportions. The Conventions provide that each party to an arbitration will pay its own expenses, the expenses of the Tribunal being borne by the parties in equal parts.

Nature of the Court.—Strictly speaking, the Permanent Court of Arbitration is not a court, but merely a panel of arbitrators out of which a tribunal could be formed. As such, it had no permanency in the real sense of the term. Manely O, Hudson observes that "the name of the Permanent Court of Arbitration is really a misnomer, and by creating exceptions which could not be fulfilled, it may have been responsible for deception of popular opinion. The Permanent Court of Arbitration is not really a Court. Nor is it in any accurate sense a tribunal, though it is often referred to as 'The Hague Tribunal' : instead it is a device for facilitating the creation of *ad hoc* tribunals. It is permanent only in the sense that a panel is permanently available from which arbitrators may be chosen, that the Administrative Council is constituted as a continuing body, and that a permanent International Bureau exists to facilitate the creation of tribunals.

Awards.—Twenty awards were given by the Permanent Court of Arbitration at The Hague between 1902 and 1932, including those of the North Atlantic Fisheries Disputes between U.S.A. and Great Britain (1910), Savarkar's Case in 1911 and the dispute between Norway and U.S.A. regarding requisition of Norwegian ships in the First World War (1922).

Cases Before the Tribunal

(1) North Atlantic Fisheries Cases (1910).—A special agreement was drawn up on January 27, 1909, whereby the American and British Governments agreed to refer certain questions to an Arbitration Tribunal chosen from the members of the Permanent Court of Arbitration at The Hague. The United States claimed the right to take fish on certain parts of Newfoundland and further claimed that regulation with regard to fisheries must be made jointly by Canada and Great Britain and U.S.A. and not by Great Britain and Canada alone. The tribunal by its award held that the liberties of fishery granted to the United States did not constitute an international servitude in their favour. It further held that the exercise of the right of Great Britain to make regulations without the consent of the United States was limited in that such regulation must be *bona fide* and must not be in violation of the treaty of 1818.

(2) Savarkar's Case (1911).—Savarkar, an Indian leader being a prisoner on a British mail steamer ship, Morea, escaped while being transported from England to India when the ship touched Marseilles. He was arrested by the French police and handed over to the captain of the ship without any extradition proceeding. The French demand for the restitution of the fugitive was refused by the British Government. The question that fell for consideration before the Tribunal consisting of five members of the Permanent Court of Arbitration was whether in conformity with rules of International law the fugitive should be restored to the French Government. The Tribunal answered the question in the negative, observing that there was no rule of International Law which imposed in such circumstances an obligation on the power which had in its custody a prisoner to restore him because a mistake had been committed by the foreign agent who delivered him up to that power.

Some other cases decided by the Court of Arbitration are *Pious Fund Case* (1902), *The Japanese House Tax Case* (1905), *Casablanca Case* (1909) *Maritime Frontiers Case* (1909) between Norway and Sweden, *Canevaro Case* (1912) against the Peruvian Government, *Russian Indemnity Case* (1912) between Turkey and

Russia, *Carthage and Manouba Case* (1913) between France and Italy, *Timor Case* (1914) between Netherlands and Portugal, *Religious Properties in Portugal case* (1920) between France, Great Britain, Spain and Portugal, *Dreyfus Case* (1921) between France and Peru, *Islands of Palmas Case* (1928) between U.S.A. and Netherlands and *Chevreau Case* (1931) between France and Great Britain.

The Permanent Court of Arbitration, which was maintained by the Second Hague Peace Conference of 1907, is still in existence, although no case has been referred to a Tribunal constituted under its provisions since 1932.

The Second Hague Peace Conference had envisaged the establishment of two bodies whose permanent character was much more marked than that of the Permanent Court of Arbitration : an International Prize Court and a Judicial Arbitration Court. These attempts, however, did not succeed.

CHAPTER XXVIII

II. THE PERMANENT COURT OF INTERNATIONAL JUSTICE

Creation of the Court.—The Permanent Court of International Justice was established in 1921 in accordance with the provisions of Article 14 of the Covenant of League of Nations, signed at Versailles on June 28, 1919. The Article provided : "The Council shall formulate and submit to the members of the League for adoption,, plans for the establishment of the Permanent Court of International Justice." The Council accordingly on February 13, 1920, invited a number of distinguished jurists to form a committee to prepare plans for the establishment of the Court and to report to the Council. They thereupon drew up a scheme, which, in the main, was adopted by the Council and the Assembly.

Members of the Court.—The Court was composed of a body of independent judges, 15 in number, regardless of their nationality from among persons of high moral character having the qualifications for appointment to the highest judicial offices in their respective countries. They were elected for nine years but could be re-elected. The election of the Judges was entrusted to the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration. An absolute majority of the votes cast was necessary for an election. The election was definitive only on the acceptance of the candidate. Article 31 of the Statute provided that Judges of the nationality of each contesting party had their right to sit in the case before the Court.

A quorum of nine Judges constituted the Court.

Article 21 provided that the Court shall elect its President and Vice-President for three years, and shall appoint its Registrar.

The seat of the Court was established at The Hague.

The Court began functioning on February 15, 1992, with 15 members, i.e., 11 Judges and 4 Deputy Judges when they made their solemn declarations.

Ad hoc judges

Article 31 of the statute sets out a procedure whereby *ad hoc* judges sit on contentious cases before the Court. This system allows any party to a contentious case to nominate a judge of their choosing. It is possible that as many as seventeen judges may sit on one case.

This system may seem strange when compared with domestic court processes, but its purpose is to encourage states to submit cases to the Court. For example, if a state knows it will have a judicial officer who can participate in deliberation and offer other judges local knowledge and an understanding of the state's perspective, that state may be more willing to submit to the Court's jurisdiction. Although this system does not sit well with the judicial nature of the body, it is usually of little practical consequence. *Ad hoc* judges usually (but not always) vote in favour of the state that appointed them and thus cancel each

other out.

Diplomatic Privileges.—Article 19 of the Statute provided that "the members of the Court when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."

Improvement on the Arbitration Court.—The Permanent Court of International Justice was a distinct improvement upon the Permanent Court of Arbitration. It was aptly remarked that the Court of Arbitration as envisaged in the 1899-Convention was "difficult, time-consuming and expensive to set in motion" and "afforded no basis for the comulation of body of jurisprudence. The Convention of 1907, although called for the creation of a Court of free and easy access, composed of Judges representing the various judicial systems of the world, and capable of ensuring continuity in arbitral jurisprudence", the Tribunal composed at The Hague was not a Permanent Court. Its Judges were also not a body of permanent officials. In fact, the Tribunal could only be called as Court by courtesy : it was simply a device for creating *ad hoc* tribunals. The Permanent Court of International Justice, on the other hand, was a Permanent Court composed of Judges and officials for a certain duration. Here there was no option to the States to select their own judges from a panel as was the case in the Permanent Court of Arbitration. Unlike the Court of Arbitration, the Permanent Court of International Justice could also give advisory opinions.

Access to Court.—Article 34 of the Statute provided that only States or Members of the League of Nations could be parties in cases before the Court. Article 35 opened the Court to the Members of the League of Nations and to States mentioned in the Annex to the Covenant but not members of the League of Nations, who become a party to the Protocol of Signature of December 6, 1920.

Jurisdiction of the Court.—Under Article 36 of the Statute, the jurisdiction of the Court comprised all cases which the parties to a dispute referred to it : bound themselves by a special provision in a treaty or convention in force; or by a declaration recognised the Court's jurisdiction "as compulsory *ipso facto* and without special agreement." Under Article 37 of the Statute, when a treaty or convention in force provided for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court was to be such tribunal. It was further provided that members might accept the optional clause by signing a separate protocol, the signature whereof involved the adjudication in the following matters, *viz.*, (1) the interpretation of a treaty; (2) any question of International Law; (3) the existence of any fact, which, if proved, would involve a breach of an international obligation; and (4) the nature of extent of the representation to be made for the breach of an international obligation.

More than 20 States gave their acceptance to the protocol, the British Government accepting jurisdiction of the Court in 1927 with some reservation.

The Court's advisory opinion could not be given *proprio motu* : The Court could act only when it had seisin of a request, which could emanate only from the Council or the Assembly of the League of Nations.

To sum up, the general principle of International Law as affirmed in the case of *Eastern Carelia* laid down that States could not be compelled to litigate their disputes without their own consent and that the jurisdiction of the Court was confined to cases voluntarily submitted to it, except where one of the

parties to a dispute had expressly bound itself in advance to accept the jurisdiction of the Court in the case of any particular dispute or class of dispute. The jurisdiction of the Court fell into voluntary, compulsory and advisory jurisdiction. The compulsory jurisdiction arose : (i) in consequence of special treaty arrangement, e.g., the interpretation of the Treaties of Peace concluded at the end of the First World War, disputes as to the interpretation of mandates, etc., and (ii) by virtue of making a general declaration under Article 36 of the Statute referred to above. The Court also acted as an adviser on points of law to the Council and Assembly of the League.

Laws Applicable.—Article 38 of the Statute set out four categories of sources of law which the Court was directed to apply, viz., (i) International Conventions; (ii) International Custom; (iii) General principles of law accepted by civilized States; and (iv) Judicial decisions and teachings of the most highly qualified publicists of the various nations.

Procedure.—French and English constituted the official languages of the Court, but the Court could authorise the use of another language also. The parties were represented by Agents and had the assistance of counsel. The procedure provided for presentation of written cases and counter-cases, and of an oral hearing by the Court of witnesses, experts, counsel, etc. All questions, including the judgment could be revised in exceptional cases on new facts coming to light. Reasons were given for the judgment. The judgment of the Court had no binding force in subsequent cases, and each judgment stood on its own merits and the Court could disregard its own previous decisions if it thought fit to do so.

Criticisms.—The International Court has been criticised with respect to its rulings, its procedures, and its authority. As with United Nations criticisms as a whole, many of these criticisms refer more to the general authority assigned to the body by member states through its charter than to specific problems with the composition of judges or their rulings. Major criticisms include :

"Compulsory" jurisdiction is limited to cases where both parties have agreed to submit to its decision, and, as such, instances of aggression tend to be automatically escalated to and adjudicated by the Security Council.

Organizations, private enterprises, and individuals cannot have their cases taken to the International Court, such as to appeal a national supreme court's ruling. U.N. agencies likewise cannot bring up a case except in advisory opinions (a process initiated by the court and non-binding).

Other existing international thematic courts, such as the *ICC*, are not under the umbrella of the International Court.

The International Court does not enjoy a full *separation of powers*, with permanent members of the Security Council being able to veto enforcement of even cases to which they consented in advance to be bound.

Important Decisions of the Permanent Court

(1) The S.S. Wimbledon.—On the 21st March, 1921, the *Wimbledon*, a British vessel, was refused access to Kiel Canal by the German authorities. The Court held that it was the duty of Germany to have permitted the passage of the *Wimbledon* through the Kiel Canal within the meaning of Article 380 of the Treaty of Versailles, which laid down that the Kiel canal shall be maintained free and open to the vessel of commerce and war of all nations at peace with

Germany.

(2) The S.S. Lotus.—On August 2, 1926, a collision occurred between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt* in consequence of which 8 Turkish nationals on board lost their lives. The Court observed : "International Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities with a view to the achievement of common aims. Restriction upon the independence of States cannot therefore be presumed."

The Court held that Turkey by instituting criminal proceedings in pursuance of Turkish law against Lt. Demons, officer of the watch on board the *Lotus* at the time of the collision, had not acted in conflict with the principle of International Law. The offence for which Lt. Demons had been prosecuted was an act of negligence or imprudence having its origin on board the *Lotus*, whilst its effects made themselves felt on board in *Boz-Kourt*. These two elements were legally entirely inseparable so much so that their separation rendered the offences non-existent, and as such each of the two States could exercise jurisdiction in respect of the incident as a whole.

(3) The Case concerning the Factory at Chrozow.—The Court observed : "It is a principle of law that any breach of an engagement involved an obligation to make reparation.....Reparation was the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.....The rules of law governing the reparation are the rules of International law in force between the two States concerned, and not the law governing relations between the States which has committed a wrongful act and the individual who has suffered damage.

The Court has indicated what this obligation amounted to. It observed :—"The reparation must, in so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed, if that act had not been committed. Restitution in kind, or, if that is not possible, payment of a sum corresponding to that value which a restitution in kind would bear, the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."

In the above passage, the Court only mentioned restitution or compensation as modes of reparation, but it is generally accepted that reparation may also take the form of satisfaction.

Some Latest Decisions

1. Certain Criminal Proceedings in France (*Republic of the Congo* v. *France*)—ORDER.—The International Court of Justice, composed as above, having regard to Article 48 of the Statute of the Court and to Article 89, paragraph 2, of the Rules of Court, having regard to the Application filed in the Registry of the Court on 9th December, 2002, whereby the Republic of the Congo, referring to Article 38, paragraph 5, of the Rules of Court, sought to institute proceedings against the French Republic in respect of a dispute arising out of certain criminal proceedings in France. Having regard to the letter from the Minister for Foreign Affairs of France, dated 8th April 2003, and received in

the Registry on 11th April, 2003, whereby France expressly consented to the jurisdiction of the Court to entertain the Application. Having regard to the entering of the case in the General List of the Court on 11 April 2003. Having regard to the Order of 17th June, 2003, whereby the Court adjudicated upon the request for the indication of a provisional measure submitted by the Republic of the Congo on 9th December, 2002. Having regard to the Order of 11th July, 2003, whereby the President of the Court, taking account of the agreement of the Parties, fixed 11th December, 2003, and 11th May, 2004, as the respective time-limits for the filing of the Memorial of the Republic of the Congo and the Counter-Memorial of the French Republic. Having regard to the Memorial and the Counter-Memorial duly filed by the Parties within those time-limits, Having regard to the Order of 17th June, 2004, whereby the Court, taking account of the agreement of the Parties and of the particular circumstances of the case, authorized the filing of a Reply by the Republic of the Congo and a Rejoinder by the French Republic, and fixed 10th December, 2004, and 10th June, 2005, respectively, as the time-limits for the filing of those pleadings. Having regard to the Orders of 8th December, 2004, 29th December, 2004, 11th July, 2005, and 11th January, 2006, whereby those time-limits, taking account of the reasons given by the Republic of the Congo and of the agreement of the Parties, were successively extended to 10th January, 2005, 11th July, 2005, 11th January, 2006, and 11th July, 2006, for the filing of the Reply, and to 10th August, 2005, 11th August, 2006, 10th August, 2007, and 11th August, 2008, for the filing of the Rejoinder.

Having regard to the Reply and the Rejoinder duly filed by the Parties within those time-limits, as last extended.

Having regard to the Order of 16th November, 2009, whereby the Court, referring to Article 101 of the Rules of Court and taking account of the agreement of the Parties and of the exceptional circumstances of the case, authorized the submission of an additional pleading by the Republic of the Congo followed by an additional pleading by the French Republic, and fixed 16th February, 2010, and 17th May, 2010, as the respective time-limits for the filing of those pleadings.

Having regard to the additional pleadings duly filed by the Parties within the time-limits so prescribed.

Having regard to the letters dated 9, February, 2010, whereby the Registrar, *inter alia*, informed the Parties that the Court, acting in accordance with Article 54, paragraph 1, of the Rules of Court, had fixed Monday 6th December, 2010, as the date for the opening of the oral proceedings in the case.

Whereas, by letter dated 5th November, 2010, and received in the Registry the same day by facsimile, the Agent of the Republic of the Congo, referring to Article 89 of the Rules of Court, informed the Court that his Government 'withdraws its Application instituting proceedings' and requested the Court 'to make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list'.

Whereas a copy of that letter was immediately communicated to the Government of the French Republic, which was informed that the time-limit provided for in Article 89, paragraph 2, of the Rules of Court, within which the French Republic could state whether it opposed the discontinuance of the proceedings, had been fixed as 12th November, 2010.

Whereas, by letter dated 8th November, 2010, and received in the Registry the same day by facsimile, the Agent of the French Republic informed the Court that her Government 'has no objection to the discontinuance of the proceedings by the Republic of the Congo'.

Places on record the discontinuance by the Republic of the Congo of the proceedings; and *Orders* that the case be removed from the List.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixteenth day of November, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of the Congo and the Government of the French Republic, respectively.

2. Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*)—Preliminary Objections.—Article 22 of CERD invoked by Georgia as a basis for the jurisdiction of the Court—Four preliminary objections to the jurisdiction of the Court raised by the Russian Federation.

First preliminary objection — Existence of a dispute.

First preliminary objection dismissed.

Second preliminary objection — Procedural conditions in Article 22 of CERD.

Second preliminary objection of the Russian Federation upheld—Court not required to consider other preliminary objections raised by the Russian Federation — Case cannot proceed to the merits phase.

Lapse of the Order of the Court of 15th October, 2008—Parties under a duty to comply with their obligations under CERD.

The Court, by twelve votes to four, rejects the first preliminary objection raised by the Russian Federation; by ten votes to six, *upholds* the second preliminary objection raised by the Russian Federation; by ten votes to six, *finds* that it has no jurisdiction to entertain the Application filed by Georgia on 12th August, 2008.

Other Cases.—Some of the other cases decided by the Permanent Court of International Justice are Danzig and the International Labour Organization, Eastern Greenland case, Interpretation of Greco-Turkish Agreement, German Settlers in Poland, Polish Upper Silesia case, Interpretation of the Statute of Memel, Interpretation of the Treaty of Lausanne, Jurisdiction of the Court of Danzig, Mavrommatis Concession case, Minority Schools in Albania and Nationality Decrees issued in Tunnis and Morocco (French Zones), Treatment of Polish Nationals in Danzig, Polish Postal Service in Danzig, and the Territorial Jurisdiction of the International Commission of the River Order.

The Permanent Court of International Justice sat for the first time in 1922, and its activities were interrupted by the Second World War. In 1946, it was dissolved in consequence of the dissolution of the League of Nations. Between 1922 and 1940, it dealt with 29 contentious cases which States had referred to it either by special agreement or by unilateral application, while 28 cases arose from requests for advisory opinions submitted by the Council of the League of Nations.

CHAPTER XXIX

III. THE INTERNATIONAL COURT OF JUSTICE

Its Genesis.—The International Court of Justice is an organ of the United Nations, inasmuch as its Statute forms an integral part of its Charter. The result is that all the members of the United Nations are *ipso facto* parties to the Statute. In this sense only it differs from the Permanent Court of International Justice, inasmuch as the latter was legally not an organ of the League of Nations and its Statute constituted a separate international agreement different from the Covenant. The 70-article Statute, setting out the organisation and procedures of the World Court, is almost a literal copy of the Statute of the Permanent Court of International Justice.

The Second World War interrupted the work of the Permanent Court of International Justice, mainly due to the invasion of Holland by Germany, but its work in the period between the two wars raised a new vista of hope of its capacity to develop International Law and to achieve pacific settlement of disputes. Its judgments bear eloquent testimony to its sincere efforts in easing international tension by elucidating thorny questions of International Law. The Permanent Court of International Justice was finally dissolved by the final Assembly of the League of Nations in April, 1946. Prior to this, the Charter of the United Nations had already provided for the establishment of the International Court of Justice as one of the principal organs of the United Nations. The present Court met for the first time at The Hague on April 3, 1946.

Article 92 of the Charter specifically provides that the International Court of Justice shall be the principal judicial organ of the United Nations which shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice.

Organization and Functioning of the Court.—The International Court of Justice like the Permanent Court of International Justice consists of fifteen judges under a President and a Vice-President, elected by the members of the Court from among themselves. The Judges of the Court are elected by the Security Council and the General Assembly of the United Nations from among the candidates first nominated by the national groups in the Permanent Court of Arbitration; or, in case of members of the United Nations not represented in the Permanent Court of Arbitration, by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of that Permanent Court. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the States which are parties to the present Statute, and to the members of the national groups, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of

candidates nominated by a group be more than double the number of seats to be filled. Before making these nominations, each national group is required to consult its highest Court of Justice, its legal faculties and schools of law, and its national academies devoted to the study of law. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court. At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and the principal legal systems of the world should be assured. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected. Provision has been made for a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council where one or more seats remain to be filled even after a third meeting.

The Judges are elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in International Law, but there are explicit provisions that no two Judges can be nationals of the same State. As a result of transitional provisions applied to the 1946 elections with a view to ensuring the gradual renewal of the Bench, the terms of five of the 15 Judges expire at the end of every three years. Judges of the Court are elected for nine years and may be re-elected. They cannot exercise any political or administrative functions or engaged in any other occupation of a professional nature. A judge may be removed by the unanimous vote of the other judges.

The quorum is of nine judges, and all decisions are determined by a majority of the judges present. The President of the Court has the deciding vote in case of a tie. The court elects its President and Vice-President every three years, and they are eligible for re-election. All decisions which are based on the principles of International Law, are final and there is no appeal.

"The seat of the International Court of Justice is at The Hague, Netherlands. A special agreement concluded between the United Nations and the Carnegie Foundation governs the terms on which the Court occupies the premises in the Peace Palace. The Court may, however, sit and discharge its duties elsewhere should it consider it advisable to do so. The official languages of the Court are French and English, but the Court may authorise a party to use another language.

Jurisdiction of the Court.—The Court exercises jurisdiction over States which are parties to the Statute over other States who deposit with the Court's Registrar a declaration signifying their acceptance of the Court's jurisdiction in accordance with the Charter and Statute and Rules of the Court, undertaking to comply in good faith with the Court's decisions and acceping the obligations under Article 94 of the Charter. Article 94 of the United Nations Charter reads thus :

"Each member of the United Nations undertakes to comply with the decisions of the International Court of Justice in any case to which it is a party."

The jurisdiction of the Court is divided into three parts, viz., (1) voluntary, (2) obligatory and (3) advisory.

(i) Voluntary Jurisdiction.—Article 36 of the Statute of the Court provides that its jurisdiction comprises all cases which the parties refer to the Court (by agreement). The agreement to refer the dispute may be made by both the parties or one party only may refer the matter to the Court and the other party may signify his assent to the reference.

(ii) Obligatory Jurisdiction.—Paragraph 2 of Article 36 provides that the States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning : (a) the interpretation of a treaty; (b) any question of International Law; (c) the existence of any fact which, if established would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to make for the breach of an international obligation.

The above declarations made by the States provide for compulsory jurisdiction by agreement, inasmuch as the Court can exercise jurisdiction only when both parties to the dispute have made the declaration as provided in paragraph 2 of Article 36. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

The Court has also compulsory or obligatory jurisdiction where the parties concerned are bound by a treaty or convention under which they agreed to refer the matter to a tribunal to have been instituted by the League of Nations or to the Permanent Court of International Justice and by virtue of Article 37 of the Statute, such matters are automatically referred to the International Court of Justice. There are trusteeship agreements which contain a provision to refer the matter to the International Court of Justice in case of dispute between the administrating authority and another member of the United Nations relating to the interpretation or application of the agreement. Then, certain specialised agencies also contain provisions to refer their disputes to the Court. But here again it may be stated that such disputes are submitted to the Court only by means of an agreement between the administering authority and the U.N. or among the specialised agencies.

As to matters specially provided for in the Charter, paragraph 3 of the Article 36 provides that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

The general principle of International Law so far as the jurisdiction of the Court is concerned may be summed up thus : The States cannot be compelled to litigate their disputes before the Court without their own consent and the jurisdiction of the Court is confined to cases which are voluntarily submitted to it, except where one of the parties to the dispute has expressly bound itself in advance to accept the jurisdiction of the Court in respect of any particular dispute or class of disputes.

(iii) Advisory Jurisdiction.—The Court may give an advisory opinion on any legal question referred to it by the Security Council or the General Assembly (Art. 65). The other organs of the United Nations and the Specialised Agencies, when empowered by the General Assembly, can ask for advisory opinions on

legal questions. The relevant article on this point is Article 96 of the Charter, which reads thus :

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Most of the agreements that enable certain specialised agencies to work in close contact with the United Nations contain provisions which authorise these agencies to request advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities.

Such advisory opinion is not binding upon the parties, but States may by treaty or agreement bind themselves in advance with regard to such advice as may be tendered by the Court. This has been done in the treaty known as the General Convention on Privileges and Immunities of the United Nations, Section 30 of which provided that all differences arising out of the interpretation or application of the present convention between the United Nations on the one hand and a member on the other hand shall be referred to the International Court of Justice for an advisory opinion on any legal question, and the opinion given by the Court shall be accepted as decisive by the parties.

"The advisory jurisdiction", observes Oppenheim, "has in fact proved to be much more fertile and more important than was originally contemplated. The number of advisory opinions given by the Court almost equals that given by way of judgments."

Formation of Chambers.—Under the provisions of paragraph 1 of Article 26 of the Statute of the International Court of Justice, the Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

Under the aforesaid provisions of the Statute of the International Court of Justice, a seven-member Chamber for Environmental Matters has been established. The members of the Chamber were elected by secret ballot to serve for an initial term of six months as on 6th August, 1993.

(A) Procedure of the Court in contentious cases.—Cases are brought before the Court either by a notification of the special agreement or by a written application addressed to the Registrar, founded on a clause providing for compulsory jurisdiction. These documents have to specify the subjects of the dispute and the parties. The Registrar forthwith communicates the special agreement or application to all concerned and also the members of the United Nations and to any other States entitled to appear before the Court.

The various stages of the proceedings are laid down in the Rules of Court adopted in 1946, amended in 1972 and completely revised in 1978. The parties are represented by agents and may be assisted by counsel and advocates. The procedure with regard to the hearing of cases consists of proceedings in two parts, viz., written and oral. The written part of the proceedings consists of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies, along with papers and documents filed in support of

the same. These papers are filed within time-limits fixed by Order. The oral part of the proceedings consists of the hearing by the Court, at public sittings, of the agents, counsel, advocates, witnesses and experts.

The full Court sits for the decision of a dispute unless otherwise provided in the Statute. A quorum of nine Judges constitutes the Court.

After the written and oral proceedings are over, the Court holds deliberations *in camera* and prepares its judgment, drafted in the two official languages of the Court and delivers it within a few weeks. All questions, including the judgment, are decided by majority. In the event of an equality of votes, the President or the Judge who acts in his place has a casting vote.

A judgment of the Court must give the reasons on which it is based. Judges who are unable to concur in the decision of the Court, or in the reasons given in support of it, may attach to the judgment a statement of their separate or dissenting opinions.

Unless otherwise decided by the Court, each party bears its own costs.

States are under no compulsion to recognize the jurisdiction of the Court, but where their consent to it has been established in a given case, it is incumbent upon them to comply with the Court's decisions therein. Article 94 of the United Nations Charter provides that if a party to a case fails to perform its obligations under a judgment of the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

A judgment of the Court is final and without appeal. The judgment may be revised by the Court only upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision and provided such ignorance was not due to negligence. A request for an interpretation of the judgment can also be made in the event of dispute as to its meaning or scope.

Judgments of the Court are not legally binding in subsequent cases and each judgment stands on its own merits. The Court can with impunity disregard its own previous decisions if it thinks fit to do so.

(B) Procedure of the Court in exercise of Advisory Jurisdiction.—Questions upon which the advisory opinion is asked are laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question. [Art. 65(2)]. The procedure is that the Registrar has forthwith to give notice of the request for an advisory opinion to all States to appear before the Court. He has also, by means of a special and direct communication, to notify any State entitled to appear before the Court or international organization considered by the Court, or should it not be sitting, by the President as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other States or organizations in the form, to the extent, and within the time limits which the Court, or should it not be

sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to States and organizations having submitted similar statements (Art. 66). The Court has to deliver its advisory opinion in open Court, notice having been given to the Secretary-General and to the representatives of members of the United Nations, of other States and of international organisations immediately concerned. (Art. 67). In the exercise of its advisory functions, the Court is further guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable. (Art. 68).

Immunities of the Judges.—The members of the Court, when engaged on the business of the Court, enjoy diplomatic privileges and immunities. The agents, counsel, and advocates of parties before the Court also enjoy the privileges and immunities necessary for the independent exercise of their duties. The salaries, allowances and compensation of the members of the Court and the Registrar are free of all taxation.

In order to protect the members of the Court against any political pressure, it is provided that no judge can be dismissed unless, in the unanimous opinion of the other Judges, he has ceased to fulfil the required conditions.

Remuneration of Judges.—Each member of the Court shall receive an annual salary. The President shall receive a special annual allowance. The Vice-President shall receive a special allowance for every day on which he acts as President. These salaries, allowances and compensation shall be fixed by the General Assembly which may not be decreased during the term of office. The above salaries, allowances and compensation shall be free of all taxation. (Art. 32).

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly. (Art. 33).

The Law applied by the Court.—Article 38(1) of the Statute provides that the International Court of Justice, whose function is to decide in accordance with International Law such disputes as are submitted to it, shall apply—

(a) international conventions (and treaties), whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law :

(c) the general principles of law recognized by civilized nations;

(d) 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.

According to Article 59 of the Statute, the decision of the Court has no binding force except between the parties and in respect of the particular case.

Interim or Provisional Measures.—Article 41 of the Statute of the Court provides for provisional measures which the Court might indicate pending the decision of the dispute. It reads :

"1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of measures suggested shall

forthwith be given to the parties and to the Security Council."

(a) Anglo-Iranian Oil Company Case.—In the Anglo-Iranian dispute over the nationalisation of Persia's oil industry, Britain along with the Anglo-Iranian Oil Company applied to the International Court of Justice for provisional steps to be taken to preserve her rights in Persia until a decision was reached on the merits. In the meantime, Persia ordered seizure of the Anglo-Iranian oil installations by virtue of the decree issued by it on June 23, 1951. The International Court of Justice by its ruling of July 5, 1951, upheld the British Government's plea for a freeze in the Persian oil dispute. The Court in its majority opinion decided that both Governments should refrain from measures which would prevent the flow of oil on the same basis as before May 1, when Persia passed the nationalisation law. The Court recommended the appointment of a board of supervision composed of two members from each Government and a fifth who should be national of a third State chosen by agreement between Britain and Persia for ensuring that operations of the oil industry continued unhampered. The Persian Government rejected the ruling of the International Court of Justice on the Anglo-Iranian oil question on the plea that the Court had no jurisdiction over the matter, inasmuch as the order amounted to a virtual injunction by the Court against a sovereign State directing it to adjust its internal affairs according to the dictates of the Court.

(b) Court's orders on release of American hostages in Iran.—On December 15, 1979, the International Court of Justice, pursuant to Article 41 of the Statute, indicated, which indication in no way prejudges the question of jurisdiction of the Court to deal with the merits of the case, by calling for the immediate release of the American hostages in Iran and restoration of the U.S. embassy premises to the possession of the United States authorities. This was one of the provisional measures indicated in the order issued by the Court pending its final decision in the proceeding instituted on November 29, 1971, by the United States against the Republic of Iran. Iran boycotted the proceedings claiming that the Court had no jurisdiction in the case.

(c) Provisional Measures of interim protection granted to Nicaragua.—Nicaragua in its Application to the International Court of Justice charged the United States with using military force against Nicaragua and intervening in its internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law. Nicaragua requested the Court to indicate provisional measures of interim protection, pending the final decision of proceedings initiated on 9th April, 1984. According to Nicaragua, the activites of a mercenary army of more than 10,000 men, recruited, paid, equipped, supplied, trained and directed by the United States, combined with the direct action of United States Central Intelligence Agency personnel and United States armed forces, had resulted in the deaths of more than 1,400 Nicaraguans, serious injury to more than 1,700 others and property damages in excess of $200 million.

The Court ruled that Nicaragua's rights to sovereignty and political independence should not be jeopardised by any military or paramilitary activities, and that the United States should cease restricting access to and from Nicaragua's ports, particularly through the laying of mines. The Court indicated these provisional measures in an Order made on 10th May, 1984.

Execution of Judicial Decisions.—This brings us to the question of

execution of the decisions of the International Court of Justice. The Statute of the Court makes no provision for the enforcement of judicial decisions. All that Article 94(2) of the Charter of the United Nations provides is that—

"If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The provisions referred to above do not make it obligatory upon the Security Council to enforce the judgment of the Court against the recalcitrant party. They only indicate a procedure of appeal to the Security Council, which may either make recommendations or decide upon measures to be taken to give effect to the judgment. Now the recommendations of the Security Council require a majority of 9 (and before the amendment of Article 27, seven) members including the votes of the permanent members. In case the Security Council decides upon enforcement measures to give effect to the judgment of the Court, it may do so under Artice 41 or 42 of the Charter. In order to give effect to its decisions, Article 41 empowers the Security Council to take measures not involving the use of armed force, which may include interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severance of diplomatic relations. Article 42 comes into operation when the Security Council considers that measures provided for in Article 41 are inadequate and it may in that case take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, etc. Kelsen, however, observes that "in view of the fact that the Charter, in the case of non-compliance with a judgment of the Court, institutes a procedure of appeal, it is hardly possible to consider such non-compliance as threat to, or breach of, the peace." "There is," observes Oppenheim, "room for clarifying Article 94 of the Charter so as to make the action of the Security Council mandatory and not merely permissive, and for amending the Charter so as to free the action of the Security Council in this respect from the shackles of the requirement of unanimity of its permanent members."

Article 94(2) suffers from ambiguity in its relationship with the rest of the Charter. The Security Council may take recourse to force only if peace is threatened. Certainly not every act of non-compliance constitutes an imminent threat to peace. The matter has not been clarified by doctrine or practice. Unfortunately, applications for enforcement directives in the United Nations can be blocked. Directives from regional organizations have higher probability of success. Certain organizations enjoy a general mandate to enforce, but have neither direct control over assets nor the capacity to acquire it. Effective power is primarily vested in States. These factors have reduced the judgment-enforcing authority of the International Court of Justice.

Contentious Cases before the Court.—Between 1946 and January 1, 1983, the International Court of Justice dealt with 48 contentious cases, delivering 42 Judgments and making 174 Orders.

A. The Corfu Channel Case (*United Kingdom* v. *Alabania*).—On October 22, 1946, two British warships passing through the Strait of Corfu were struck with mines in Albanian territorial waters, with the result that H.M.S. *Saumarez* sank while H.M.S. *Volage* was seriously damaged. On the Channel being swept

by the British navy on November 12 and 13 without obtaining the consent of the Albanian authorities, a newly laid field of anchored mines was discovered at the same place where the explosions had occurred in October. Great Britain alleged that Albania was responsible for the presence of the mines in the Channel.

On the dispute being referred to the International Court of Justice, it found that the People's Republic of Albania was responsible under International Law for the explosions which occurred on October 22, 1946, in the Albanian waters, and for the damage and loss of human life resulting therefrom on account of having failed to warn the British warships of the existence of minefield in its waters. This responsibility, according to the Court's opinion, rested on certain and well-recognised principles, viz., elementary consideration of humanity, even more exacting in peace than in war, on the principle of the freedom of maritime communications and every State's obligations not to allow knowingly its territory to be used for acts contrary to the rights of other States. The Court further held that in accordance with well-recognised international custom, States in peace time have a right to send their warships through straits used for international navigations without the previous authorisation of a coastal State provided the passage is innocent unless provided otherwise in an international convention. The right of innocent passage was held to imply an obligation on the territorial State not to permit its waters to be used in such a way as to cause damage to the interests of other States. This included, in particular, the duty to notify, for the benefit, of shipping in general, the existence of any dangers to navigation of which it was aware. The Court further held that the United Kingdom did not violate the sovereignty of the People's Republic of Albania by reason of the acts of the British Navy in Albanian waters on October 22, 1946. It also held that by reason of the act of the British Navy in the Albanian waters in the course of the operation of November 12 and 13, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania and that this declaration by the Court constituted in itself appropriate satisfaction. In the result Albania was held liable to pay pounds 8,43,947 to the United Kingdom.

B. The Anglo-Iranian Oil Company (*United Kingdom* v. *Iran*).—The case has been discussed in this chapter earlier and may be referred to there.

C. Haya de la Torre's Case.—Victor Raul Haya de la Torre, a Peruvian national and a political leader accused of having instigated a military rebellion, was granted asylum in the Colombian Embassy at Lima. On the matter being referred to the International Court of Justice, the Court observed that although the Havana Convention expressly prescribed the surrender of common criminals to the local authorities, no obligations of the kind existed in regard to political offenders. It, however, reiterated its earlier view that asylum had been irregularly granted and that, although on this ground Peru was entitled to demand its termination, Columbia was not to surrender the refugee.

D. Right of passage over Indian Territory (*Portugal* v. *India*).—In the case relating to the dispute with Portugal on the right of access of Portugal to certain territories in India, filed with the International Court of Justice on the 22nd December, 1955, India challenged the jurisdiction of the Court on four legal and two legal and factual grounds saying that Portugal violated Court procedure in the way she submitted her case and denying record of any rights of passage granted to Portugal in the past. On the 26th November, 1957, the

International Court of Justice, however, rejected four of the six preliminary objections made by India to the Court's jurisdiction to hear the case. Two of the objections were not decided upon that date but were left for consideration at a later hearing together with the merits of the case.

Decision on merits.—On the merits, the International Court of Justice giving its judgment on the 12th of April, 1960, in Portugal's case against India, ruled that Portugal had a right of passage to her enclaves in India, for private persons subject to India's regulation, but no such right for armed forces. The Court found that India had not acted contrary to its obligations with respect to the passage of private persons. It overruled two preliminary objections of India and declared that it had Jurisdiction in the dispute between the two countries.

The Court found that Article 17 of the 1779-Treaty was valid but did not grant sovereignty to Portugal. Portugal had invoked the treaty as a basis of its sovereignty over Dadra and Nagar Haveli and claimed that it had acquired sovereignty from the Marathas under Article 17 of the treaty. India had contended that it was given by the Marathas as mere jagirs, under their own sovereignty for Rs 12,000 and that they were later usurped by the Portuguese. The Court observed that the Treaty of 1779 and the *Sanads* of 1783 and 1795 were intended by the Marathas to effect in favour of the Portuguese only a grant of a *jagir or Saranjam*, and not to transfer sovereignty over the villages to them. The fact that the Potuguese had access to villages for the purpose of collecting revenue and in pursuit of that purpose exercised such authority as had been delegated to them by the Marathas could not, in the view of the Court, be equated to a right of passage for the exercise of sovereignty.

Portugal claimed a right of passage to the extent necessary for the exercise of its sovereignty over the enclaves, without any immunity and subject to the regulation and control of India. The Court held that Portugal had in 1954 a right of passage over intervening Indian territory between coastal Daman and the enclaves and between the enclaves, in respect of private persons, civil officials and goods in general, to the extent necessary as claimed by Portugal, for the exercise of its sovereignty over the enclaves, and subject to the regulation and control of India.

The Court was of the view that no right of passage in favour of Portugal involving a correlative obligation on India had been established of armed forces, armed police, and arms and ammunition.

Having found that Portugal had in 1954 a right of passage over intervening Indian territory between Daman and the enclaves in respect of private persons, civil officials and goods in general, the Court next considered whether India had acted contrary to its obligation resulting from Portugal's right of passage in respect of any of these categories.

In the result, the Court by eleven votes to four found that Portugal had in 1954 (i.e., before the successful insurrection of the people of Dadra and Nagar Haveli) a right of passage over the intervening Indian territory between the enclaves of Dadra and Nagar Haveli and the coastal district of Daman and between these enclaves, to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the regulation and control of India, in respect of private persons, civil officials and goods in general; by eight votes to seven found that Portugal did not have in 1954 such a right of passage in respect of armed forces, armed police, and arms and ammunition; and by nine votes to six found that India had not acted contrary to its obligations resulting from Portugal's right of passage in respect of private persons, civil officials and goods in general.

The Soviet Judge of the International Court of Justice, Judge F.I. Kojevnikov, stated in a separate declaration on the Portuguese-Indian dispute that he could concur neither in reasoning nor the operative part of the judgment on the first and second points, for he was of the opinion that in this case the Court had no jurisdiction to examine and adjudicate upon the merits of the dispute. The Soviet Judge said that in his opinion "Portugal did not possess and does not possess any sovereign right over Dadra and Nagar Haveli and since it never had and has not now any right of passage over Indian territory to these regions and between each of them."

E. South-West Africa (*Ethiopia and Liberia* v. *South Africa*).—This case has been discussed in Chapter XXIV "The United Nations", in Section 4, "The Trusteeship Council."

F. United States Diplomatic and Consular Staff in Tehran—*United States of America* v. *Iran*.

On November 4, 1979, several hundred Iranian students invaded the U.S. embassy, seized a group of hostages and demanded that the exiled Shah be sent back from the United States. On the basis of the facts, the invasion of embassy premises, the seizure of United States diplomatic and consular staff and their continued detention, the United States Government invoked jurisdictional provision in certain treaties as bases for the jurisdiction of the International Court of Justice in the present case and requested the Court to adjudge and declare that the Government of Iran in tolerating, encouraging and failing to prevent and punish the conduct violated its international legal obligations to the United States as provided by the provisions of the Vienna Convention on Diplomatic Relations, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.

By order dated 15th December, 1979, and adopted unanimously, the Court indicated provisional measures in the case. It indicated pending its final decision in the proceedings instituted on 29th November, 1979, by the Islamic Republic of Iran that the Government of the Islamic Republic of Iran should immediately ensure that the premises of the United States Embassy, Chancery and Consulates be restored to the possession of the United States authorities under their exclusive control, ensure the immediate release, without any exception, of all persons of United States nationally who are or have been held in Embassy of the United States of America and afford to all the diplomatic and consular personnel of the United States the full protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran.

Decision.—On the merits, the Court : (1) by thirteen votes to two, decided that the Islamic Republic of Iran, by the conduct which the Court set out in its judgment, had violated in several respects, and was violating, obligations owed by it to the United States of America under International Conventions in force between the two countries, as well as under long-established rules of general

international law;

(2) By thirteen votes to two, decided that the violations of these obligations engaged the responsibility of the Islamic Republic of Iran towards the United States of America;

(3) Unanimously decided that the Government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of November 4, 1979, and what followed from those events, and to the end must immediately terminate the unlawful detention of the United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961-Vienna Convention of Republic on Diplomatic Relations); must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport; and must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in the Teheran and of its Consulates in Iran;

(4) Unanimously decided that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness;

(5) By twelve votes to three, decided that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of November 4, 1979, and what followed from these events; and

(6) By fourteen votes to one, decided that the form and amount of such reparation, failing agreement between the parties shall be settled by the Court, and reserved for that purpose the subsequent procedure in the case.

G. Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua* v. *United States of America*).

The present was the third opinion rendered by the International Court of Justice on June 27, 1986. In its first order dated May 10, 1984, the Court had rejected the request of the United States that the case be struck off from the list for lack of jurisdiction. In its second order on November 26, 1984, the Court had rejected the United States jurisdictional objections and found that it had jurisdiction over the dispute under the optional clause Article 36(2) of the Statute of the International Court of Justice, and under the Treaty of Friendship, Commerce and Navigation, dated January 21, 1956, between the two countries. After the Court's second opinion, the United States had withdrawn itself from further participation of the proceedings of the Court.

On June 27, 1986, the International Court of Justice at The Hague ruled that the United States had breached international law by mining Nicaraguan waters and backing the anti-Sandinista rebels and said that Washington should pay Managua compensation.

The judgment was announced just two days after the U.S. House of Representatives approved a 100-million-dollar dominated aid package for the rebels, known as Contras, and 300 million dollars in aid for Nicaragua's neighbours Guatemala, Coasta Rica, Honduras and EI Salvador. Under the plan, the US Government for the first time would give military support to the rebels known as Contras.

The Hague Court, which upheld the Nicaraguan complaint by a large

majority, said that Washington had breached international law by laying mines in the internal or territorial waters of Nicaragua during the first month of 1984. It observed that the United States, by training, arming, equipping, financing and supplying the Contra forces or otherwise encouraging, supporting and aiding and paramilitary activities in and against Nicaragua, had acted against Managua in breach of its obligation under customary international law not to intervene in the affairs of another State. It added that Washington, by certain attacks on Nicaraguan territory in 1983-84, had also acted in breach of its obligation under customary international law not to use force against another State.

The Court further observed that Washington was under a duty immediately to cease and to refrain from all such acts and was under an obligation to make reparation to Nicaragua for all injury caused. It also called on both countries to seek a solution to their disputes by peaceful means in accordance with international law.

Washington had refused to participate in the hearings which ended on September 20, 1985, and on October 7, rejected the jurisdiction of the Court, saying that it was being used for political purposes. On June 27, 1986, the United States categorically rejected the World Court's ruling that it had broken international law helping the Contra rebels overthrow the Sandinista Government in Nicaragua and dismissed the idea of reparation noted in the verdict.

The Court also found that the United States had violated its obligations under the bilateral Treaty of Friendship, Commerce and Navigation, 1956.

H. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta, 1985 ICJ Rep 13).

The Socialist People's Libyan Arab Jamahiriya (Libya) and the Republic of Malta submitted their dispute, pursuant to a special agreement, to the International Court of Justice concerning the delimitation of the continental shelf underlying the Mediterranean Sea between the two States.

The International Court of Justice found that the law applicable to the case in dispute was customary law, inasmuch as there were no relevant treaties which could bind the parties. The Court referred to the 1982-United Nations Conventions on the Law of the Sea which had been signed by both the parties, although the Convention had not come into force, and held that while the Convention set a goal that the delimitation of disputed areas of a continental shelf was to be decided on an equitable basis, the Convention remained silent as to the method to be followed to achieve the goal.

The Court finally held, in its verdict delivered on June 3, 1985, that, in general, the location of a line of delimitation should take into account the distance between the two coasts and the disparity in the lengths of the relevant sections of those coasts, and that an equitable result could be obtained in the present case by adjusting toward Malta a line equidistant between the two States, thus taking into account Libya's greater coastal exposure and Malta's relatively small size.

The Court began the process of delimitation by tracing a provisional median line between the two coasts. It adjusted the median line, out of equitable consideration, by eliminating from the baseline formed by the Maltese coast that portion that extended to Malta's uninhabited rock.

Recent Decision.—In the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, on April 8, 1993, the Court on Bosnia and Herzegovina's request for the indication of provisional measures of protection issues the Order, in which it called upon the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately to take all measures within its power to prevent commission of the crime of genocide. The Court also ordered that both Parties should ensure that no action is taken which might aggravate of the crime of genocide, or render it more difficult of solution.

Hearings in the case *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* were held in January, 1993. The Court delivered a judgment on the merits on 14th June, 1993, in which it observed that the continental shelf and fishery zones are two separate and conceptually distinct zones for delimitation purposes. It noted, however, that the task for the court, under the law applicable to the delimitation of either zone, is to achieve an "equitable solution". The Court, in its judgment, divided delimitation line in each of these zones.[1]

Advisory Cases.—Between 1946 and January 1, 1983, the Court dealt with 17 requests for advisory opinion, delivering 18 such opinions and making 25 Orders in the cases concerned.

A. Condition of Admission of a State to Membership in the United Nations.—During 1946 and 1947, many States were refused admission to the membership of the United Nations mostly on account of the use of veto by the Soviet Union in the Security Council. In the case of the ex-enemy States of Eastern Europe, Soviet Russia suggested that she would refrain from using her veto if other members of the Council allowed the applications of those States which had the support of the Soviet Government. On November 17, 1947, the General Assembly requested the International Court of Justice to give an advisory opinion on the question whether a member of the United Nations called upon to vote on the admission of a State to members in the United Nations, could or could not make its consent to the admission dependent on the admission of other States to membership in the United Nations. The Court by nine votes to six answered the question in the negative.

B. Competence of the General Assembly for the admission of a State to the United Nations.—On November 22, 1949, the General Assembly adopted a resolution requesting the International Court of Justice to give its advisory opinion on the question whether the General Assembly could by its own decision admit a State to the membership of the United Nations in case the Security Council failed to make the recommendation. The Court by 12 votes to 2 answered the question in the negative.

C. Reparation for injuries suffered in the Service of the United Nations.—The United Nations Mediator in Palsetine, Count Folke Bernadotte, while serving as the head of the truce team, was assassinated on September 17, 1948. The United Nations General Assembly thereupon submitted to the International Court of Justice for an advisory opinion the question whether in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has or

1. Report on the work of the Organization by the Secretary-General of the United Nations, September, 1993.

has not the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused : (a) to the United Nations, and (b) to the victim or to persons entitled through him ? The Court gave an affirmative answer to both parts of the question.

D. International Status of South-West Africa.—The case has been discussed in Chapter VII "States in General."

E. Voting Procedure on Questions relating to reports and Petitions concerning the Territory of South-West Africa.—In the advisory opinion given on July 11, 1950, the Court stated that the Union of South Africa continued to have international obligations binding upon it in respect of the territory of South-West Africa and that the supervisory functions were to be exercised by the United Nations. That opinion was accepted by the General Assembly as a basis for supervision over the administration of the territory.

In 1954, a Committee of the General Assembly drafted sets of rules one of which, rule F, read as follows : "Decisions of the General Assembly on questions relating to reports and petitions concerning the territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations."

On November 3, 1954, the General Assembly requested an advisory opinion from the Court on the following questions :

1. Whether the above-quoted rule F on the voting procedure to be followed by the General Assembly was a correct interpretation of the advisory opinion of the Court of July 11, 1950; and

2. If that interpretation was not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the territory of South-West Africa ?

In its opinion delivered on June 7, 1955, the Court pointed out that the Assembly primarily concerned with the question whether rule F corresponded to a correct interpretation of the following passage from the Court's opinion of 1950 : "The degree of supervision to be exercised by the General Assembly should not, therefore, exceed that which applied under the Mandate System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." The words "the degree of supervision", said the Court, "related to the extent of the substantive supervision and not to procedural matters, such as the system of voting which was applicable in the time of the League of Nations. Consequently, rule F could not be regarded as relevant to the degree of supervision." The word "procedure" used in the second part of the passage in question referred to those procedural steps whereby supervision was to be effected; but the voting system of the General Assembly was not in contemplation when the Court used those words. Moreover, in its opinion of 1950, the Court had said that the General Assembly derived its competence to exercise its supervisory functions from the Charter; it was, therefore, within the framework of the Charter that the Assembly must find the rules governing the making of its decisions in connection with those functions.

For these reasons, the Court was unanimously of the opinion that rule F corresponded to a correct interpretation of the opinion of 1950. The Court

declared that since the first question had been answered in the affirmative, it was not necessary for the Court to consider the second question.

F. Admissibility of hearings of petitioners by the Committee on South-West Africa.—On December 3, 1955, the General Assembly, on behalf of the Committee on South-West Africa, requested an advisory opinion from the Court to decide whether it was permissible for the Committee to grant oral hearings to petitioners, and if so whether this would be consistent with the advisory opinion of the Court given on July 11, 1950.

The Court referred to its advisory opinion of 1950, in which it had declared that the obligations of the Mandatory Power continued unimpaired except that the supervisory functions formerly exercised by the Council of the League of Nations were now to be exercised by the United Nations. The obligations of the mandatory Power could not be extended beyond those which had been obtained under the mandates system. The General Assembly should also conform as far as possible to the procedure followed by the Council of the League.

Under the League of Nations, no oral hearings were at any time granted to petitioners. Nevertheless, the Council of the League, having established the right of petition and having regulated the manner of its exercise, had been, in the opinion of the Court, competent to authorize the Permanent Mandates Commission to grant oral hearings to petitioners, had it seen fit to do so.

In conclusion, the Court held that it would not be inconsistent with the opinion of 1950 for the General Assembly to authorize a procedure for the Committee on South-West-Africa to grant oral hearings to petitioners who had already submitted written petitions, provided that the Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the mandated territory.

As observed by the Secretary-General of the United Nations in his Report on the Work of the Organisation in September, 1993, it will appear from the incidence of cases of considerable political as well as legal importance that the Court exists not only to settle questions of law but forms an integrated part of the United Nations peace efforts. Seen in the context, the contentious and advisory jurisdictions of the Court are seen to be complementary.

Contribution of International Court of Justice to the Development of International Law

In view of various decisions of the court, it can be concluded that International Court of Justice has played a significant role to the development of International Law. This court has made certain pronouncements on territorial disputes and on diverse issues like asylum, nationality, trusteeship, fishery rights, law of the sea, the right of passage, the status of foreign investments and even in respect of sovereignty and the non-use of force. In dealing with all these issues, the court contributed to the development of International Law in two ways. Firstly, it interpreted and applied the existing rules in such a way so as to resolve issues affecting the life of the nations. For example, it decided the cases relating to maritime zones. Further, the court condemned colonisation and reaffirmed the principle of self-determination as provided under U.N. Charter. Secondly, where no rule of international law existed, the court evolved certain new principles. For instance, in Reparation case, the Court stated that United

Nations is an international person. The U.N.O. has been exercising and enjoying functions and rights which can only be explained that it has international personality and capacity to work on the international sphere. The U.N.O. can now bring claim in respect of injuries to its employees and agents through the International Court of Justice. The Court decided the cases regarding "Conditions of admission of States to the membership of U.N." and also the "Competence of the General Assembly for admitting a State to the U.N.O."

In this way, the International Court of Justice has been able to make progressive development of International Law in following ways : firstly, when there is no International treaty or convention on a particular point in dispute, the court under Article 38 of the Statute of the International Court of Justice, can apply general principles of law recognised by the civilised States and thereby contribute to the progressive development of International Law. Secondly, the International Court of Justice clarified the vague rules of International Law. The court contributed directly towards ensuring respect to International Law. Further, the court cleared obscurities and doubts besides removing the lacunae of International Law. In the case concerning continental shelf (*Libya* v. *Malta*), the court observed : "the U.N. Convention on Law of Sea, 1982, has not yet come into force, and therefore not operative as treaty law. Nevertheless, it cannot be denied that this Convention is of major importance, having been adopted by an overwhelming majority of States. Hence, it is the duty of the court to consider independently upto what degree the relevant provisions are binding upon as a rule of Customary International Law." In an earlier case, the International Court of Justice observed that "The Exclusive Economic Zone may be regarded as part of modern International Law, as it is a part of recent U.N. Convention on Law of Sea, 1982."

Thirdly, although Article 59 of the Statute of the International Court of Justice undermines or even prohibits the doctrine of precedent by providing that the decisions of the court shall not be binding except upon the parties to a dispute and only in that dispute, yet the court ordinarily does not deviate from its past decisions.

The decisions of certain contentious cases would be relevant here. In Anglo Norwegian Fisheries case, the International Court of Justice clarified the law relating to the determination of fisheries zone by the States. The court also held that it was not bound by past decisions and precedents and is free to make progressive development of International Law.

In Corfu Channel case, the court clarified the law relating to self-defence, intervention and right to innocent passage. In *Columbia* v. *Peru*, the court clarified the law relating to asylum under International Law.

In Nottebohm case, the court propounded the principle of effective nationality.

In North Sea Continental Shelf case, the court held that the principle of equidistance was not obligatory in all cases of delimitation of continental self.

In *United States of America* v. *Italy*, the International Court of Justice expounded the principles relating to the applicability of the Rule of Exhaustion of Local Remedies.

In view of above discussion and decisions, it becomes crystal clear that the International Court of Justice has contributed to the development of

International Law in various ways and its role has been of the principal judicial organ of the world community for deciding cases to be based on equity, justice, reason, and common sense.

Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica* v. *Nicaragua*)

The Court, indicates the following provisional measures :

(1) Unanimously—Each Party shall refrain from sending to, or maintaining in the disputed territory, including the caño, any personnel, whether civilian, police or security;

(2) By thirteen votes to four—Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the caño, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;

(3) Unanimously—Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(4) Unanimously—Each Party shall inform the Court as to its compliance with the above provisional measures.

Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Request for Advisory Opinion)

Order.—The President of the International Court of Justice,

Having regard to Articles 48 and 66, paragraph 4, of the Statute of the Court, and to Article 105, paragraph 2, of the Rules of Court,

Having regard to the request for an advisory opinion submitted on 26th April, 2010, by the International Fund for Agricultural Development on questions concerning the Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the Fund,

Having regard to the Order made by the Court on 29th April, 2010, fixing 29th October, 2010, as the time-limit within which written statements might be submitted, in accordance with Article 66, paragraph 2, of the Statute, on the question laid before the Court for advisory opinion, and 31st January, 2011, as the time-limit within which States and organizations having presented written statements might submit, in accordance with Article 66, paragraph 4, of the Statute, written comments on the other written statements,

Having regard to the same Order whereby the Court decided that the President of the International Fund for Agricultural Development should transmit to the Court any statement setting forth the views of the complainant in the proceedings against the Fund before the Administrative Tribunal of the International Labour Organization which the said complainant might wish to bring to the attention of the Court, and fixed 29th October, 2010, as the time-limit within which any possible statement by the complainant who is the

subject of the judgment might be presented to the Court and 31st January, 2011, as the time-limit within which any possible comments by the complainant might be presented to the Court;

Whereas the General Counsel of IFAD, on 19th October, 2010, submitted a written statement of the Fund and, on 26th October, 2010, a statement setting forth the views of the complainant in the proceedings against the Fund before the Administrative Tribunal of the International Labour Organization, within the time-limits fixed by the Court for those purposes;

Whereas on 28th October, 2010, the Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands submitted a written statement of the Government of Bolivia, within the time- limit fixed by the Court for that purpose;

Whereas by a letter dated 21st January, 2011, and received in the Registry on the same day, the General Counsel of the Fund, referring to forthcoming consultations between the Fund and the Bureau of the Conference of the Parties of the United Nations Convention to Combat Desertification, relating to the very subject-matter of the proceedings before the Court, requested that the time-limit for the submission of written comments be extended to 11th March, 2011, in order that comments on behalf of the Fund might be submitted 'immediately following such consultations and after the thirty-fourth session of the IFAD Governing Council . . . and the first session of the Consultation for the Ninth Replenishment of the Resources of the Fund . . . ',

Extends to 11th March, 2011, the time-limit within which written comments may be submitted on the other written statements, in accordance with Article 66, paragraph 4, of the Statute of the Court, as well as the time-limit within which any possible comments by the complainant may be presented to the Court; and

Reserves the subsequent procedure for further decision.

Case Concerning Ahmadou Sadio Diallo (*Republic of Guinea* v. *Democratic Republic of the Congo*) 30th November 2010

Judgment.—The Court, by eight votes to six, *finds* that the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988-1989 is inadmissible;

Unanimously, *finds* that, in respect of the circumstances in which Mr. Diallo was expelled from Congolese territory on 31st January, 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights;

Unanimously, *finds* that, in respect of the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion, the Democratic Republic of the Congo violated Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights;

By thirteen votes to one, *finds* that, by not informing Mr. Diallo without delay, upon his detention in 1995-1996, of his rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, the Democratic Republic of the Congo violated the obligations incumbent upon it under that subparagraph;

By twelve votes to two, *rejects* all other submissions by the Republic of Guinea relating to the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion;

By nine votes to five, *finds* that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as associi in Africom-Zaire and Africontainers-Zaire;

Unanimously, *finds* that the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) above;

Unanimously, *decides* that, failing agreement between the Parties on this matter within six months from the date of this Judgment, the question of compensation due to the Republic of Guinea shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

CHAPTER XXX

THE INTERNATIONAL CRIMINAL COURT

It is noteworthy that the need for the establishment of an International Criminal Court of Justice had been experienced by the world community for more than a century before. For achieving this objective, vigorous actions had been initiated under the patronage of League of Nations. In this context, the Advisory Committee of Jurists was assigned the work, besides the task of preparing plans for the establishment of a Permanent Court of International Justice, the work of preparing a draft relating to the Constitution of a High Court which should take cognizance of "crimes committed against international good order and universal law of nations." The Advisory Committee of Jurists met at Hague in June, 1920, and drew up a Draft scheme for the constitution of the Permanent Court of International Justice. The final draft of the Committee also included the recommendation that a High Court of International Justice be established, which should be given the jurisdiction to try offences "against international pubic order" or "against universal law of Nations" which might be referred to it by the Council or Assembly of the League of Nations on the ground that for the trial of criminal cases, a Special Chamber of Permanent Court of International Justice, would be more practicable and appropriate.

Further, alongwith the Convention for the Prevention and Punishment of Terrorism, the League of Nations drafted a Convention for the establishment of an International Criminal Court in 1937. The proposed Court was to consist of five judges and five deputies belonging to different nations to be elected by the Permanent Court of International Justice. The League of Nations had requested the members to adopt the Convention for the creation of International Criminal Court on 16th November, 1937. Although this convention was signed by Belgium, Bulgaria, Spain, France, Greece and Netherlands, Romania, Czechoslovakia, Turkey and Yugoslavia, but it never came into force, as there were no ratifications. So the attempt proved to be futile. But this move was in the direction of larger interests of the evolution and development of international criminal law, and the creation of an International Criminal Court.

After the establishment of United Nations, proposal for the establishment of an International Criminal Court, was again considered and the matter was pursued. In 1948, the General Assembly requested the International Law Commission to study the desirability of establishing an International Criminal Court to try persons charged with crimes of genocide and other crimes. It was pointed out that the jurisdiction over such crimes would be conferred by International Conventions. In 1950, the General Assembly of United Nations had asked the International Law Commission to take into account the observations made by the delegations for the formulation of Nuremberg Principles while preparing a draft code of offences against peace and security of mankind. The Commission submitted the final draft of the Code in 1954. In 1977, the International Law Commission suggested that the 1954 draft of the Code, should

be reconsidered. In 1980, seven nations asked that "Draft Code of Offences Against Peace and Security of Mankind," be included in the agenda of the General Assembly. It is significant to note that on the recommendation of the legal advisor of the United Nations, certain legal documents connected with important Conventions, were added to the Code. These Conventions included the International Conventions on the Elimination of All forms of Racial Discrimination, 1966, the Convention on the Non-Applicability of statutory limitations to War Crimes and Crimes Against Humanity, 1968, Convention on the Prevention and Punishment of Crime against Internationally Protected Persons, including Diplomatic Agents, 1973, Definition of Aggression, Declaration on the Granting of Independence to Colonial Countries and Peoples and Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, in accordance with the Charter of the United Nations.

Another important Convention in this direction was the Genocide Convention, 1948. Article 1 of this Convention declares that "Genocide is a crime under International Law." Article IV provides that "persons committing genocide shall be punished whether they are constitutionally responsible rulers, public officials or private individuals."

Further, Article VI provides that they shall be tried by a competent tribunal of the State in the territory of which the act was committed or by an international penal tribunal as may have jurisdiction with respect to those contracting parties, which should have accepted its jurisdiction.

The next important Conventions in this direction were, the Hague Convention for the Seizure of Aircraft, 1970, and the Montreal Convention of the Seizure of Aircraft, 1971. Under these conventions, States have undertaken to provide deterrent punishment to hijackers. Under these conventions, States Parties have jurisdiction over hijackers in some or other way and these features of jurisdiction, have made the offence of hijacking "very near to piracy" under International Customary Law.

Yet another important Convention in this direction was "International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973", which came into effect on 18th July, 1976. Article 1 of this Convention declares "apartheid", as a crime against humanity, violating the principles of international Law and constituting a serious threat to international peace and security. Article V provides that persons charged with apartheid may be tried by a competent tribunal of any State-Party to the Convention.

"Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973", is another important Convention in this direction. Article 2 of this Convention declares certain acts as enumerated in this article as crimes. Article 7 provides that the State-Party in whose territory the offender is present, if it does not extradite him, submit without an exception whatsoever and without delay the cases to the competent authorities, for the purpose of prosecution.

In the International Convention Against the Taking of Hostages, 1979, similar provisions have also been made.

It is now crystal clear that serious attempts have been made for evolving a body of International Criminal law, and certain provisions for the

establishment of international penal tribunal have also been made under several Conventions. However, "draft Code of Offences Against Peace and Security of Mankind", could not be adopted by the General Assembly of United Nations, as this draft statute had neither been recommended nor accepted by any member-state.

U.N. Commission on Crime Prevention and Criminal Justice

Due to realisation of new breeds of criminality, like sophisticated computer crimes, terrorism, illicit drug- trafficking, money laundering and violent street crimes, a pervasive feeling of insecurity has grown in the international community. Due to awareness and experience of these crimes, as many as 114 State Ministers met at Versailles in November, 1991, and they voiced their concern for the creation of an effective U.N. crime prevention and criminal justice programme. The General Assembly affirmed these concerns on 18th December, 1991. The General Assembly unanimously called for the creation of a new Commission—"Commission on Crime Prevention and Criminal Justice", as a functional body of the Economic and Social Council. The General Assembly dissolved the existing Committee on "Crime Prevention and Control" and decided that the funds of the same be divested to the new Commission.

The Commission on Crime Prevention and Criminal Justice—the newest functional body of the Economic and Social Council, was held at Vienna from 21st to 30th April, 1992. This Commission approved the draft resolution which could serve as a blue print for the future activities of the U.N. Crime Prevention and Criminal Justice Programme. It accepted the recommendations of the Ministerial Meeting on the creation of an Effective U.N. Crime Prevention and Criminal Justice Programme held at Versailles from 21st to 23rd November, 1991, and decided to consult Member-States on the desirability of a Convention on Crime Prevention and Criminal Justice.

Priority areas of the Commission included, national and transnational crime, organised crime, economic crime including money laundering. The role of criminal law in the protection of the environment, crime prevention in urban ares, and juvenile and violent criminality. The Ninth Congress on the Prevention of Crime and the Treatment of Offenders was, however, organised in 1995.

World Conference on Organised Crime

The World Conference on Organised Crime was held at Naples (Italy) from 21st to 23rd November, 1994. The Conference discussed in detail, the new style criminal organisations of multinational crimes. The Naples Conference adopted the Naples Political and Global Action Plan, which was a step towards realising the idea of a legally binding international convention on transnational crime. When the conference ended, Italy announced the plans to fund an international centre for training law enforcement personnel to combat transnational crime.

It was resolved in the conference to adopt greater use of bilateral and multinational agreements on extradition and exchange of witnesses and evidence, personnel exchanges between national enforcement agencies; and international aid to criminal justice systems in developing countries. Further, Naples Declaration laid down that states should consider making money-laundering a crime, requiring greater transparency of banks and other financial enterprises, and establishing laws providing for the seizure of organised crime assets.

Adoption of the State of International Criminal Court

On December 9, 1993, the General Assembly requested the International Law Commission to elaborate the draft statute for an International Criminal Court as a matter of priority. The Commission considered the question of establishing an International Criminal Court from its forty-second session to its forty-sixth session in 1997. At the end of the last session, the Commission finalised a draft statute for an International Criminal Court, which was submitted to the General Assembly for consideration.

Through its resolution No. 51/207 dated 17th December, 1996, the General Assembly decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalising and adopting a convention for the establishment of an International Criminal Court. By its resolution dated 15th December, 1997, the General Assembly had accepted the offer of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15th June to 17th July, 1998. The Conference adopted on 17th July 1998, the statute known as the Rome Statute of the International Criminal Court. The statute contained 128 Articles and was divided into 13 parts as detailed below :—

(i) Establishment of the Court;
(ii) Jurisdiction, Admissibility and Applicable Law;
(iii) General Principles of Criminal Law;
(iv) Composition and Administration of the Court;
(v) Investigation and Prosecution;
(vi) Trial;
(vii) The Penalties;
(viii) Appeal and Revision;
(ix) International Co-operation and Judicial Assistance;
(x) Enforcement;
(xi) Assembly of States-Parties;
(xii) Financing; and
(xiii) Final Clause.

The U.N. Diplomatic Conference of Plenipotentiaries on the establishment of International Criminal Court held in Rome, was represented by 162 countries. Besides adopting the statute, the conference, through a resolution in its Part F of Annex I, established the preparatory commission for the International Criminal Court to prepare proposals for practical arrangements for the establishment and coming into operation of the Court.

Article 126 of the statute provided that the statute shall enter into force on the first day of the month after 60th day following the date of deposit of the 60th instrument of ratification, acceptance, approval or accession with Secretary-General of the United Nations. For each state, ratifying, accepting, approving or acceding to the statute after deposit of the 60th instrument of ratification acceptance, approval or accession, the statute shall enter into force on the 1st day of the month after 60th day following the deposit by such state of its instrument or ratification, acceptance, approval or accession.

Establishment of the Court

Article 1 of the Statute provides that there shall be a permanent institution which shall have power to exercise jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute and shall be complementary to national criminal jurisdiction. It has been further provided that the Court shall be brought into relationship with the United Nations through an Assembly of States Parties to this and thereafter concluded by the President of the Court on its behalf. The seat of the Court shall be established at the Hague in the Netherlands.

Jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in accordance with this Statute with respect to the following crimes :—

(a) The Crime of Genocide;
(b) Crime Against Humanity;
(c) War Crimes;
(d) The Crime of Aggression.

The Court shall have jurisdiction only with respect to crimes committed after the entry into force of the Statute. A state which becomes a party to the Statute thereby accepts the jurisdiction of the Court with respect to crimes referred to in Article 5. However, the Court shall have no jurisdiction over any person who is under the age of 18 years at the time of the alleged commission of a crime. The Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of State or Government, a member of Government or Parliament an elected representative or a Government official, shall in no case exempt a person from criminal responsibility under the Statute, nor shall it, in and of itself, constitute a ground for reduction of a sentence. Immunities or special procedural rules which may attach to the official capacity, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Law applicable.—Article 21 of the Statute lays down that the Court shall apply :—

(a) in the first place, this statute, the elements of crime and its Rules of Procedure and Evidence;
(b) in the second place, where appropriate applicable treaties and the principles and rules of international law—including the established principles of international law, and the established principles of the international law of armed conflicts;
(c) failing that, the general principles of law derived by Court from national laws of legal systems of the world including, as appropriate the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the Statute and the international law and internationally recognised norms and standards.

(2) The Court may apply principles and rules of law as interpreted in its previous decisions.

(3) The application and interpretation of law pursuant to this Article, must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

General Principles of Criminal Law Adopted in the Statute

(1) Nullum crimen sine lege.—A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place a crime within the jurisdiction of the Court. The definition of crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

(2) Nulla poena sine lege.—A person convicted by the Court, may be punished only in accordance with this statute.

(3) Non-retroactively ratione personal.—No person shall be criminally responsible under this statute for conduct prior to the entry into force of the statute. In the event of a change in the law applicable to a given case, prior to final judgment, the law more favourable to the person being investigated, prosecuted or convicted, shall apply.

(4) Individual criminal responsibility.—Article 25 of the Statute which deals with individual criminal responsibility, provides as follows :

(i) The Court shall have jurisdiction over natural persons pursuant to this Statute.

(ii) A person who commits crime within the jurisdiction of the Court, shall be individually responsible and be liable for punishment in accordance with this statute.

(iii) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court, if that person :

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission, including providing the means for its commission;

(d) in any other way, contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose;

(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide.

(iv) No provision in this Statute relating to individual responsibility shall affect the responsibility of States under International Law.

Composition of the Court

Article 34 of the Statute provides that the Court shall be composed of the following organs :—

(a) The Presidency;

(b) An Appeal Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor; and

(d) The Registry.

There shall be 18 judges of the Court, to be chosen from among persons of high moral character, impartiality and integrity, who possess the qualifications required in their respective states for appointment to the highest judicial offices. Nominations of candidates for election to the Court may be made by any State Party to the Statute. Every candidate for election to the Court shall, (i) have established competence in criminal law and procedure, and necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or (ii) have established competence in relevant areas of international law such as, international humanitarian law and the law of human rights, extensive experience in professional legal capacity which is of relevance to the judicial work of the Court. Further, every candidate for election to the Court, shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court *i.e.* Arabic, Chinese, English, French, Russian and Spanish. No two judges may be nationals of the same state. The judges shall hold office for a term of nine years. But at the first selection, one-third of the judges elected, shall be selected by a lot to serve for a term of three years, and one-third of the judges shall be elected by a lot to serve for a term of six years, and the reminder shall serve for a term of nine years.

Place of Trial

Unless otherwise decided, the place of trial shall be the seat of the Court, *i.e.*, the Hague. The Court has started functioning there since 11th March, 2003.

Penalties

Article 77 of the Statute provides the following penalties :—

(1) Subject to Article 110, (which deals with review by the Court concerning reduction of sentence), the Court may impose one of the following penalties on a person convicted of a crime under Article 5 of the Statute;

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

(2) In addition to imprisonment, the Court may order :

(a) a fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.

Appeal and Revision

A decision under Article 74 may be appealed in accordance with the Rules of Procedure and Evidence. Appeal against other decisions may also be made in

accordance with Rules of Procedure and Evidence. The convicted person or after his death, spouses, children, parents or any person alive at the time of accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeal's Chamber to revise the final judgment of conviction or sentence on the grounds specified in the Statute.

Compensation to an arrested or convicted person

Any person who has been the victim of unlawful arrest or detention, shall have an enforceable right to compensation.

General Obligation to Co-operate

State-Parties shall, in accordance with the provisions of the Statute, co-operate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Enforcement

A sentence of imprisonment shall be served in a state designated by the Court from list of states which have indicated to the Court their willingness to accept the sentenced persons.

Assembly of State Parties

The Rome Statute establishes an Assembly of State Parties. Each State-Party shall have one representative in the Assembly who may be accompanied by alternative and observers. Other states which have signed the Statute in or the final act, may be observers in the Assembly :

The Assembly shall :—

(a) consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) consider the reports and activities of the Bureau established under Paragraph 3 and take appropriate action in regard thereto;

(d) consider and decide the budget of the Court;

(e) decide whether to alter, in accordance with Article 36, the numbers of the judges;

(f) to consider pursuant to Article 87 paragraph 5 and 7, any question relating to non-co-operation;

(g) perform any other function, consistent with this Statute or the Rules of Procedure and Evidence. The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three years' term.

The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau, if consensus cannot be reached, except as otherwise provided in the Statute :

(a) Decisions on matters of substance, must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States-Parties constitutes the quorum for voting.

(b) Decisions on the matters of procedure shall be taken by a simple majority of States Parties present and voting. The Assembly shall adopt its own rules of Procedure.

Settlement of Disputes

Any dispute concerning the judicial functions of the Court, shall be settled by the decision of the Court. Any other dispute between two or more States-Parties relating to interpretation or application of the Statute which is not settled through negotiations within three months of their commencement, shall be referred to the Assembly of States-Parties. The Assembly may itself seek to settle the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of the Court.

International Criminal Tribunal for Rwanda (UN- ICTR)

The International Criminal Tribunal for Rwanda was established at Arusha, Tanzania in November, 1994, by the Security Council acting under Chapter Seven of the UN Charter. Genocide in Rwanda took place between 6th April, 1994, and 17th July, 1994, after the plane of the former President of Rwanda was shot down. Military effectively took control of the country and committed mass scale murders. One estimate says that 500,000 people were massacred in three months.

There is inherent weakness with these International Courts. They are far from reality and depend on the states for co-operation. UN-ICTR and UN-ICTY alone cost about 20 per cent of the total budget of the United Nations and so there is an added pressure on these Ad-Hoc Tribunals to complete their mandates.

Hybrid courts have lesser problems and function more smoothly. They are Municipal Courts with international participation for example Special Court for Sierra Leon.

UN-ICTR has convicted over 35 high profile suspects of genocide. It is the only International Tribunal which has convicted Head of a State and continues to try high ranking officials and ministers who planned and perpetrated the killings of innocent people.

UN-ICTR has undoubtedly contributed richly to International Criminal Law. Jurisprudence evolved by the Tribunal will form the foundations of International Criminal Court.

Palestinian Authority

On 22 January, 2009, the Office of the Prosecutor of the International Criminal Court received an official communication from the Minister of Justice of the *Palestinian Authority* (PA), Ali Kashan, which expressed the PA's readiness to recognize the jurisdiction of the ICC over 'the territory of Palestine.' The PA's declaration purported to invoke Article 12 (3) of the Rome Statute, which specifically enables "a state which is not a party to this Statute" to request that the ICC exercise its jurisdiction on an ad hoc basis with respect to an alleged crime on that state's territory or involving its nationals.

In other words, the PA's declaration to the Office of the Prosecutor amounted to an official request to confirm that the PA can be considered a state for purposes of ICC jurisdiction.

Resentment in Africa about "double standard"

The fact that so far the International Criminal Court has only investigated African countries and only indicted Africans is creating resentment in some African countries, even in countries which are state parties to the Court. At a meeting of 30 African ICC member states in June, 2009, several African countries, including Senegal, Djibouti and the Comoros, called on African ICC members to withdraw from the Court in protest of the fact that the Court allegedly targets Africa only, and especially of the indictment against Sudan's President Omar al-Bashir. The Peace and Security Commissioner of the *African Union*, Ramtane Lamamra, said that the Prosecutor of the ICC was applying "a double standard in pursuing cases against some leaders while ignoring others".

Conclusion.—Undoubtedly, the adoption of the Rome Statute of the International Criminal Court is a great achievement in itself in the context of containing international crimes. There are, however, certain shortcoming in the Statute. For example, the crimes of hijacking and terrorism have not been included in the list of crimes under the Statute. Besides, the enforcement the conclusion devised under the Statute, is not quite satisfactory. The making of a provision of review of the Statute of the Court after seven years of entry into force, is a welcome step under the provisions of the Statute, which will facilitate the general interests of the world community.
